Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: SmithKline Beechman Pharmaceuticals

File: B-271845

Date: August 23, 1996

Robert H. Koehler, Esq., and Michael J. Schaengold, Esq., Patton Boggs, for the protester.
Barbara Robbins, Esq., Department of Health and Human Services, for the agency.
Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where statute concerning vaccine procurements states that the agency "shall, as appropriate" award multiple contracts, and further provides that the agency "may decline to enter into such contracts," the plain language of the statute affords the agency discretionary authority to refrain from making multiple contract awards in appropriate circumstances.

DECISION

SmithKline Beechman Pharmaceuticals protests the provisions of request for proposals (RFP) No. 96-51(N), issued by the Department of Health and Human Services (HHS), Centers for Disease Control and Prevention (CDC), for quantities of hepatitis B high risk/adolescent vaccine. SmithKline objects that the solicitation provision advising that only a single award will be made is improper, and argues that the agency is statutorily required to award a contract to every qualified offeror regardless of price.[1]

We deny the protest.

[1]Initially, SmithKline also challenged a provision of the solicitation regarding the type of packaging that was required. In response to this issue, the agency amended the solicitation in a manner which, as SmithKline agrees, renders that issue moot.

On April 10, 1996, the CDC issued RFP No. 96-51(N) calling for the award of an indefinite quantity contract to provide quantities of hepatitis B high risk/adolescent vaccine.[2] The solicitation provided for a minimum of 1.1 million doses of vaccine with an estimated maximum of 11 million doses.

Under the heading "Evaluation and Award," the solicitation stated:

> "b. The Government intends to make only one award under this solicitation. The low offeror shall be determined based on the lowest offered price per dose.
>
> "c. Award shall be made to the low responsible offeror who offers a reasonable discounted price [and meets other qualifying requirements.]"

SmithKline protests that this solicitation provision is contrary to the statutory requirements of OBRA which, SmithKline asserts, mandate award of a contract to every qualified offeror. SmithKline bases its protest on the following OBRA provision, codified at 42 U.S.C. § 1396s, which states:

> "(d) Negotiation of Contracts with Manufacturers
>
> (1) In General
>
> For the purpose of meeting obligations under this section, the Secretary shall negotiate and enter into contracts with manufacturers of pediatric vaccines consistent with the requirements of this subsection . . . .
>
> . . . . .
>
> (7) Multiple Suppliers
>
> In the case of the pediatric vaccine involved, the Secretary shall, as appropriate, enter into a contract referred to in paragraph (1) with each manufacturer of the vaccine that meets the terms and conditions of the Secretary for an award of such a contract (including terms and conditions regarding safety and quality). With

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[2]The acquisition is a part of the Vaccines for Children Program under the Omnibus Budget Reconciliation Act of 1993 (OBRA), 42 U.S.C. § 1396s (1994), which is a federally funded program for the acquisition and distribution of pediatric vaccine for the immunization of eligible children.

> respect to multiple contracts entered into pursuant to this paragraph, the Secretary may have in effect different prices under each of such contracts . . . ."

SmithKline maintains that the statutory provision codified at (d)(7) "mandates that the [agency] conduct procurements . . . in a manner that allocates the doses so that all qualified manufacturers will be awarded contracts," and asserts that "CDC does not have the authority to make a single award here." We disagree.

SmithKline's assertion that the language of (d)(7) should be read as "the Secretary shall . . . enter into a contract . . . with each [qualified] manufacturer" effectively reads the words "as appropriate" out of the statute, thus altering the plain meaning of the statute. SmithKline also ignores the statutory language codified at 42 U.S.C. § 1396s(d)(2), which states:

> "Authority to Decline Contracts
>
> The Secretary may decline to enter into such contracts [identified in section (d)(1)] and may modify or extend such contracts."

It is well settled that, where the language of a statute is clear on its face, its plain meaning will be given effect; that is, if the intent of Congress is clear, "that is the end of the matter." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). In this regard, the clear intent of Congress must be determined by giving meaning to all statutory language. See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S.Ct. 2407, 2413 (1995); Consumer Fed'n of Am. v. U.S. Department of Health and Human Servs., 83 F.3d 1497 (D.C. Cir. 1996); Ziegler Coal Co. v. Kleppe, 536 F.2d 398, 406 (D.C. Cir. 1976); Tuten v. United States, 440 A.2d 1008, 1010 (D.C. 1982), aff'd, 460 U.S. 660 (1983).

Here, we find without merit SmithKline's assertion that the language of OBRA "mandates" award to all qualified offerors. On the contrary, the plain meaning of the statutory language codified at (d)(7) provides that the agency shall award contracts to qualified contractors "as appropriate." That express discretionary authority is similarly reflected in the provision at (d)(2), which authorizes the agency to "decline to enter into such contracts." In short, the plain language of

OBRA grants the agency the discretion to refrain from awarding contracts in appropriate circumstances. Pursuant to Chevron, U.S.A, supra, that is the end of the matter.[3]

The protest is denied.

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[3]In arguing that the agency must award SmithKline a contract, regardless of price, SmithKline refers to OBRA's legislative history, which contains the following provisions:

> "The Conference Agreement further provides that the Secretary shall, as appropriate, enter into a contract with each manufacturer of the vaccine that meets the terms and conditions of the Secretary. The Secretary also may have multiple prices.
>
> . . . . .
>
> "The Conference Agreement also provides authority for the Secretary to decline to enter into contracts. The Conferees have provided this authority for extreme circumstances only and, again, would emphasize the importance of continuity of vaccine suppliers for federally vaccine-eligible children and States." 139 Cong. Rec. H6172-6173 (daily ed. Aug. 5, 1993).

SmithKline argues that the reference to "extreme circumstances" should, effectively, be read into the statute, and that costs to the government may not be considered in determining what constitutes an "extreme circumstance."

SmithKline's arguments regarding the effect of the legislative history are unavailing. Legislative history, while often indicative of congressional intent, is not law. To effectively impose the "extreme circumstances" test as a mandatory limitation on the agency's exercise of its discretionary authority, the Congress would have had to include that provision in the statute itself. See LTV Aerospace Corp., 55 Comp. Gen. 307 (1975), 75-2 CPD ¶ 203. Moreover, even if the "extreme circumstances" limitation were read into the statute, nothing in the legislative history concerning that limitation precludes the agency from considering costs to the government in determining what constitutes an "extreme circumstance."