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Decision

Matter of: King Farm Associates, LLC

File: B-404896.16

Date: May 30, 2012

Angela B. Styles, Esq., Derek R. Mullins, Esq., and Robert J. Wagman, Jr., Esq., Crowell & Moring LLP, for the protester.
Kris Durmer, Esq., Jay Bernstein, Esq., Lesley Busch, Esq., and Katharine Healy, Esq., General Services Administration, for the agency.
Tania Calhoun, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO will not grant request for reconsideration to vacate protest decision based on new information where the protester has not demonstrated any nexus between the newly-disclosed information and the procurement at issue.

DECISION

King Farm Associates, LLC, of Vienna, Virginia, requests reconsideration of our decision in King Farm Assocs., LLC; One Largo Metro LLC; Metroview Dev. Holdings, LLC, B-404896.10 et al., Dec. 5, 2011, 2012 CPD ¶ 6, in which we denied its protest of the General Services Administration's (GSA) award of a lease to Fishers Lane/JBG Companies, of Rockville, Maryland, under solicitation for offers (SFO) No. 08-011, for office space for the Department of Health and Human Services. In its protest, King Farm challenged GSA's reevaluation of its proposal and various aspects of the source selection decision.¹ We denied the protest,

¹ As explained in our decision, the subject of this protest was the reevaluation and new source selection decision resulting from our recommendation in a prior decision. See One Largo Metro LLC; Metroview Dev. Holdings, LLC; King Farm Assocs., LLC, B-404896 et al., June 20, 2011, 2011 CPD ¶ 128. In that prior decision, we sustained protests from three firms, including King Farm, challenging the original evaluation and source selection decision. Id. Details of the facts, arguments, analyses, and conclusions from the decision at issue here are not required to understand the request for reconsideration and are not repeated here.

concluding that the protesters had not demonstrated that GSA's actions were unreasonable. King Farm now asks that we vacate our decision, direct GSA to provide a new agency report for our review, and issue a new decision.

We deny the request for reconsideration.

BACKGROUND

The SFO, issued by GSA's Public Buildings Service, sought offers for a 15-year lease of office space in suburban Maryland. After evaluating the initial proposals submitted in response to the SFO, the agency engaged in several rounds of clarifications and discussions and requested final revised offers. These offers were evaluated by the agency's technical teams and source selection evaluation board (SSEB). The SSEB recommended that the lease be awarded to King Farm. The SSEB's report and recommendation were provided to the agency's source selection authority (SSA), who agreed that the lease should be awarded to King Farm. The SSA's decision was provided to GSA's commissioner for the National Capital Region, Public Buildings Service, who also served as the Head of the Contracting Activity (HCA) for this region. After reviewing the SSEB's evaluation report, the HCA selected Fishers Lane for award.

King Farm and other firms filed protests in our Office. We sustained the protests and recommended that GSA reevaluate proposals and perform and document a new source selection decision. Pursuant to that recommendation, the HCA reevaluated proposals and made a new tradeoff analysis and source selection decision, again concluding that Fishers Lane's proposal reflected the best value to the government. Following a debriefing, King Farm and other offerors filed protests in our Office. The protesters raised numerous objections to GSA's reevaluation of offers and source selection decision. As explained in the decision, we denied the protesters' challenges, finding that the HCA's decision was not unreasonable.

REQUEST FOR RECONSIDERATION

In its request for reconsideration, King Farm states that an April 2012 report issued by GSA's Office of Inspector General (OIG), and subsequent statements by the IG, "have exposed new facts demonstrating improper and potentially criminal procurement activities in GSA's Public Buildings Service." Request for Reconsideration, at 2.

The OIG Report concerned an investigation of possible excessive expenditures and employee misconduct in connection with the Public Building Service's October 2010

Western Regions Conference.² One of the OIG's findings was that ". . . in many instances GSA followed neither federal procurement laws nor its own policy on conference spending." OIG Report, supra, at 1. After the OIG's report was issued, the GSA Administrator terminated two appointees in the line of authority and submitted her own resignation due to the "loss of confidence" in GSA's leadership.³ Another official was placed on administrative leave for his conduct at the conference.⁴ At a congressional hearing on April 16, the IG stated that criminal referrals had been made to the Department of Justice, with a recommendation for criminal charges. He did not name any individuals as the subjects of these criminal referrals.⁵

King Farm alleges that the GSA officials who were fired, resigned, or placed on administrative leave as a result of the OIG's report were "personally involved" in this procurement, citing various e-mails in the record. Request for Reconsideration, at 2. The firm further alleges that GSA's source selection process in the lease procurement "utilized GSA attorneys to shield the decision-making process" and, as a result, the record excluded relevant documents and testimony based on GSA's claims of attorney-client privilege. Id., at 3. Citing the OIG's findings of improper procurement activity and the IG's statements concerning criminal referrals, King Farm argues that "there is now evidence of improper and potentially criminal procurement practices being perpetrated" by the same officials involved in the lease procurement, and that the communications protected by the attorney-client privilege are no longer protected based on the "crime/fraud" exception to the privilege. Id., at 11-12. To protect the integrity of the procurement process, King Farm asserts that GAO's decision must be vacated and GAO must issue a new decision based on a complete record.

² GSA OIG Management Deficiency Report: General Services Administration, Public Buildings Service, 2010 Western Regions Conference, Apr. 2, 2012, at 3. According to the OIG Report, GSA's regions covering the western half of the United States hold this conference every other year. The 2010 Western Regional Conference was hosted by GSA's Pacific Rim Region. Id.

³ Testimony of Martha N. Johnson, before the House Committee on Transportation and Infrastructure, Subcommittee on Economic Development, Public Buildings and Emergency Management, Apr. 17, 2012, CQ Congressional Transcripts, at 61.

⁴ "GSA scandal engulfs another top official," www.govexec.com/management/2012/04/gsa-scandal-engulfs-another-top-official/41721.

⁵ Testimony of Brian D. Miller, before the House Committee on Oversight and Government Reform, Apr. 16, 2012, CQ Congressional Transcripts, at 44-45.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a) (2012). We conclude that King Farm has failed to provide any basis warranting the relief it now requests. Our analysis begins, and ends, with our finding that King Farm's request for reconsideration has not shown any nexus between the activities described in the OIG's report and the criminal referrals--the "information not previously considered"--and the lease procurement at issue here.

It is readily apparent that the OIG report is wholly unrelated to the lease procurement at issue. The improper procurement practices it describes were limited to the OIG's investigation in connection with the 2010 Western Region Conference, hosted by GSA's Pacific Rim Region. OIG Report, supra, at 3. The OIG specifically found that "GSA failed to follow contracting regulations in many of the procurements associated with the [Western Region Conference] and wasted taxpayer dollars." Id., at 4. These procurements concerned the original solicitation and agreement with a hotel, the revised hotel agreement, the contract to provide a team-building exercise, and the contract for audio-visual services. Id.

In contrast, the lease procurement had nothing to do with this or any other conference. It was, instead, a procurement for the lease of office space undertaken by the National Capital Region. The OIG report does not purport to extend to such procurements, and the OIG's office has confirmed that it has not conducted, and does not plan to conduct, an audit or investigation of the lease procurement. GSA Response to Request for Reconsideration, Attachment 3, E-Mail Exchange Between OIG and GSA Office of the General Counsel.

Moreover, King Farm's efforts to tie certain GSA officials to the source selection decision in the lease procurement, to the improper procurement activities described in the OIG's report, and to the IG's criminal referrals, are unavailing.

First, GSA states that none of the GSA officials cited by King Farm as engaging in "potentially criminal procurement activity" evaluated offers for the lease procurement or otherwise participated in the source selection decision for the lease procurement, as both functions were performed solely by the HCA. Id., at 4, n.2. The e-mails cited by King Farm in support of its position that the officials were "personally involved" do not contradict GSA's statement.⁶

⁶ As our decision explained, King Farm and another protester initially protested that the award decision did not represent the HCA's independent judgment, but was the result of the influence of a more senior GSA official. This official is referenced in King Farm's request for reconsideration. King Farm abandoned this protest ground when it did not address the agency's response in its comments; the other protester

(continued...)

Second, nothing in the OIG's report suggests any involvement by any of these officials in any of the procurement activities that were the subject of the OIG's investigation. Although these officials were disciplined as a result of the OIG's report, there is no evidence that they were disciplined because they "personally were engaged in, or personally approved of," improper procurement activities. Instead, as noted above, the evidence shows that two officials were terminated and one resigned because the excesses and improprieties associated with the Western Region Conference created a loss of confidence in GSA's leadership team, and that the fourth was placed on administrative leave based on his conduct at the conference. See n.3, n.4, supra.

Finally, King Farm has not presented any evidence to indicate, or otherwise suggest, that the GSA officials who were, in fact, the subject of the OIG's investigation and the subsequent IG's criminal referrals, were involved with the lease procurement.

In conclusion, King Farm's request for reconsideration, rooted entirely on OIG report findings and IG criminal referrals that lack any apparent connection to the procurement at issue in our underlying decision, is without any basis.⁷ See Environmental Protection Agency; CGI Federal, Inc.--Recon., B-299504.3, B-299504.4, July 23, 2008, 2008 CPD ¶ 149, at 6 (denying request for reconsideration, in part, where there was no nexus between new information, which formed the basis of the request, and findings in the underlying decision); Cf., Lockheed Martin Corp., B-295402, Feb. 18, 2005, 2005 CPD ¶ 24, at 2-3 (protest challenging agency actions that occurred in the relatively distant past was timely

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withdrew its protest ground after hearing the HCA's testimony at a hearing conducted during the course of the protest. In that hearing, in response to the question, "to what extent was the decision you issued the result of your independent judgment?", the HCA testified, "100 percent." Hearing Transcript, at 81.

⁷ King Farm asserts that the "fundamental question" in its request for reconsideration is whether GSA improperly withheld documents from the administrative record. It is mistaken. King Farm has long known that documents were withheld from the record but did not raise this issue within 10 days of the issuance of our decision. 4 C.F.R. § 21.14(b). Rather, King Farm's request for reconsideration turns entirely on the new information it has presented to our Office.

where it was based on newly-obtained information related to the procurement at issue).

The request for reconsideration is denied.

Lynn H. Gibson
General Counsel