

Written by Nick Sanders  
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Frankly, we've been sitting on this one for a while, thinking about how to best approach this case of what today's youngsters might call "epic failure" on the parts of both DCAA and agency contracting officials. There's just so much to say, and so many ways to say it, that we were stumped for a few weeks. Then we thought, "Screw it! Let's just mash it all up and see how it reads." So here we are. Get ready for a roller-coaster ride, folks.

We first discussed the strange bid protest case of PMO Partnership Joint Venture in one of our more popular articles—"Government Accounting Issues Associated with Joint Ventures"—link [here](#)

. In that article, we reported that PMO's JV indirect rate structure was found unacceptable and, by the way, noncompliant with CAS 401. The GAO rejected the Federal Transit Administration's (FTA's) rejection of PMO's proposal on several grounds, not the least of which was that, as a small business, PMO was exempt from the Cost Accounting Standards.

We first mentioned DCAA's bizarre interpretation of the requirements of FAR 15.408 in [this article](#)

Here's what we said—

The [DCAA] audit guidance opined that the 'overarching principal of FAR Part 15' [sic] is that 'the contracting officer must purchase supplies and services at fair and reasonable prices.' That's more or less correct, but then the audit guidance states, 'Contractors are generally required to follow the Table 15-2 instructions for submitting proposals as contained within FAR 15.408.' Well, that's not true *at all*. Contractors are only required to follow the proposal format

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instructions found in FAR Table 15-2 when they are submitting cost or pricing data. (Or, if you will, ‘certified’ cost or pricing data, based on the [recently revised](#) FAR definition(s).) If the contractor is not submitting cost or pricing data, it is not required to follow the format of Table 15-2.

(We also noted some ambiguity in the revised FAR definitions of “certified cost or pricing data” and “cost or pricing data”. The link embedded in the quoted paragraph above discusses those definitional issues in more detail.)

It’s become clear to us that DCAA believes that *every proposal* needs to follow the format and instructions found in Table 15-2. If a proposal doesn’t follow the prescribed format, DCAA considers it to be inadequate. We think DCAA is crazy respectfully disagree with DCAA’s audit guidance on this issue. And so, apparently, do the administrative judges at GAO, based on their comments in a recent bid protest—  
[link here](#)

The GAO bid protest in question concerns PMO Partnership JV, covering the *exact same* 2008 FTA competition on which GAO previously opined. In the previous protest ruling, GAO recommended that FTA “reevaluate” the PMO proposal based on GAO’s findings. In the more recent protest (link above), PMO was again back at the GAO, this time protesting FTA’s reevaluation.

In the first, flawed, evaluation, FTA contracted the pre-award audit to Booth Management Consulting, LLC (BMC). In the reevaluation, FTA asked DCAA to conduct a review of PMO’s proposal. According to the GAO, FTA “requested that the DCAA ‘conduct an adequacy review of PMO-JV’s proposal using the applicable regulatory criteria contained within FAR [§] 15.408, Table 15-2—Instructions for Submitting Cost/Price Proposals When Cost or Pricing Data Are Required.’”

The problem with FTA’s direction to DCAA was that the original 2008 solicitation specified that offerors were *not* submitting cost or pricing data. The GAO decision provided the original proposal instructions, which were—

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(1) Adequate price competition is expected to exist, and this action is therefore exempt from the requirement for submission of cost or pricing data. However, all Offerors (prime and subContractors) shall submit a budget summary for the entire contract period of performance. ... This information is necessary to determine the adequacy of the Offeror's proposal, e.g., information adequate to validate that the proposed costs are consistent with the technical proposal, or cost breakdowns to help identify unrealistically priced proposals.

(2) Any information submitted must support the price proposed. Include sufficient detail or cross-reference to clearly establish the relationship of the information provided to the price proposed. Support any information provided by explanations or supporting rationale as needed to permit the Government to evaluate the documentation . . . Such information is not considered cost or pricing data, and will not require certification in accordance with FAR [§] 15.406-2.

[(3)] If, after receipt of offer, the Contracting Officer concludes there is insufficient information available to determine price reasonableness and none of the exceptions described in FAR [§] 15.403-1 applies, then cost or pricing data shall be obtained. As a minimum, a budget summary shall be submitted for each year of the contract period (reference paragraph 1 above.)

As we've previously written, offerors are only required to comply with FAR Table 15-2 when they are submitting cost or pricing data. Though the recent regulatory changes may blur the distinction between "cost and pricing data" and "information other than cost or pricing data" to the point where it no longer matters for purposes of formatting one's cost proposal, back in 2008 when PMO submitted its original bid, the distinction was bright-line clear. Clearly, PMO was *not required* to follow the requirements of FAR Table 15-2, and FTA should not have referenced those requirements in its direction to DCAA.

For its part, DCAA accepted FTA's direction in its entirety, even when that direction was in conflict with its normal audit procedures. The GAO quoted DCAA's audit report as follows—

The DCAA noted that its 'effort does not constitute an audit or attestation engagement under generally accepted government auditing standards (GAGAS).' Thus, the DCAA did not 'express an opinion on the adequacy of the proposal for price negotiation.' The DCAA also stated that its analysis was not conducted in accordance with its normal procedure ... Instead, in accordance with FTA's request, the DCAA did 'not execute this additional coordination with the contractor as it is generally conducted to obtain a revised proposal that meets the adequacy

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requirements stipulated by the FAR.’ The DCAA further clarified that its ‘proposal adequacy assessment was limited to reviewing, to the extent possible, the cost data contained in the compact disk [FTA] provided on January 22, 2010, without requesting additional data from PMO.’

Wow. There’s a whole lotta fail in that paragraph.

Adding to the level of incompetence is the GAO’s notation that, in its original bid protest decision addressed FTA’s contention that (among other things), PMO’s accounting system was inadequate. In the original decision, GAO said—

... 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.

In the current decision, GAO reported that—

On the record provided to us, it appears that the agency did not request a reevaluation of the adequacy of PMO-JV’s accounting system, which was why the agency previously rejected PMO/JV’s proposal. Instead, this new request was focused on evaluating the adequacy of PMO-JV’s cost/price proposal using FAR § 15.408, Table 15-2—Instructions for Submitting Cost/Price Proposals When Cost or Pricing Data Are Required.

To recap the story so far, FTA requested that DCAA “review” PMO’s cost proposal instead of its accounting system, using the wrong criteria, in violation of both GAGAS and DCAA’s normal procedures, and without interacting with the contractor to resolve any issues (in violation of the recently issued DCAA “[Rules of Engagement](#)”). And DCAA accepted the direction, possibly because the assignment was being reimbursed under inter-agency procedures. (I.e., DCAA

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was billing FTA for its time and expenses.) But let's be clear, gentle readers:

*DCAA exhibited a startling lack of independence and good judgment in accepting the scope and procedural limitations imposed by its customer.*

DCAA's audit report was issued in June 2010—well after the controversies over audit quality and well after DCAA had recommitted to following GAGAS and maintaining its independence at all costs.

Although FTA was ridiculously inept in every aspect of its handling of PMO's proposal, DCAA displayed a similar level of incompetence. And we're sure no reader of this article is surprised that DCAA's flawed procedures resulted in a flawed audit report.

As the GAO reported—

The DCAA found various inadequacies relating to PMO-JV's proposed subcontract (subconsultant) costs. For example, the DCAA reported that PMO-JV failed to provide adequate cost or pricing data, or a cost or price analysis, for any of the [deleted] subcontract consultant services included in the Contract Pricing Summary Sheet (Attachment J-6), and concluded that this failure violated the requirements contained in FAR § 15.408, Table 15-2.... The DCAA additionally reported six more 'cost or pricing data' inadequacies, based on its comparison of PMO-JV's cost proposal to FAR § 15.408, Table 15-2, that related to its and its subcontractor's proposed direct labor rates and indirect expense rates.

The FTA used DCAA's review findings to reject PMO's proposal for a second time. The FTA told PMO that its cost proposal "was inadequate" because it did not comply with "the documentation requirements of FAR [§] 15.408, Table 15-2, Instructions for Submitting Cost/Price Proposals When Cost or Pricing Data are required." Because PMO's cost proposal did not comply with the requirements of FAR Table 15-2, FTA found that the cost proposal "did not provide for an acceptable basis for negotiating a fair and reasonable price." Thus, PMO was eliminated—once again—from the competition.

By now, readers will be unsurprised that GAO had a problem with both the reevaluation of PMO's proposal and FTA's second rejection. PMO's second bid protest was sustained and GAO recommended that FTA reimburse PMO's "reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees." The GAO judges used language that was rather more restrained than ours, but we want to quote a lot of it as a reference for you, our loyal readers. (Because we're nice like that.)

In accordance with the terms of the solicitation, PMO-JV did not submit cost or pricing data with its cost proposal, nor did it submit data in the format specified at FAR § 15.408, Table 15-2. PMO-JV instead submitted other than cost or pricing data on Attachment J-6, Contract Pricing Summary, with supporting back-up material, and a budget summary as requested by the RFP.

However, the FTA contracting officer limited DCAA's review of PMO's cost proposal to verifying whether the data was presented as required by FAR § 15.408, Table 15-2. This was improper because the use of these requirements are [sic] only appropriate where cost or pricing data is required by the solicitation. We also note that this table was neither referenced nor incorporated into the RFP, and there is nothing in the RFP to put offerors on notice that the agency would evaluate cost proposals against FAR 15.408, Table 15-2; to the contrary, the solicitation expressly stated that cost or pricing data was not required.

As indicated, DCAA's constrained adequacy review found various inadequacies in PMO's cost proposal because supporting data required by FAR § 15.408, Table 15-2 was not included. For example, DCAA reported that PMO-JV's Contract Pricing Summary Sheet (Attachment J-6) failed to include a price analyses of all subcontractor proposals and a cost analyses for subcontract proposals exceeding the threshold for cost or pricing data (\$650,000), as required by FAR 15.408, Table 15-2, II.A.(2). However, the RFP's cost proposal instructions did not indicate that PMO-JV had to conduct and submit such analyses.

An agency may not induce offerors to prepare and submit proposals based on one premise, then make source selection decisions based on another. [Legal citations omitted.] The problems found by DCAA were based upon FAR requirements that are only applicable when cost or pricing data is required. Because the RFP expressly provided that cost or pricing data was not required, and because the RFP did not otherwise indicate that the data should be presented in this format, the agency's evaluation of PMO-JV's cost proposal was unreasonable.

Moreover, the record, which includes numerous audits of the cost proposals of the other offerors (including the 18 awardees), shows that none of these cost proposals were evaluated for adequacy based on the instructions contained in FAR § 15.408, Table 15-2. It is fundamental that the contracting agency must treat all offerors equally, and therefore it must evaluate offers evenhandedly against common requirements. [Legal citation omitted.]

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Furthermore, the agency's prohibition on DCAA communications with PMO-JV concerning the adequacy of its submitted cost data appears inconsistent not only with DCAA practice, but with FAR § 15.404-2(d), which states:

The [administrative contracting officer] or the auditor, as appropriate, shall notify the contracting officer immediately if the data provided for review is so deficient as to preclude review or audit. . . . The contracting officer immediately shall take appropriate action to obtain the required data. Should the offeror/contractor again refuse to provide adequate data, or provide access to necessary data, the contracting officer shall withhold the award . . .

In this case, we think that questions about the adequacy of the submitted cost data should have been a subject of dialogue between the agency (or DCAA) and PMO-JV before that firm's proposal was rejected for this reason, particularly given that the previous awards under this solicitation were made over a year ago

Well, that about ends the saga of PMO Partnership JV and its two bid protests. But before we go, there are some remaining loose ends to identify (since we can't tie them up). Ponder these questions, if you will.

1.

Why did FTA expressly direct DCAA to evaluate PMO's cost proposal based on the requirements of FAR Table 15-2, when it was well aware that its own solicitation had clearly identified that cost or pricing data was not to be submitted?

2.

Why did FTA violate the mandatory requirements of FAR 15.404-2(d)?

3.

Why did FTA tell PMO that its proposal did not form an adequate basis for negotiations when DCAA's audit report clearly stated that it did not express an opinion on the adequacy of the proposal for price negotiations? What caused the FTA contracting officer to reach this conclusion, if not the DCAA audit report?

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4.

Where is the evidence of independent judgment and discretion on the part of the FTA contracting officer? Did the contracting officer use the two audit reports (first BMC and then DCAA) as a pretext for rejecting PMO's otherwise acceptable proposal from the competition?

5.

Why did DCAA accept customer direction that compromised its independence and conflicted with its own audit guidance?

6.

Why did DCAA permit its auditors to violate GAGAS, after being subjected to such harsh criticism for doing so in the past?

We have no answers for the questions above, gentle readers. But we fervently believe that answering them would be a big step on the road to getting the Federal acquisition environment back to the level at which it needs to be.