UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
CHIEF ADMINISTRATIVE OFFICER

January 29, 2010

Glenn G. Wolcott
Deputy Assistant General Counsel
United States Government Accountability Office
Washington, DC 20548

Dear Mr. Wolcott:

Subject: Protest of Port of Bellingham
B-401837

This is in response to the Government Accountability Office's (GAO) December 2, 2009 letter to Secretary Gary Locke, Department of Commerce, concerning GAO's decision sustaining the protest filed by Port of Bellingham against the award of a lease by the National Oceanic and Atmospheric Administration (NOAA) to Port of Newport (Newport, Oregon). Pursuant to 31 U.S.C. §3554(b)(3) (2000 & Supp. IV 2004), as the head of the lease acquisition activity responsible for solicitation No. 09WSA0200C, I am reporting on the actions taken and planned to be taken in response to GAO's recommended corrective actions in this matter.

Recommended Corrective Actions

In the December 2, 2009 decision, GAO sustained the Port of Bellingham protest on the basis that a portion of the pier structure at the Newport site would be in the 100-year floodplain, also known as the base floodplain; and that NOAA did not comply with the requirements set forth in the its solicitation for offers (and under Executive Order (E.O.) 11988 (*Floodplain Management,* May 24, 1977)) with respect to making an award to a site located within a base floodplain in the absence of making a determination that "there is no practicable alternative" to the Port of Newport's offer. GAO's recommended corrective actions were that NOAA conduct an assessment of whether there was a practicable alternative, as contemplated by the solicitation, to awarding the lease to the Port of Newport. If NOAA's analysis identifies a practicable alternative, GAO recommends that NOAA implement the alternative, if otherwise feasible. If NOAA's analysis concludes there is no practicable alternative, GAO recommends that NOAA comply with the procedural requirements established under E.O. 11988, and provide a copy of its documentation to the parties to the protest.

Following consultation on these issues within the Department of Commerce, NOAA is proceeding with all appropriate actions and intends to fully comply with GAO's decision and recommended corrective actions with respect to the E.O. 11988 requirements. In complying with GAO's recommended corrective actions, NOAA is taking the following specific actions consistent with the steps required under E.O. 11988. NOAA expects to complete all actions no later than May 28, 2010.

1. Assessment of Practicable Alternatives. NOAA will conduct an analysis of the offerors' previously submitted final revised proposals to determine if there is a practicable alternative that does not involve development in a base floodplain, and otherwise presents a feasible selection award under the solicitation for offers. In making this determination, NOAA will consider the final revised proposals submitted in response to the SFO.

   NOAA has requested that the Federal Emergency Management Agency (FEMA) conduct an analysis of floodplain issues associated with the final revised proposals submitted by the four offerors in this acquisition. NOAA will use FEMA's analysis as the basis for determining whether a lease based on each of the offerors' final revised proposals would result in an action being taken in a base floodplain. NOAA will use the FEMA analysis as part of NOAA's overall analysis of whether there is a practicable alternative, and document the basis of its initial determination of whether there is a practicable alternative to development in a base floodplain.

   If NOAA determines that a practicable alternative exists, and is otherwise feasible (e.g., within available resources and authorities) to implement, NOAA would take the necessary steps to implement the alternative. Pursuant to the GAO decision, NOAA would provide a copy of its decision and supporting analysis to all parties and to GAO.

2. Independent Validation of Draft Assessment. If NOAA determines that that there appears to be no practicable alternative to the Port of Newport lease award, NOAA would document the basis of this preliminary conclusion, as well as the potential impacts and measures proposed to avoid or minimize adverse effects. NOAA intends to request the General Services Administration (GSA) to conduct an independent review of NOAA's draft assessment of practicable alternatives. NOAA acknowledges that this step is not required in the normal assessment process, nor by GAO's decision, but believes this action is warranted in this instance. If GSA agrees to conduct this review, NOAA would take under consideration any recommended actions or revisions suggested by GSA, and proceed with the public notice process required pursuant to EO 11988.

3. Public Notice and Comment. If NOAA determines that there appears to be no practicable alternative to the Port of Newport lease award, NOAA would issue public notice of the proposed determination: in local newspapers and to the local government officials of the City of Newport, Lincoln County, Oregon; and to the parties to the protest (Port of Newport and Port of Bellingham) as required under the GAO decision. The draft assessment report, including the Port of Newport's proposed action, would be posted on the NOAA website for public review and comment for a period of 30 days. Again, this may go beyond what is normally required under the E.O 11988 process.

4. Final Determination of Practicable Alternatives. Following conclusion of the public notice and comment period, NOAA would finalize the assessment report and make a final determination.

5. Publication of Final Determination. NOAA would then publish a summary of its final determination to the parties and to GAO. The final report supporting NOAA's determination would be posted to NOAA's website, to allow broader public notice of the action, flood protection techniques and other mitigation measures that would be used to minimize flood risks and floodplain impacts.

NOAA believes this course of action is fully responsive to GAO's recommended corrective actions, and compliant with the E.O. 11988 assessment process.

Reimbursement of Costs

By letter dated January 13, 2010, the Port of Bellingham provided to NOAA its invoice for the costs of filing and pursuing this protest, including attorneys' fees. NOAA intends to timely respond to the request for reimbursement of such costs.

Please do not hesitate to contact me (301-713-0836) if there are questions or concerns.

Sincerely,

William F. Broglie
NOAA Chief Administrative Officer