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Conflicts of Interest

Trump-Tied Company May Get \$1.7 Billion FBI Bid. Then What?

BY DANIEL SEIDEN

If the \$1.7 billion contract to build a new FBI headquarters near Washington goes to Vornado Realty Trust — a company with connections to President Donald Trump and White House adviser (and Trump son-in-law) Jared Kushner — a conflicts-of-interest bid protest by competitors could hold up the project.

Vornado is one of three finalists to win the contract from the General Services Administration, ABC News reported last week.

It is also partial owner of two Trump Organization buildings and a major investor in a Kushner Companies building, the report said.

Contract competitors, therefore, may react to an award to Vornado by sprinting to the courthouse to protest and get the award thrown out on organizational-conflict-of-interest grounds.

“At a minimum, these relationships alone create the appearance of an unfair competitive advantage for Vornado,” Steven L. Schooner, Nash & Cibinic professor of government procurement law at George Washington University, told Bloomberg BNA. “Based on what’s currently in the public domain, any firm that lost in a head-to-head competition for a GSA contract to Vornado would have little to lose by bringing a protest — whether to the Government Accountability Office or the U.S. Court of Federal Claims.”

The other two finalists are not known to the public, Garth Beall, manager of Renard Development, told Bloomberg BNA.

“GSA shortlisted some extremely well qualified companies to bid on the new HQ but has not publicly released the list of bidders,” Beall said, although he told ABC News that he hopes the GSA chooses a Renard site in Greenbelt, Md., for the new FBI headquarters.

Vornado did not reply to a Bloomberg BNA request for comment.

Addressing ‘Smoke’ There is little doubt of a protest if Vornado wins, but a protester will have to prove that where there is smoke, there is actually fire, said Timothy Sullivan, a partner with Thompson Coburn LLP, Washington.

“If the agency does its homework here, including probing in advance the possibility of any conflicts of interest with Vornado, it should be able to survive a protest,” he said.

Kristi Morgan Aronica, managing partner of Weitz Morgan PLLC in Austin, Texas, said she was unsure whether a protest would be successful.

An award to Vornado may survive a challenge “if the contracting officer recognizes the potential conflicts, adequately addresses them in the administration of the procurement, Vornado demonstrates that it hasn’t received inside information, and that in particular [Vornado CEO] Steven Roth, by virtue of his role as adviser to the president, hasn’t influenced the procurement,” she said.

Relationships alone don’t create a competitive advantage for Vornado, Sullivan said.

“It is possible, of course, that there are things beneath the surface that we do not know about, that could swing the case against Vornado. But at this point, all we have is the smoke caused by the relationships,” he said. “My general advice would have been for a company in Vornado’s position to address this smoke up front and show the agency what it has done to eliminate the possibility of a conflict.”

A GSA spokesperson declined to comment on the project because it’s in active procurement.

However, the agency said it would select a winner from no more than five finalists, and has released a shortlist of three possible headquarters sites in the Washington area.

Rare Success, Unusual Situation Agencies’ contracting officers are required to assess whether organizational conflicts of interest exist under Federal Acquisition Regulation (FAR) 9.5, and mitigate significant potential conflicts before making contract award decisions.

These conflicts occur when a contract bidder:

- has a competitive advantage from unequal access to information;
- benefits from improper influence over contract competition rules; or
- could leverage a relationship in a way that precludes impartial performance for the government.

Successful conflict-of-interest protests are relatively rare even when protesters aren’t trying to stop powerful friends of the U.S. president from performing government work.

The FAR doesn’t cover the unusual situation in which a president has a major financial stake in a bidder, said Charles Tiefer, law professor at the University of Baltimore.

“Most protests go to the GAO, which defers a lot to contracting officers on discretionary decisions,” said Tiefer, who expressed a lack of confidence in the GAO’s ability to stand up to President Trump.

Vornado's competitors "could yell and scream about this, but there is no guarantee of an adequate remedy," he said.

"A skillful GSA procurement official would know how to tilt the playing field toward Trump's friends at Vornado without much chance of a successful protest," Tiefer said.

A bigger question is whether the GSA could mitigate a conflict, said W. Barron Avery, a partner at Baker & Hostetler LLP in Washington and leader of the firm's government contracts group.

"Without all of the details of the relationships, it's hard to say what types of mitigation tools can be used here, but this type of conflict can likely be mitigated if the agency takes the right steps, particularly if the issue is potential unequal access to information," he said.

An unsuccessful bidder recently argued that the Coast Guard didn't adequately investigate an unequal-access-to-information conflict involving a competitor's employment of a former Coast Guard employee, but the GAO said familiarity with the type of work required under a solicitation from prior government employment isn't evidence of an unfair competitive advantage.

Schooner, on the other hand, said competitors could improve their prospects challenging a Vornado win by going to court, rather than the GAO, "because of the potential for discovery into the extent and nature of pre-

existing and ongoing relationships and entanglements between Vornado and Trump and Kushner family businesses."

It bears repeating, however, that Vornado is not assured a win. There are, after all, two other finalists.

'Head in the Sand' The GSA's treatment of Trump's lease of the Old Post Office building for the Trump Hotel shows that the agency "has its head in the sand" about Trump's conflicts, Tiefer said.

The GSA didn't stop Trump from benefiting from that lease while he is in the White House, and it won't prevent a conflict of interest over a new FBI building, he said.

The agency has no credibility when it comes to conflicts of interest involving the Trump family, Schooner said.

"Even if GSA published a document that suggested that any potential conflict of interest had been properly vetted, that would likely be greeted by the utmost skepticism by any knowledgeable and credible compliance professional or expert in public service ethics," Schooner said.

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