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MEMORANDUM FOR      ROBIN CARNAHAN  
   ADMINISTRATOR

FROM:                      ALEX DEMOTS                      *Alex DeMota*  
   GENERAL COUNSEL

DATE:                        NOVEMBER 3, 2023

SUBJECT:                    LEGAL REVIEW OF OCTOBER 12, 2023, LETTER FROM  
   THE FEDERAL BUREAU OF INVESTIGATION REGARDING  
   THE SITE SELECTION PROCESS FOR A NEW SUBURBAN  
   HEADQUARTERS FACILITY

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*Introduction*

You requested that the Office of the General Counsel (OGC or Office) perform a legal review of the October 12, 2023, letter from Christopher Wray, Director of the Federal Bureau of Investigation (FBI) (the “Letter”), regarding the site selection process for a new suburban headquarters facility. As noted further herein, and after reviewing the record, our opinion is that the U.S. General Services Administration (GSA) conducted the site selection process in a reasonable and legally sound manner in full compliance with the Site Selection Plan (SSP), as amended in July 2023, and all applicable laws. GSA issued the amended SSP after engaging in congressionally mandated consultations with representatives from Maryland and Virginia,<sup>1</sup> and after extensive discussions with the FBI. As set forth below in greater detail, our office has concluded that the concerns raised in the Letter do not provide GSA with sufficient legal justification to question the legitimacy of the site selection process. Therefore, it is our conclusion that the Letter’s request to appoint a new site selection authority (SSA) to “re-run” the site selection decision process is not warranted and, furthermore, would unnecessarily expose GSA and the site selection process to increased legal, programmatic, and business risk.

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<sup>1</sup> *Consolidated Appropriations Act, 2023*, P.L. 117-328 (Dec. 29, 2022).

### The SSA's Discretion

The first concern states that the SSP “does not provide the SSA with carte blanche authority to ignore key elements of the site selection plan, to include the directive that ‘subcriteria are of equal importance.’” After carefully reviewing the SSP, my Office has concluded that it sets forth specific and distinct duties as between the site selection panel (Panel) and the SSA. In particular, the SSP tasks the Panel with assigning an overall color to each of the five criteria and, in the same section, further notes that each of the subcriteria are “of equal importance.”<sup>2</sup> It does not give that same direction to the SSA. Nor does the SSP suggest that the SSA must use the same methodology as the Panel. Instead, the SSP requires the SSA to “determine which site is most advantageous to the United States, based on all factors considered, including the consensus ratings provided by the panel.”<sup>3</sup> Furthermore, unlike the methodology provided for the Panel, the SSP provides the SSA with broad discretion and authority to

use the evaluation report developed by the site selection panel to help guide and inform a final decision as to which property is in the best interest of the United States; however, the site selection authority is vested with the discretion to fully evaluate all attributes of the sites and select the site which is truly most advantageous to the Government, regardless of the recommendation provided by the panel. The site selection authority may consider any and all information in making a decision, including the full record of the site selection panel but also information, data, or other materials not considered or evaluated by the site selection panel.<sup>4</sup>

The broad authority granted to the SSA is further highlighted in Section XI of the SSP, which notes that the SSA is vested with the authority to make the site selection decision “regardless of the recommendation provided by the Panel.”<sup>5</sup>

Even though the SSA possessed broad discretion, she in fact only applied her discretion very narrowly to a limited number of criteria. While the Letter asserts that there were “a number of key substantive disagreements” between the SSA and the Panel, the record more accurately reflects substantial agreement between the SSA and the Panel on nearly all of the criteria and

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<sup>2</sup> SSP at Section VIII.

<sup>3</sup> SSP at Section II.

<sup>4</sup> SSP at Section XI.

<sup>5</sup> SSP at Section XI (emphasis added). While this site selection process is not governed by the Federal Acquisition Regulation, it is instructive to note that contracting officers are not bound by selection board evaluations. Much like the SSA for this site selection, a contracting officer has the responsibility and the authority to evaluate offers and make procurement decisions. See *FirstLine Transp. Sec., Inc. v. United States*, 100 Fed.Cl. 359 (2011). Moreover, the typical selection board’s duties are limited to an advisory function. See *Tiber Creek Consulting, Inc. v. United States*, 129 Fed.Cl. 409, 413 (2016).

subcriteria. The SSA and the Panel agreed fully on ratings for 9 of the 12 subcriteria. And, when exercising her discretion, the differences between the SSA and the Panel, as noted in the Site Selection Decision (SSD), largely reflect differences in judgment. The SSA did not consider information entirely unrelated to the underlying criteria or subcriteria.<sup>6</sup> For instance, under Criteria #3, the SSA and the Panel had identical subcriteria ratings for each of the sites. However, at the criteria level, the SSA simply applied her judgment differently than the Panel. In the Panel's view, "the difference in developable area of the Greenbelt site when compared to the Springfield site was a larger differential than when comparing the risk-associated impacts to the schedule that Springfield presents."<sup>7</sup> Yet, in reviewing the same underlying subcriteria ratings, the SSA had a different opinion. In her view,

it is important to note that none of the sites is without risk and that each site has its unique risks. My overall ratings reflect my judgment of how consequential the unique risks of each site are to the Government and whether or not such risks can be reasonably mitigated.<sup>8</sup>

Accordingly, after carefully considering the risks, she concluded that, "Because both Greenbelt and Springfield offer different advantages and disadvantages to the Government, and that establishing the marginality of these differences is difficult to do, I assigned both sites the rating of most favorable to the Government (Blue) from a Site Development Flexibility and Schedule Risk perspective."<sup>9</sup>

Our Office's opinion is that this exercise of expert judgment is consistent with Section XI of the SSP and with the general legal requirement for agency actions to be reasonable and reasonably explained.<sup>10</sup> It is furthermore worth noting that the few instances where the SSA and the Panel's evaluations differ represent precisely the kind of expert judgment that courts tend to favor in such cases.<sup>11</sup>

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<sup>6</sup> See *NEQ, LLC v. United States*, 88 Fed.Cl. 38, 48 (2009) ("[I]t is well-settled that 'a solicitation need not identify each element to be considered by the agency during the course of the evaluation where such element is intrinsic to the stated factors.'" (quoting *Banknote Corp. of America, Inc. v. U.S.*, 56 Fed.Cl. 377, 387 (2003)); *Forestry Survs. & Data v. United States*, 44 Fed.Cl. 493, 499 (1999) (noting agencies possess "great discretion in determining the scope of an evaluation factor").

<sup>7</sup> *Site Selection Panel Recommendation Report* at 19.

<sup>8</sup> *SSD* at 25.

<sup>9</sup> *Id.* at 26.

<sup>10</sup> See, *infra*, note 19.

<sup>11</sup> See, e.g., *Ames I, LLC v. United States*, 162 Fed.Cl. 1 (2022) ("Thus, under governing regulations, the SSA not only had the discretion to deviate from the SSEB's recommendation, but also had an obligation to issue a decision based on its 'independent judgment.'" (citation omitted).

### Whether There Was “Sufficient Justification”

For its second procedural concern, the Letter acknowledges that the SSA has the discretion to make the selection decision “regardless of the of the recommendation provided by the panel” provided “sufficient justification were provided to explain why these numerous, consistently one-directional changes were applied.” The Letter goes on to assert that the SSA’s justifications are “varied and insufficient.” However, based on our review of the record, the SSD presents sufficient justification to support her decision.

In our view, the SSA provides a detailed rationale for her decisions, including where her judgment differed from the Panel’s recommendation. The SSA’s detailed explanation supporting the reasons underpinning her divergence from Panel’s ratings provide “sufficient justification” to support her decision as set forth in the SSD.<sup>12</sup> In the normal procurement context, which we believe can provide some useful comparisons here, a disappointed bidder challenging a procurement decision has the burden of demonstrating the arbitrary and capricious nature of the agency decision by a preponderance of the evidence.<sup>13</sup> Under an arbitrary and capricious standard, a reviewing court should not substitute its judgment for that of the agency, but should review the basis for the agency decision to determine if it was legally permissible, reasonable, and supported by the facts.<sup>14</sup> Similarly, in this instance GSA should defer to our own SSA’s judgment and expertise unless we conclude there was a significant error in the process, which we do not.

### Compliance with Ethics Rules and Regulations

The Letter suggests that the SSA’s previous employment with the Washington Metropolitan Area Transit Authority (WMATA) may present a conflict of interest, or undermine confidence in the SSA’s ability to make an impartial site selection decision. Based on our review of the record, GSA conducted the site selection process in full compliance with all ethical laws, regulations, and policies.

Our review did not find any evidence of bias or any improper conflict in the record. As part of our review, our office considered the July 6, 2021, memorandum from the Administrator granting then PBS Commissioner Nina Albert a limited authorization pursuant to 5 C.F.R. § 2635.502(d) to participate in GSA matters related to the FBI headquarters project and

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<sup>12</sup> Additionally, while this memorandum focuses primarily on the legal questions surrounding the process, GSA’s plan to provide a detailed, publicly available decision document will enable Congress, the public, and all interested stakeholders to review the detailed decisions behind the selection.

<sup>13</sup> See *Maint. Eng’rs v. United States*, 50 Fed.Cl. 399, 410 (2001) (citations omitted).

<sup>14</sup> See *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

WMATA.<sup>15</sup> That authorization states that “the public interest will be substantially served by ensuring that a high-level political appointee is accountable to Congress and the public for the direction of the FBI Project.” It also notes that the Administrator “fully expect[s] that any decisions you advise or make will be guided by what is best for the FBI, GSA, the Federal Government, and taxpayers.” The authorization conferred upon Ms. Albert the ability “to participate in matters related to the planning for and potential execution of an FBI Headquarters project notwithstanding any potential involvement (or perceived involvement) of WMATA in that project.” Therefore, any issues of potential conflict were appropriately addressed in 2021 when GSA hired Ms. Albert as the PBS Commissioner.

Notwithstanding this intentional action, the Letter asserts that the authorization seems to contemplate that Ms. Albert would perform only “day-to-day oversight” of the FBI project, rather than serve a more active role. The plain language of the authorization expressly stated that Ms. Albert “may participate in **all** FBI Headquarters Project matters where WMATA may be involved.”<sup>16</sup> We therefore do not find any evidence that the waiver was insufficient to allow Ms. Albert to fully participate in the site selection.

It is worth stressing that, as a public official, there is a strong presumption that Ms. Albert acted in good faith.<sup>17</sup> In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.<sup>18</sup> Moreover, as the limited authorization indicates, WMATA is a government agency, not a private company – and her participation in this matter should be understood in that context. We have found nothing in the record, let alone the “clear evidence” required under the law, to suggest that Ms. Albert did anything but carry out her duties and responsibilities as set forth in the SSP in good faith.

Regarding the “appearance” concern raised in the Letter, the Administrator appropriately balanced any such concern against the value of Ms. Albert’s real estate expertise when she initially granted the authorization and later when she approved of Ms. Albert to serve as the SSA.

#### *The Request to Select a New SSA and “Re-Run” the Site Selection Process*

Finally, the Letter requests the appointment of a new site selection authority to “re-run the site selection decision process.” Reopening the process after the issuance of a final SSD would be

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<sup>15</sup> While this authorization was only required for any activity covered from one year after Ms. Albert’s last day at WMATA (July 2, 2021), and is therefore no longer holding, it does demonstrate GSA’s deliberate action to ensure that Ms. Albert’s expertise could be leveraged on this critical project.

<sup>16</sup> Emphasis added.

<sup>17</sup> See *INTELiTEAMS, Inc.*, B- 418123.4, 2020 CPD ¶ 397, 2020 WL 7343784 (Dec. 2005).

<sup>18</sup> See *Coastal Int’l Sec. v. U.S.*, 93 Fed.Cl. 502, 537 (2010) (“As a general matter, government officials are presumed to act in good faith, and a protester’s contention that procurement officials were motivated by bias or bad faith must be supported by convincing proof.”)

subject to review under the Administrative Procedures Act,<sup>19</sup> which would require a legally sufficient reason to start over.<sup>20</sup> As noted previously, we have found no legal support in the record to justify overturning the site selection decision. Based on our evaluation, GSA conducted a process in full compliance with the law, with the utmost integrity, and in accordance with the SSP, and it should therefore stand.

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<sup>19</sup> See 5 U.S.C. § 551 *et seq.* The Administrative Procedures Act provides that an agency's decision is to be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under the arbitrary or capricious standard of review, an agency's decision must be sustained if it has a rational basis. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

<sup>20</sup> See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16, 129 S. Ct. 1800, 1811, 173 L. Ed. 2d 738 (2009) ("And of course the agency must show that there are good reasons for the new policy.")