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DECISION



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

FILE: B-209419

DATE: February 14, 1983

MATTER OF: Particle Data, Inc.

DIGEST:

1. Protest against alleged improprieties which are apparent on the face of a solicitation must be filed prior to bid opening.
2. An agency's technical evaluation of a bid and descriptive literature will not be disturbed where it is neither unreasonable, arbitrary, nor violative of procurement laws and regulations. Where a bid is subject to two interpretations, under one of which it is nonresponsive, the bid is considered nonresponsive and must be rejected.
3. A protester's allegations of bias are to be considered mere speculation where the protester does not meet burden of proof.

Particle Data, Inc., protests the award of a contract by the Department of Agriculture under solicitation No. 84-S-ARS-82 for a blood cell counter, Coulter Model ZM/C 1000 Accu System or equal, to Curtin Matheson Scientific, Inc. The Department of Agriculture states that Particle Data's bid was rejected because it did not meet the technical specifications required in the IFB.

The protest is dismissed in part and denied in part.

Particle Data submitted the lowest bid but it was rejected because the accompanying descriptive literature did not show that its product met the salient characteristics listed in the invitation for bids (IFB). Particle Data contests the agency's position and maintains that its product was equal to or better than the Coulter model and that its bid and product clearly met the stated salient characteristics identified in the IFB. Particle Data's initial protest to the agency was rejected and, because of urgency, the agency refused to suspend performance of the contract while the protest was pending in our Office.

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Particle Data maintains that the solicitation was seriously lacking in its identification of essential specification details, that the solicitation included obscure specifications to establish a basis to reject its protest, that the technical evaluation of its bid was erroneous and, finally, that the contract should have been suspended during the pendency of the protest.

To the extent that Particle Data's protest is based upon alleged ambiguities or improprieties in the specifications, its protest is untimely. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1982), require that protests based upon alleged solicitation improprieties apparent prior to bid opening be filed prior to bid opening. Ferguson-Williams, Inc., B-208927, November 1, 1982, 82-2 CPD 394. Bids were opened on September 8, 1982, and Particle Data's protest to the agency was not made until September 22, 1982.

The agency rejected Particle Data's bid because it allegedly did not demonstrate that its product could meet six salient characteristic requirements identified in the IFB. Specifically, it rejected Particle Data's product because it:

1. did not have a built-in timer (service requirement No. 2),
2. was limited to 128 channels and unable to expand to an effective resolution of 1,000 channels (service requirement No. 6),
3. was not shown able to display cell size in microns diameter and cubic microns at every threshold setting (specification No. 2),
4. did not have a timing mode of operation (specification No. 3),
5. did not provide constant current to the aperture tube despite changes in conductivity of the electrolyte (specification No. 4), and
6. did not offer automatic calibration constants for each aperture (specification No. 7).

Particle Data contests each alleged deviation from the salient characteristic requirements. Concerning whether its product has a built-in timer and timing mode of operation, Particle Data refers to its brochure, submitted originally to the agency, and states that the "STATUS" section of the brochure clearly indicates that its product does have a built-in timer and timing mode of operation. The "STATUS" section describes the keyboard and keys of its product and how each key functions. The section lists a "Metering Time" key and adds in a footnote that wrong metering times are detected automatically. Particle Data concludes from this evidence that its product has a built-in timer and timing mode of operation and that this was clearly indicated to the agency in the brochure.

The agency states that the information supplied by Particle Data did not clearly indicate that its product met the timing specifications. Particle Data responds that the "Metering Time" key "speaks for itself" on the timing specifications. Despite its contentions, reference to the "Metering Time" key alone does not unambiguously answer the timer and timing mode questions. It would be just as reasonable to conclude that its product lacked these features, as the agency did.

Secondly, it is not clear from its literature whether Particle Data can meet the specification requiring that the "Counter must automatically display cell size in microns diameter and in cubic microns at every threshold setting." To indicate compliance, Particle Data refers to the picture of its product submitted with its literature and to the "Operate" section of its brochure. Particle Data does not specifically state what in the picture or brochure indicates compliance; however, reference to both shows nothing that indicates that its product can automatically display cell size in microns at every threshold setting. Furthermore, Particle Data's blanket statement of compliance is not sufficient to remove any ambiguity or to make the bid responsive. Illinois Chemical Corporation, B-205119, February 9, 1982, 82-1 CPD 119. See Sutron Corporation, B-205082, January 29, 1982, 82-1 CPD 69.

The responsiveness of an "equal" bid to a brand name or equal procurement depends upon the completeness and sufficiency of the descriptive material submitted with the bid, previously submitted information, or information otherwise reasonably available to the contracting agency.

Environmental Conditioners, Inc., B-188633, August 31, 1977, 77-2 CPD 166. Because the adequacy of the descriptive material and the equality of the product it describes are technical evaluations for the judgment of the contracting agency, we have deferred to the agency's determination unless it is clear from the record that the descriptive material is ambiguous or evidences nonconformity with the salient characteristics. Bell & Howell Company, Datatape Division, B-204791, March 9, 1982, 82-1 CPD 219.

Despite its argument to the contrary, Particle Data's literature is susceptible to two different and conflicting interpretations. We have held that where a bid is subject to two interpretations, under one of which it is nonresponsive, the bid is considered nonresponsive and must be rejected. Illinois Chemical Corporation, supra.

The "brand name or equal" section of the IFB clearly puts the burden on the bidder to furnish the necessary information which will allow the purchasing activity to "determine whether the product offered meets the salient characteristics requirement of the invitation for bids." It cautions bidders that the "purchasing activity is not responsible for locating or securing any information which is not identified in the bid and reasonably available." See Illinois Chemical Corporation, supra. As stated above, the agency's interpretation of the bid was reasonable because the technical information submitted by the Particle Data was no better than ambiguous and could reasonably lead to a determination of nonresponsiveness. Particle Data clearly did not meet its burden of proof.

Finally, Particle Data implies that rejection of its bid was based upon bias. It states that obscure specifications were included in this solicitation to establish a basis upon which its bid could be rejected. Particle Data has not submitted any proof regarding this contention. We have held that the burden of proof to support allegations of bias is on the protester and, where it is not met, the protester's allegations are to be considered as mere speculation. Crystal Industries, Inc., B-205710, July 27, 1982, 82-2 CPD 82. In the absence of any supporting evidence, Particle Data's allegation of bias is nothing more than speculation.

Finally, in view of the above, Particle Data was not prejudiced by the failure of Agriculture to suspend performance of the contract. In any event, we note that there is no requirement that contract performance be suspended following a protest.

We dismiss the protest in part and deny it in part.

for Milton J. Fowler
Comptroller General
of the United States