



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Logan, LLC

File: B-294974.6

Date: December 1, 2006

Carolyn Callaway, Esq., for the protester.

James E. Hicks, Esq., Drug Enforcement Administration, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Statutory requirement to obtain maximum practicable competition in simplified acquisitions is met where agency uses competitive procedures in establishing blanket purchase agreements (BPA) with multiple vendors; under those circumstances, there is no requirement that the agency conduct a further competition among the BPA holders in connection with each individual purchase order subsequently issued under the BPAs.

2. Challenge to agency's decisions made after competitive establishment of BPAs regarding whether and how to place orders with specific BPA holders concerns administration of the BPAs, an issue not for review in a bid protest before the Government Accountability Office.

DECISION

Logan, LLC (formerly known as Envirosolve, LLC)¹ protests the decision by the Drug Enforcement Administration (DEA), Department of Justice, to exclude it from the rotation of purchase orders under blanket purchase agreements (BPA) established with various vendors for hazardous waste cleanup services. Envirosolve argues that

¹ Although Envirosolve, LLC changed its name to Logan LLC, Protest, Aug. 24, 2006, at 2 n.1, DEA declined to accept a proposed novation agreement for reasons not relevant to the protest here. Agency Report (AR), Sept. 25, 2006, at 1 n.1. As the parties both refer to the vendor by its former name, we will refer to the protester as Envirosolve for the balance of this decision.

the agency's decision to exclude it from receiving further purchase orders under its BPA is improper.

We deny the protest.

BACKGROUND

DEA's mission of enforcing federal narcotics laws routinely results in the seizure of illegal clandestine drug laboratories, and the subsequent destruction of both illegal drugs and the facilities in which they are manufactured. The destruction of clandestine drug laboratories often entails the disposal of environmentally hazardous chemicals. The cost of hazardous waste cleanup for a single clandestine laboratory can range from under \$1,000 to over \$100,000; the cost for a single hazardous waste cleanup action, however, cannot be predicted or established in advance of the seizure of the individual clandestine drug laboratory. Protest (B-294974), Oct. 12, 2004, at 3.

DEA's disposal of clandestine laboratory hazardous waste products is governed by federal, state, and local environmental laws and regulations. As the agency operates throughout the United States, DEA's requirement for hazardous waste cleanup services is also a nationwide one. In order to meet its needs and responsibilities, DEA has utilized the services of contractors who are properly qualified in hazardous waste management. DEA has also accomplished the administration of its hazardous waste cleanup requirements by dividing the country into 44 geographic areas, or "contract areas," and establishing contract vehicles for the required services for one or more contract areas. Agency Dismissal Request, Nov. 12, 2004, at 1.

The history of the contractual relationship between DEA and EnviroSolve is a long and difficult one (see EnviroSolve LLC, B-294974.4, June 8, 2005, 2005 CPD ¶ 106 for additional details). Relevant to the protest here, in October 2004, the agency was without the required hazardous cleanup services for 18 contract areas and, in order to meet its needs, decided to establish BPAs with various firms for the required services.² DEA then established, noncompetitively, BPAs with at least 10 different

² A BPA is a simplified method of filling anticipated repetitive needs for supplies or services by establishing "charge accounts" with qualified sources of supply. Federal Acquisition Regulation (FAR) § 13.303-1(a); see EnviroSolve LLC, *supra*, at 3 n.3. A BPA includes a description of the service(s) to be provided, and methods for pricing, issuing, and delivering future orders. FAR § 13.303-3. BPAs, like basic ordering agreements, are often used when the specific items and quantities to be covered by a contract are not known at the time the agreement is executed. FAR §§ 13.303-2, 16.703. Agencies may establish BPAs with more than one supplier for supplies or services of the same type, or a single vendor from which numerous individual purchases will likely be made in a given period. FAR § 13.303-2(c). A BPA is

(continued...)

vendors, but not EnviroSolve, for one or more contract areas each. The agency subsequently began issuing purchase orders, noncompetitively, under the BPAs it had established with the selected vendors. While some of the purchase orders did not exceed \$2,500, other purchase orders were for amounts above \$2,500 and below \$100,000. In each instance, DEA procured the cleanup services directly from a BPA holder for the given contract area, and did not consider or solicit quotations from other sources.

On October 12, 2004, EnviroSolve filed a protest with our Office asserting, among other things, that DEA's use of noncompetitive BPAs as the method for procuring the required hazardous waste cleanup services violated applicable competition requirements. EnviroSolve also protested that the agency had intentionally and improperly excluded it from competition.

On January 5, 2005, DEA advised our Office of its decision to take corrective action in response to EnviroSolve's protest. Specifically, the agency agreed to discontinue issuing purchase orders under the noncompetitively-established BPAs without adhering to applicable competition requirements.³ DEA also agreed to formulate an acquisition strategy that would address the applicable competition requirements (e.g., to competitively establish one or more BPAs for each contract area). Based on DEA's announced corrective action, this Office dismissed EnviroSolve's protest.

On March 11, 2005, DEA issued request for quotations (RFQ) No. DEA-05-R-0003 for hazardous waste cleanup services for 12 contract areas. The RFQ contemplated the competitive establishment of one or more BPAs with various vendors for each contract area for a period up to 5 years. The solicitation stated that BPAs would be established with those responsible vendors whose quotations were determined to be technically acceptable and whose prices were found to be fair and reasonable. AR, Tab 1, RFQ No. DEA-05-R-0003, at 15. Additionally, the RFQ (and subsequent BPAs) informed vendors that the issuance of the actual purchase orders would be rotated among BPA holders for the particular contract area. Id., amend. 3, Questions and Answers, at 4. Under this RFQ, DEA established a BPA with EnviroSolve for nine contract areas. Protest, Aug. 24, 2006, at 6-7.

(...continued)

generally not itself a contract, and does not obligate the agency to enter into future contracts with the vendor. FAR §§ 13.303-1(a), 16.703(a)(3); Faye Zhengxing v. United States, 71 Fed. Cl. 732, 738 (2006); EnviroSolve LLC, supra. However, circumstances may transform a BPA into a binding obligation, that is, an enforceable contract. See Almar Indus. v. United States, 16 Cl. Ct. 243, 245-47 (1989).

³ DEA agreed that, as an interim measure, the issuance of noncompetitive purchase orders would be done in accordance with the requirements of the FAR, would not exceed a 2-month period, and would be rotated fairly among BPA holders.

On November 4, DEA issued RFQ No. DEA-06-R-0002 for hazardous waste cleanup services for 24 contract areas. This RFQ contemplated the competitive establishment of one or more BPAs with various vendors for each contract area for a period up to 24 months.⁴ As with the previous RFQ, this RFQ stated that BPAs would be established with those responsible vendors whose quotations were determined to be technically acceptable and whose prices were found to be fair and reasonable. AR, Tab 3, RFQ No. DEA-06-R-0002, at 6. The RFQ (and subsequent BPAs) here likewise informed vendors that the issuance of the actual purchase orders would be rotated among BPA holders for the particular contract area. *Id.*, amend. 1, Questions and Answers, at 1. Under this RFQ, DEA established a second BPA with Envirosolve for six additional contract areas. Protest, Aug. 24, 2006, at 5-7; Comments, Oct. 5, 2006, at 9.

On or about July 17, 2006, DEA began excluding Envirosolve from the rotation of purchase orders for hazardous waste cleanup services among BPA holders. Envirosolve then filed the current protest challenging its exclusion. In its report to our Office in response to the protest, the agency explained that the DEA Hazardous Waste Disposal Section is presently conducting an investigation concerning the discovery of three drums containing clandestine drug laboratory waste at a location in Tulsa, Oklahoma. AR, Sept. 25, 2006, at 2. According to DEA, its initial investigation determined that the labeling on the drums indicated that the hazardous waste had been processed and transported by Envirosolve. Given Envirosolve's apparent loss of control of the three drums of hazardous waste, the contracting officer decided to temporarily discontinue issuing purchase orders to Envirosolve during the pendency of the investigation.

DISCUSSION

Envirosolve raises a number of issues regarding the agency's decision to temporarily discontinue issuing its purchase orders during the pendency of the DEA investigation into the possible mishandling of hazardous waste. The protester generally contends that the agency's decision to exclude it from the rotation of BPA purchase orders is not justified by the ongoing investigation, nor were the agency actions done in accordance with applicable procurement statutes and regulations. We have fully considered all of Envirosolve's grounds of protest and find no basis to sustain the protest.

Envirosolve first argues that the DEA decision to cease issuing its purchase orders under the established BPAs violates applicable competition requirements. Specifically, the protester alleges that the agency decision to exclude it from the

⁴ The RFQ also included a "minimum guaranteed amount" of work for each BPA holder for each contract area. AR, Tab 3, RFQ No. DEA-06-R-0002, at 4-6.

rotation of purchase orders violates the Competition in Contracting Act of 1984 (CICA). We disagree.

The overarching goal of CICA is the promotion of competition in procurements by federal agencies and, in furtherance thereof, CICA generally requires contracting agencies to conduct procurements using full and open competition through the use of competitive procedures, except in the case where a different procurement procedure is expressly authorized by statute. 41 U.S.C. § 253(a)(1)(A) (2000). As relevant here, under the Federal Acquisition Streamlining Act of 1994 (FASA) simplified acquisitions--used to purchase supplies and services, the aggregate amount of which does not exceed the simplified acquisition threshold (in most instances, \$100,000) (FAR §§ 2.101, 13.000, 13.003(a))--are excepted from CICA's full and open competition requirement. 41 U.S.C. § 253(g). Part 13 of the FAR establishes procedures for simplified acquisitions, which are designed to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors. To facilitate these objectives, FASA requires only that contracting agencies obtain competition to the "maximum extent practicable."⁵ 41 U.S.C. §§ 253(g)(4), 427(c); FAR § 13.104; Information Ventures, Inc., B-293541, Apr. 9, 2004, 2004 CPD ¶ 81 at 3.

In this case, DEA complied with the statutory requirement to obtain maximum practicable competition when it established the BPAs for these small purchases.⁶ Under these circumstances, there is no requirement that DEA compete among the BPA holders each individual purchase order subsequently issued under the BPAs.

⁵ In order to obtain competition to the maximum extent practicable, agencies must make reasonable efforts, consistent with efficiency and economy, to give responsible sources the opportunity to compete. Gateway Cable Co., B-223157 et al., Sept. 22, 1986, 86-2 CPD ¶ 333 at 5. In contrast, full and open competition is defined as meaning that all responsible sources are permitted to submit bids or proposals on the procurement. 41 U.S.C. § 403(6).

⁶ To the extent EnviroSolve argues that DEA did not achieve competition to the maximum extent practicable by competing the establishment of the BPAs (and thus must compete issuance of the purchase orders under the BPAs), this argument is untimely. Our Bid Protest Regulations require that protests based upon alleged improprieties which do not exist in the initial solicitation, but which are subsequently incorporated into the solicitation, must be filed no later than the next closing time for receipt of proposals following the incorporation. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2006). EnviroSolve was aware from at least March 29, 2005 (the date that Amendment 3 to RFQ No. DEA-05-R-0003 was issued) that DEA did not plan to compete the issuance of the actual purchase orders after competitively establishing BPAs with one or more sources of supply, yet did not protest this issue to our Office until August 24, 2006.

Envirosolve also protests that DEA's decision to temporarily suspend issuing purchase orders under its BPAs violates the terms of the BPAs themselves, and constitutes a nonresponsibility determination that, for a small business concern such as itself, must be referred to the Small Business Administration. In our view, any decisions made by DEA after establishment of the BPAs regarding whether and how to place orders with specific BPA holders, and any challenge to the agency's actions, concern administration of the terms of the BPAs, an issue that is not for our review. See 4 C.F.R. § 21.5(a); East West Research, Inc.--Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379 at 2.

Envirosolve next asserts that DEA's decision to discontinue issuing it purchase orders violates the terms of the promised corrective action, in which DEA agreed to competitively award BPAs, rotate orders among BPA holders, and not exclude Envirosolve from competing for DEA work. We disagree.

As set forth above, in its January 5, 2005, notice of corrective action, DEA agreed to rotate orders fairly among holders of the noncompetitively-established BPAs (including Envirosolve) until it was able to achieve compliance with applicable competition requirements (e.g., by competitively establishing one or more BPAs for each contract area). By means of RFQs subsequently issued by DEA on March 11, 2005 and November 4, 2005, the agency competitively established BPAs with various vendors for a total of 36 contract areas. Moreover, DEA did not exclude Envirosolve from competing for the BPAs here. In fact, the agency established two BPAs with Envirosolve for a total of 15 contract areas. We think that these facts demonstrate that DEA has implemented its promised corrective action.

Envirosolve essentially contends that DEA's promised corrective action extends in perpetuity, and precludes the agency from excluding Envirosolve from DEA work under any circumstances. We disagree. The corrective action that DEA agreed to in January 2005 could not anticipate all future events. Just as the corrective action did not guarantee that Envirosolve would receive a competitively-established BPA from the agency, so too it did not guarantee that Envirosolve would continue to receive orders under its BPAs even if, as the agency contends is the case here, circumstances arose that warrant further investigation into possible wrongdoing in connection with Envirosolve's performance of purchase orders issued to it.

Finally, Envirosolve argues that DEA has improperly suspended and/or debarred it without due process. Specifically, Envirosolve argues that the agency suspended it on or about July 17, 2006 and has yet to provide Envirosolve with formal notice of the suspension decision or the opportunity to be heard on the subject.⁷ The agency's

⁷ Suspensions are imposed for a temporary period before suspected misconduct is proven or disproven, and while an investigation and any ensuing legal proceedings (continued...)

actions, the protester alleges, also constituted a de facto debarment from competing for government contracts without due process.⁸

Our Office no longer reviews protests that an agency improperly suspended or debarred a contractor from receiving government contracts. 4 C.F.R. § 21.5(i). We have instead determined that suspension and debarment matters (including, as Envirosolve claims here, procedural deficiencies) are properly for review by the contracting agency in accordance with the applicable provisions of the FAR. Id.; Triton Elec. Enters., Inc., B-294221 et al., July 9, 2004, 2004 CPD ¶ 139 at 2; Shinwha Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5.

The protest is denied.

Gary L. Kepplinger
General Counsel

(...continued)

are taking place. FAR § 9.407-4(a). An agency may, upon adequate evidence, suspend a contractor suspected of, among other things, commission of a criminal offense in connection with performing a public contract, or other misconduct indicating a lack of business integrity. FAR § 9.407-2(a).

⁸ Debarments are imposed where contractor misconduct has been established (in contrast to suspensions, which serve as protective measures). Where an agency proposes a contractor for debarment and, after proceedings where the contractor is afforded the opportunity to dispute material facts, the agency concludes that the cause of debarment has been established by a preponderance of the evidence, the agency may then debar the contractor for a period commensurate with the seriousness of the cause. FAR §§ 9.406-3, 9.406-4. A de facto debarment occurs when an agency excludes a contractor from competing for government contracts without following applicable debarment regulations and procedures. See Quality Trust, Inc., B-289445, Feb. 14, 2002, 2002 CPD ¶ 41 at 4.