



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Kirti International

File: B-407612

Date: January 16, 2013

Dharmesh Patel, for the protester.
Gary M. Saladino, Esq., Department of the Navy, for the agency.
Frank Maguire, Esq., and David A. Ashen, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protester's proposal was reasonably found technically unacceptable where solicitation required compliance with specific industry standard but proposal repeatedly referred to other standards, thereby creating ambiguity regarding protester's intentions and introducing uncertainty regarding protester's commitment to perform in accordance with the terms of the solicitation.

DECISION

Kirti International, of Galveston, Texas, protests the Department of the Navy's award of a contract to Fendercare Marine, Ltd., of the United Kingdom, under request for proposals (RFP) No. N65540-12-R-0011, for maritime fenders. The protester asserts that the agency unreasonably found its proposal to be technically unacceptable.

We deny the protest.

BACKGROUND

The solicitation statement of work (SOW) established requirements for 3.3 and 4.5 meter hydro-pneumatic submarine fenders (as well as storage and installation kits) to be used for the protection of vessels and piers from damage when vessels are moored either ship-to-ship or at piers or wharves. Award was to be made to the responsible offeror submitting the lowest-priced, technically acceptable offer. Technical acceptability was to be determined based on evaluation in four areas: corporate experience, capabilities/personnel, ISO (International Organization for Standardization) 17357: 2002(E) certification, and past performance. RFP at 70.

To be determined technically acceptable, an offeror had to be technically acceptable in each of the four areas. Id. The Navy advised that the total dollar value of the procurement is \$29,748,000. Agency Report (AR) at 2.

Pertinent here, the RFP set forth several specific requirements for compliance with ISO 17357: 2002(E), which establishes performance, material and dimensional requirements for high pressure floating rubber fenders, as well as testing and inspection procedures. RFP at 16; AR at 4. For example, the solicitation provided as follows:

Each fender must be manufactured in accordance with the requirements of ISO 17357: 2002(E) [with certain specified exceptions].

* * * * *

Hydro-pneumatic fenders and rubber materials to be provided for this solicitation shall successfully meet ISO 17357: 2002(E), Clause 9 requirements.

* * * * *

The offeror shall provide proof that all Hydro-Pneumatic fenders previously manufactured by the offeror and those to be manufactured by the offeror for this Solicitation are in accordance with ISO 17357: 2002(E) certification.

RFP at 16, 71. Further, the RFP required that offerors submit technical records and testing reports demonstrating compliance with various technical standards set forth in ISO 17357: 2002(E). RFP at 72-73.

RFP amendment No. 3, setting forth offeror questions and agency answers (Q&A), further emphasized the need for the offeror to demonstrate compliance with ISO 17357: 2002(E). For example, in response to a question concerning the testing of fenders, the agency responded as follows:

All testing cited as such experience must have been accomplished per ISO 17357. The requirement for documentation showing a contractor that has manufactured and tested at least 30 hydro-pneumatic fenders of the sizes required by the Statement of Work demonstrates a strong track record of such experience per ISO 17357. ISO 17357 includes many different sizes. The Government requests the contractor to specifically identify in their proposal how many hydro-pneumatic fenders of the sizes required in this solicitation have been manufactured and tested per ISO 17357. The Government requires

all hydro-pneumatic fenders delivered to be manufactured and tested per ISO 17357.

Answer to Question No. 1.

Three offerors, including Kirti, submitted proposals. While Kirti's proposal was found to be acceptable with regard to corporate experience, capabilities/personnel, and past performance, the proposal was determined to be unacceptable with regard to the requirement for ISO 17357: 2002(E) compliance. Business Clearance Memorandum (BCM) at 10-13. Specifically, the evaluators identified six areas in which Kirti did not demonstrate compliance with ISO 17357: 2002(E). Id. In this regard, the evaluators noted that Kirti's proposal included three certificates, "relevant to design, development, manufacture, and installation of rubber engineering products for marine projects," which were for compliance with standards other than ISO 17357: 2002(E). Id. at 10. The first, AR exh. 15, was a certificate confirming that Kirti's management system met the requirements of ISO 14001: 2004. The second, AR exh.16, was a certificate that Kirti's management system met the requirements of BS OHSAS [British Standard Occupational Health and Safety Assessment Series] 19001: 2007. The third, AR exh.17, was a certificate that Kirti's management system met the requirements of ISO 9001: 2008. In addition, the evaluators noted that Kirti's proposal, in the section entitled, "General Technical specification of 'DIPTI'¹ Hydro Pneumatic Fender," included the following statements:

A. All the Fenders will be manufactured as per ISO 17357: 2000(E) / eqvt. ASTM [American Society for Testing and Materials] Standard.

B. The material of Hydro Pneumatic Fenders will be High Abrasion Resistance Rubber suitably reinforced by synthetic tyre cord as per the material Specification laid down in ISO 17357: 2002(E) / eqvt. ASTM standard.

BCM at 10 (emphasis added); see AR, exh. 12, at 1. The agency determined that Kirti's citation of standards other than the required ISO 17357: 2002(E), which the evaluators viewed as the "only appropriate Standard for production and testing of hydro-pneumatic fenders," rendered Kirti's proposal unacceptable. BCM at 10. Upon learning of the rejection of its proposal, and after being debriefed and filing an agency-level protest, Kirti filed this protest with our Office.

¹ The protester advises that "DIPTI" is the brand name of its products. Second Supp. Comments at ¶ 4.

DISCUSSION

Kirti asserts that it is “capable” of performing this work, since it is already “manufacturing similar fenders and supplying them to various navies throughout the world.” Protest at 1. Kirti further asserts that it had “confirmed everywhere in our technical offer that the fenders will be manufactured as per ISO 17357,” and asserts that the agency “is taking a partial view of our statement” and “misrepresenting the whole issue.” Id. The agency responds that Kirti received an overall rating of unacceptable because it failed to provide adequate proof of compliance with ISO 17357: 2000(E) as required by the RFP.

In reviewing a protest challenging an agency’s evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency’s discretion since the agency is responsible for defining its needs and the best method of accommodating them. Smiths Detection, Inc.; Am. Sci. and Eng’g, Inc., B-402168.4 et al., Feb. 9, 2011, 2011 CPD ¶ 39 at 6-7. Rather, we will review the record only to determine whether the agency’s evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3.

Here, we find that Kirti’s proposal, at best, was ambiguous with regard to Kirti’s intention to comply with clear requirements in the RFP regarding the applicability of ISO 17357: 2002(E). A proposal that contains an ambiguity as to whether the offeror will comply with a material requirement of the solicitation renders the proposal or quotation unacceptable. Solers, Inc., B-404032.3, B-404032.4, Apr. 6, 2011, 2011 CPD ¶ 83 at 7 n.6; Rel-Tek Sys. & Design, Inc., B-280463.3, Nov. 25, 1998, 99-1 CPD ¶ 2 at 3. In our view, the agency reasonably concluded here that Kirti’s repeated references in its proposal to standards other than ISO 17357, and Kirti’s use of a qualified designation, i.e., “ISO 17357: 2002(E) / eqvt. ASTM standard,” created ambiguity regarding Kirti’s intentions and introduced uncertainty regarding whether Kirti intended to perform in accordance with the terms of the RFP. For example, in referring to “ISO 17357: 2002(E) / eqvt. ASTM,” it was unclear whether Kirti was committing itself to perform in accordance with ISO 17357: 2002(E) or in accordance with what it viewed to be an equivalent ASTM (American Society for Testing and Materials) standard.

Further, Kirti’s statement that it is “capable,” Protest at 1, is not sufficient here, since it is not chiefly Kirti’s capabilities that are at issue, but rather its intentions regarding performance. Although Kirti does include in its proposal several generalized statements that it will comply with the requirements of ISO 17357: 2002(E), see, e.g., AR, exh. 12, at 1, those statements do not overcome the ambiguity created by its repeated references to other standards in its proposal.

The evaluators also determined that Kirti's proposal was unacceptable with regard to several testing requirements under the ISO 17357 factor. BCM at 10-13. In this regard, the RFP required that offerors "provide reports for previously manufactured submarine floating hydro-pneumatic rubber fenders for the size submarine hydro-pneumatic rubber fender required by this solicitation," documenting parallel compression, angular compression, durability, and compression recovery tests. RFP at 72, Section L, § 4, ISO 17357 Certification, ¶ (e). In its debriefing, Kirti was advised that it failed to provide such reports for the 3.3m D x 10.6m L hydro-pneumatic fender, as required by this provision. AR, exh. 7, Debriefing (Point No. 4); see also BCM at 11, ¶ 5. While Kirti responds that it has an order "for 20 Nos. of 3.3 x 10.6 mtr long Hydro – Pneumatic Fender from Indian Navy," Protest at 5 (Point No. 4), this refers to a purchase order, not a testing report, and therefore does not show compliance with the solicitation requirement in this regard.²

Similarly, another section of the RFP required offerors to provide reports of tests and inspections per ISO 17357: 2002(E), Clause 9, for previously-manufactured submarine floating hydro-pneumatic rubber fenders, to document material tests of the outer and inner rubber, as well as other hydro-pneumatic fender tests. RFP at 72, Section L, § 4, ISO 17357 Certification, ¶ (f). Kirti was advised in its debriefing that it failed to provide such reports for all size fenders, as required by this provision. Debriefing (Point No. 5); see BCM at 11, ¶ 3, 6. In its protest, Kirti concedes that it had "not submitted the [required] reports for 3.3 x 10.6 mtr long" fenders, but asserts that, "in any Technical compliance all over the world it is understood that any company which satisfied the norms for a given size or higher is considered capable enough for the smaller sizes." Protest at 5. Not only does Kirti fail to submit any evidence in support of this claim but, more importantly, the RFP here specifically required the report Kirti concedes it did not supply. See BCM at 11.

Accordingly, we conclude that the agency reasonably determined Kirti to be unacceptable with regard to the requirements for ISO 17357: 2002(E) compliance. Such clearly stated solicitation requirements are considered material to the needs of

² Kirti, in its comments on the agency report, appears to assert that the requirements of ¶ (e) are irrelevant. This assertion, however, amounts to an untimely challenge to the terms of the solicitation, see 4 C.F.R. § 21.2(a)(1), as well as an untimely piecemeal presentation of protest arguments. See CapRock Gov't Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 24 (Bid Protest Regulations do not contemplate piecemeal presentation or development of protest issues through later submissions citing examples or providing alternate or more specific legal arguments missing from earlier general allegations of impropriety).

the government, and a proposal that fails to conform to such material terms is technically unacceptable and may not form the basis for award. Outdoor Venture Corp., B-288894.2, Dec. 19, 2002, 2001 CPD ¶ 13 at 2-3.

The protest is denied.

Susan A. Poling
General Counsel