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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-220523 **DATE:** January 8, 1986
MATTER OF: Anthra Pharmaceuticals, Inc.

DIGEST:

Protest against the contracting agency's decision not to enter into research contracts with the protester, a small business, under a solicitation issued pursuant to the Small Business Innovation Development Act, is denied where the record shows that the protester's principal investigators are full-time university employees, whereas the solicitation requires that for the small business to be eligible for award, an investigator's "primary employment" must be with the offeror.

Anthra Pharmaceuticals, Inc. protests the failure of the Department of Health and Human Services (HHS) to award the firm a contract based on the proposals Anthra submitted in response to solicitation No. PHS85-3 for small business innovative research in areas of scientific interest to the Public Health Service (PHS). The solicitation was part of HHS's effort under the Small Business Innovation Development Act, 15 U.S.C. § 638 (1982), which requires certain agencies to reserve a portion of their research efforts for award to small business firms, and authorizes the agencies to award "funding agreements" based on the evaluation of proposals submitted in response to solicitations issued pursuant to the statute.^{1/} We deny the protest.

Anthra states that HHS found both of its proposals, for the synthesis of analogs of clinically active anticancer agents, to be of sufficient scientific merit and feasibility to warrant awards. Anthra contends that HHS failed to make

^{1/} These funding agreements can take the form of contracts (as here), grants, or cooperative agreements. 15 U.S.C. § 638(e)(3).

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awards, however, because it improperly determined that the principal investigators for the two research projects were not primarily employed with Anthra as required by the terms of the solicitation and the Small Business Administration (SBA) Policy Directive, 50 Fed. Reg. 917 (1985), that provides guidance to participating agencies for the conduct of their fiscal year 1985 small business innovative research programs.

The solicitation listed a number of research topics for various PHS components, for which proposals could be submitted. Firms were advised that their submissions would be judged on a competitive basis^{2/} and evaluated based on soundness and technical merit (40 percent); the qualifications of the principal investigator and staff (30 percent); the proposed research's potential for technological innovation and/or commercial application (20 percent); and facilities and research environment (10 percent). Offerors also were advised of the approximate number of firm, fixed-price contracts that would be awarded for each of the listed PHS components.

The solicitation required, in a provision entitled "Eligibility," that in order for an organization to be eligible for award, the "primary employment" of the principal investigator must be with the organization at the time of award and during the conduct of the proposed project. The provision defined the term "primary employment" as meaning that "more than one-half of the principal investigator's time is spent in the employ of the small business." Both the requirement and the definition are set out in the SBA Policy Directive. While HHS found Anthra's proposals to be technically meritorious, the proposals revealed that the two principal research investigators for the proposed projects were full-time university faculty members and directors of university laboratories. Information developed during the evaluation of the firm's proposals also revealed that the arrangement the investigators had with Anthra appeared to be contrary to the established policies of their

^{2/} Such a competitive selection of research proposals solicited pursuant to the Small Business Innovation Development Act comes within the definition of "competitive procedures." See 41 U.S.C.A. § 259(b)(5) (West Supp. 1985) (added by section 504 of the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. 98-577).

respective universities, which prohibited more than 1 day per week of outside consulting activities. HHS decided that Anthra therefore did not meet the solicitation's eligibility criterion, and declined to enter into any contracts with the firm; the record indicates that but for this eligibility problem, HHS would have funded Anthra's proposals.

Anthra argues that its proposed principal investigators are involved with Anthra to a significant extent above and beyond their university employment. According to Anthra, its principal investigators are founding members and current officers and directors of the firm, and as such are fully committed to the success of Anthra through time, effort, and financial investment. Anthra points out that it specifically stated in its proposals that the investigators were devoting 41 hours per week to the company, accomplished by utilizing after-university work hours, weekends, holidays, and university vacation time. As to the policies of their universities regarding outside employment, Anthra alleges that the universities only prohibit financially-compensated outside activities during a faculty member's regular employment hours, and place no constraints on activities outside regular employment hours other than to restrict teaching at another college or university without obtaining prior approval.

HHS takes the position that the principal investigator eligibility requirement would become a sham if it accepted the proposition of an 81-hour week for an investigator, 40 hours of which are spent in the employ of a non-small business organization. In HHS's view, this would mean that any scientist with a regular 40-hour per week, full-time job would be eligible as long as he asserted that he would work another 41 hours per week for a small business research firm. HHS points out that several proposals submitted in response to the solicitation had similar eligibility problems, and in all cases except Anthra's the eligibility questions were resolved satisfactorily either by replacement of a principal investigator or by the principal investigator agreeing to reduce his university employment to a part-time basis.

We find that it was reasonable for HHS to conclude that Anthra did not meet the solicitation's eligibility criterion. Solicitations must be read reasonably, see Byrd Tractors, Inc., B-212449, Dec. 13, 1983, 83-2 C.P.D. ¶ 677, and in our view a requirement that the offeror be the

principal investigator's primary employer, so that more than half his time is spent in the offeror's employ, simply is not met where the investigator already has a full-time, 40-hour per week job with someone else. Under Anthra's approach of proposing investigators that would work 41 more hours per week for the offeror, a firm seeking funding could propose a principal investigator who works elsewhere any number of hours per week beyond 40--50, 60, etc.--on any number of other efforts so long as the offeror says that the person will work that same number of hours plus 1--51, 61, etc.--on the research project. We do not think that type of approach meets the understanding commonly reflected in a "primary employment" requirement of any sort, particularly one as defined in the SBA Policy Directive and this solicitation. Accordingly, we are not prepared to conclude that HHS was compelled to accept Anthra's proposals on the basis submitted.

The protest is denied.

Harry R. Van Cleve
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General Counsel