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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: GPA-Buffer, LP

File: B-298953.2

Date: March 21, 2007

Jeffrey E. Weinstein, Esq., for the protester.

Barry D. Segal, Esq., General Services Administration, for the agency.

Glenn G. Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reimbursement of protest costs is denied where record fails to establish that the agency delayed taking corrective action in the face of clearly meritorious protest.

DECISION

GPA-Buffer, LP requests that we recommend reimbursement of the costs GPA-Buffer incurred in connection with filing and pursuing a protest challenging the General Services Administration's (GSA) decision to enter into a sole-source agreement with the state of Florida to lease real property on which to construct office space for the U.S. Army Southern Command (SouthCom) headquarters.

We deny the request.

In August 2005, GSA and the state of Florida entered into a memorandum of agreement under which the state agreed to make a 40-acre site available, at no cost, for the subsequent construction of office space to house SouthCom's headquarters.¹ The memorandum provided that the state of Florida would subsequently conduct a competitive procurement for the actual construction of the required office space. Agency Report (AR), exh. 22. The memorandum also provided, "it is anticipated that

¹ SouthCom currently occupies office space in nine different locations in the greater Miami area, including a site owned by the protester. The purpose of the planned acquisition was to consolidate the SouthCom offices at a single location.

SouthCom will seek and obtain the required Congressional Title 10 authorization for this proposed project.”² Id. at 2.

In November 2005, GSA prepared a Justification for Other Than Full and Open Competition (JOTFOC) for its plan to non-competitively enter into a lease agreement with the state of Florida for the 40-acre site.³ Among other things, the JOTFOC concluded that “[n]o other source has 40 acres of available land at no cost.”⁴ AR exh. 42, at 3.

On April 28, 2006, the Army submitted the statutorily required notice to the U.S. House of Representatives Committee on Armed Services, providing various information regarding the proposed acquisition.⁵ In its notice to the Committee, the Army described its requirements, explained that its needs had outgrown the available space in the various offices located throughout the greater Miami area, noted that eight of the nine current locations do not meet DOD anti-terrorism and force protection standards established after the September 2001 terrorist attacks, and concluded: “No suitable government-owned or controlled space is available in the Miami area to satisfy this requirement. Accordingly, the Department of the Army requests authority to . . . lease the new build-to-suit facility on state land.” AR exh. 50, at 2.

On September 26, 2006, GSA published a “Notice of Intent to Procure Using Other Than Full and Open Competition” on the FedBizOpps Internet website, stating: “[GSA] proposes to enter into a noncompetitive lease procurement using other than full and open competition with the state of Florida for housing of the long term space needs of the United States Southern Command . . . in Doral, Florida.” GSA Motion to Dismiss, Oct. 16, 2006, exh. 1. GSA explains that the September 26 notice

² The provisions of 10 U.S.C. § 2662 require the Department of Defense (DOD) to notify its congressional oversight committees prior to conducting certain transactions involving real property.

³ The agency concluded that, to meet SouthCom’s consolidated office requirements, a site of at least 40 acres was required. Prior to executing the JOTFOC, GSA conducted a market survey during which GSA identified five potential sites that were at least 40 acres in size, but determined that none of those sites was available at no cost to the government. AR exh. 10; Contracting Officer’s Statement at 2. GSA also obtained data indicating that the appraised value of the state of Florida’s 40-acre site was between \$27 million and \$40 million in fiscal year 2005. AR exh. 35.

⁴ The protester’s site, which is one of the nine sites in the greater Miami where SouthCom currently has office space, is approximately 25 acres.

⁵ The notification was similarly sent to the U.S. Senate Committee on Armed Services.

“was issued to inform the public of GSA’s intent to use the State offered no cost land.” Contracting Officer’s Statement at 6.

On October 6, GPA filed a protest challenging the bases for the agency’s determination to obtain the state’s 40-acre site as a sole-source procurement. On November 13, the agency responded to GPA’s protest, filing a report with this Office responding to the protester’s various arguments⁶ and maintaining that the agency’s sole-source determination complied with applicable law and regulations.

On November 16, 2006, the U.S. House of Representatives Committee on Armed Services responded to the Army’s earlier notice of the proposed acquisition, addressing various aspects of the Army’s proposed actions. Among other things, the Committee stated:

After careful review of the proposal, existing facilities, and headquarters requirements, the Committee believes that a replacement headquarters facility for USSOUTHCOM is indeed necessary. However, entering into a lease for a headquarters facility is neither the most economic nor the most effective means of meeting the needs of the command.

As such, the Committee recommends pursuit of military construction funding to meet USSOUTHCOM headquarters requirements.

Letter from U.S. House of Representatives Committee on Armed Services to the Army, Nov. 15, 2006, at 1.

On November 30, GSA advised our Office that it was no longer pursuing the sole-source lease agreement with the state of Florida, referencing the Committee’s directions quoted above. Letter from GSA to GAO, Nov. 30, 2006, at 1. In light of GSA’s statement that it was no longer pursuing the sole-source procurement, we dismissed GPA-Buffer’s protest as academic.

Thereafter, GPA-Buffer submitted this request for our recommendation that GSA “pay [GPA-Buffer] its costs of filing and pursuing the protest, including attorneys fees and bid and proposal preparation costs.” Letter from Counsel for GPA-Buffer to GAO (Dec. 19, 2006).

⁶ Initially, GSA sought dismissal of the protest, arguing that it was not timely filed. In response, this Office notified counsel for the parties that we did not intend to dismiss the protest prior to receipt of a complete agency report. Thereafter, the agency report was timely submitted to GAO and to the protester.

When an agency takes action which renders a protest moot prior to our issuance of a decision resolving the merits of the protest, our Office may recommend, in certain circumstances, that the protester be reimbursed the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(e) (2006). In this regard, we will generally recommend reimbursement of protest costs where an agency has delayed taking corrective action in response to a “clearly meritorious protest.”⁷ See, e.g., Johnson Controls World Servs., Inc.—Costs, B-299529.4, Aug. 19, 2005, 2005 CPD ¶ 162 at 8. However, not all agency actions that render a protest academic are “corrective” in nature and, further, even when an agency takes action that it describes as “corrective,” that action does not, of itself, establish that the protest was “clearly meritorious.” Spar Applied Sys.—Declaration of Entitlement, B-276030.2, Sept. 12, 1997, 1997 CPD ¶ 70 at 5.

Here, based on the record discussed above, we are unable to conclude that the agency took “corrective action” in response to GPA-Buffer’s protest, nor can we conclude that GPA-Buffer’s protest was “clearly meritorious.” As discussed above, GSA and the Army abandoned the proposed acquisition of real property based on the House Armed Services Committees’ direction that “entering into a lease for a headquarters facility is neither the most economic nor the most effective means of meeting the needs of the command,” and the Committee’s recommendation that SouthCom “[pursue] military construction funding to meet USSOUTHCOM headquarters requirements.” Based on this record, we are unable to conclude that the agency’s action in abandoning the proposed no-cost sole-source acquisition was “corrective action” taken in response to GPA-Buffer’s protest and, similarly, based on our truncated protest process, we cannot conclude that the agency’s proposed sole-source acquisition of property on a no-cost basis constituted a clear violation of procurement statute or regulation for which there was no “defensible legal position.”⁸

⁷ We have described a “clearly meritorious” protest as one that does not involve a “close question,” or one where a reasonable agency inquiry would have revealed the “absence of a defensible legal position.” See PADCO, Inc., B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 3.

⁸ There can be no dispute that the agency acted promptly in responding to the Committee’s directions.

Since we are unable to conclude that the agency delayed taking corrective action in the face of a clearly meritorious protest, we decline to recommend reimbursement of GPA-Buffer's costs.

The request for reimbursement of costs is denied.

Gary L. Kepplinger
General Counsel