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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: SmithKline Beecham Pharmaceuticals, N.A.

File: B-252226.2

Date: August 4, 1993

Carl L. Vacketta, Esq., Pettit & Martin, for the protester.
Daniel I. Prywes, Esq., Pepper, Hamilton & Scheetz, for Merck & Co., an interested party.
Michael Colvin, Department of Health and Human Services, for the agency.
Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency conducts discussions with proposed awardee, after submission of best and final offers, in order to ensure uninterrupted supply of quantities of multi-dose vials of vaccine, it must also conduct discussions with other offeror in competitive range.

DECISION

SmithKline Beecham Pharmaceuticals, N.A. protests the award of a contract to Merck & Co. under request for proposals (RFP) No. 93-17(N), issued by the Center For Disease Control (CDC), Department of Health and Human Services (HHS), for supply of indefinite quantities of Hepatitis B vaccine. SmithKline protests the evaluation of offers, the statement of requirements, the conduct of discussions, and the eligibility of Merck to receive an award.

We sustain the protest.

The RFP schedule specified four line items: (B.1.a.1) pediatric formulation, 1 milliliter (ml) vials (4 doses); (B.1.a.2) pediatric, 3 ml vials (12 doses); (B.1.b.1) adult formulation, 1 ml vials (1 dose); and (B.1.b.2) adult, 3 ml vials (3 doses). The schedule also listed, in milliliters, maximum annual quantities, guaranteed annual minimum quantities, and maximum monthly usage for the pediatric and adult formulations. The schedule did not indicate which of these quantities would be single and multi-dose vials. The RFP provided for evaluation of offers

in consideration of multiple awards and advised offerors that the agency reserved the right to order any of the vial sizes listed in any resultant contract, although "it contemplated ordering vaccine at the lowest offered prices per dose to immunize a child and an adult." Award was to be on an item-by-item basis (B.1.a. (pediatric) and/or B.1.b. (adult)), based on the lowest offered price per dose for each. Successful offerors were required to possess a current Food and Drug Administration (FDA) license and operating in accordance with the Current Good Manufacturing Regulations. The RFP specifically warned: "IN ORDER TO BE CONSIDERED FOR AWARD, OFFEROR MUST SUBMIT EVIDENCE OF A CURRENT FDA LICENSE."

The RFP was sent to 14 potential offerors, with only SmithKline and Merck submitting proposals by the November 20, 1992, closing date. Merck's initial offer provided the following prices:

Pediatric[1]

B.1.a.1	0.5 ml Vials (1 dose)	$8.20	
B.1.a.2	3 ml Vials (6 doses)	$41.10	($6.85/dose)

Adult

B.1.b.1	1 ml Vials (1 dose)	$28.50	
B.1.b.2	3 ml Vials (3 doses)	$82.95	($27.65/dose)

SmithKline's initial proposal offered only a one-vial/dose price for each formulation: $14.20 for pediatric vaccine (B.1.a.1), which was higher than Merck's single dose offer, and $28.39 for adult vaccine (B.1.b.1), which was lower than Merck's single dose offer but higher than its multi-dose offer. Both offerors submitted evidence of an FDA license[2] and the agency included both offerors in the competitive range. During discussions, the CDC advised the offerors that quantities for both vaccine formulations had been changed and would be expressed in terms of doses instead of mls. The agency did not amend the RFP to reflect these

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[1]Merck's offer represented a change from the pediatric vial size and dosage set forth in the RFP.

[2]In fact, Merck's 1986 FDA license for manufacture and sale of Hepatitis B vaccine did not cover the new pediatric formulation proposed by Merck. According to Merck, the omission of this information from its proposal was unintentional and, as of June 8, 1993, its FDA license covers the new formulation.

changes.[3] Although both offerors submitted best and final offers (BAFO) by the December 20 closing date, neither changed its prices. Merck's pediatric offer represented the lowest price per dose. With regard to the adult formulation, while SmithKline's single-dose offer was $0.11 less than Merck's single-dose offer, Merck's multi-dose vial offer represented the lowest price per dose ($0.74 less than SmithKline's single-dose price).

Additional discussions were conducted with Merck. These discussions were occasioned by the difference in price between the Merck single-dose vial and the per-dose price in the Merck multi-dose vial, in conjunction with the fact that Merck had experienced difficulty in providing 3 ml vials under previous contracts. The discussions resulted in the addition of a notation under the multi-dose line items stating that "[i]f for any reason, the contractor is unable to provide the [multi-dose] vials as ordered under the contract, the contractor agrees to substitute [single] dose vials at the equivalent per dose price . . . provided [single] dose vials are available."

The agency awarded a single contract for all four line items to Merck on January 21, 1993. The total estimated contract amount was $98,080,000, based on the maximum annual quantities of adult and pediatric formulations at the single-dose prices for each dose. SmithKline then filed this protest with our Office.

SmithKline originally contended that the agency failed to evaluate the offers in accordance with the RFP criteria; failed to ensure that the award represented the most advantageous price; and improperly accepted Merck's offer which was "in the nature of" an unbalanced offer. After review of the agency report, SmithKline protested the CDC's post-BAFO discussions with Merck and Merck's lack of a current FDA license for its pediatric formulation. We agree with SmithKline that the post-BAFO discussions were improper.

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[3]SmithKline protests the agency's failure to set forth separate estimates of requirements for each of the four line items and the failure to amend the RFP to reflect the agency's revised requirements. These protest grounds are untimely. Both matters concern alleged solicitation improprieties which must be raised prior to the closing date for receipt of proposals, or in the case of later introduced improprieties, prior to the next closing date. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1993). Here, SmithKline first protested after contract award.

It is a fundamental principle of federal procurement that all offerors must be treated equally. Loral Terracom; Marconi Italiana, 66 Comp. Gen. 272 (1987), 87-1 CPD ¶ 182. Thus, the conduct of discussions with one offeror generally requires that discussions be conducted with all offerors whose offers are within the competitive range and that offerors have an opportunity to submit revised offers. Microlog Corp., B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227. This rule applies even to post-selection negotiations that do not directly affect the offerors' relative standing, because all offerors are entitled to an equal opportunity to revise their proposals. PRC Information Sciences Co., 56 Comp. Gen. 768 (1977), 77-2 CPD ¶ 11. Discussions occur when an offeror is given an opportunity to revise or modify its proposal, or when information provided by an offeror is essential for determining the acceptability of its proposal. Federal Acquisition Regulation (FAR) § 15.601; Motorola, Inc., 66 Comp. Gen. 519 (1987), 87-1 CPD ¶ 604.

The CDC argues that its post-BAFO discussions with Merck were appropriate under HHS Acquisition Regulation § 315.670(a), which provides for limited negotiations with the selected offeror, so long as "no factor which could have any effect on the selection process" is introduced and the negotiations do "not in any way prejudice the competitive interests or right of the unsuccessful offerors." Such negotiations must be limited to "definitizing the final agreement on terms and conditions" including such matters as payment provisions, patent or data rights, property provisions, labor rates, indirect cost rates, and fees. Since SmithKline did not offer a price for multi-dose vials, the contracting officer concluded that it would not be prejudiced by the discussions. We disagree.

The record makes plain that the CDC conducted additional discussions with Merck because the agency lacked confidence in the firm's ability to deliver multi-dose vials. According to the CDC, Merck had "experienced some difficulty in providing 3 ml size vials when ordered under previous contracts." However, prior contracts had reflected equivalent per dose prices for all size vials, unlike Merck's current proposal. Thus, under these prior contracts, Merck was able to substitute single dose vials in response to multi-dose orders at no price increase. Under Merck's current offer such substitution could result in Merck's tendering higher priced, single-dose vials. Therefore, the agency negotiated a concession from Merck to furnish the substituted single-dose vials for pediatric and adult vaccines at the lower, multi-dose prices, in anticipation that Merck would be unable to comply with multi-dose delivery orders.

If the agency had simply made the award on the basis of Merck's multi-dose price, Merck would have been obligated to provide the required number of multi-dose vials at that price per dose. Should it make a difference, then, that the agency reached the same result through discussions with Merck? We think so. It is clear that the agency was reluctant to award a contract to Merck calling for delivery of multi-dose packages. It is not at all clear what the agency would have done had Merck refused to accede, in discussions, to providing single doses at its multi-dose price if it was unable to actually provide multi-dose vials. By providing Merck an opportunity for meeting its obligation in an alternate fashion acceptable to the CDC, the discussions were prejudicial to the protester.

The awardee was selected based on the best per-dose price, and Merck's perceived inability to meet its obligations under the contract called into question whether the agency would receive that price. The agency's decision to negotiate a modification in advance of award was directly related to the acceptance of Merck's pediatric and adult vaccine offers. See Motorola, Inc., supra. Moreover, with respect to the adult vaccine, SmithKline's single-dose price was less than Merck's single-dose price. If, instead of negotiating a lower single-dose price with Merck, the agency had evaluated Merck's proposal on the basis that Merck could not deliver multi-dose vials, SmithKline's single-dose price would have been the lowest per-dose price for the adult vaccine. Accordingly, the agency's post-BAFO negotiations effectively displaced SmithKline as the low single-dose offeror, and SmithKline was prejudiced by this action. As observed by SmithKline, at a minimum, additional discussions would have provided it an opportunity to lower its prices. In view of the relatively small difference between the offerors' prices for the adult formulation, it is not clear that the outcome of the competition would have remained the same had SmithKline been provided such an opportunity. Microlog, Corp., supra. Therefore, we sustain SmithKline's protest.[4]

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[4]Since we are sustaining the protest on this ground, it is unnecessary to resolve the issues concerning most advantageous price, alleged unbalancing, and lack of a current FDA license. We note that, with regard to the unbalancing allegation, our review of the record disclosed nothing objectionable in Merck's pricing for any of the line items. Further, since Merck now possesses the appropriate FDA license, if the firm is successful following additional BAFOs, it would be eligible for award.

We recommend that the CDC reopen negotiations with Merck and SmithKline and obtain another round of BAFOs.[5] We also find that SmithKline is entitled to the costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d)(1). In accordance with 4 C.F.R. § 21.6(f)(1), SmithKline's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 working days of receipt of this decision.

The protest is sustained.

for Milton J. Socolar
Comptroller General
of the United States

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[5]SmithKline also contended that the RFP contemplated up to four contracts and, as the offeror proposing the lowest single-dose price, it, not Merck, should have received a contract for this line item which the agency contemplated a maximum of two awards. The evaluation scheme, seeking the lowest per-dose price for each formulation, does not clearly account for the situation presented here where one offeror proposes the lowest single-dose price and another offeror proposes the lowest multiple-dose price. The record indicates that even the CDC program evaluator was confused by the scheme and at one point anticipated two awards for the adult formulation alone. We recommend that in conjunction with reopening negotiations, the agency clarify its evaluation scheme in this respect.