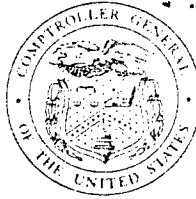


DECISION



13546 Ph II
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-192483

DATE: April 24, 1980

MATTER OF: Fairplain Development Company
et al.

DIGEST:

- ✓ 26604480
1. Although it is not clear that protest of restriction to locations in central business district of Benton Harbor, Michigan in solicitation for lease of office space is timely, protest will be considered as raising a significant issue since it concerns agency's implementation of Executive Order (E.O.) 12072, 43 Fed. Reg. 36869 (1978) dealing with preference for location of Federal facilities in urban areas.
 2. GAO will not normally review agency compliance with Executive Branch policies under Bid Protest Procedures but will consider protest which contends such policies are contrary to applicable procurement statutes and regulations.
 3. Leasing agency has primary responsibility for setting forth minimum needs, including location of facility. GAO will not object to agency's choice of location unless that choice lacks reasonable basis.
 4. As Rural Development Act of 1972, 42 U.S.C. § 3122(b) (1976) defines "rural area" as any community with population of less than 50,000 which is not immediately adjacent to city with population of 50,000 or more and GSA defines "urban area" for purposes of E.O. 12072 as any incorporated community with population of 10,000 or more, solicitation restricting offers for leased office space to buildings in central business district of city of 16,481 is compatible with both requirements and is within the

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[Protest Against Proposal Rejection]

authority of GSA under Sections 490(e) and 490(h)(1) of 40 U.S.C. (Federal Property and Administrative Services Act of 1949).

The Fairplain Development Company (Fairplain) protests the General Services Administration's (GSA) rejection of its proposal to lease 8,720 square feet of office space. GSA had rejected the proposal because the offered space was outside the area specified in the solicitation (No. GS-5B-12966). GSA sought space within the central business district of Benton Harbor, Michigan, into which it intended to move the District Office, Social Security Administration (SSA) from Fairplain Plaza, which is owned by Fairplain and is outside the specified area.

✓ 1182
✓ 1182

The City of Benton Harbor, Michigan has filed a statement supporting the restriction to its central business district. The owner of a building in the restricted area has presented arguments also favoring the space restriction. Bertrand Township, the Township of Buchanan, Benton Township and the Human Resources Commission, a tri-county agency dealing with problems of the aged, have expressed opposition to moving the SSA district office to downtown Benton Harbor. St. Joseph Township, the City of New Buffalo, the City of Coloma and a County Commissioner of Berrien County have also protested the relocation of the SSA district office.

GSA states the location restriction was imposed to implement national urban policy as set forth in Executive Order 12072, 43 Fed. Reg. 36869 (1978) (E.O. 12072). GSA contends Fairplain's protest is untimely under our Bid Protest Procedures, 4 C.F.R. Part 20 (1979), and as the subject matter concerns Executive Branch policy, it is not appropriate for our review under our bid protest function.

The agency points out that the solicitation issued on May 10, 1978 unequivocally limited consideration to the downtown area and contends that since Fairplain's protest was not filed with our Office until after the date set forth in the solicitation for the receipt of offers the protest is untimely under section 20.2(b)(1) of our Bid Protest Procedures. GSA also contends that all of the protests filed by the interested communities and groups are untimely for the same reason. There is some doubt

as to the timeliness of the protests. However, since they concern GSA's implementation of a national urban policy which will affect all of GSA's acquisition of facilities for Federal agencies, we will consider the merits under section 20.2(c) of our Bid Protest Procedures as involving an issue significant to procurement practices or procedures. Edw. Kocharian and Company, Inc., B-193045, January 15, 1979, 79-1 CPD 20.

As the subject matter of this protest concerns Executive Branch policy with respect to urban areas, GSA suggests it is not appropriate for resolution under our Bid Protest Procedures. It argues that under these Procedures, we review agency compliance with applicable procurement statutes and regulations, not with Executive Branch policies. In support of this position, GSA cites Systems & Programming Resources, Inc., B-192190, August 16, 1978, 78-2 CPD 124; Comtem, Inc., Request for Reconsideration, B-186983, March 9, 1977, 77-1 CPD 173; and Kasper Brothers, B-188276, February 8, 1977, 77-1 CPD 99.

We do not normally review allegations of an agency's failure to comply with Executive Branch policies under our Procedures. However, we do review agency compliance with or implementation of such policies when it is contended that such policies are contrary to applicable procurement statutes and regulations. See 53 Comp. Gen. 102 (1973); American Can Company, B-187381, B-187658, March 17, 1977, 77-1 CPD 196.

Fairplain contends the requirement that office space be located in downtown Benton Harbor unduly restricts competition and conflicts with applicable statutes and regulations. It argues that while the restricted area may be the central business district of Benton Harbor, it is clearly not the central business district of the three rural counties served by the SSA district office. It states that because Benton Harbor has a population of approximately 16,481, comprising about 6 percent of the total population of the area served, GSA erred in treating Benton Harbor as an urban area and in applying the urban renewal preference to its downtown area.

Fairplain argues that neither E.O. 12072 nor GSA implementing regulations require or even permit the restriction of this procurement to space within the

central business district of Benton Harbor. Moreover, Fairplain contends that E.O. 12072 exceeds the authority delegated to the President by Section 205(a) of the Federal Property and Administrative Services Act of 1949 (Property Act), as amended, 40 U.S.C. § 486(a) (1976), and it is therefore without legal effect. Fairplain states the only directive Congress has provided with respect to locations preferred for Federal facilities is found in the Rural Development Act of 1972, 42 U.S.C. § 3122(b) (1976), which establishes a rural area preference.

GSA admits the restriction in the subject solicitation was imposed to implement the national urban policy. It contends the restricted area is large enough to insure adequate competition and states that the SSA's determination to relocate into the central business district of Benton Harbor is supported by local officials. GSA concedes the entire area served by the SSA district office is rural as defined by the Rural Development Act. Therefore, it argues, locating the office in the central business district would comply with both the Rural Development Act and, because it would serve to strengthen the city, with E.O. 12072.

Federal Property Management Regulations (FPMR) § 101-18.100 (1978) regarding the leasing of property provides that competition is to be obtained to the maximum extent practical among those locations meeting minimum Government requirements. This section further provides that material consideration shall be given to the efficient performance of the agencies' missions and programs with due regard to the convenience of the public served and the health and safety of employees. Among the other required considerations are the need for development and redevelopment of areas, the impact the site selection will have on improving social and economic conditions and "insofar as practicable in accordance with section 601(b) of the Rural Development Act of 1977, (86 Stat. 674), first priority will be given to locating leased space for new offices" in rural areas with "due consideration" being given to E.O. 11512 which has been replaced by E.O. 12072.

We have held that the leasing agency has the primary responsibility for setting forth its minimum needs, including the location of the facility and we will not object unless its determination lacks a reasonable basis. Dr. Edward Weiner, B-190730, September 26, 1978, 78-2 CPD 230.

Section 601 of the Rural Development Act of 1972, Pub. L. No. 92-419, 86 Stat. 657, 674, amended section 901(b) of the Agricultural Act of 1970, 42 U.S.C. § 3122(b), to read as follows:

"Congress hereby directs the heads of all executive departments and agencies of the Government to establish and maintain departmental policies and procedures giving first priority to the location of new offices and other facilities in rural areas as defined in the private business enterprise exception in section 1926(a)(7) of Title 7."

In part, 7 U.S.C. § 1926(a)(7) provides that for purposes of loans and grants for private business enterprises, the terms "rural" and "rural area" shall not include any area in any city or town which has a population in excess of 50,000 inhabitants. As Benton Harbor's population is under 50,000, it and the current location of the SSA office are both within a rural area for purposes of the Rural Development Act.

E.O. 12072 cites as its authority Section 205(a) of the Property Act and provides that:

"1-103 Except where such selection is otherwise prohibited, the process for meeting Federal space needs in urban areas shall give first consideration to a centralized community business area and adjacent areas of similar character, including other specific areas which may be recommended by local officials." (Emphasis supplied.)

While the E.O. does not define "urban area", it authorizes the Administrator, GSA to issue regulations and criteria to implement its policy. Under this authority, the

Administrator has proposed an amendment to the FPMR (44 Fed. Reg. 18,707, March 29, 1979). Among other things this amendment would in § 101-17.003-33 define "urban area" as:

"§ 101-17.003-33 Urban Area.

"* * * any Standard Metropolitan Statistical Area (SMSA) as defined by the Department of Commerce. An area which is not an SMSA is classified as an urban area if it is one of the following:

"(a) A geographical area within the jurisdiction of any incorporated city, town, borough, village or other unit of general local government, except county or parish, having a population of 10,000 or more inhabitants;

"(b) that portion of the geographical area within the jurisdiction of any county, town, township, or similar governmental entity which contains no incorporated unit of general local government, but has a population density equal to or exceeding 1,500 inhabitants per square mile; or (c) that portion of any geographical area having a population density equal to or exceeding 1,500 inhabitants per square mile and situated adjacent to the boundary of any incorporated unit of general local government which has a population of 10,000 or more inhabitants."

Basically, this means that any incorporated community with a population of 10,000 or more is considered by GSA to be an "urban area." This definition is taken from the Federal Urban Land-Use Act, 40 U.S.C. § 535 (1976).

The E.O. on its face does not conflict with the Rural Development Act which was an attempt by Congress to improve the economy and living conditions in rural America. H.R. Rep. 835, 92nd Cong., 2nd Sess. 1, reprinted in (1972) U.S. Code Cong, and Ad. News 3147.

On the other hand, the purpose of the E.O. was to put Federal facilities in central business districts in urban areas in order to revitalize the economy in the Nation's cities. See 14 Weekly Comp. of Pres. Doc. 1427-1428, August 16, 1978. Inherent in the E.O. is the fact that a determination has already been made by an Executive agency that its office will be located in an urban area.

While the Rural Development Act defines the term "rural area" as any community with a population of less than 50,000 which is not immediately adjacent to a city with a population of 50,000 or more, GSA proposes to define "urban area" for purposes of the E.O. as any incorporated community with a population of 10,000 or more. Under these two definitions, a community with a population between 10,000 and 50,000 such as Benton Harbor, may be considered to be urban by GSA for purposes of the application of the E.O. Such a position is compatible with the Rural Development Act and the E.O., both of which have the same fundamental purpose: to revitalize the economy of the United States.

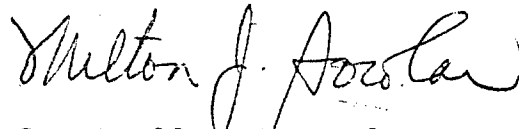
Moreover, section 490(h)(1) of 40 U.S.C. authorizes GSA to enter into lease agreements for periods not in excess of 20 years in buildings which are in existence or to be erected by the lessor and to assign and reassign space therein to federal agencies. Under section 490(e) of 40 U.S.C., GSA is authorized, in accordance with policies and directives prescribed by the President under section 486(a) to assign and reassign space of all Executive agencies in Government-owned and leased buildings if the Administrator determines such assignment or reassignment is advantageous to the Government in terms of economy, efficiency or national security.

Since in this case we see no conflict between the E.O. and the Rural Development Act and in view of the Administrator's broad authority to assign and reassign building space for Executive agencies, GSA is authorized to require the location of Federal offices in the central business

district of Benton Harbor. Under these circumstances, no useful purpose would be served by an extended discussion of Fairplain's position that the E.O. exceeds the authority of the President. In support of its argument, Fairplain's cited American Federation of Labor and Congress of Industrial Organizations, et al v. Alfred E. Kahn et al., C.A. D.C. No. 9-1564, June 22, 1979 where the Court found the President's voluntary wage and price standards were sufficiently related to economy and efficiency to be authorized by the Property Act. We do not interpret this decision as a diminution of the authority of the President and we cannot conclude the courts would find the national urban policy so unrelated to economy and efficiency in Government procurement as to treat E.O. 12072 as having been issued without statutory authority.

The E.O., as implemented by GSA is not inconsistent with the Rural Development Act, and we are aware of no legal basis upon which the restriction of competition to the central business district of Benton Harbor could be disturbed.

This protest is denied.



Acting Comptroller General
of the United States