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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: PMO Partnership Joint Venture

File: B-401973.3; B-401973.5

Date: January 14, 2010

William M. Weisberg, Esq., Joyce L. Tong, Esq., and Angela L. Nadler, Esq., Bryan Cave, LLP, for the protester.

Stephen F. Pereira, Esq., Kerry L. Miller, Esq., and Michael L. Culotta, Esq., Department of Transportation, for the agency.

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DIGEST

Agency improperly rejected the proposal of a joint venture offeror for a cost-reimbursement contract because the indirect cost rate structure included in the joint venture's accounting system was considered unacceptable, where the agency has provided no supportable or reasonable bases for its determination and unreasonably failed to consider a revised indirect cost rate that the agency specifically requested from the joint venture prior to award.

DECISION

PMO Partnership Joint Venture (PMO-JV) of San Francisco, California protests the Department of Transportation (DOT), Federal Transit Administration's (FTA) rejection of its proposal for failing to provide an adequate accounting system under request for proposals (RFP) No. DTFT60-08-R-00010 for program management oversight (PMO) services.

We sustain the protest.

On June 26, 2008, FTA issued a RFP soliciting proposals for PMO services to provide support for select capital projects with continuous review and evaluation of grantee and FTA processes to ensure compliance with statutory, administrative, and regulatory requirements, and to monitor the projects to determine whether the projects are progressing on time, within budget, and in accordance with approved grantee plans and specifications. Agency Report (AR) at 2. The solicitation contemplated the award of multiple (approximately 15 to 25) cost-reimbursement, indefinite-delivery/indefinite-quantity (ID/IQ) task order type contracts. RFP at 2, 94.

Award was to be made to responsible offerors whose proposals contained the combination of criteria offering the best value to FTA, considering the following evaluation criteria, listed in descending order of importance: Technical and Management, Cost/Price, and Socioeconomic Status. Id. at 95.

PMO-JV¹ submitted a timely proposal to FTA by the September 4, 2009 deadline for receipt of proposals. The agency evaluated PMO-JV's technical proposal, determined it was among the most "highly rated" technical proposals, and invited PMO-JV to participate in oral presentations on December 15. PMO-JV's oral presentation took place on January 8, 2010. After oral presentations, the agency rated PMO-JV's technical proposal as technically acceptable. AR, Tab 4B, Source Selection Decision, at 8-9.

The RFP also requested that offerors complete and submit a cost proposal utilizing Attachment J-6, Contract Pricing Summary, included in the RFP. RFP at 87. Offerors were further required to state whether or not the Federal Government currently approves their accounting systems without conditions and whether proposed indirect rates have been "audited and accepted by any Federal Audit Agency." RFP at 89, 93. Additionally, all offerors had to "make [their] records available for pre-award or post-award audits." RFP at 89.

In its proposal, PMO-JV included a completed Attachment J-6 for the joint venture and one of the joint venture partners, which referenced and incorporated supporting J-6 attachments for the other two joint venture partners. The completed attachments identified the various direct labor rates for required personnel, broken down by the partner from which the employee would be assigned--The Allen Group, LLC, Brindley Pieters & Associates, Inc., or EAC Consulting, Inc.--and calculated a total direct labor cost for each partner. In the "Labor Overhead" section of each Attachment J-6, PMO-JV provided a labor overhead rate that was applied to each of the joint venture partner's total direct labor costs. Additionally, PMO-JV supplied Attachment J-6 costs for various subcontracted consultant services. PMO-JV's J-6 Attachments.

¹ PMO-JV, a newly formed joint venture of The Allen Group, LLC, Brindley Pieters & Associates, Inc., and EAC Consulting, Inc., was formed as a joint venture under the laws of the state of Florida for the purpose of contracting with FTA under the current solicitation. AR, Tab 4C, Booth Management Consulting, LLC (BMC) Audit Report, at 6. FTA states that the joint venture is a small business concern. AR, Tab 5, Contracting Officer Determination and Findings, at 3.

On June 9, 2009, FTA sent PMO-JV's cost proposal for a pre-award audit to BMC.² AR, Tab 4C, BMC Audit Report (Sept. 24, 2009), at 2. As part of the audit, BMC reviewed PMO-JV's proposed costs, including proposed indirect rates, to determine if PMO-JV's proposal provided an acceptable basis for negotiation of a fair and reasonable price and issued its final report to FTA on September 24. Id. BMC determined that "the cost/pricing data submitted by the offeror are not adequate to negotiate a fair and reasonable contract price for the direct labor, escalation, and indirect cost rates." Id. at 3. BMC explained as follows:

Indirect cost rates were not projected for the PMO Partnership and used in the cost proposal in accordance with FAR 31.203. Instead the indirect cost rates for each partner were used separately in the cost proposal. A budget should have been developed for the partnership entity and projected indirect rates should have been calculated from the budget and used in the cost proposal. As a result the indirect costs included in the cost proposal are questioned . . .

The contract pricing summary lists Brindley P[i]eters & Associates and EAC Consulting as if they are sub-consultants on the project instead of partners and the Allen Group as if it is the prime contractor instead of a partner. The cost proposal should be for the PMO Partnership Joint Venture Entity and should not list the costs for each partner separately. The PMO Partnership Joint Venture is a separate entity in and of itself and that is how the costs should be presented in the cost proposal. . . .

Id. at 5-6.

Based on BMC's audit, the contracting officer determined that PMO-JV's proposal was unacceptable. AR, Tab 5, Contracting Officer Determination and Findings, at 6. On October 5, the contracting officer advised PMO-JV of the rejection of its proposal for the following reasons:

The cost proposal, submitted by the Joint Venture [JV] does not reflect that the JV is operating as an independent entity, which for Government contracting purposes would list an indirect rate structure that would be unique to the Joint Venture only and . . . was not prepared in all material respects in accordance with the appropriate provisions of the FAR Part 31 and the Transportation Acquisition Regulation. It is also noted that the JV proposal proposed three (3) separate indirect rates that were both unique and specific to each of the 3 JV members.

² This audit was requested by a FTA contracting officer. AR, Tab 4C, BMC Audit Report (Sept. 24, 2009), at 2.

AR, Tab 1B, FTA Letter to PMO-JV (Oct. 5, 2009), at 2.

PMO-JV received this letter on October 9, and filed a protest with our Office on October 20, arguing that the joint venture is and operates as an independent legal entity,³ explaining why its proposed overhead rate structure was proper particularly considering that it is a newly formed joint venture, and contending that because the RFP did not contain instructions on how joint venture offeror indirect rates were to be prepared, the rejection of its proposal was based on the application of unstated evaluation criteria.

In addition, PMO-JV stated in its protest that the contracting officer contacted PMO-JV on September 9, and requested that PMO-JV submit one overall overhead rate. On September 10, PMO-JV states that it provided the requested rate, which was a weighted average of the three partner's individual overhead rates, to the contracting officer. However, this offered rate was not provided to BMC by the contracting officer. Thereafter, according to PMO-JV, the contracting officer told PMO-JV that it could not provide clarifications regarding this offered overhead rate because it was "too late." Protest at 3; AR, Tab 4D, BMC Revised Audit Report (Oct. 5, 2009), at 6.⁴

On November 19, the agency submitted its agency report in response to the protest. In response to PMO-JV's allegations, FTA stated "None of the arguments presented in

³ On February 4, PMO-JV provided the contracting officer with a copy of the joint venture agreement, tax identification number, central contractor registration and Data Universal Number System number. Protest at 2.

⁴ On October 2, BMC held an exit conference with PMO-JV regarding its audit. AR, Tab 4D, BMC Revised Audit Report (Oct. 5, 2009), at 6. According to BMC, during that conference, PMO-JV was made aware of BMC's audit results and given a chance to respond. BMC described PMO-JV's response as follows:

[PMO-JV's representative] stated that they had several joint ventures with other government agencies that were prepared in this manner and that there were no clear instructions given in the RFP as to how the cost proposal for a joint venture should be prepared. She also stated that she had spoken with the contract[ing] officer about the cost proposal a few weeks prior to the exit interview and the contract[ing] officer explained to her that there needed to be indirect cost rates specifically for the joint venture. [She] stated that she prepared a weighted average of the three partner's individual rates and provided that to the contract[ing] officer.

Id.

the Protest . . . address the real issue in this case, and that is, PMO-JV's failure to submit a single overhead rate in their Cost Proposal. The basic failure of [PMO-JV] is its non-compliance with Cost Accounting Standard ("CAS") 401."⁵ AR at 6. The agency also did not deny that it had asked PMO-JV for a revised single overhead rate or that upon receipt of the revised rate that it did not provide this rate to BMC or otherwise consider this solicited information.

PMO-JV filed comments on the agency report, which noted that FTA had incorrectly applied CAS 401 to PMO-JV because it is a small business, erroneously required one indirect overhead rate be provided by the joint venture, and failed to consider the single overhead rate provided by PMO-JV at the request of the contracting officer. The GAO attorney handling this case for our office, after a complete review of the entire record, conducted an outcome prediction alternate dispute resolution (ADR) conference, during which she stated that the agency had not provided a reasonable basis for excluding PMO-JV's proposal based on the documentation in the record and had unreasonably failed to consider the single weighted average overhead rate that had been requested by the contracting officer. The agency did not initiate corrective action in response to the outcome prediction ADR, but provided further argument as to the applicability of CAS 401 and submitted a statement from a BMC representative addressing this issue.

We first note that FTA's rejection of PMO-JV's proposal due to evaluated problems in its accounting system concerns a matter of a prospective contractor's responsibility, not technical acceptability. See Pacificon Prods., Inc., B-196371, July 22, 1980, 80-2 CPD ¶ 58 at 4. In this regard, Federal Acquisition Regulation (FAR) § 9.104(e) provides that "to be determined responsible, a prospective contractor must . . . have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them." FAR § 16.301-3(a)(1) states that a cost-reimbursement contract may only be used when a contractor's accounting system is adequate for determining costs applicable to the contract.

Responsibility is to be determined based on any information received by the agency up to the time award is proposed to be made. American Tech. & Analytical Servs., Inc., B-282277.5, May 31, 2000, 2000 CPD ¶ 98 at 3. In this regard, FAR § 9.105-1(b)(3) requires that information on financial resources and performance capability shall be obtained or updated on as current a basis as is as feasible up to the date of award. The determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer, who, in making that decision, must necessarily rely on his or her business judgment. We therefore will not question a negative determination of responsibility unless the determination lacked any reasonable basis. Oertzen & Co. GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158 at 3.

⁵ This was the first time that CAS 401 was mentioned by FTA or BMC as the basis for the rejection of PMO-JV's proposal.

In this respect, while a contracting officer has significant discretion in this area, a negative responsibility determination will not be found to be reasonable where it is based primarily on unreasonable or unsupported conclusions. Decker and Co.; Baurenovierungsgesellschaft, m.b.H., B-220807 et al., Jan. 28, 1986, 86-1 CPD ¶ 100 at 7. Moreover, an agency's reliance upon the advice of an auditor, such as the Defense Contract Audit Agency, does not insulate the agency from responsibility for error on the part of that advisor. See ASRC Research & Tech. Solutions, LLC, B-400217, B-400217.2, Aug. 21, 2008, 2008 CPD ¶ 202 at 11 n.12.

As noted, FTA now asserts that PMO-JV's accounting system is inadequate because PMO-JV's failure to submit a unique indirect rate for the joint venture violates CAS 401. CAS 401 states:

- (a) A contractor's practices used in estimating costs in pricing a proposal shall be consistent with his cost accounting practices used in accumulating and reporting costs.
- (b) A contractor's cost accounting practices used in accumulating and reporting actual costs for a contract shall be consistent with his practices used in estimating costs in pricing the related proposal.
- (c) The grouping of homogeneous costs in estimates prepared for proposal purposes shall not per se be deemed an inconsistent application of cost accounting practices under paragraphs (a) and (b) of this section when such costs are accumulated and reported in greater detail on an actual cost basis during contract performance.

48 C.F.R. § 9904.401-40 (2009). That is, CAS 401 requires a contractor's accounting practices in estimating costs for a proposal to be consistent with cost accounting practices used by the contractor in accumulating and reporting costs. 48 C.F.R. § 9904.401-20. This requirement is imposed because "[c]onsistency in the application of cost accounting practices is necessary to enhance the likelihood that comparable transactions are treated alike," so that, among other things, there is "financial control over costs during contract performance." Id.

FTA has provided a memorandum from BMC in support of its argument that PMO-JV's failure to submit a unique indirect rate for the joint venture violates CAS 401, which states that "the contractor's proposal did not comply with CAS 401 as the contractor's proposal failed to identify a unique rate structure, for the [joint venture] which an independent and professionally operated organization would have established in the regular course of doing business. . . . The CAS/FAR noncompliance issue is not the number of indirect rates," but rather PMO-JV's "failure to identify **its own rate structure for allocating costs to Government contracts.**" BMC Memorandum (Dec. 16, 2009) at 2.

However, CAS 401 is clearly inapplicable to PMO-JV because FTA has conceded that PMO-JV is a small business concern. AR, Tab 5, Contracting Officer Determination and Findings, Source Selection Decision, at 3. The applicable regulation, 48 C.F.R. § 9903.201-1(b)(3), states: “The following categories of contracts and subcontracts are exempt from all CAS requirements: (3) Contracts and subcontracts with small businesses.” The agency nevertheless argues that “if the current award is \$7.5 million or more the award is CAS covered. . . . **Even if the proposer would otherwise be entitled to claim exemption from CAS as a small business, the [\$7.5 million] trigger applies and the award would be CAS covered.**” This argument represents a misunderstanding of the CAS regulations. The “trigger” relied upon by FTA is set forth in 48 C.F.R. § 9903.201(b)(7), which exempts “from all CAS requirements” “[c]ontracts or subcontracts of less than \$7.5 million, provided that, at the time of award, the business unit of the contractor or subcontractor is not currently performing any CAS-covered contracts or subcontracts valued at \$7.5 million or greater.” That is, as indicated by the provision itself, this section is another exemption from all CAS requirements, not a rationale for ignoring the small business exemption. Since PMO-JV is a small business for which CAS does not apply, the agency’s rationale for excluding PMO-JV on the basis of CAS 401 is unreasonable.

In any case, except for the conclusory statements made by BMC quoted above, neither FTA nor BMC has provided any analysis or legal authority as to why the PMO-JV indirect rate structure, which adopts the individual overhead rates of the joint venture partners for PMO-JV’s own use and describes how the rates will be applied, violates CAS 401. Nor is it apparent to our Office why this would violate CAS 401, given that FTA and BMC have not explained why the particular overhead rate structure proposed by PMO-JV would lead to an inconsistency in the application of cost accounting practices or a loss of financial control over costs during contract performance. In this regard, it is notable that BMC’s audit report and FTA’s determination and findings supporting the rejection of PMO-JV’s proposal because of its unacceptable accounting system did not make any mention of a CAS 401

violation.⁶ Moreover, we have found no other authority that explicitly prohibits PMO-JV's proposed rate structure.⁷

Finally, the agency improperly failed to consider the "weighted average" overhead rate that combined the various overhead rates of the joint venture partners, which the contracting officer requested PMO-JV to submit a month prior to rejecting PMO-JV's proposal. As noted above, this is a matter that concerns PMO-JV's responsibility. An agency can and should reverse a previous non-responsibility determination based on additional information brought to its attention prior to award. Henry Spen & Co., Inc., B-183164, Jan. 27, 1976, 76-1 CPD ¶ 46 at 4. In this regard, where an agency requests information pertaining to an offeror's responsibility, it is required to reasonably consider this information if there is sufficient time to do so prior to making award. See Tomko, Inc., B-210023.2, B-212217, Feb. 13, 1984, 84-1 CPD ¶ 202 at 3-4. While the agency has not responded to this protest basis, it may be that the agency believed considering this information would constitute discussions that would require opening discussions with all competitive range offerors. However, communicating with an offeror concerning its responsibility, that is, addressing agency concerns about the offeror's ability to perform, do not constitute discussions, so long as the offeror does not change its proposed cost or otherwise materially modify its proposal. See Luhr Brothers, Inc.-- Recon., B-248423.2, Nov. 9, 1992, 92-2 CPD ¶ 328 at 3-4. It appears that considering and accepting a weighted average overhead rate would not constitute discussions because this would only involve a change to PMO-JV's accounting system, not its cost proposal.

While the agency acted properly in choosing to investigate whether or not PMO-JV had an adequate accounting system to support this cost-reimbursement contract, the FTA has not provided on this record a reasonable explanation why PMO-JV's accounting system was unacceptable. FTA also unreasonably failed to consider additional information pertaining to this issue that it specifically requested from PMO-JV, and we sustain the protest on these bases.

⁶ While BMC asserts that FAR §§ 31.201-1 and 31.203(d) address the objectives of CAS 401, the fact is that CAS 401, unlike some other CAS provisions, has not been incorporated into FAR part 31. See The Future Role of the Cost Accounting Standards Board, Cost Accounting Standards Board Review Panel Report to Congress, GAO SP-99-1, Apr. 2, 1999, at 106-07. FAR §§ 31.201-1 and 31.203(d) address the allocation of a contractor's costs during contract performance and do not, by their terms, address the acceptability of the indirect rate structure proposed by PMO-JV.

⁷ It may be that there are legitimate legal or accounting reasons for questioning PMO-JV's indirect rate structure that have not been provided to our Office.

We recommend that FTA reevaluate PMO-JV's accounting system to determine whether it is adequate. In so doing, we note that if the agency has problems with PMO-JV's accounting system, it may open a dialogue to resolve these issues without such dialogue necessarily being considered discussions, given that this is a matter relating to PMO-JV's responsibility, so long as PMO-JV does not change its proposed cost or otherwise materially modify its proposal. If PMO-JV's accounting system is found adequate, the agency should determine whether PMO-JV's proposal is otherwise acceptable and in line for award, and if so award should be made to that firm. If PMO-JV's accounting system is found inadequate and its proposal rejected for this reason, the matter, which involves the responsibility of a small business concern, must be referred to the Small Business Administration for a Certificate of Competency (COC) determination.⁸ We also recommend that the agency reimburse the protester for the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2009). The protester's certified claims for cost, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
Acting General Counsel

⁸ Under the Small Business Act, 15 U.S.C. § 637(b)(7) (2006), the SBA has conclusive authority to determine the responsibility of small business concerns. Thus, when a procuring agency finds that a small business is nonresponsible, the agency is required to refer the matter to the SBA for a final determination under COC procedures. ECS Metals Ltd., B-229804, Feb. 10, 1988, 88-1 CPD ¶ 136 at 3.