



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: DLS Services, Inc.

File: B-276960

Date: May 20, 1997

William H. Carroll, Esq., Dykema Gossett, for the protester.
Thomas A. Darner, Esq., and Maria S. Kavouras, Esq., Environmental Protection Agency, for the agency.
Adam Vodraska, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The General Accounting Office will not consider a protest challenging the substitution of one section 8(a) concern for another as the designee for a sole source contract award under the SBA's section 8(a) set-aside program.

DECISION

DLS Services, Inc., protests the substitution of Harombee Enterprises for DLS as the section 8(a) concern designated for a noncompetitive contract award under the Small Business Administration's (SBA) section 8(a) program pursuant to solicitation No. PB-CI-97-10203, issued by the Environmental Protection Agency (EPA) for janitorial services at the agency's laboratory in Ann Arbor, Michigan.

We dismiss the protest.

The protester, the incumbent 8(a) contractor, contends that EPA improperly requested that SBA rescind its initial designation of DLS for award of the follow-on contract after EPA and DLS were unable to reach agreement on price during contract negotiations.

EPA explains that the impasse was reached after DLS failed to provide requested information justifying its price, specifically, information which substantiated why subcontracted work, direct labor costs, and other portions of its proposal were significantly higher than the costs under its previous contract. Because DLS's previous contract had expired and DLS refused to provide further services by purchase order, EPA states that it was left with little choice but to ask SBA to designate another 8(a) concern for the contract. SBA, which was involved in the negotiations, agreed to do so and withdrew its designation of DLS for the contract and designated Harombee instead. EPA then ended its negotiations with DLS, and,

pending the negotiation of a long-term contract with Harombee, issued purchase order No. 7A-0523-NAWW for the janitorial services to Harombee through the SBA.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994), authorizes SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. This is a contracting approach which in general is not subject to the competitive and procedural requirements of the procurement regulations and the statutory provisions they implement. Border Maintenance Serv., Inc.--Recon., B-252680.2, July 20, 1993, 93-2 CPD ¶ 43 at 2. Because of the broad discretion afforded a contracting officer to let contracts under section 8(a) of the Small Business Act upon such terms and conditions as may be agreed upon by the procuring agency and the SBA, our review of actions under the section 8(a) program generally is limited to determining whether government officials have violated regulations or engaged in fraud or bad faith. Id.

DLS does not contend that government officials acted fraudulently or in bad faith during the negotiations. Rather, DLS asserts that in terminating negotiations with DLS, EPA failed to make a required determination that the price proposed by DLS was not a fair market price, and then, by seeking the substitution of another 8(a) concern for DLS, effectively circumvented the regulatory scheme devised to address price disagreements between the procuring agency and the designated 8(a) concern. In this regard, the protester alleges violations of Federal Acquisition Regulation (FAR) § 19.810(a)¹ and 13 C.F.R. § 124.311(c)(3) (1997),² which it asserts are designed to ensure that the inability of an 8(a) concern selected for a contract to reach agreement with the procuring agency on the price of the contract is a matter that is elevated to senior levels within SBA and the procuring agency.

¹FAR 19.810(a) provides that the Administrator of SBA may refer certain matters--including "[t]he terms and conditions of a particular sole source acquisition to be awarded under the 8(a) Program" and "[t]he estimated fair market price"--for determination to the agency head if SBA and the contracting officer fail to agree on them.

²13 C.F.R. § 124.311(c)(3) requires SBA's Associate Administrator for Minority Small Business and Capital Ownership Development to deny a request to compete an 8(a) contract below the applicable dollar threshold where the requirement was previously offered on a noncompetitive basis if he or she concludes that the request is based on the inability of the contracting agency and the 8(a) concern selected to perform the contract to reach an agreement on price or some other material term and condition.

However, as pointed out by EPA, the regulations cited by the protester are inapplicable to the situation at issue here because no competitive 8(a) procurement for the solicited janitorial services is planned or occurring and there is no dispute between the procuring agency and SBA over the terms of the contract or the fair market price. Rather, when negotiations with DLS failed, EPA requested that SBA designate another 8(a) concern for negotiations for the sole source contract award, which SBA agreed to do. The protester has not cited, nor are we aware of any legal prohibition against SBA, at the behest of the procuring agency, from substituting one designated 8(a) concern for another during contract negotiations. In requesting that our Office either direct EPA to resume negotiations or instruct the agencies to resolve the price disagreement at higher administrative levels pursuant to the above-cited regulations, the protester is essentially asking us to arbitrate the section 8(a) sole source negotiations process, which is not our function. Quality Support, Inc.-- Recon., B-254635.3, Mar. 17, 1994, 94-1 CPD ¶ 233 at 3.

The protest is dismissed.

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