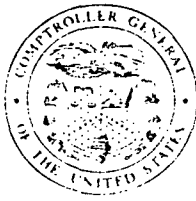


DECISION



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

40939

95251

FILE: B-179144

DATE: July 16, 1974

MATTER OF: Particle Data, Inc.

- DIGEST:
1. Since invitation specifications did not include usage requirement, bid of low bidder should not have been rejected for failure to meet usage requirement of contracting activity, invitation should have been canceled with subsequent readvertisement under revised specifications. See 50 Comp. Gen. 50 (1970).
 2. Although under ASPR 1-705.4(c) contracting officer has discretion to submit to SBA his determination of bidder's lack of tenacity and perseverance where procurement is in excess of \$2,500 but not more than \$10,000, since contracting officer did not rely on \$6,000 amount of procurement in not sending determination to SBA, but relied instead entirely upon bidder's lack of tenacity and perseverance, he was remiss in not sending determination to SBA as required by ASPR 1-705.4(c)(vi).
 3. Fact that bidder was dilatory in furnishing service it was not obligated to perform under prior contracts and that it failed to provide instrument for testing for proposed purchase by Government agency should have no bearing on bidder's tenacity and perseverance in determination of bidder's responsibility, since tenacity and perseverance is determined from record of contract performance and failures to provide timely service and sample were not violations of contract obligations; further, immediate procurement has no provision for servicing.

Although we do not recommend that the award made under invitation for bids No. DADA15-73-B-0111, issued by the Walter Reed Army Medical Center, Washington, D. C., be disturbed inasmuch as the contract has been completed, we are bringing to the attention of the Department of the Army the deficiencies in the procurement as noted below.

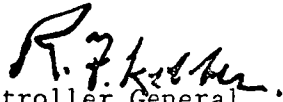
Although Particle Data submitted the low bid on the item procured, an electronic particle counter, award was made to Coulter Electronics, Inc. (Coulter), the only other bidder, because of the contracting officer's determination that Particle Data was a nonresponsible bidder. The determination of nonresponsibility was based upon conversations with various personnel at different hospitals throughout the United States who were familiar with the performance of the Particle Data counter. From these conversations, the contracting officer concluded that while the Particle Data counter apparently functioned well when used for research or for a relatively small number of counts a day, numerous difficulties were experienced with that counter when it was subjected to greater workloads. In the latter instances, those persons contacted expressed dissatisfaction with the Particle Data instrument.

Because the Medical Center's daily envisioned workload (approximately 100-150 counts) was not small, the contracting officer concluded that it would be false economy and not in the best interest of the Government to accept the low bid. It was further noted that although Particle Data was supposed to submit a counter to the Department of the Navy, Bureau of Medicine and Surgery, for a user test under a proposed purchase by the Corpus Christi Naval Air Station Hospital, this testing had not begun because Particle Data was dilatory in providing the Bureau with a counter. Finally, the contracting officer also found that in some instances Particle Data had been slow in servicing its customers' counters. Because of the delay in furnishing the test model and servicing the counters, the contracting officer found Particle Data to be additionally nonresponsible due to lack of tenacity and perseverance. Consequently, the contracting officer concluded that, even though Particle Data had represented itself to be small business, the issue of responsibility did not have to be submitted to the Small Business Administration (SBA).

First, we note that the invitation contained no usage requirements. Yet the bid, which took no exception to the invitation specifications, was rejected largely because the evidence obtained from other hospitals did not establish that the Particle Data counter would be satisfactory for the heavy duty clinical purpose contemplated by the purchasing activity. Since the invitation did not provide for heavy duty performance, it was improper to determine that the bidder was not responsible because its equipment may have been incapable of that kind of performance. The test of responsibility should measure whether the bidder is capable of providing the equipment required by the invitation and not on the basis of some unstated requirement. If the specifications as written failed to express the minimum needs of the Government, then the proper course of action would have been cancellation of the invitation and subsequent readvertisement under revised specifications rather than an award to Coulter. See 50 Comp. Gen. 50 (1970).

Secondly, we question the finding that Particle Data was lacking in tenacity and perseverance. There is nothing in the record indicating that Particle Data was contractually obligated to the various users of its counters to supply service for the counters. Therefore, the fact that Particle Data was not diligent in supplying service is irrelevant. Moreover, there is no indication that Particle Data did not perform its contracts for furnishing counters to the users. Whatever problem may have been encountered on servicing, there is no showing that any problems were encountered in connection with contract performance. Since the immediate procurement was for a counter, with no provision for servicing, any lack of diligence in the latter regard should have no bearing on the matter. Moreover, the fact that Particle Data may have failed to provide an instrument for testing in connection with a proposed purchase by the Navy should have no bearing on tenacity and perseverance. In that connection, ASPR 1-903.1(iii) indicates that the "tenacity and perseverance to do an acceptable job" is determined from the record of contract performance. Particle Data was not violating any contract performance requirement in not timely furnishing a sample for testing to obtain an award.

Further, when the determination was made that Particle Data was nonresponsible for a lack of tenacity and perseverance, the contracting officer was required by paragraph 1-705.4(c)(vi) of ASPR to submit the documentation supporting the determination to SBA to provide SBA with an opportunity to appeal the decision to the head of the procuring activity. From the administrative report, it does not appear that the documentation was sent to SBA. We do note that ASPR 1-705.4(c) provides an exception for referrals to SBA in that it makes referral discretionary with the contracting officer for procurements exceeding \$2,500 and up to \$10,000. In this case, both bids were under \$6,000. However, the contracting officer did not rely upon the amount of the procurement in not submitting the matter to SBA, but rather that Particle Data lacked tenacity and perseverance. Therefore, it would appear that the contracting officer was remiss in not submitting the matter to SBA.


Deputy Comptroller General
of the United States