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**Comptroller General
of the United States**

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

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Decision

Matter of: Envirosolve LLC

File: B-294974.4

Date: June 8, 2005

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

Protest of agency's failure to implement corrective action in response to an earlier protest filed with the Government Accountability Office is sustained where the record shows that the agency failed to implement the corrective action it proposed to take in response to clearly meritorious issues raised in the original protest, such that protester was put to the expense of protesting a second time on the same ground.

DECISION

Envirosolve LLC challenges various actions by the Drug Enforcement Administration (DEA), Department of Justice, concerning the establishment of blanket purchase agreements (BPA) and the placement of purchase orders under the BPAs with various companies for hazardous waste cleanup services. As explained below, Envirosolve filed an earlier protest challenging DEA's actions; we dismissed that protest as academic based on DEA's promise of corrective action. Envirosolve now argues that we should reconsider our dismissal as a result of DEA's subsequent failure to implement the promised corrective action. Envirosolve also argues that DEA's failure to implement corrective action has resulted in the continued improper issuance of noncompetitive purchase orders for cleanup services.

We sustain 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.¹ 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 laboratory. *Envirosolve Protest*, 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 both its need and its responsibilities, DEA has utilized the services of hazardous waste cleanup contractors who are properly qualified in waste management. *DEA Dismissal Request*, Nov. 12, 2004, at 1. DEA has also accomplished the administration of its hazardous waste cleanup contractors by dividing the country into 44 geographic areas, or "contract areas," and establishing contracts for the required services for one or more contract area.

In 2002, DEA issued a competitive request for proposals (RFP) for hazardous waste cleanup services. The RFP contemplated the award of an indefinite-delivery/ indefinite-quantity contract for a 1-year base period (October 1, 2002 to September 30, 2003) and up to four 1-year options for each contract area. The RFP noted that while a total of 44 contracts might be awarded, the agency expected to award more than one contract area to individual contractors (see *Safety-Kleen (Pecatonica), Inc.*, B-290838, Sept. 24, 2002, 2002 CPD ¶ 176, for additional details). *Envirosolve* submitted a proposal in response to the RFP and was subsequently awarded a contract to provide hazardous waste cleanup services for 14 contract areas. *Envirosolve Protest*, Oct. 12, 2004, attach. 1, Declaration of James G. Fehrle, at 1.

In December 2003, as a result of perceived problems with *Envirosolve's* contract performance, DEA decided not to exercise the contract's remaining option periods but to recompetete the contract areas then held by *Envirosolve*. On February 27, 2004, DEA issued RFP No. DEA-04-R-0003 for hazardous waste cleanup services for 18 contract areas, including the 14 contract areas then held by *Envirosolve*. *Envirosolve* submitted a proposal in response to the solicitation. On July 22, the contracting officer notified *Envirosolve* that its proposal had been excluded from the competitive range. On August 2, *Envirosolve* filed a protest with our Office

¹ For example, for calendar year 2003, the DEA El Paso Intelligence Center's National Clandestine Laboratory Seizure System reported 9,364 laboratory seizures nationwide, or approximately 26 seizures per day. *Envirosolve Protest*, Oct. 12, 2004, attach. 2.

(B-294420), arguing that the agency's evaluation of its proposal and competitive range determination were improper. On September 17, DEA announced its intention to cancel the RFP, and Envirosolve's protest was dismissed as academic.² Envirosolve's contract with DEA expired on September 30.

Following its decision to cancel the solicitation, DEA was aware that as of October 1, the agency would be without the required cleanup services for 18 contract areas. Moreover, DEA anticipated that several of the affected contract areas would require a large number of cleanups during the following fiscal year. Accordingly, in order to meet its needs, DEA decided to establish BPAs with various contractors for hazardous waste cleanup services.³ The contracting officer established the BPAs with various vendors by requesting that the DEA field offices identify at least one company deemed qualified to perform hazardous waste cleanup services for a given contract area. DEA Dismissal Request, Nov. 12, 2004, at 3. The contracting officer then followed up the recommendations of the agency's field personnel by requesting that the potential contractors provide certain corporate and pricing information. Id.

² DEA asserted that several reasons influenced its decision to cancel the RFP, including the lack of competition for several contract areas, the physical security requirements set forth in the solicitation, and the fact that the agency would only be able to award four contracts out of the 18 contract areas solicited. DEA Dismissal Request, Nov. 12, 2004, at 2. The agency has stated that it is reviewing the solicitation with the intent to make revisions that address the agency's security requirements and other factors that will help increase competition. Id.

³ 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 OMNIPLEX World Servs. Corp., B-291105, Nov. 6, 2002, 2002 CPD ¶ 199 at 3; Boehringer Mannheim Corp., B-279238, May 21, 1998, 98-1 CPD ¶ 141 at 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 firm from which numerous individual purchases will likely be made in a given period. FAR § 13.303-2(c). A BPA is not itself a contract and does not obligate the agency to enter into future contracts with the contractor(s). FAR §§ 13.303-1(a), 16.703(a)(2); Boehringer Mannheim Corp., *supra*; see also Humco, Inc., B-244633, Nov. 6, 1991, 91-2 CPD ¶ 431 at 3. Rather, an actual contract is formed when the agency issues a purchase order under the BPA, or the basic agreement is incorporated into a new contract by reference. FAR § 13.303-5; Modern Sys. Tech. Corp. v. United States, 24 Cl. Ct. 360, 363 (1991).

DEA subsequently established BPAs with at least 10 vendors for one or more contract areas, thereby providing the agency with a single BPA holder for 15 of the 18 affected contract areas. Each BPA included the labor, material, and equipment price lists of the vendor. Each BPA also stated that the individual orders placed under the BPA would not exceed \$100,000, and that the period of performance was from the date of award to September 30, 2005. At the time it established BPAs with selected companies, DEA intended that the purchase orders subsequently issued for the required cleanup services would only be placed with the BPA holder(s). As the agency explained:

DEA is primarily focused on ensuring that the major contract areas have at least one contractor to provide hazardous waste services. Initially, one BPA is being set up per contract area to allow all areas to be minimally covered. The DEA intends to add additional providers in each contract area as time progresses and to allow rotation of calls among the BPA holders.

Id. at 3.

On October 11, DEA began issuing purchase orders under the BPAs it had established with selected contractors. While some of the purchase orders issued by DEA 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 the BPA holder for the given contract area and did not consider or solicit quotations from other sources or publicize its contract actions.

On October 12, EnviroSolve filed the underlying protest with our Office (B-294974). EnviroSolve's protest raised numerous issues regarding DEA's establishment and use of BPAs as the method for procuring the required services. Specifically, EnviroSolve alleged that DEA's use of BPAs to obtain the required hazardous waste cleanup services failed to comply with applicable competition requirements, and that the agency had intentionally and improperly excluded EnviroSolve from competition here.⁴ EnviroSolve Protest, Oct. 12, 2004, at 4-15.

On January 5, 2005, DEA advised our Office that it had decided to take corrective action as follows:

⁴ EnviroSolve also alleged that DEA's use of BPAs to obtain the required hazardous waste cleanup services failed to comply with applicable publication requirements, that the agency had improperly contracted with large businesses instead of setting work aside for small business concerns, and that DEA had improperly issued "case-by-case" purchase orders to other contractors without complying with applicable competition and publication requirements. EnviroSolve Protest, Oct. 12, 2004, at 4-15.

[T]he agency agrees to discontinue issuing purchase orders [under the BPAs] without adhering to applicable competition requirements, to be determined on a case-by-case basis based upon the estimated size of each order. The agency will decide shortly upon an acquisition strategy that will achieve the applicable competition requirements, perhaps through the competitive award of BPAs, or the establishment of multiple BPAs with qualified, responsible contractors and mini-competitions among BPA holders. The agency need to issue orders noncompetitively will be done in accordance with the requirements of FAR § 13.106-1(b) and will not exceed a two-month period. . . .

[T]he agency agrees not to deliberately exclude Envirosolve from competing for the BPAs and purchase orders here, and should the agency believe that Envirosolve is not a responsible contractor, then it will properly refer the issue to the [Small Business Administration] for a responsibility determination.⁵

DEA Notice of Corrective Action, Jan. 5, 2005, at 1. By decision of January 6, our Office dismissed Envirosolve's October 12, 2004 protest, since DEA's corrective action rendered the protest academic.⁶

On March 8, Envirosolve filed the current protest with our Office, requesting that we reconsider the dismissal of its earlier protest. In support thereof, Envirosolve argues that the agency has failed to implement the promised corrective action. Specifically, Envirosolve contends that DEA has failed to discontinue issuing purchase orders for cleanup services without adhering to applicable competition requirements. Envirosolve alleges that the agency has neither competitively awarded BPAs to companies nor conducted "mini-competitions" for the award of purchase orders under the BPAs it has in place with vendors for the various contract areas, as

⁵ DEA also agreed to: (1) discontinue issuing purchase orders under the BPAs without adhering to applicable publication requirements; (2) discontinue awarding case-by-case contracts without adhering to applicable competition and publication requirements; and (3) set aside all purchase orders exceeding \$2,500 and not exceeding \$100,000 for small businesses, or to perform an adequate determination in accordance with FAR § 19.502-2. DEA Notice of Corrective Action, Jan. 5, 2005, at 1.

⁶ Envirosolve did not object to DEA's dismissal request here; at a hearing conducted by our Office prior to DEA's decision to take corrective action, Envirosolve agreed that the agency's proposed corrective action rendered its October 12, 2004 protest academic. Hearing Transcript at 53. DEA subsequently agreed that Envirosolve was entitled to be reimbursed the reasonable costs of filing and pursuing its October 12, 2004 protest, including attorneys' fees. Letter from DEA to GAO, Feb. 14, 2005, at 1.

promised in its notice of corrective action. Enviro-solve also argues that DEA has continued to deliberately exclude it from competing for BPAs and purchase orders. Specifically, Enviro-solve contends that it has not been afforded an opportunity to compete for either the BPAs or the purchase orders, and appears to have been excluded from receiving BPAs in DEA contract areas for which it is qualified and has submitted the requisite information.

In response to Enviro-solve's protest, DEA does not deny that it failed to implement the promised corrective action. Rather, the agency acknowledges that it did not issue a solicitation for the competitive award of BPAs with companies for the various hazardous waste cleanup contract areas until March 10, and has yet to make any award determinations.⁷ DEA Response, Mar. 21, 2005, at 1. DEA also reports that it issued to Enviro-solve a BPA for 1 contract area on January 25, and for 11 additional contract areas on March 10, and is now planning to rotate the issuance of noncompetitive purchase orders for hazardous waste cleanup services among existing BPA holders, in an attempt to treat all vendors fairly until the agency can establish new competitive BPAs with firms for the contract areas in question.⁸ *Id.*; DEA Response, Apr. 7, 2005, at 1. Lastly, while the agency maintains that it has not deliberately excluded Enviro-solve from competing for BPAs and/or purchase orders, DEA acknowledges that "instant coordination and implementation of BPAs and placement of purchase orders is not possible," and the agency's records indicate that, at least for certain contract areas, DEA's rotation of purchase orders among BPA holders did not include Enviro-solve. DEA Response, Apr. 7, 2005, at 2, attach. 1, DEA Summary of Cleanup Orders, at 1-2.

ANALYSIS

As a preliminary matter, although it characterizes its current filing as a request for reconsideration, Enviro-solve does not argue that we should not have dismissed its earlier protest because the agency's proposed corrective action did not, in fact, render the protest academic. Compare Saltwater Inc.-Recon. and Costs, B-294121.3, B-294121.4, Feb. 8, 2005, 2005 CPD ¶ 33. Instead, Enviro-solve argues that DEA has failed to take the corrective action promised within the time period promised. A protest, like the one here, that was once academic is not revived by subsequent agency action or inaction. Rather, the subsequent agency conduct gives rise to a

⁷ DEA's records also indicate that the agency continued to issue purchase orders to large business concerns for hazardous waste cleanup services in amounts between \$2,500 and \$100,000 until March 30, when it cancelled the BPAs it had in place with the large businesses in question. DEA Response, Apr. 7, 2005, at 2, attach. 1, DEA Summary of Cleanup Orders, at 1-2.

⁸ DEA also reports that Enviro-solve is now the only BPA holder for four of the agency's hazardous waste cleanup contracts areas. DEA Response, Apr. 7, 2005, at 1.

new basis for protest even if some of the issues raised by the subsequent action are the same as the issues raised under the earlier protest. See Lackland 21st Century Servs. Consol.-Protest and Costs, B-285938.6, July 13, 2001, 2001 CPD ¶ 124 at 4.

We have recognized that the mere promise of corrective action, without reasonably prompt implementation, has the obvious effect of circumventing the goal of the bid protest system of effecting the economic and expeditious resolution of bid protests. Louisiana Clearwater, Inc.-Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6; Pemco Aeroplex, Inc.-Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 7-8. When an agency proposes corrective action, we consider it implicit that it will undertake a good faith effort to implement the corrective action and to address all issues raised by the protester that are meritorious. Louisiana Clearwater, Inc.-Recon. and Costs, *supra*. Where an agency fails to implement the promised corrective action, or implements corrective action that fails to address a meritorious issue raised in the protest that prompted the corrective action, such that the protester is put to the expense of subsequently protesting the very same procurement deficiency, the agency's action has precluded the timely, economical resolution of the protest. See id.

As explained in detail below, we conclude that EnviroSolve's October 12, 2004 protest of DEA's failure to adhere to applicable competition requirements with regard to the establishment of BPAs with selected vendors, followed by the issuance of noncompetitive purchase orders under the BPAs, was clearly meritorious. Further, the record shows that DEA has failed to remedy these deficiencies because it has not implemented the corrective action it proposed in response to the earlier protest.

Under the Federal Acquisition Streamlining Act of 1994 (FASA), simplified acquisitions--used to purchase supplies and services, including construction, research and development, and commercial items, the aggregate amount of which does not exceed \$100,000 (FAR §§ 2.101, 13.000, 13.003(a))--are excepted from the general requirement that agencies obtain full and open competition through the use of competitive procedures when conducting procurements. See 41 U.S.C. §§ 253(a)(1)(A), (g)(1), and (g)(4) (2004). 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 agencies obtain competition to the maximum extent practicable. 41 U.S.C. § 427(c); FAR § 13.104; see Information Ventures, Inc., B-293541, Apr. 9, 2004, 2004 CPD ¶ 81 at 3. Consistent with the maximum-extent-practicable standard, an agency "must not solicit quotations based on personal preference." FAR § 13.104(a)(1). Additionally, an agency may solicit from one source only "if the contracting officer determines that the circumstances of the contract action deem only one source is reasonably available (e.g., urgency, exclusive licensing agreements, or industrial mobilization)." FAR § 13.106-1(b)(1); see Information Ventures, Inc., *supra*.

BPA's are one method of simplified acquisition. FAR § 13.303; see Native Res. Dev., Inc., B-246597.2, B-246597.3, July 13, 1992, 92-2 CPD ¶ 15 at 10 n.11. Agencies are not required to request proposals or to conduct a competition before establishing BPA's. Information Sys. Tech. Corp., B-280013.2, Aug. 6, 1998, 98-2 CPD ¶ 36 at 3. After a BPA is established, however, otherwise applicable competition requirements still apply to all procurements under the BPA. FAR § 13.303-5(a) (BPA to be used only for purchases that are otherwise authorized by law or regulation); Information Sys. Tech. Corp., supra. Moreover, the existence of a BPA does not justify purchasing from only one source. FAR § 13.303-5(c). If, for a procurement in excess of \$2,500 there is an insufficient number of established BPA's to ensure maximum practicable competition, the contracting officer must solicit quotations from other sources. FAR § 13.303-5(d)(1).

We find that DEA's use of BPA's to fulfill its hazardous waste cleanup requirements failed to comply with applicable competition requirements in several regards. First, the choice of vendors with whom DEA established BPA's was noncompetitive and apparently based upon the personal preference of local agency personnel. DEA also viewed the establishment of BPA's as a form of "down-select" that effectively determined which vendors the agency would exclusively consider and utilize to meet its hazardous waste cleanup requirements. See OMNIPLEX World Servs. Corp., supra. Lastly, DEA's subsequent decision to noncompetitively issue purchase orders to select BPA holders was not consistent with the applicable standard--obtaining competition to the maximum extent practicable.⁹

As explained above, DEA, in recognition of the deficiencies in its procurement methods, decided to take corrective action in response to the earlier protest. Based on the description of the corrective action it planned to take, it was reasonable to assume that DEA would remedy the noncompetitive methods it was then employing to meet its requirements. The record indicates, however, that the agency in fact did little to implement its proposed corrective action, until after EnviroSolve filed the current protest. Specifically, DEA took more than 2 months--from January 6 until March 10--merely to issue a solicitation for the competitive award of BPA's for the requisite cleanup services for the contract areas here, and has yet to make award. As an interim measure, DEA decided to rotate the issuance of noncompetitive purchase

⁹ As mentioned above, even under the maximum-extent-practicable standard applicable to simplified acquisitions, an agency "may solicit from one source if the contracting officer determines that the circumstances of the contract action deem only one source is reasonably available (e.g., urgency . . .)," FAR § 13.106-1(b)(1); we review protests of the sole-source determinations made in these simplified acquisition procurements for reasonableness. Information Ventures, Inc., supra; see Information Ventures, Inc., B-290785, Aug. 26, 2002, 2002 CPD ¶ 152 at 3. DEA has not argued nor attempted to demonstrate that, under the circumstances of the procurements here, only one source is reasonably available.

orders among BPA holders, but established a BPA with Envirosolve for only 1 contract area before Envirosolve's protest here, with 11 additional contract areas added only after the filing of this protest. Additionally, while DEA states that it plans to treat all competitors fairly by rotating the issuance of noncompetitive purchase orders among them, such action also does not comply with applicable competition requirements. Moreover, while the agency may not have deliberately excluded Envirosolve from the noncompetitive purchase orders it has issued here, the record indicates that neither did DEA's rotation of purchase orders among BPA holders always include Envirosolve. We recognize DEA's good faith effort to rectify the deficiencies attendant to its earlier procurement actions while still meeting the agency's requirements for hazardous waste cleanup services; nonetheless, DEA's corrective action was not prompt or proper.

In sum, as asserted in Envirosolve's earlier protest, the record shows that DEA failed to adhere to applicable competition requirements in its procurements here. In addition, DEA failed to promptly implement its proposed corrective action, effectively requiring the protester to file a second protest, and thereby defeating the goal of resolving protests economically and expeditiously. See Louisiana Clearwater, Inc.-Recon. and Costs, supra.

We recommend that DEA adhere to applicable competition requirements with regard to the procurement of the hazardous waste cleanup services in question. If DEA continues to procure the services here using simplified acquisition procedures, we recommend that the agency promote competition to the maximum extent practicable, for example, by competitively establishing BPAs with vendors for the various contract areas. If the agency reasonably determines that the issuance of purchase orders on a sole-source basis is necessary for the hazardous waste cleanup services, then the agency should document a properly reasoned and accurate determination for the sole-source award(s). We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest here, including attorneys' fees. 4 C.F.R. § 21.8(d)(1)(2005). Envirosolve shall file its claim for costs, detailing and certifying the time expended and cost incurred, with the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel