

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Unisys Corporation with respect to the procurement of an Inmate Telephone System conducted by the New York State Department of Corrections and Community Supervision.

**Determination
of Bid Protest**

SF-20170111

Contract Number – C161416

November 9, 2017

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Corrections and Community Supervision (DOCCS) for an inmate telephone system (ITS). We have determined the grounds advanced by Unisys Corporation (Unisys) are insufficient to merit overturning the contract award made by DOCCS and, therefore, we deny the Protest. As a result, we are today approving the DOCCS contract with Securus Technologies, Inc. (Securus) for the ITS.

BACKGROUND

Facts

On November 9, 2016, DOCCS issued Request For Proposals 2016-02 (RFP) for a comprehensive ITS serving all New York State correctional facilities that allows inmates to place pre-paid and collect calls to friends and family and also supports related administrative and investigatory activities (*see* RFP, at Section 1.3, pg. 2). The RFP provided for a contract award on a best value basis (*see* RFP, at Section 2.8, pg. 6). The technical and cost proposals were worth 95 points and 5 points, respectively (*see* RFP, at Section 9.4, pgs. 57-58).¹ In addition to the technical and cost proposals, offerors submitted a diversity practices questionnaire worth up to 2% of the technical score (*see* RFP, at Section 9.3.5, pg. 57).² Offerors were required to complete the Proposal Response Forms set forth in Appendix K to the RFP as part of their technical proposals (*see* RFP, at Section 9.3.3, pg. 56; Appendix K). Appendix K listed each section of the RFP (except Section 7 which related to rates, fees and costs that were to be addressed separately in the cost proposal) and instructed offerors to (i) acknowledge and agree to certain information in the RFP, (ii) provide supporting documentation, and/or (iii) address

¹ Prior to the issuance of the RFP, our Office acknowledged DOCCS' decision to weight the cost component at five percent of the total score due to rate limitations imposed by the Federal Communications Commission. While unusual, DOCCS concluded that the cost component would be substantially predetermined and, therefore, the technical component would be determinative of best value.

² Diversity practices are defined as the contractor's past, present, and prospective practices and policies with respect to: (i) utilizing certified minority or women owned business enterprises (MWBES); (ii) entering into partnerships, joint ventures or similar arrangements with MWBES; and (iii) demonstrating the contractor's commitment to a policy of diversity practices related to MWBES (5 NYCRR § 140.1[o]). For information concerning the evaluation of diversity practices, see 5 NYCRR § 142.3.

specific matters in the narrative or attached documentation, as applicable (*see* RFP, at Appendix K). Appendix K also identified which technical criteria of the RFP would be scored (*Id.*). Offerors used the form attached to the RFP to prepare their cost proposals and included a narrative response describing their billing methodology, procedures and practices (*see* RFP, at Section 7.3, pg. 38; Appendix H). DOCCS received three proposals by the January 23, 2017 proposal due date.

DOCCS verified the submitted proposals met all mandatory requirements and then scored the technical proposals (*see* RFP, at Section 9.4.1, pg. 57). A team of five evaluators scored certain sections in Appendix K which DOCCS categorized as Business Operations Capabilities and Delivery of Services. A different team of three evaluators scored certain sections in Appendix K which DOCCS classified as Telecommunication Capabilities. Two other evaluators scored the diversity practices questionnaires. These three scores were combined to produce a single technical score for each offeror.

With respect to the cost proposals, DOCCS scored offerors' narrative responses related to billing using a predetermined rating scale (*see* RFP, at Section 9.4.3, pg. 58). DOCCS then compared the total account fees proposed by the offerors and awarded the highest possible score to the proposal offering the lowest total account fees while the other cost proposals received a proportionate score based on their relation to the proposal offering the lowest total account fees (*Id.*). In the same manner, DOCCS awarded the proposal offering the lowest cost per minute the highest score allocated to that criterion. DOCCS combined the narrative score and the scores for total account fees and cost per minute rate to produce a single cost score for each offeror (*see* RFP, at Section 9.4.3, pg. 58).

DOCCS determined the final composite score for each offeror by combining the final technical and cost scores (*see* RFP, at Section 9.4.4, pg. 58).³ By letter dated March 13, 2017, Unisys was notified that DOCCS awarded the contract to Securus, the offeror receiving the highest final composite score.

DOCCS provided Unisys debriefings on March 23, 2017, and April 20, 2017. Unisys filed a protest with this Office by letter dated March 30, 2017 (Protest).⁴ Securus responded to the Protest by letter dated April 7, 2017 (Securus Answer) and DOCCS responded to the Protest by letter dated June 28, 2017 (DOCCS Answer). Unisys filed a reply to the Securus Answer and the DOCCS Answer by letter dated July 7, 2017 (Reply).

Comptroller's Authority and Procedures

³ Offerors were required to provide an onsite or real-time demonstration prior to DOCCS finalizing the scoring of proposals; however, such demonstrations were not to be scored (*see* RFP, at Section 9.4.1, pg. 57). Our review of the procurement record confirms DOCCS evaluated the demonstrations on a pass/fail basis in accordance with the RFP.

⁴ Initial protests to this Office must be filed within 10 business days of receiving notice of the contract award which it seeks to challenge or, if a debriefing has been requested, within five business days of the debriefing, whichever is later (*see* 2 NYCRR § 24.4[b][1]). The first debriefing was held on March 23, 2017 and therefore the Protest was filed in a timely manner.

Under State Finance Law (SFL) § 112(2), with certain limited exceptions, before any contract made for or by a state agency, which exceeds fifty thousand dollars, becomes effective it must be approved by the Comptroller.

In carrying out the aforementioned responsibilities proscribed by SFL § 112, OSC has promulgated a Contract Award Protest Procedure that governs the process to be used when an interested party challenges a contract award by a State agency.⁵ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest process engaged in at the department level, the Protest is governed by section 24.4 of Title 2 of the Codes, Rules and Regulations of the State of New York.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOCCS with the DOCCS/Securus contract;
2. the correspondence between this Office and DOCCS arising out of our review of the DOCCS/Securus contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Unisys' Protest dated March 30, 2017;
 - b. Securus' Answer to the Protest dated April 7, 2017;
 - c. DOCCS' Answer to the Protest dated June 28, 2017; and
 - d. Unisys' Reply to Securus' Answer and DOCCS' Answer dated July 7, 2017.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL Article 11 which provides that contracts for services shall be awarded on the basis of "best value" to a responsive and responsible offerer.⁶ Best value is defined as "the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers."⁷ A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."⁸

ANALYSIS OF THE PROTEST

Protest to this Office

⁵ 2 NYCRR Part 24.

⁶ SFL § 163(10).

⁷ SFL § 163(1)(j).

⁸ SFL § 163(1)(d).

In its Protest, Unisys challenges the procurement conducted by DOCCS on the following grounds:

1. The RFP did not adequately inform offerors as to how DOCCS would evaluate and score the technical proposals.
2. DOCCS failed to analyze and evaluate the technical proposals consistent with the scoring methodology set forth in the RFP.
3. DOCCS failed to enforce the RFP's prohibition against a vendor submitting a proposal as the prime contractor and being named as a subcontractor on another offeror's proposal. Specifically, JLG Technologies (JLG), a Securus-owned company, may be named as a subcontractor in a proposal submitted by Century Link and ICS.
4. DOCCS failed to adequately scrutinize allegations against Securus concerning security incidents and erred in determining Securus to be responsible.
5. The first debriefing did not comply with the requirements of SFL § 163.

DOCCS' Response to the Protest

In its Answer, DOCCS contends the Protest should be rejected and the award upheld on the following grounds:

1. Appendix K to the RFP sufficiently set forth which sections of the RFP would be scored.
2. DOCCS properly evaluated the proposals.
3. The RFP prohibited Securus itself from being a subcontractor for another offeror and such prohibition was not intended to apply to subsidiaries of an offeror.
4. Securus disclosed security incidents as required by the RFP and DOCCS properly considered this information as part of its evaluation of Securus' proposal and its determination of vendor responsibility.
5. DOCCS addressed all of Unisys' concerns relating to the first debriefing in subsequent disclosures and a second debriefing.

Securus' Response to the Protest

In its Answer, Securus contends the Protest should be rejected and the award upheld on the following grounds:

1. Unisys' Protest is time-barred and therefore should be denied.⁹
2. The RFP disclosed to all offerors the general manner in which DOCCS would evaluate proposals and Unisys presents no evidence that DOCCS scored proposals other than objectively, comprehensively and uniformly, in compliance with New York State law. Moreover, Unisys waived its right to protest a lack of scoring criteria by failing to obtain clarification from DOCCS prior to submitting its proposal.
3. JLG, a company acquired by Securus, cannot be a subcontractor for CenturyLink/ICS because its agreement with ICS to provide JLG's software/products to CenturyLink terminated before the date proposals were due.

⁹ As previously determined, the Protest was timely and, thus, this issue has been resolved (*see* n 2, *supra*).

4. DOCCS properly determined Securus to be a responsible vendor and DOCCS' determination should be afforded great deference.

Unisys' Reply to the Answers

In its Reply, Unisys elaborates on the arguments contained in the Protest and further alleges that DOCCS improperly changed the evaluation criteria after the submission of proposals.

DISCUSSION

Evaluation and Scoring of the Technical Proposals

1. Disclosure of Evaluation Methodology in the RFP

Unisys asserts the evaluation methodology provided in the RFP lacked specificity and, as a result, failed to comply with New York State law (*see* Protest, at pg. 5). To support its claim, Unisys cites the absence of a rating scale, scoring tool and allocation of points and weight to each criterion being scored in the technical proposals (*Id.*). DOCCS states Appendix K was sufficient to inform offerors which sections of the RFP would be scored and argues, like Securus, that Unisys should have raised concerns with the scoring methodology prior to submitting a proposal (*see* DOCCS Answer, at pg. 2; Securus Answer, at pg. 4).¹⁰

SFL § 163(9)(b) provides that the “solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the *general manner* in which the evaluation and selection shall be conducted. Where appropriate, the solicitation shall identify the *relative importance and/or weight of cost and the overall technical criterion* to be considered by a state agency in its determination of best value” (emphasis added). Further, SFL § 163(7) provides “[w]here the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted.”

In this case, the RFP stated the relative weight of the technical proposal and the cost proposal in the overall scoring (*see* RFP, at Sections 9.4.2, 9.4.3, pgs. 57-58). Appendix K corresponded to each administrative and technical section of the RFP and identified which items needed to be addressed in the technical proposals and/or supporting documentation, and the RFP described the general manner in which the technical proposals would be scored (*see* RFP, at Section 9.4.2, pg. 57; Appendix K). Indeed, Unisys acknowledges “DOCCS did in fact identify in section 9.4.2 [of the RFP] that each requirement would be evaluated in three categories...and that Appendix K included which items would be scored” (*see* Reply, at pg. 3). Contrary to Unisys' assertions, further specifics regarding DOCCS evaluation method and selection process were not required to be disclosed in the RFP. Thus, we are satisfied that the RFP met the

¹⁰ Our Contract Award Protest Procedure does not preclude an offeror from raising concerns about the scoring methodology after an award is made and, therefore, we will address Unisys' concerns in the Determination.

requirements of SFL § 163(9)(b). With regard to the requirements of SFL § 163(7), a state agency is not required to disclose its detailed evaluation tool to offerors, but it must develop such a tool prior to the receipt of initial bids. In this case, the procurement record contained an evaluation tool created by DOCCS prior to receipt of the initial proposals that details the evaluation criteria, the points and weights assigned to such criteria and the manner in which DOCCS was to conduct the evaluation process and selection of awardee.

2. DOCCS' Application of Evaluation Criteria to the Technical Proposals

Unisys “questions whether the [technical scoring] methodology set forth in the RFP was followed and applied during the evaluation process” (Reply, at pg. 2; *see also* Protest, at pgs. 4-6). For instance, Unisys alleges DOCCS improperly changed the evaluation process after bids were submitted by creating a new category of criteria to be scored (*see* Reply, at pg. 3). DOCCS avers “the proposal submitted by Unisys was evaluated properly by the reviewers” (DOCCS Answer, at pg. 3).

The RFP identifies three categories of evaluation criteria for the technical proposals, Delivery of Services, Telecommunication Capabilities and Business Operations Capabilities (*see* RFP, at Section 9.4.2, pg. 57). Unisys claims DOCCS added a fourth technical scoring category, “Business Capabilities _ Vendor Qualifications,” in the scoring responses DOCCS provided to Unisys at its debriefings, which represents an impermissible change to the scoring methodology (*see* Reply, at pg. 3). We reviewed correspondence DOCCS provided to Unisys as part of its debriefing in which DOCCS identified the technical classification for certain criteria to be scored pursuant to Section 6 of the RFP as “Business Capabilities _ Vendor Qualifications.” While such classification is not explicitly listed as a separate category in Section 9.4.2 of the RFP, Section 6 of the RFP sets forth the requirements for Vendor Qualifications to be included in the technical proposals (*see* RFP, at Section 6, pg. 34; *see also* Appendix K). Moreover, Appendix K recapitulates the technical criteria to be evaluated and includes all the requirements for RFP Section 6 - Vendor Qualifications.¹¹ The RFP issued on November 9, 2016, disclosed to offerors that these criteria would be scored, regardless of how they were categorized by DOCCS in the RFP. Our review of the procurement record confirms DOCCS scored the technical proposals according to the evaluation criteria set forth in Appendix K, as instructed. Thus, we find DOCCS did not add a new category of technical criteria after the submission of proposals and, further, DOCCS applied the predetermined evaluation criteria in accordance with the RFP.

3. RFP's Prohibition of Vendor as Prime Contractor and Subcontractor

Unisys alleges DOCCS waived a mandatory requirement during evaluation of the proposals (*see* Protest, at pgs. 6-7; Reply, at pgs. 2-3). Specifically, Unisys claims DOCCS allowed Securus to submit a proposal as a prime contractor while Securus, or JLG, a Securus-owned subsidiary, was named as a subcontractor in another offeror's proposal in direct contradiction to the RFP (*Id.*). DOCCS replies the restriction was clearly intended to prevent Securus itself, a prime offeror, from being a subcontractor on another proposal (*see* DOCCS

¹¹ As stated above, DOCCS designated one team of evaluators to score the Telecommunication Capabilities criteria while another team scored the other technical criteria. DOCCS' characterization of the evaluation criteria appears to be merely a matter of scoring logistics.

Answer, at pg. 2). Securus argues JLG could not be a subsidiary named in the other proposal because JLG was no longer partnering with that particular offeror at the time of the proposal due date (*see* Securus Answer, at pg. 6).

DOCCS notified offerors that it “will not entertain bids with a vendor as prime on one bid and a subcontractor to another bid. Additionally, each vendor may only be part of one submission” (Addendum II to RFP, at pg. 2). We find DOCCS interpretation of its own specification, as described above, to be reasonable. Moreover, our examination of the procurement record indicates no vendor is identified as a prime contractor and a subcontractor on multiple proposals. Furthermore, JLG was not named in any proposal. Thus, we conclude DOCCS did not waive the prohibition set forth in the RFP.

Vendor Responsibility

Unisys raises concerns regarding alleged data security breaches by Securus, and asserts DOCCS failed to independently determine Securus is a responsible vendor and instead relied solely on Securus’ explanation in its proposal (*see* Protest, at pg. 7-8; Reply, at pg. 4). In light of reports of these security incidents, Unisys believes Securus should have been “disqualified, or at least substantially downgraded” (*see* Reply, at pg. 5). DOCCS contends Securus complied with the RFP’s disclosure requirements and states “evaluators weighed the information they were provided [by Securus] and made their individual assessments” (DOCCS Answer, at pg. 3). Securus disputes Unisys’ allegation that Securus experienced a data or security breach and insists DOCCS’ determination warrants great deference (*see* Securus Answer, at pgs. 6-7).

SFL § 163(4)(d) provides that “service contracts shall be awarded on the basis of best value to a responsive and *responsible* offerer...” (emphasis added). Further, SFL § 163(9)(f) provides that “[p]rior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor” For purposes of SFL § 163, “responsible” means the financial ability, legal capacity, integrity, and past performance of a business entity (*see* SFL § 163[1][c]).

A review of the procurement record establishes that DOCCS conducted a vendor responsibility review of Securus and determined Securus to be a responsible offeror, able to successfully and securely perform the services under the contract. As part of our audit of the DOCCS/Securus contract, this Office also conducted an independent vendor responsibility review of Securus. As part of that review, this Office carefully examined the information provided in the procurement record, the Protest, the Reply and additional information provided by DOCCS in response to our questions regarding the alleged security breaches by Securus. Based on our review, we find no basis to upset DOCCS determination that Securus is a responsible vendor.

Unisys’ Debriefing

In the Protest, Unisys contends that its debriefing was defective because “the DOCCS personnel at the debriefing did not participate in the evaluations, were not knowledgeable about the technology, and personally did not evaluate any proposals” (Protest, at pg. 3). Unisys further

claims DOCCS failed to provide the scoring of its proposal and the qualitative and quantitative analysis used to evaluate the proposals (*Id.*). DOCCS states “all of the issues raised regarding the first debriefing were addressed in subsequent disclosures to Unisys as well as in a second debriefing conducted on April 20, 2017” (DOCCS Answer, at pg. 1).

SFL § 163(9)(c)(iv) sets forth the minimum information that must be included in a debriefing: “(A) the reasons that the proposal, bid or offer submitted by the unsuccessful offerer was not selected for award; (B) the qualitative and quantitative analysis employed by the agency in assessing the relative merits of the proposals, bids or offers; (C) the application of the selection criteria to the unsuccessful offerer’s proposal; and (D) when the debriefing is held after the final award, the reasons for the selection of the winning proposal, bid or offer. The debriefing shall also provide, to the extent practicable, general advice and guidance to the unsuccessful offerer concerning potential ways that their future proposals, bids or offers could be more responsive.” In addition, SFL § 163[9][c][iii] specifically requires that “[s]tate agency personnel participating in the debriefing discussion shall have been involved with and knowledgeable about the procurement and the evaluation and selection of the successful offerer or offerers.”

The procurement record submitted to this Office contained an agenda and summary of the March 23, 2017 debriefing prepared by DOCCS which indicates that the following topics were addressed: background for the ITS procurement and the impact of new technology on the current ITS; the key breakdown for technical and cost scoring; the strengths and weaknesses of Unisys’ technical proposal; and the purpose of the real-time demonstrations. After that debriefing, Unisys requested, and DOCCS provided, the average scores assigned to each section of Unisys’ technical proposal, the evaluation scoring scale and a breakdown of Unisys’ composite score. As to the personnel at the debriefing, while the DOCCS’ employee conducting the debriefing did not evaluate proposals, it appears that this individual possessed comprehensive knowledge regarding the procurement.¹² The procurement record also included Unisys’ questions after the first debriefing and DOCCS’ responses discussed at the second debriefing on April 20, 2017.¹³

Based on our review of the procurement record, we conclude that Unisys’ arguments based on the debriefings provided by DOCCS are without merit.

¹² By letter dated March 30, 2017, Velma Berry, DOCCS’ Contract Management Specialist 2, Contract Procurement Unit/Support Operations, who conducted the debriefing, advised Unisys that she was part of the committee that drafted the RFP, attended the meeting where evaluators were instructed on the evaluation process used in this procurement, and compiled the aggregated scores used to select the successful bidder. Unisys seems to suggest that only individuals actually evaluating proposals are considered “involved with” a procurement for purposes of complying with SFL §163(9)(c)(iii). We disagree with this limited interpretation and believe this requirement is satisfied by selecting an individual with comprehensive knowledge of the particular procurement.

¹³ We note SFL § 163(9)(c) also requires the debriefing to include the reasons why Securix’ proposal was selected; however, the Protest did not take issue with this particular requirement.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract award by DOCCS. As a result, the Protest is denied and we are today approving the DOCCS/Securus contract for an inmate telephone system.