Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: SmithKline Beecham Pharmaceuticals

File: B-277253; B-277253.4

Date: September 17, 1997

James P. Gallatin, Jr., Esq., Scott D. Chaplin, Esq., and James P. Hodges, Esq., Reed Smith Shaw & McClay, for the protester.
Joel R. Feidelman, Esq., Deneen J. Melander, Esq., and Nancy R. Wagner, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Merck & Company, Inc., an intervenor.
J. Albert Calluso, Esq., Defense Logistics Agency, for the agency.
Andrew T. Pogany, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting agency should have employed an indefinite delivery/indefinite quantity contract with multiple award provision is denied where agency properly determined that a requirements contract with a single award provision reflected its needs and enhanced competition between the only two producers of the item being procured.

DECISION

SmithKline Beecham Pharmaceuticals protests the terms of request for proposals (RFP) No. SP0200-97-R-1700, issued by the Defense Logistics Agency (DLA) for adult hepatitis A vaccine.

We deny the protest.

The RFP, issued on May 12, 1997, contemplated the award of a single requirements contract, for an initial 1-year base period with 4 option years, to the offeror submitting the lowest priced, technically acceptable proposal. The RFP specified by brand name the only two hepatitis A vaccines licensed in the United States--Havrix (manufactured by SmithKline) and Vaqta (manufactured by Merck & Company, Inc.). The RFP instructed offerors to propose pricing for these two specified commercially available single-dose adult hepatitis A vaccines packaged in the following three ways: a single dose syringe, a package of five single dose syringes, and a single dose vial. Currently, the Department of Defense procures the hepatitis A vaccines through Distribution and Pricing Agreements (DAPA), which are similar to basic ordering agreements, with SmithKline and Merck. The RFP provides that, upon award of the contract, the successful offeror's DAPA will be modified to reflect the contract prices received under this solicitation and that the losing

offeror's adult hepatitis A vaccine DAPA will be canceled for the duration of the contract. Proposals from these two firms were received by June 20, 1997, the amended closing date for receipt of initial proposals.

SmithKline principally protests as improper the agency's decision to award a single contract rather than multiple contracts to both firms. According to SmithKline, the agency has not complied with the requirements of the Competition in Contracting Act (CICA), 10 U.S.C. § 2304(a)(1)(A) (1994), to "obtain full and open competition through the use of competitive procedures in accordance with the requirements of [CICA] and the Federal Acquisition Regulation [FAR]." SmithKline further contends that multiple awards are mandated here by FAR § 16.504(c), which requires that the contracting officer, "to the maximum extent practicable, give preference to making multiple awards of [indefinite delivery/indefinite quantity (IDIQ)] contracts under a single solicitation."

As noted above, however, the solicitation here did not contemplate award of an IDIQ contract, but instead contemplated award of a requirements contract. As such, FAR § 16.503, which is applicable to requirements contracts, is controlling here; that section provides no preference for multiple awards. Further, although SmithKline asserts that the agency should have employed an IDIQ contract in the solicitation, rather than a requirements contract, the agency reports that it elected not to do so because it could not determine a "viable stated minimum [or] maximum" quantity that would be "flexible enough to accommodate the changing role of the military" since inoculation of "all active duty and selected reserve force military personnel" are required and the agency "could not predetermine the precise quantities of vaccine it would require in order to accomplish its task." We note in this regard that FAR § 16.504(a) requires the contracting agency to be able to specify minimum and maximum stated quantities as a condition for using IDIQ contracts. In any case, FAR § 16.504(c) does not mandate making multiple awards, but instead requires the contracting officer to "exercise sound business judgment" in determining whether multiple awards are appropriate. Indeed, FAR § 16.504(c) states that multiple awards should not be made where, as here, the contracting officer determines that more favorable terms and conditions, including pricing, would be obtained if a single award is made. Since there is no reason to believe that making multiple awards when there are only two competitors would result in terms and conditions, including pricing, as favorable as those that would be obtained if a single award were to be made, we find no basis to question the contracting officer's judgment in this regard. Moreover, we see no evidence that the CICA requirement for full and open competition was violated by the agency's decision to employ a single award methodology--the protester was not precluded from competing, and a single award enhances competition between the only two firms that produce the vaccines. Since the protester relies on FAR § 16.504, which is inapposite to requirements contracts, and since we are unaware of any statute or regulation which requires a contracting agency to employ multiple awards in a solicitation for a requirements contract, we deny this ground of protest.

SmithKline argues that the solicitation's limitation on the dosage strength (adult only) and the packaging of the product restricts competition. In this regard, SmithKline states that it has an adolescent form of Havrix intended for use by individuals under the age of 19, which is currently priced at 44 percent less than the adult dosage price offered to the military, and has also developed an adult, multi-dose vial form of Havrix, currently awaiting FDA approval, which is likely to offer additional savings to the government and which should be considered in this procurement. However, as noted by the agency, it already has existing DAPAs with manufacturers of the adolescent hepatitis A vaccine--including SmithKline--which will be unaffected by this procurement, and the agency simply has determined not to procure the adolescent vaccine at this time. We know of no requirement that the agency procure adolescent vaccine for which it already has sources of supply simply because it has decided to procure the adult vaccine. Further, in view of the fact that SmithKline's multi-dose vial form is not yet approved by the FDA, SmithKline's challenge to the agency's failure to include that vial form in the solicitation is also clearly without merit.

Finally, SmithKline, in its written comments, raises a number of additional arguments, including, for example, that the solicitation improperly equates the two vaccines as functionally equal and that the agency failed to obtain the required justification and approval for a competition restricted to only two manufacturers or to adequately document this type of brand name only solicitation. These arguments are untimely, because they were raised after the June 20 closing date for receipt of initial proposals, 4 C.F.R. § 21.2(a)(1) (1997), fail to suggest prejudice to SmithKline with respect to its ability to successfully compete for this requirement (as is the case with respect to the alleged lack of documentation limiting the competition to SmithKline and Merck), and/or are otherwise without merit.

The protest is denied.

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