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Decision

Matter of: Diebold, Inc.

File: B-404823

Date: June 2, 2011

Joseph J. Dyer, Esq., Joshua C. Drewitz, Esq., and Caroline A. Keller, Esq., Seyfarth Shaw LLP, for the protester.

Patricia S. Grady, Esq., Department of the Treasury, for the agency.

Nora K. Adkins, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where an agency made material modifications to the terms and conditions of a commercial item solicitation's clauses in making the award without requesting revised proposals from the other offerors.

DECISION

Diebold, Inc., of North Canton, Ohio, protests the award of a contract to ADT Security Services, Inc., of Alexandria, Virginia, by the Department of the Treasury, Office of the Comptroller of the Currency (OCC) under request for proposals (RFP) No. CC-11-HQ-R003 for interim security and compliance services in support of OCC's physical security program.

We sustain the protest.

On January 27, 2011, OCC issued the RFP under Federal Acquisition Regulation (FAR) part 12 commercial item procedures. The RFP contemplated the award of a 1-year fixed-price contract for the period of February 1, 2011 through January 31, 2012.¹ RFP at 1. The solicitation was provided via email and advised that award

¹ This RFP was issued after the cancellation of an earlier solicitation (RFP No. CC-10-HR-R-0060) for these security services. This cancellation occurred after Diebold was notified that it was the apparent successful offeror, and after ADT filed a protest. OCC cancelled the solicitation after deciding the solicitation did not accurately reflect OCC's needs. The current RFP was issued shortly thereafter to fulfill the interim requirement for these services.

would be made on a best value basis based upon two equally weighted evaluation factors—past performance and price. Agency Report (AR), Tab 1, Email to Offerors (Jan. 27, 2011), at 1. OCC received proposals from Diebold and ADT by the January 28 deadline. While Diebold offered a lower price, ADT's past performance was considered to be better than Diebold's, and OCC decided that ADT's proposal offered the best value. On February 11, OCC made award to ADT. After a debriefing, this protest followed.

Diebold's protest alleged that OCC unreasonably evaluated its past performance and failed to conduct a proper trade-off analysis between price and past performance in determining the best value. In a supplemental protest, Diebold argued that OCC made changes to the RFP after selecting ADT for award without permitting Diebold an opportunity to compete on the altered solicitation. We agree with Diebold that the agency made material modifications to the terms and conditions of the solicitation, without an amendment to the RFP, and that the agency's actions resulted in unequal treatment of the offerors. We sustain Diebold's protest on this basis.²

Here, the RFP incorporated by reference the standard commercial clauses in accordance with FAR subpart 12.3. RFP at 1. FAR subpart 12.3 requires that solicitations for commercial items include the provisions at FAR §§ 52.212-1 (Instructions to Offerors-Commercial Items), 52.212-3 (Offeror Representations and Certifications-Commercial Items), 52.212-4 (Contract Terms and Conditions-Commercial Items), and 52.212-5 (Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items).³ FAR § 12.301(b). Pertinent to this protest is FAR § 52.212-4, which contains various terms and conditions addressing various matters, including warranty and limitation of liability, that have been determined to be consistent with customary commercial practices. FAR §§ 52.212-4 (o), (p).

After OCC selected ADT for award, it sent a draft contract for ADT's review on February 2. The draft contract included numerous provisions, specifically those

² Because we sustain the protest based on the agency's failure to amend the RFP, we need not address the allegations raised by Diebold regarding its past performance evaluation or the agency's best-value trade-off. In implementing the corrective action of obtaining revised proposals we recommend below, the agency may want to review these allegations and conduct discussions if appropriate.

³ FAR subpart 12.3 also instructs that contracts for the acquisition of commercial items shall, to the maximum extent practicable, include (1) only those clauses required to implement provisions of law or executive orders applicable to the acquisition of commercial items or (2) determined to be consistent with customary commercial practice. FAR § 12.301(a).

included in section H, which had not previously been included in the solicitation.⁴ Supp. Contracting Officer's Statement at 4. As relevant here, section H of the draft contract included section H.7-Reimbursement of Travel Costs, section H.18-Standard Commercial Warranty, and section H.21-Harmless from Liability.

In response, ADT submitted an email requesting various changes to section H of the draft contract. ADT's email described these changes as necessary "to conform the contract to customary commercial practice in the security industry." AR, Tab 8, Email from ADT to OCC (Feb. 4, 2011), attach., at 1.

After a review, OCC decided to permit certain of ADT's requested modifications to the draft contract. Section H.21-Harmless from Liability was included in the draft contract and generally provides for the contractor to hold and save the government harmless from liability for suits or damages based on the contractor's negligent or wrongful actions. ADT requested and OCC agreed to a proviso that ADT's "hold and save harmless" obligation under this section did not "apply to suits or damages arising from or due to Detection Events which are defined for purposes of this provision as criminal break-ins, unauthorized intrusions, or the consequences therefrom, that Contractor's equipment and/or services are intended to avert, detect, prevent or record." AR, ADT Contract, at 44.

The agency also agreed to insert into Section H two new liability clauses. Section H.22-Safety Act Waiver waived claims against ADT arising from Qualified Anti-Terrorism Technologies (QATT) systems or services. Section H.23-Mutual Limitation of Liability provided that neither party would be liable to the other for any special, indirect, consequential or incidental damages arising out of any performance of the contract. Id. at 44-45.

As to the section H.18-Standard Commercial Warranty, the agency agreed to add a new section H.18.1-Equipment Warranty to permit ADT to include its standard commercial warranty. ADT Contract at 42-43.

The protester argues that the terms and conditions of the RFP were materially altered. In this regard, Diebold notes that the revision of clause H.21 further limited ADT's liability by adding language holding ADT harmless from any obligation to indemnify OCC of the consequences of detection events. Diebold further notes that the two newly added sections H.23 and H.22 further limited contractor liability. All of these revisions were not provided for in FAR § 52.212-4(p)-Limitation of Liability that was included in the initial RFP.

⁴ The section H-Special Requirements that were included in the draft contract provided to ADT, which were not in this RFP, included many of the same clauses found in the previously cancelled RFP's Section H-Special Requirements. AR, Tab 10, ADT Contract.

Diebold also references the addition of ADT's standard equipment warranty (section H.18.1) and claims that it excluded the solicitation's required warranties of merchantability and fitness found in RFP provision FAR § 52.212.4(o). Finally, Diebold notes that H.7-Travel Costs provided for the reimbursement of ADT's travel costs, which are unallowable in a fixed-price contract.⁵ Protester Comments at 15.

Diebold argues that because these changes to the terms and conditions of the contract were material, OCC was required to issue an amendment to the RFP to allow the offerors to compete on an equal basis. In response, the agency asserts that the changes to the terms and conditions included in ADT's contract from those included in the RFP were permissible. The agency argues that FAR part 12 gives contracting officers the discretion to tailor commercial items clauses and that the changes made were minor.

It is a fundamental principle of government procurement that competition must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals. Systems Mgmt., Inc.; Qualimetrics, Inc., B-287032.3, B-287032.4, Apr. 16, 2001, 2001 CPD ¶ 85 at 8. When, either before or after receipt of quotations, the government changes or relaxes its requirements, it must issue an amendment to notify all offerors of the changed requirements and give them an opportunity to respond. Id.; AVL Books.Com, Inc., B-295780, Mar. 28, 2005, 2005 CPD ¶ 46 at 2; see Cardkey Sys., B-220660, Feb. 11, 1986, 86-1 CPD ¶ 154 at 2 ("If it becomes apparent that the contract being negotiated differs significantly from the requirements stated in the RFP, the contracting agency must amend the RFP or, at the least, advise offerors of the change during discussions and seek new offers.") We will sustain a protest where an agency, without issuing a written amendment, materially alters the solicitation's requirements to the protester's prejudice. See Systems Mgmt., Inc.; Qualimetrics, Inc.; Qualimetrics, Inc., supra at 8.

We agree with OCC that contracting officers are permitted under FAR part 12 to tailor the provisions of FAR § 52.212-4 to the market practices and conditions for each acquisition. FAR § 12.302(a). However, this section makes clear that any tailoring to the provisions and clauses can only be done "after conducting appropriate market research," id., and "shall be by addenda to the solicitation and contract." FAR § 12.302(d). Consequently, under commercial item acquisitions, a contracting officer exercising the authority to change the terms and conditions must do so in a manner that gives all offerors an equal opportunity to compete by either publishing the tailored clauses in the initial solicitation's addenda or by providing an

⁵ The agency states that the inclusion of section H-7-Travel Costs in the draft contract was in error. Supp. Contracting Officer's Statement at 4.

amendment to the solicitation to include the revised terms and conditions. See Aalco Forwarding, Inc., et al., B-277241 et al., Oct. 21, 1997, 97-2 CPD ¶ 110 at 18.

We find that the agency altered materially the terms and conditions of the solicitation when it modified the draft contract at ADT's request. For example, the modified section H.21 eliminated ADT's obligation to indemnify the government for suits or damages based upon "detection events." ADT's email to the agency during the negotiations of the contract terms and conditions demonstrates how the modified section H.21 limited ADT's liability/risk beyond that provided for in the RFP:

[REDACTED]

AR, Tab 8, ADT Email to OCC (Feb. 10, 2011). Thus, the record shows that the changed language of section H.21 was a material change to the RFP because it greatly reduced the liability of ADT by absolving it from the results of "detection events."

Additionally, section H.23 materially reduced ADT's liability compared to that set forth in solicitation provision FAR § 52.212-4(p) by allowing ADT to limit its liability with respect to consequential damages. The solicitation's limitation of liability provision stated, "Except as otherwise provided by an express warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items." FAR § 52.212-4(p). Again, ADT's email to the agency during negotiations of the contract terms and conditions illustrates why this change is material:

[REDACTED]

AR, Tab 8, ADT Email to OCC (Feb. 10, 2011). Thus, it is apparent that the additional contract provision (section H.23) proposed by ADT and accepted by OCC granted ADT a broader limitation of liability for consequential damages than established in the solicitation, and thus was a material change to the RFP.

Accordingly, as illustrated by the foregoing examples, we find that the agency was required to issue an amendment to the solicitation upon the addition and acceptance of these material changes. AVL Books.Com, Inc., supra at 2. Because the agency did not issue the required amendment permitting all offerors to respond on the altered requirements, we find the agency's actions resulted in unequal treatment of Diebold.

We further find that Diebold was prejudiced by the agency's actions. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3. Here, Diebold asserts that the changes in liability could significantly impact an offeror's

price. Protester's Submission (Mar. 14, 2011) at 4. Given that there were only two evaluation factors that were of equal importance (price and past performance), and that Diebold was the low offeror by over [REDACTED] percent, we do not know, and we will not speculate, how this matter would have affected the source selection decision. In such circumstances, we resolve any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See Kellogg, Brown & Root Services, Inc.-Recon., B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84 at 5. Accordingly we conclude that Diebold has established the requisite competitive prejudice to prevail in a bid protest.

We recommend that OCC amend the solicitation to reflect the changes made to the terms and conditions of the RFP, request and evaluate proposal revisions, and make a new award determination; if that decision results in the selection of Diebold, we also recommend that the OCC terminate for convenience its contract with ADT and make an award to Diebold. We further recommend that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2011). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receiving this decision.

The protest is sustained.

Lynn H. Gibson
General Counsel