Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Boehringer Mannheim Corporation

File: B-279238

Date: May 21, 1998

Robert M. Jenkins III, Esq., Harkins Cunningham, for the protester.
Timothy Sullivan, Esq., and Katherine S. Nucci, Esq., Adduci, Mastriani & Schaumberg, for Abbott Laboratories, an intervenor.
Phillipa L. Anderson, Esq., and Melbourne A. Noel, Jr., Esq., Department of Veterans Affairs, for the agency.
Wm. David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Blanket purchase agreement (BPA) with vendor for blood glucose monitoring products, which was executed pursuant to Federal Acquisition Regulation (FAR) Subpart 8.4, is not legally objectionable notwithstanding the inclusion in the BPA of a conditional discount for other products sold by that vendor under another BPA.

DECISION

Boehringer Mannheim Corporation (BMC) protests the terms of a blanket purchase agreement (BPA) entered into by the Abbott Diagnostics Division and Veterans Integrated Service Network No. 7 (VISN 7), Department of Veterans Affairs (VA), for blood glucose monitoring products. BMC contends the VA improperly bundled the anticipated purchase of these products with a potential 16-percent discount on any purchases made by VISN 7 under a separate Abbott immunoassay products BPA, thereby contravening the government's duty to promote full and open competition.

We deny the protest.

The VISN 7 blood glucose monitoring products BPA is part of a VA program to promote the standardization of pharmaceuticals and medical/surgical supply items in the hospital and clinic system operated by the Veterans Health Administration. As part of the program, the VA created the National Center for Laboratory Accuracy and Standardization. The Center conducted a study of monitoring systems and found that glucose monitoring products used for diabetes patients represented the single greatest over-the-counter supply cost for the VA in the year studied. The Center recommended that each VISN develop a multi-disciplinary committee consisting of primary care providers, diabetes specialists, nursing educators, and

laboratory and pharmacy service personnel to select glucose monitoring devices on a national level that would help with the standardization efforts for the accurate measurement of glucose and would promote the reduction of testing costs. The recommendation encouraged the selection of devices from one manufacturer.

VA management asked each VISN to implement the Center's recommendation by negotiating "[i]ncentive agreements (Blanket Purchase Agreements) . . . under the current Federal Supply Contracts." The VA advised that "[a]ll contractors will be requested to submit proposals for consideration in return for VISN commitment." The multi-disciplinary committee was to review the proposals and make a selection.

In response to a request from VISN 7, Abbott, BMC, and Johnson & Johnson--three federal supply schedule (FSS) vendors of blood glucose monitoring systems--demonstrated their products to the VISN 7 multi-disciplinary committee. The committee charge was to choose and standardize around a specific monitoring system. The attendees evaluated the products for accuracy, reliability, and precision; usability; data handling and computer interface; and strong positives and negatives. After discussions of the demonstrations, two-thirds of the attendees indicated a preference for Abbott's products based on the factors identified above.

A VA acquisition officer was then asked to negotiate a BPA with Abbott on the basis of VISN 7's decision to standardize using Abbott's glucose monitoring products. Both BMC and Abbott already had national BPAs negotiated by the General Services Administration which offered discounts on the glucose monitoring products depending on the percentage market share that the VISN purchases from that manufacturer. In addition to the terms and conditions of its national BPA, during negotiations with the VA, Abbott offered new incentives that were described as "quick-start" and "additional immunoassay BPA" incentives based on a BPA for immunoassay products also negotiated with VISN 7.

The final executed BPA describes these as incentives intended to encourage VISN 7's rapid conversion to the Abbott product at a level of 100-percent standardization by the VISN 7 facilities. If VISN 7 were to complete its standardization to the Abbott product by May 15, 1998, all facilities in the VISN would receive a 25-percent rebate on the VISN's expenditures for this product between January 1 and December 31, 1998. Also, in return for 100-percent standardization, Abbott promised to apply a 16-percent discount to the pricing in another VISN 7 BPA, one that covers immunoassay products. The 16-percent discount on immunoassay products would be effective February 1, 1998; however, if standardization to Abbott's glucose monitoring products was not complete by April 15, pricing for Abbott's immunoassay products would revert to the current FSS levels until complete standardization occurred. Then, the 16-percent discount for the immunoassay products would be provided so long as VISN 7 remained 100-percent standardized to the Abbott glucose monitoring system. The VISN 7

management issued memoranda to implement the standardization process to obtain the promised discounts. BMC's protest followed.

BMC primarily objects to what it characterizes as the "bundling" of pricing of two distinct sets of products--Abbott's glucose monitoring products and its immunoassay products--in one BPA. The agency denies that it bundled separate requirements in one procurement vehicle. The VA maintains that the BPA for Abbott's glucose monitoring products merely cross-references the BPA for Abbott's immunoassay products to allow a 16-percent discount on these immunoassay products when purchased under Abbott's separate BPA for those products if, and only so long as, VISN 7 purchases 100 percent of its requirements for glucose monitoring products under Abbott's BPA for these products. According to the VA, the BPA with Abbott for blood glucose monitoring products is a valid BPA with "an incentive agreement grafted onto it," which does not contravene any statute or regulation.

We find nothing unlawful in VISN 7's BPA with Abbott. A BPA is not a contract, but rather a simplified method of filling anticipated repetitive needs for supplies or services by establishing "charge accounts" with qualified sources of supplies. Federal Acquisition Regulation (FAR) § 13.201(a) (June 1997). A BPA may be established with FSS contractors, if not inconsistent with the terms of the applicable schedule contract. FAR § 13.202(c)(3). FAR § 8.404(b)(4) (FAC 97-01) specifically permits the establishment of BPAs when following the ordering procedures in FAR Subpart 8.4. The provision further notes that all schedule contracts contain provisions authorizing BPAs and that ordering offices may use BPAs to establish accounts with contractors to fill recurring requirements. FAR § 8.404(b)(5) notes that agencies may wish to request a price reduction vis-à-vis the vendor's FSS pricing when a BPA is being established.

Here, the VA has executed the Abbott BPA in accordance with the FAR. To determine which product best met its needs, consistent with FSS procedures as described in FAR Subpart 8.4, the VA invited three vendors with schedules for the blood glucose monitoring products to demonstrate their products. After this product demonstration, the multi-disciplinary committee discussed the merits of these competing products and concluded that Abbott's system best met the agency's clinical needs and should be the standard product for VISN 7.[1] In accordance with Abbott's FSS, which contained a provision permitting BPAs, the VA negotiated the BPA with Abbott. The VA achieved a lower initial price than the price under

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[1]Although price was one of the factors considered by the committee, there is no indication in the record that the committee made its decision to select Abbott based on the 16-percent reduction on Abbott's immunoassay BPA pricing. The contemporaneous minutes of the deliberations support the agency's position that the selection was primarily based on non-price factors. The BPA at issue was, in fact, negotiated after the selection.

Abbott's national BPA,[2] and discounts under which it anticipates first-year cost savings of approximately $1 million (with only $160,000 in savings resulting from the 16-percent discount of Abbott's immunoassay products). We cannot conclude, nor does BMC establish, that Abbott's product does not represent the best value or the lowest overall cost alternative or that the VA did not follow the applicable FAR provisions in issuing this BPA.

BMC nonetheless argues that the Abbott offer of a 16-percent reduction on immunoassay BPA pricing quantity to encourage the VA medical facilities to convert to the Abbott monitoring system violates the statutory requirement for full and open competition, 41 U.S.C. § 253(a)(1)(A) (1994), by relying on impermissible bundling of products. The short answer is that purchases under the FSS program meet the full and open competition requirement since the term "competitive procedures" is defined to include the multiple awards schedule program of the General Services Administration. 41 U.S.C. § 259(b)(3).[3] See FAR § 6.102(d)(3); Southwest Decor, Inc.--Recon., B-246964.3, B-246965.3, June 4, 1992, 92-1 CPD ¶ 491 at 2.

Moreover, the "bundling" cases cited by the protester refer to situations in which an agency has combined two separate requirements in one solicitation, thus restricting competition. See, e.g., Better Serv., B-265751.2, Jan. 18, 1996, 96-1 CPD ¶ 90. Those cases are irrelevant here, where there is no allegation that the agency combined two procurements into one solicitation; indeed, the agency's purchases will indisputably be conducted under two separate BPAs. To the extent that the protester is raising antitrust concerns about Abbott's conduct, such concerns are outside the scope of our bid protest jurisdiction. 4th Dimension Software, Inc.; Computer Assocs. Int'l, Inc., B-251936, B-251936.2, May 13, 1993, 93-1 CPD ¶ 420 at 6.

We see no legal impropriety in the BPA at issue here. By its terms a BPA is a method of filling repetitive needs. The Abbott BPA, as with other BPAs, provides an incentive agreement to the agency to buy a vendor's products and to receive discounts on the items covered by the BPA. While the VA would also receive a 16-percent discount when ordering Abbott's immunoassay products under another BPA if the agency purchases all of its glucose monitoring products from Abbott (since that is the import of "standardization" here), the failure to standardize to Abbott's glucose monitoring products would simply mean that the agency would not

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[2]The Abbott BPA also provided a lower initial price than the other vendors.

[3]The protester also argues that the VA has violated the mandate of FAR § 15.402(b) (FAR 97-02) that contracting officers price each contract separately and not use proposed price reductions under one contract as an evaluation factor in another. We see no basis to apply the provision in FAR § 15.402(b), which applies to negotiated procurements, in the context of FSS BPAs, where agencies are merely seeking further price reductions vis-à-vis FSS pricing.

receive the additional discounts for immunoassay products. We are aware of no statute or regulation that precludes the agency from negotiating such a BPA.

The protest is denied.

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