

July 2, 1997

P.S. Protest No. 97-11

THE GAP, INC.

850 Cherry Ave., San Bruno, CA

DIGEST

Protest involving proposed sale of postal real property is dismissed; the protest jurisdiction conferred on the General Counsel by the Purchasing Manual does not extend to such disposal transactions.

DECISION

The Gap, Inc., (“Gap”) protests the Postal Service’s unwillingness to solicit or entertain its offer to purchase the Postal Service’s excess real property known as 850 Cherry Avenue, San Bruno, CA, and its decision, instead, to sell that property on a noncompetitive basis to Hines Interest Limited Partnership (Hines).

850 Cherry Avenue was the Postal Service’s former Western Region headquarters.¹ In 1994, the Postal Service solicited requests for qualification (RFQ) for a “full service development firm to assist in the demolition of the existing office structure and the planning and redevelopment of the site to its highest and best use.” Hines was selected to accomplish that effort. In 1996, the Postal Service and Hines signed a letter (the letter of intent) reflecting their intent to “enter into [a Predevelopment Agreement] to conduct predevelopment activities for the property” including the development of “a Class ‘A’ suburban office building . . . in a manner which will maximize the economic value of the [property] to [the Postal Service and Hines].” The letter of intent contemplated the

¹ This account comes from the contracting officer’s statement on the protest. The manager of the Asset Management office within the Facilities organization was the contracting officer who prepared the statement. Upon his departure from the Postal Service in the course of the protest, the vice president, Facilities, became the cognizant contracting officer.

Postal Service and Hines forming a joint venture entity or partnership to construct, lease, own and manage the new office building.

Consistent with the letter of intent, Hines had a building design prepared and approved by the local government. It negotiated with Gap as a prospective tenant of the new building. “[I]n early April of 1997, postal management reassessed the criteria for handling real property that is no longer needed for postal operations, and concluded that properties whose development plan does not contemplate a postal operations presence [as the plan for 850 Cherry Ave. did not], should be, instead, considered for disposal after the planning process has identified the properties’ highest and best use.” Accordingly, the Postal Service discussed with Hines alternatives to the Postal Service’s continued participation in the ownership and development of the property, and the Postal Service decided to negotiate to sell the property to Hines.

Gap’s April 25 protest, which invokes the regulations at Purchasing Manual 3.6,² asserts that it has been and remains interested in purchasing or leasing the site, and that on various occasions it had inquired of Hines concerning such a possibility, only to be told that the Postal Service was not interested in such a transaction.³ The protest asserts that Gap would be “the most logical user of the site” because of its other properties in the area, but contends that it has been “denied the opportunity to negotiate directly with the USPS.”

The contracting officer’s statement sought the summary dismissal of the protest on four grounds. First, the protest is “against actions that are part of the performance or administration of a contract,” and thus not subject to protest jurisdiction. The sale of the property to Hines is said to be within the scope of the RFQ, and “consistent with the purpose of the May 8, 1996, letter agreement,” and thus not protestable. Second, Gap is not an interested party because it was not an actual or prospective offeror within the requirements of the 1994 RFQ. Gap would be eligible to purchase the property only if the Postal Service “disregard[ed]” all Hines’ performance and “offer[ed] the property for sale on the open market (in accordance with procedures set forth in the Real Estate Handbook),” an outcome for which “[t]here is absolutely no basis.”⁴ Third, the protest is

² The Purchasing Manual (Purch. M.), issued January 30, 1997, is the successor to the Procurement Manual (Proc. M.), section 4.6 of which contained the Postal Service’s previous protest regulations. The Purch. M.’s protest regulations apply to “any protest received after” its issuance, although during an initial transition period, contracting officers may continue to use Proc. M. policies and procedures. Purch. M. Transmittal Letter Issue 1.

³ Although the protest contends that Hines declined to advise the Postal Service of Gap’s interest, in violation of Hines’ “fiduciary relationship with the USPS,” the contracting officer’s statement recites that Hines informed him of that interest “[o]n more than one occasion,” and that he expressed the Postal Service’s lack of interest in a sale.

⁴ The reference to the Real Estate Handbook is apparently a reference to Handbook RE-1, Realty Acquisition and Management, August, 1996.

untimely and precluded by the timeliness standards at Purch. M. 3.6.4 since it arises far later than fifteen days after the May, 1996, contract award. Fourth, the protest involves the disposal of real property by sale, a matter “not covered by the Purchasing Manual” and not reviewable under its protest regulations. A contract for the sale of real property does not involve the “purchase [of] supplies and services” for which the Purch. M. was established. Purch. M. 1.1.1.b.3.

By letter dated May 9, Gap offered to purchase 850 Cherry Ave. By letter dated May 12, the contracting officer declined to consider that offer, noting that following the receipt of the approval of the vice president, Purchasing and Materials,⁵ on May 6, “a purchase contract with Hines was executed . . . which is now in full force and effect.” Also on May 9, outside counsel for Gap submitted comments on the contracting officer’s statement. Those comments characterize the protest as “against the apparent intent of the Contracting Officer to enter into sole source discussions with Hines for the sale of [850 Cherry Ave.]” The comments contend that neither the RFQ nor the letter of intent provide a contractual basis for such a sale, and that in such a sale, “the Postal Service . . . became obligated to insure that the property is sold through a procedure which guarantees fair, competitive offers.”⁶ The comments further contend that the protest is timely measured from the Postal Service’s decision to sell the property to Hines, that the protest procedures are applicable to such a contract even though it does not involve “simple procurement activities,” and that the cases which the contracting officer cites for the proposition that Gap lacks standing as an interested party are inapposite.

Counsel for Hines submitted comments as an interested party. Citing cases describing the Congressional intent that the Postal Service be run in a business-like fashion, Hines disputes the applicability of 40 U.S.C. § 304a to the Postal Service. Further, while the Purch. M. limits contracting officers’ discretion in many ways with respect to purchases, Hines asserts that it contains no such limitations with respect to the sale of real property. In any event, Hines contends, the contracting officer’s actions here, which are not in violation of any statute or regulation, are entitled to a presumption of correctness and must be upheld.

⁵ Purch. M. 3.6.5.a. provides that while a timely protest before contract award is pending, award of the contract may not occur absent the vice president’s determination “that urgent and compelling circumstances which affect interests of the United States Postal Service will not permit waiting for the protest decision” That section further requires that notice of the award be provided to the protester, any interested parties, and the General Counsel “at the time of or before the award.

⁶ Elsewhere, the comments assert the application to the sale of the provisions of 40 U.S.C. § 304a, which provides, in part, that “whenever any real property . . . acquired by any Federal agency . . . is . . . declared to be in excess of its needs by the Federal agency . . . , the Administrator of General Services is authorized . . . to sell the same at public sale to the highest responsible bidder upon such terms and after such public advertisement as he may deem in the public interest. . . .”

The contracting officer submitted comments responding to those of Gap and Hines dated May 20, and also on that date participated in a conference on the protest, making the following points:

— The development and disposition of real property are matters not governed by the Purch. M., but rather by Handbook RE-1, a postal regulation which is not “officially published” and which gives no enforceable rights to nonpostal parties. Handbook RE-1 contains no procedure by which a contracting officer’s actions concerning real property disposal may be challenged.

— The Purch. M. does not “cover real property generally or the disposal of [real property] by sale or otherwise.” Its predecessor, the Proc. Man., “appeared to disclaim any protest jurisdiction . . . [over] disposals of real property,” since 11.1.1.c.2 of that directive, “Transactions not covered,” provides, in part, that

[n]either this Chapter [11, Facilities and Related Services,] nor this manual covers . . . [t]ransactions in which the Postal Service is transferring an interest in real estate to another party

The Purch. M. contains no chapter dealing with facilities and related services. Its statement of applicability “to all purchasing activities” (Purch. M. 1.1.1.c), “indicates no intent to introduce or re-introduce jurisdiction over non-purchasing actions.”

— The few postal protest decisions on disposal actions reach differing results. They include *F. L. Bailey*, P.S. Protest No. 79-38, November 1, 1997, (no protest jurisdiction over sale of obsolete postal personal property when sale is conducted pursuant to Handbook AS-701, Supply Management, which “provide[s] no guidance with regard to the submission or prosecution of protests); *Bingo Motors Inc.*, P.S. Protest Nos. 84-40, 41, July 25, 1984, (considering on the merits and denying a protest concerning the sale of excess spotter tractors under the authority of Management Instruction PO-750-82-1 and the Regional Vehicle Sales Instruction Package without discussion of jurisdiction); *Lott’s*, P.S. Protest No. 80-8, March 8, 1980, (considering on the merits and denying a protest of the sale of excess real property under the authority of the 1975 version of Handbook RE-1 without discussion of jurisdiction); and *Charles A. Poekel & Co., Inc.*, P.S. Protest No. 84-43, August 17, 1984, (considering on the merits and sustaining in part a protest against the procedure used for the disposal by sale (subject to the leasing back of a portion) of real property without discussion of jurisdiction.) Notwithstanding these latter decisions, in the absence of “express authorization . . . to review protest of projects for the disposal . . . of real property . . . there appears to be no general jurisdiction in the General Counsel . . . to review such actions.”

— 40 U.S.C. § 304a is not applicable to the Postal Service by virtue of 39 U.S.C. § 410(a), which exempts the Postal Service from federal laws “dealing with public or Federal contracts, property, [or] works” except as those laws are referenced at § 410(b), which does not reference § 304a.

— On the merits, the contracting officer’s exclusive dealings with Hines are consistent with the policies of Chapter 1 and the procedures of Chapter 8 of Handbook RE-1. Section 142.31 provides that the Postal Service may dispose of excess real property “by sale . . . at not less than its market value.” The contracting officer’s actions are consistent with the provisions of Chapter 8 governing development or disposal of real property. The specific requirements of sections 813.31 and 813.6 are not applicable to the transaction. Instead, the transaction is subject only to the general guidance of 812.7, which recognizes the need for flexibility in developmental projects.⁷

— Negotiating exclusively with Hines for the sale of the property is consistent with the RFQ process and the letter of intent, and recognizes the value which Hines’ contributions have brought to the property and its “justifiable expectation” that it will obtain the benefits of its agreement with the Postal Service.

Gap submitted further comments on the contracting officer’s submissions which make the following points:⁸

⁷ Alternatively, activities of the Realty Asset Management office, part of postal headquarters, are not subject to Handbook RE-1, which is directed to Facilities field personnel, so that the manager of that office “has an even broader scope of discretion and authority than RE-1 chapter 8 suggests”

⁸ In the course of the protest, Gap sought various documents relating to the Hines transaction from the contracting officer pursuant to the Freedom of Information Act. Not receiving all the documents it requested, Gap has appealed the partial denial of its request. While its final comments object to the contracting officer’s omissions in this regard and the impact of those omissions on its protest, decisions of this office have consistently recited the separation of FOIA proceedings from protest proceedings, and that the consideration of protests is not to be delayed pending the outcome of FOIA requests or appeals. See, e.g., *Cordova Air Service, Inc.*, P.S. Protest No. 92-86, January 22, 1993.

Gap’s comments also complain of this office’s refusal to accommodate its request for a conference to be held after the second week of June, the date proposed to Gap’s outside counsel in early June. In that discussion, counsel failed to specify any circumstance which would have precluded a conference on that timetable, including the circumstances subsequently cited which must have been foreseeable. Subsequently, counsel failed to respond in a timely manner to this office’s further inquiries concerning a conference.

The resolution of bid protests is an administrative procedure which functions differently from judicial litigation. . . . Due process is satisfied when the protester is afforded a reasonable opportunity to present its case. *Systems Research Laboratories, Inc. -- Reconsideration*, Comp. Gen. Dec. B-186842, 78-1 CPD ¶ 341, May 5, 1978.

(Con’t on next page.)

— Purch. M. 3.1.6 intentionally defines the protest jurisdiction broadly to encompass all “protests against Postal Service contracting procedures and awards,” not just those within the scope of the Manual.

— This office’s acceptance and docketing of the protest was an acknowledgment of its jurisdiction over the protest, as was the contracting officer’s compliance with Purch. M. 3.6.5.a before proceeding with award. Further, this office’s previous decisions in *Lott’s* and *Charles A. Poekel & Co., Inc.*, recognize this office’s jurisdiction over real estate disposal protests.

— The procedures of Chapter 8 of Handbook RE-1 governing the disposal of excess property, including procedures for obtaining its appraisal, offering it to the General Services Administration or to state and local governments, and advertising it on the open market “replicate the requirements of 40 U.S.C. § 304a.”

Those required procedures were not followed in this case. The Handbook RE-1 procedures for the disposition of property were required to be followed because the transaction is a disposition, not a developmental project; “[o]nce the property was determined to be excess and the Postal Service no longer desired to retain an interest, it should have been properly advertised. The proposed sale . . . is directly in violation of a process which governs every federal entity designed to assure that public property is sold to the highest bidder after fair competition . . . [and] is therefore invalid.”

— Contrary to the contracting officer’s apparent suggestion, Gap’s offer is more attractive than Hines’ offer. Contentions to the contrary may be based in part on misinformation about certain “variances” Hines is said to have obtained, but those variances are not unique to Hines.

DISCUSSION

This office has jurisdiction to consider protests concerning Postal Service contracts only to the extent that the applicable protest regulation confers it.⁹

(Con’t from previous page.)

Pitney Bowes, Inc. -- On Reconsideration, P.S. Protest No. 89-86, January 30, 1990.

⁹ We have of course, jurisdiction to determine our jurisdiction. The novel suggestion that the acceptance and docketing of a protest concedes jurisdiction is unpersuasive and inconsistent with the protest regulation, which allows the summary dismissal or denial of a protest “when a protest . . . is not reviewable by the General Counsel under these procedures” either upon its receipt and without a report by the contracting officer or later, after information subsequently obtained causes “the propriety of summary denial or dismissal [to become] clear” Purch. M. 3.6.7.p.

The Postal Contracting Manual . . . governs our consideration of protests As we stated in *Tapeswitch Corporation (On Reconsideration)*, P.S. Protest No. 75-40, July 1, 1978:

This office has consistently held that the plain and unambiguous language of PCM Section 2-407.8 requires a literal construction of its terms. . . . This regulation . . . has the force and effect of law and consequently this office is without authority to vary its terms. . . .

James W. and Joan C. Carroll, P.S. Protest No. 82-13, August 27, 1982.

The protest regulation is now Purch. M. 3.6., but the principle is unchanged. While the protester would have us interpret the regulation expansively so as to cover contracts for the disposition of real property as well as contracts for the purchase of supplies and services from suppliers, the overall subject of the Purch. M., we decline to do so.

The contracting authority of the Postal Service is vested in the vice president, Purchasing and Materials, who has redelegated some of that that authority to others. Purch. M. 1.1.2.a; 1.4.1; 1.4.2. The vice president has delegated “[r]esponsibility for policies and procedures unique to the acquisition, lease and disposal of real estate and to services related to those transactions to the vice president, Facilities.” Purch M. 1.1.2.a.1.¹⁰

Consistent with that delegation, the Purch M. does not deal with or discuss contracting for the purchase of real estate, although it does deal with the design and construction of postal facilities. Purch. M. 4.4., Design and Construction Purchasing, see also Purch. M. 1.1.c.3, noting that procedural guidance to implement the Purch. M. is also included in Handbook RE-14, Design and Construction Purchasing Handbook.

The omission of any discussion of real estate acquisition from the Purch. M. is a continuation of the practice of its predecessor, the Proc. M., which contained the same delegation to the vice president, Facilities (Proc. M. 1.1.2.a), and which specifically provided that “[n]either this chapter [11] nor the Procurement Manual as a whole covers the purchase of real property” Proc. M. 11.1.1.c.1. Neither the Purch. M. nor the Proc. M. deal with the disposition of excess property. The disposition by sale of excess personal property is governed by section 747 of Handbook AS-701, Material Management, February 1995. As previously noted, the disposition of excess real property is governed by Handbook RE-1.

¹⁰ “The term real estate includes . . . the disposal of real property (including improvements on real property), and any interests in real property, by easement, license, sale, lease or exchange; and the development and redevelopment of real property under lease agreements. . . .” Purch. M. 1.6.2.r.

The specific provision of Proc. M. 11.1.1.c.2 excepting “[t]ransactions . . . transferring . . . real estate to another“ from the Proc M. persuasively establishes that the protest procedures of that directive were not applicable to those transactions. Nothing suggests the drafters’ intent to reverse that result in the Proc. M.’s successor, the Purch. M.

The property disposal protest decisions discussed in the contracting officer’s comments all were issued under the protest regulation in the predecessor to the Proc. M., the Postal Contracting Manual (PCM). Review of the PCM as it existed immediately prior to the issuance of the Proc. M. (as amended through Transmittal Letter 34, August 14, 1984) does not indicate that property disposal protests would fall within its jurisdiction. The directive involved the “procurement” of property and services (see, e.g., PCM 1-100), provided no guidance or direction with respect to the disposal of property, and the protest regulation was limited to protests involving “all procurement contracts” (PCM 2-407.8 a.).¹¹ Accordingly, the jurisdictional conclusion reached in *F. L. Bailey* are persuasive as consistent with the terms of the PCM, and the assumption of jurisdiction *sub silentio* to the contrary in *Bingo Motors, Inc.*, and *Lott’s* is not. (*Charles A. Poekel, Inc.*, which included the purchaser’s leaseback of a portion of the property disposed of, involved the Postal Service’s acquisition of that leasehold interest, a matter within PCM protest jurisdiction, since leases were procurements within the PCM’s scope. PCM 18-4.)

We conclude, consistent with *F. L. Bailey, supra*, that we lack jurisdiction over Gap’s protest, and that the protest must be dismissed. We will, however, comment briefly on the merit of the protest’s central contention. The protest contends entitlement to participate in a public sale of 850 Cherry Ave., asserting that such a sale is mandated either by 40 U.S.C. § 304a or by the disposal regulations in Chapter 8 of Handbook RE-1. The cited statute has no application to the U. S. Postal Service. As the contracting officer notes, 39 U.S.C. § 410(a) excludes the application of “Federal law[s] dealing with public or Federal contracts, property, [and] works” except for those set out at §410(b); while subsection (b) makes six portions of Title 40 applicable to the Postal Service, § 304a is not among them.¹²

Assuming, *arguendo*, the application of the property sale regulations of Handbook RE-1 to this transaction; they do not require the public sale of excess real property. Section 813.62 provides for negotiation without advertising with appropriate justification and

¹¹ Unlike the Proc. M. and the Purch. M., however, the PCM did apply to the purchase of real property. PCM 18-1.

¹² . The Postal Service’s ability to control its property derives from 39 U.S.C. § 401 (5), which confers on it the general power “to acquire . . . such personal or real property . . . as it deems necessary or convenient in the transaction of its business, [and] to . . . sell, lease or otherwise dispose of such property or any interest therein.” See also 39 U.S.C. § 404 (a)(2) conferring the specific power “to determine the need for . . . postal . . . facilities . . . and to provide such . . . facilities”

approval. Further, the regulations are for the benefit of the Postal Service, not for prospective buyers, and confer no rights on them. "Failure of a government contracting agency to abide by a provision of its own regulation is material only if the provision is for the benefit of the contractor. . . ." *DeMatteo Construction Company v. United States*, 600 F.2nd 1384 at 1392. (Ct. Cl., 1979) (*per curiam*)(opinion of Trial Judge Miller). See, also, *Ric Marinkovich*, P.S. Protest No. 87-63, August 6, 1987 ("[T]he protester has not established that the regulation [requiring higher-level approval for the solicitation of emergency mail transportation service] creates any rights in prospective offerors. The regulation is merely for the protection or guidance of the Postal Service. The protester cannot be heard to complain that it was not followed." *Bank Street College of Education -- Request for Reconsideration*, Comp. Gen. Dec. B-213209.2, October 23, 1984, 84-2 CPD ¶ 445.")

The protest is dismissed.

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