December 18, 2012

MEMORANDUM FOR GARY GRIPPO
ACTING CHIEF FINANCIAL OFFICER (B)

FROM: PAUL MALATINO
DIRECTOR, OFFICE OF SPECIAL PROJECTS (JA-P)

SUBJECT Use of Fee Waiver to Offset $2.4 Million Loss of Customer Funds
Memorandum Number A090168-08

The Office of Special Projects has been charged with oversight and monitoring of the DHS Headquarters Consolidation Project on the campus of Saint Elizabeths in Washington, D.C. In the course of that oversight, we have identified a need for improved fee management procedures for customer reimbursable projects that use combined FAS and PBS project management and contract support. We are addressing this matter to you, because the final responsibility for assuring a reasonable and compliant cost recovery methodology rests with the Chief Financial Officer.

GSA fee structure for reimbursable services is ambiguous and poorly defined as it relates to cross-service project management and contract support. The two primary GSA services, the Public Buildings Service (PBS) and Federal Acquisition Service (FAS) operate under separate revolving fund authorities. In setting a fee for its services, GSA has found that PBS has no authority to fully or partially exempt any eligible transaction from its "project management fee", which is currently fixed at four percent. By comparison, the GSA interpretation of the relevant implementing legislation has found that FAS, on a case by case basis, can vary or waive entirely its "assisted acquisition fee", which is the FAS equivalent of the PBS project management fee. As in the example we cite, an ambiguity arises when reimbursable work involves the combined efforts of both services. GSA needs to address this matter with well-defined procedures that ensure full cost recovery in the aggregate.

The case in point concerned a GSA proposal to compensate DHS for $2.4 million in expired DHS American Recovery and Reinvestment Act of 2009 (Recovery Act) funds intended to provide information technology support services. Funding flowed from DHS through PBS under a reimbursable work authorization (RWA). PBS, in turn, engaged FAS to manage the information technology acquisition. The $2.4 million loss is tied to two FAS task orders. In both instances, the funds expired unused on September 30, 2011, the end of the 12-month period of performance for what had been defined under each contract as severable services. As a means of compensating DHS for this loss, GSA has proposed waiving the FAS assisted acquisition fee on a much larger, related information technology procurement. This memorandum addresses some of the overlapping problems found in this example and suggests an alternative fee structure for future cross-service projects.

Background

DHS received $200 million in Recovery Act funding to continue development of the DHS Consolidated Headquarters at St. Elizabeths. Of that total, it allocated $89,913,000 to partially fund the Technology Integration Program (TIP), a major acquisition to design and implement a state of the art data network to serve the entire DHS campus. It allocated an additional $2,943,397, evenly split, to partially fund two additional acquisitions in support of this effort: independent verification and validation (IV&V) services; and project management services (PMO).

The TIP contract, along with the two smaller support contracts, IV&V and PMO, represent FAS acquisitions. Funding flowed from DHS through PBS under a broadly scoped RWA covering both information technology as well as other non-IT tenant build-out costs. PBS in turn entered into an interagency agreement with FAS to procure the requested services. As structured, FAS was to charge a three percent fee for the IV&V and PMO tasks, and a two percent fee for the much larger TIP contract. The FAS fee was in addition to the RWA project management fee charged by PBS, which was to be capped at two percent, or half the usual PBS fee of four percent. The combined GSA fee to DHS would have been five percent for the IV&V and PMO contracts and four percent for the TIP contract.

	Initial Funding	FAS Fee[1]	PBS Fee[2]	Combined
IV&V and PMO Contracts	*$2,943,397*	*3%*	*2%*	*5%*
TIP Contract	*$89,913,000*	*2%*	*2%*	*4%*

1. *FAS intends to waive the 2% fee on the TIP contract up to the amount of loss incurred on the IVV and PMO contracts, approximately $2.4 million.*
2. *PBS fee capped at 2%, or half the normal 4% fee*

Finding 1 – PBS has no authority to waive RWA project management fee

The agreed upon fee structure, covering information technology services acquired by PBS through FAS on behalf of DHS, was predicated upon PBS waiving half its normal project management fee. The fee sharing arrangement was made prior to and without respect to the subsequent losses incurred under the IV&V and PMO contracts. The terms of this arrangement could be inferred from the file documentation, but was not expressly stated. No formal waiver request was evident in the agency files.

Generally, an agency cannot waive full cost recovery for services provided on behalf of another agency. Absent specific authority, such an action would result in an illegal augmentation of the recipient's appropriation. PBS has been granted such authority only in connection with tenant agency rent and in limited circumstances. With that exception, PBS is otherwise required by statute to recapture its actual costs of providing reimbursable services. Because PBS's indirect costs for these services cannot easily be quantified on a per-project basis, PBS longstanding policy is that these indirect costs will be accounted for by charging a four percent fee on all projects. Waiver or reduction of this fee on any project effectively means that PBS will not recover its indirect costs, as required by statute. By agreeing to the reduced fee, PBS appears to have violated the statutory requirement.

The restrictions placed on PBS stand in sharp contrast with the flexibility extended to FAS. FAS argues, with support from the GSA Office of General Counsel, that the legislation establishing the Acquisition Services Fund provides GSA with the authority to both set and waive its indirect cost recovery rate on a case by case basis. Full cost recovery, to the extent practicable, is the stated goal, but only as measured across all business lines, in the aggregate. With its responsibility to ensure the adequacy of management controls, your office may wish to explore the limits of this implied authority.

Finding 2 – PBS incorrectly coded information technology services as an equipment purchase, exempting the costs from the RWA project management fee

PBS recovers its own operational costs relative to this effort, as it does with all reimbursable services it provides, by consistently charging an RWA project management fee. The fee is automatically levied on all applicable direct costs, which would include, for example: design costs, architect and engineering services, construction, and construction management. Certain costs, however, are not included in the fee calculation. These include transactions coded as move costs, overtime utilities, expensed furniture, and expensed operating equipment. To date, all of the costs incurred under all three FAS task orders have been miscoded in the financial system as **Object Class 31, Sub Object Class M53 – "Equipment Purchase"**. The RWA itself, which should govern, cites instead **Object Class 25 – "Contract Services"**, a more accurate classification of the work to be performed under the initial phase of the TIP acquisition, and the IV&V and PMO contracts in their entirety. None of the recorded transactions should have been classified as an equipment purchase. As a result, all costs incurred under these task orders were exempted from the PBS automatic four percent project management fees; i.e., no fee has been charged. Correcting the miscoding will result in a system-generated application of the full four percent fee, double the fee agreed upon. To preempt this outcome, an override citing applicable authority would be needed; however, as discussed in Finding 1, GSA lacks the authority to waive any part of the RWA project management fee charged by PBS.

Finding 3 – PBS incorrectly charged FAS assisted acquisition fee against DHS funds

By engaging FAS to plan and award the DHS information technology procurements, PBS has in effect supplemented its in-house project team - a PBS internal business decision. It collects four percent from DHS regardless of whether its project management function is fulfilled using in-house staff, supplemental contract labor, or an external service like FAS. It pays for in-house staff and contract labor out of its own operating fund, Budget Activity PG61, and recovers these costs in the aggregate through its four percent fee as applied across all RWAs.

The cost PBS incurs by using FAS to assist with this procurement should similarly be funded out of PG61 – it is a cost of PBS operations. FAS has no agreement with DHS for the services required; the interagency agreement that enumerates terms, conditions and source of funding is an agreement between FAS and PBS. That agreement, incorrectly in our opinion, cites a single funding source - the DHS RWA - to cover both vendor costs and the FAS acquisition fee. Only vendor costs should be billed to PBS and charged against the RWA. The FAS fee should be billed to PBS and charged against PBS operations, PG61. Executed in this manner, the accounting treatment captures the essence of the transaction, matching the two percent expense incurred against the four percent revenue earned.

Conclusion

i. GSA needs to define permissible fee sharing arrangements for reimbursable services. To do this, it must first verify its interpretation of fee setting and fee waiver authority under both the Federal Buildings Fund and the Acquisition Services Fund. Then, for a situation like the example cited here, we believe the PBS project management fee should govern; the customer should incur the usual PBS fee. Any arrangement between PBS and FAS for FAS assistance with the acquisition should be funded out of PBS' operating budget to be recovered only in the aggregate as an element of the project management indirect cost pool.

ii. A loss of funding, even where cause can be traced to a procurement deficiency, does not offer sufficient justification to permit GSA to waive an otherwise recoverable expense. This is not arguing that the harmed party should not be compensated; it is simply recognition of the limited permissible use of funds arising under appropriations law. The authority to remediate damages, to offset the loss of funds and make DHS whole, is an authority vested solely with Congress.

iii. Finally, the coding errors that have resulted in a fee exception require corrective action, while the undetected occurrence signals a potential management control weakness.

These observations are made in the course of our oversight and monitoring of the DHS headquarters consolidation project. They do not derive from nor have we conducted the tests and procedures that would be required under an audit. Accordingly, we are making no formal recommendations. However, this memo will be made available to the independent public accountant, and may trigger additional testing as part of its annual audit of GSA's financial statements. We hope these observations will assist you in evaluating your procurement and management control options. If we can be of further assistance, please contact me at 202-208-0021.

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