

K.6 also discusses illustrations, drawings, and other information the offeror must provide in its proposal so that the contracting officer can properly determine the equality of the substitute product:

The evaluation of proposals and the determination as to equality of the product offered will be based on information furnished by the offeror or identified in the proposal, as well as other information reasonably available to the purchasing activity. The purchasing activity is not responsible for locating or obtaining any information not identified in the proposal and reasonably available to the purchasing activity.

The "Roof Replacement Qualifications" section of the Technical Specifications lists two further requirements:

1. Contractor must be licensed by the manufacturer for a minimum of two years.
2. The Contractor must submit a signed letter from the manufacturer certifying that a warranty was issued for eight roof projects.

TLT's proposal named a roofing material made by Goodyear, a manufacturer other than those specified in the solicitation, and the proposal was not accompanied by nor did TLT otherwise provide the supporting information required by K.6. Additionally, TLT submitted no information to indicate it met the requirements of the Roof Replacement Qualifications section of the Technical Specifications.^{1/}

The contracting officer determined that TLT's proposal, although lower in price than the other proposals received, did not meet all requirements of the solicitation. He informed TLT of his determination by letter dated September 11 in which he pointed out TLT's offering of a non-approved substitute roof and the absence of the two Roof Replacement Qualifications requirements noted above. The contract was awarded to J.D. Rivet and Co., Inc. ("Rivet") on the same date.^{1/} By letter dated September 20 TLT protested the contracting officer's decision.

TLT claims the Goodyear Hysunite roofing material it offered in its proposal is an acceptable equal product, thereby making its proposal one conforming to the terms of the solicitation. TLT argues that Special Clause G.6, "Materials And Workmanship" (Clause 11-5) (June 1988), of the solicitation allows such product substitution. The protestor also contends that the contracting officer gave no reason for his rejection of its proposed roofing material, and did not allow it the opportunity to discuss roofing product requirements.

^{1/}On August 16 the contracting officer sent a letter to all offerors specifically requesting proof that the manufacturer of the roofing material they proposed installing had warranted at least eight projects installed by the particular contractor. TLT did not provide such proof.

^{2/}TLT wrote the contracting officer on September 13 offering to supply the brand-name roofing material specified in the solicitation for the same total price submitted in its proposal. However, TLT's offer came too late, since the contracting officer had already awarded the contract to Rivet.

On November 27, 1989, the contracting officer filed his statement in response to TLT's protest.^{1/} The contracting officer first argues that TLT's proposal was properly rejected as "nonresponsive," since TLT's offered Hysunite roofing product is not an approved equal under the solicitation. He also argues rejection was proper because TLT failed to demonstrate Goodyear had warranted eight TLT roof installations, and that TLT has not shown it is currently licensed by Goodyear to install the Hysunite material.

Rivet filed comments as an interested party, arguing that TLT's Hysunite roofing material is not an acceptable "or equal" product. Since Hysunite has only been on the market for a year and a half, Goodyear could not have licensed TLT as an installer for two years, as the solicitation requires. Rivet also agrees with the contracting officer that TLT has not shown the required eight warranted installations of the Hysunite material.^{4/}

Discussion

At the outset, we note that the contracting officer has used incorrect terminology in labelling TLT's proposal "nonresponsive." As the Postal Service Procurement Manual (PM) makes clear, all postal solicitations are now conducted on a negotiated basis; as such, proposals are evaluated to determine technical acceptability or unacceptability. See PM 4.1.4. "Responsiveness" and "nonresponsiveness," relevant to sealed-bid solicitations, are no longer proper terms to use in evaluating proposals under Postal Service procurements. See CFI, P.S. Protest No. 88-82, February 17, 1989.

However, despite the contracting officer's characterization, it is clear he found TLT's Hysunite roofing material did not meet the requirements of the solicitation, i.e., was technically unacceptable. This office will not substitute its judgment for that of the contracting officer or disturb his evaluation of an offer's technical acceptability unless it is shown to be arbitrary or in violation of procurement regulations. See Cohlmia Airline, Inc., P.S. Protest No. 87-41, October 30, 1987; H & B Telephone Systems, P.S. Protest No. 83-61, February 6, 1984. Our review of the contracting officer's acceptability/unacceptability determination only examines the contracting officer's evaluation to ensure it had a reasonable basis. Cohlmia, supra; Computer Systems & Resources, Inc., P.S. Protest No. 86-4, March 27, 1986.

^{3/}We note the contracting officer's report was filed several weeks beyond the Procurement Manual (PM) deadline.

See PM 4.5.7 e. Such delay severely undermines the quick resolution of bid protests.

^{4/}Niko Contracting Co. ("Niko"), like TLT a disappointed offeror, also filed comments to this protest. Niko notes its concern with the Postal Service's new procurement procedures that allow for negotiation with all offerors and require non-publication of offers. It believes the prior sealed-bid procedures were more effective and fair. Such arguments are beyond the scope of this protest and our protest procedures in general. See BWN Contracting Co., P.S. Protest Nos. 89-38, 89-50, & 89-57, August 31, 1989.

Part 2-01 of the solicitation's Technical Specifications required the roofing material to be J.P. Stevens' hypalon or an approved equal manufactured by Hartz-Mason & Burkeline; TLT's Goodyear Hysunite did not meet this requirement. Thus, the contracting officer's evaluation of TLT's proposed roofing as unacceptable had a reasonable basis and was not arbitrary.¹⁷ Furthermore, the contracting officer was under no obligation to conduct discussions with TLT concerning roofing requirements, since PM 4.1.5 f.2. requires discussions to be held only when "there is uncertainty as to the pricing or technical aspects of the most favorable initial proposal" Although TLT's price was the most favorable received, there was no uncertainty about its technical proposal: it did not offer roofing materials that met the specification requirements.

Part 2-01's "approved equal" language works similarly to supply procurements which restrict award to approved sources. Such source restrictions are permissible in certain situations:

As a general rule, contracting officials may restrict the award of contracts to approved sources where it is necessary to ensure the procurement of satisfactory end products provided that, if time permits, other offerors are given the opportunity to qualify as alternate sources.

Illinois Lock Company, P.S. Protest No. 89-35, September 26, 1989. See also Interstate Diesel Services, Inc., Comp. Gen. Dec. B-230107, May 20, 1988, 88-1 CPD & 480.¹⁷

Even if the Brand Name Or Equal provision of the solicitation, K.6, could be read to allow substitution of roofing materials other than those manufactured by J.P. Stevens or Hartz-Mason and Burkeline, TLT failed to submit the information required by Section K.6 to support its offer of an "equal" product. TLT failed to carry its burden under K.6 to demonstrate the Goodyear Hysunite roof was equal to those identified in the solicitation, and rejection of its offer for such failure alone would have been appropriate.

Had TLT offered a product meeting the requirements of the specifications, it still would have been rejected as nonresponsible. The roof warranty and installation license requirements of the Roof Replacement Qualifications section operate as definitive responsibility criteria: specific and objective standards established for measuring an

^{5/}To the extent that TLT protests the narrow scope of the solicitation's approved equal clause, that portion of the protest must be deemed untimely. Protests based upon apparent deficiencies in the terms of a solicitation must be received by the date set for receipt of proposals. PM 4.5.4 b. See Leder, Inc., P.S. Protest No. 88-62, October 25, 1988. Since TLT was aware of the approved equal requirements when it received the solicitation, any protest of those terms made after the time set for submission of offers is untimely. This timeliness requirement is jurisdictional and cannot be waived. Bessemer Products Corporation, P.S. Protest No. 86-05, March 26, 1986.

^{6/}As indicated in footnote 5, the propriety of the contracting officer so limiting the source is not before us.

offeror's ability to perform the contract. Elco Elevator Corporation, Comp. Gen. Dec. B-213519, B-213519.2, February 14, 1984, 84-1 CPD & 197. These criteria cannot be waived, since to do so would prejudice other offerors who had fashioned their proposals around the criteria. Compo Corporation, P.S. Protest No. 88-22, May 3, 1988. See also Gage Constructors, P.S. Protest No. 87-11, July 13, 1987; Abco Peerless Sprinkler Corp., P.S. Protest No. 84-50, August 24, 1984.

If a protestor alleges misapplication of definitive responsibility criteria, our review is limited to determining whether the contracting officer had before him information from which he reasonably could have determined that the criteria were or were not met.^{1/} Power Systems, Comp. Gen. Dec. B-210032, August 23, 1983, 83-2 CPD & 232; accord Elco Elevator Corporation, supra. Here, the failure of TLT to meet the license and warranty requirements justified a determination that it was nonresponsible. That decision must be upheld.

The protest is denied.

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[checked against original JLS 5/25/93]

^{1/}To the extent TLT's protest challenges the necessity or reasonableness of the criteria, it must be dismissed as untimely raised since not made before the due date for return of proposals. See footnote 5, supra.