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Decision

Matter of: Verizon Wireless

File: B-406854; B-406854.2

Date: September 17, 2012

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John E. Cornell, Esq., General Services Administration, for the agency.
Jonathan L. Kang, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the terms of a solicitation is timely where the solicitation expressly permitted offerors to take exception to its terms, the agency did not advise the protester that it could not take exception to certain terms until after the receipt of initial quotations, and the protester challenged the disputed terms after the agency rejected these exceptions and prior to the subsequent time for the receipt of revised quotations.
 2. Protest challenging the terms of a solicitation for commercial products and services contemplating the establishment of blanket purchase agreements with holders of Federal Supply Schedule contracts is sustained where the record does not show that the agency performed adequate market research to demonstrate that the terms were consistent with customary commercial practice, as required by the rules applicable to commercial item procurements set forth in the Federal Acquisition Regulation at Part 12.
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DECISION

Verizon Wireless,¹ of Laurel, Maryland, protests the terms of request for quotations (RFQ) No. QTA-0-12-PS-B-0006, which was issued by the General Services Administration (GSA). The protester argues that the solicitation, which was for

¹ Verizon states that the protest is filed by Cellco Partnership doing business as Verizon Wireless.

commercial wireless telecommunications products and services offered under vendors' Federal Supply Schedule (FSS) contracts, contains terms that are inconsistent with customary commercial practice and unduly restrictive of competition.

We sustain the protest.

BACKGROUND

The RFQ seeks quotations to provide a vehicle for the centralized government-wide procurement of wireless devices and services. GSA describes the requirements of the solicitation as the Wireless Services and Devices Federal Strategic Sourcing Initiative (wireless FSSI). The RFQ was issued on November 15, 2011, and anticipates the establishment of multiple blanket purchase agreements (BPA) for government-wide procurement of wireless telecommunications services and devices, for a 5-year period. The solicitation stated that the estimated business volume for all orders under the BPAs for the 5-year term is \$1.6 billion. All entities authorized to use the FSS will be eligible to place orders under the BPA. The competition was limited to vendors who have contracts under GSA FSS contract No. 70, special item number 132-53.

As relevant here, the RFQ advised vendors they could take exception to the solicitation requirements, as follows:

4.7 Notice of Exceptions to RFQ Requirements

In compliance with the requirement of the RFQ, if no exceptions are taken, the Offerors shall make an affirmative statement in the letter of transmittal of their Quotation indicating that no exceptions to the RFQ have been taken. If the Offeror takes exception to any of the terms, conditions, pricing formats, clauses, etc., each exception shall be identified in the letter of transmittal and cross-referenced to the specific section in the RFQ.

All deviations, exceptions, or conditional assumptions taken with respect to the technical proposal instructions or requirements must be supported by sufficient amplification/rationale to justify further evaluation.

RFQ amend. 0004 at 55-56.

Verizon submitted a quotation by the closing date of January 31, 2012. The protester's quotation took exception to several solicitation terms, including, as relevant here, the following: (1) a price maintenance clause, (2) a sales leakage clause, and (3) a deactivation of international roaming charges clause. See Agency

Report (AR), Tab 31, Agency Request for Response (May 15, 2012), at 2, 4, 6. The agency evaluated Verizon's quotation, and identified areas that required revision or clarification. Contracting Officer's (CO) Statement ¶¶ 20. On May 15, the agency sent Verizon a letter requesting that it address questions concerning non-price and price issues. AR, Tab 31, Agency Request for Response (May 15, 2012). The letter advised that the protester's exception to the three clauses cited above was unacceptable. The letter further advised that the responses should be provided by May 29, and that if the vendor desired to submit a revised quotation, an opportunity would be provided at a later date. Id. at 14. The date for submission of responses was later extended to June 8.

On June 7, Verizon filed its initial protest with our Office, arguing that GSA had unreasonably refused to permit it to take exception to the three terms cited above. On June 8, the protester provided its response to GSA's May 15 letter, concerning its quotation.

On June 22, GSA requested that our Office dismiss the protest, arguing that it was an untimely challenge to the terms of the solicitation. For the reasons addressed in detail below, we denied the request on June 25. GSA provided its report on the protest on July 10.

On July 20, GSA sent a letter to Verizon addressing the protester's June 8 response, advising the protester for the first time that its proposed approach to "pooling" of unused minutes was not acceptable. Supp. Protest, attach. 1, Letter from GSA to Verizon (July 20, 2012), at 6-7. Also on July 20, the agency issued RFQ amendment No. 005, which established a deadline of August 10 for the submission of revised quotations. On August 9, Verizon filed a supplemental protest challenging the pooling clause.

On August 17, the agency submitted its report concerning the August 9 supplemental protest, arguing only that the protest was untimely. On August 27, our Office requested that GSA provide a response that addressed the merits of the supplemental protest argument, noting that the agency's August 17 filing did not do so. On August 29, GSA reiterated its position that the August 9 supplemental protest was untimely, and declined to address the merits of the protester's arguments. Agency Response to GAO Request (Aug. 29, 2012) at 1.

TIMELINESS

GSA contends that this protest is untimely filed because it challenges the terms and conditions of the solicitation, but was not filed prior to the initial time for receipt of quotations. We disagree.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based upon alleged improprieties in

a solicitation that are apparent prior to the closing time for receipt of proposals must be filed before that time. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2012). This rule includes challenges to alleged improprieties that do not exist in the initial solicitation, but which are subsequently incorporated into that solicitation; in such cases, the terms of the solicitation must be challenged not later than the next closing time for receipt of proposals following the incorporation. Id.; see Innovative Management, Inc., B-291375, Nov. 20, 2002, 2003 CPD ¶ 11 at 4. In this respect, our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

Here, the RFQ advised vendors they could include “deviations, exceptions, or conditional assumptions” to solicitation terms, provided they were supported by sufficient rationales. RFQ amend. 0004 at 55-56. Nothing in the RFQ advised vendors that they could not take exception to particular solicitation terms.

As discussed above, Verizon’s initial quotation took exception to a number of terms, including the clauses challenged here. On May 15, GSA advised that the vendor could not take exception to the price maintenance, sales leakage, and deactivation of international roaming clauses, and requested that Verizon respond by June 8. On June 7, Verizon filed its initial protest. Similarly, GSA advised Verizon on July 20 that it could not take exception to the pooling clause, and advised that its revised quotation was due on August 10. On August 9, Verizon filed its supplemental protest raising the issue.

Because the RFQ expressly permitted vendors to take exception to solicitation terms, and because GSA did not advise Verizon that it could not take exception to the disputed clauses until after the company submitted its initial quotation, we conclude that Verizon was not required to challenge the terms of the solicitation prior to the time for receipt of initial quotations. Instead, Verizon learned of the agency’s interpretation of the terms of the solicitation, i.e., that the disputed terms were mandatory and that Verizon could not take exception, as a result of the agency’s communications after the initial closing date. Because Verizon filed each protest prior to the next closing date for receipt of quotations, each protest is timely. See SMARTnet, Inc., B-400651.2, Jan. 27, 2009, 2009 CPD ¶ 34 at 7 (where a requirement was not clearly specified in the original solicitation, and was later clarified in a post-protest corrective action that amended the solicitation, a protest challenging the requirement is timely when filed prior to the next closing time for receipt of revised proposals in response to the amended solicitation).

CHALLENGES TO THE SOLICITATION TERMS

Verizon argues that the price maintenance, sales leakage, deactivation of international roaming, and pooling clauses are all unreasonable because they are

not terms used in customary commercial practice. GSA's response to the protest contends, generally, that many of the disputed clauses are similar to other clauses used in commercial practice or have otherwise been accepted by Verizon in the past. GSA's response, however, is almost completely devoid of specific examples or citations in support of the agency's argument that the disputed clauses are similar to those used in customary commercial practice. Further, the agency either failed or specifically refused to respond to various arguments raised by the protester.²

The Federal Acquisition Streamlining Act of 1994, 41 U.S.C. 3307 (2006), established a preference and specific requirements for acquiring commercial items that meet an agency's needs. The Federal Acquisition Regulation (FAR) requires that contracts for the acquisition of commercial items "shall, to the maximum extent practicable, include only those clauses . . . [d]etermined to be consistent with customary commercial practice." FAR § 12.301(a)(2). This provision is applicable to the establishment of FSS BPAs under FAR Subpart 8.4, as is the case here. FAR § 8.402(f)(1). In establishing acquisitions for commercial items, FAR § 10.002(b) requires market research by the acquiring agency to address, among other things, customary practices regarding the provision of the commercial items. Id.; Northrop Grumman Tech. Servs., Inc., B-406523, June 22, 2012, 2012 CPD ¶ 197 at 14-15. Consistent with this approach, FAR § 12.302(c) bars the tailoring of solicitations for commercial items in a manner inconsistent with customary commercial practice unless a waiver is approved in accordance with agency procedures. The waiver must describe the customary commercial practice found in the marketplace, support the need to include a term or condition that is inconsistent with that practice, and include a determination that the use of the customary

² In its initial protest, Verizon also challenged the RFQ's performance metrics requirement. Protest at 25; see RFQ amend. 004, at 23-24. The protester argued that this requirement was inconsistent with customary commercial practice because certain metrics were not ordinarily tracked as a commercial practice and that there were "legal restrictions" on sharing certain metrics with third parties without the consent of each customer. Protest at 25. The protester, however, does not identify which of the metrics in the solicitation could not be shared, nor does the protester identify the legal restrictions that may apply. For this reason, we conclude that the protester has not demonstrated that the disputed performance metrics clause is inconsistent with customary commercial practice or that complying with the clause would be unduly burdensome. Additionally, Verizon's initial protest also challenged the device refresh and ordering interface requirements included in the solicitation. During the course of its protest, Verizon advised that the agency was apparently now allowing exceptions to these requirements and if this was the case it withdrew these protest grounds. Supp. AR at 3; Supp. Protest at 10-13. Thus, we do not discuss these issues further.

commercial practice is inconsistent with the needs of the government. FAR § 12.302(c).

For the reasons discussed below, we conclude that the agency has not demonstrated with adequate market research or otherwise that the protested clauses are consistent with customary commercial practice, or were properly included in the solicitation, and we sustain the protest on this basis. See Smelkinson Sysco Food Servs., B-281631, Mar. 15, 1999, 99-1 CPD ¶ 57 at 5-6 (protest sustained where agency performed inadequate market research to support its conclusion that the protested clause was consistent with customary commercial practice).

Price Maintenance Clause

First, Verizon argues that the RFQ's price maintenance clause is inconsistent with customary commercial practice. This clause requires the vendor to provide discounts to existing customers under the BPA in the event the vendor provides a discount to other customers, as follows:

3.11 Price Maintenance Clause

Notwithstanding the terms of [General Services Acquisition Manual (GSAM)] 552.238.75 which is a material term of the Schedule contract, the following applies. If the Contractor offers an entity, as defined in [Acquisition Decision Memorandum (ADM)] 4800.2E (as amended), prices that are ten (10) or more percent lower for service(s) comparable to those provided under this BPA, it shall submit a modification request to the BPA CO within ten (10) business days to lower the BPA price so that all users under this agreement receive the same reduced price(s) on a going-forward basis for all existing and future orders under this BPA. The terms and conditions and the technical requirements (e.g., coverage area, unlimited text messages) will not be considered when comparing the prices.

* * * * *

The Contractor shall implement the improved pricing to all users of this agreement across the Government within 45 calendar days. Because this is merely a modification to the pricing under the agreement, not the underlying schedule contract, these price reductions for this agreement will not trigger a price reduction under GSAM 552.238.75.

3.11.1 Services Covered

This Price Maintenance Clause includes all service plans and service features under this BPA. This clause does not address devices and infrastructure/subsystems. All options and features for which at least some users of this BPA are separately charged shall be included in this Price Maintenance Clause. Devices may be offered at promotional discounts to agencies at the discretion of the carrier.

RFQ amend. 0004 at 47-48.

Verizon argues that this clause is inconsistent with customary commercial practice because it is broader in scope than other price maintenance clauses. While the protester acknowledges that FSS contracts currently have a price maintenance clause, General Services Acquisition Regulation (GSAR) § 552.238-75, the protester argues that the RFQ clause here is substantially different from the FSS clause. Specifically, the protester contends that while the RFQ clause requires price reductions when the vendor offers lower prices for “comparable” services, it has no exclusions for differing terms and conditions or technical requirements: “The terms and conditions and the technical requirements (e.g., coverage area, unlimited text messages) will not be considered when comparing the prices.” RFQ amend. 0004 at 47-48. The protester argues that this is inconsistent with customary commercial practice and other clauses, as it would require the vendor to provide a discount in the event that the vendor offers a new customer a lower price, even where based on different terms and conditions that merit the lower price.

The protester also notes that the RFQ clause requires the vendor to provide price reductions whenever it “offers” a lower price to another customer, meaning that the price reduction would be triggered regardless of whether the transaction took place. The protester contends that such a broad requirement is inconsistent with customary commercial practice and other clauses used by the government.

Additionally, the protester notes that the price maintenance clause applies to offers to any “entity” as defined in ADM 4800.2E, as amended.³ Under that document, entities eligible to use the FSS include, under varying circumstances, the Executive Branch and other federal agencies, wholly-owned government corporations, mixed-ownership government corporations, state and local governments, tribal governments, authorized cost-reimbursement contractors and subcontractors, and entities authorized under the Foreign Assistance Act. ADM 4800.2G ¶ 6, available at: <http://www.gsa.gov/graphics/fas/SignedGSADirective48002F.pdf>. Verizon contends that the list of users under ADM 4800.2G is so broad that it would require

³ This is the GSA order governing the use of the FSS. ADM 4800.2E has been superseded by ADM 4800.2G.

the vendor to offer price reductions under the BPA in a manner that is not consistent with commercial practice.

GSA acknowledges that there is a conflict between the RFQ price maintenance clause and the price reduction clause at GSAR § 552.238-75, which is incorporated into FSS contract No. 70. AR at 4. While the solicitation states that, in the event of a conflict between any solicitation term and the FSS contract, the terms of that FSS contract take precedence, RFQ amend. 004 at 10, the agency explains that, due to the conflict here, the agency sought and obtained a deviation from the GSAR clause, and intends to require vendors who receive a BPA to add the clause deviation to their FSS contracts. AR at 4. GSA does not, however, argue that the deviation from the GSAR to allow the RFQ clause to be incorporated into vendors' FSS contract constitutes a waiver for purposes of FAR § 12.302(c), consistent with the requirements set forth above. See id.

Despite the conflict, the agency argues that the clause is nonetheless consistent with customary commercial practice because similar clauses are used by wireless carriers in contracts with state governmental agencies and large businesses. The agency contends in this regard that it conducted and documented "extensive market research" with agency customers and industry regarding the solicitation's terms and requirements. CO Statement ¶ 2. However, the record includes no evidence of any meaningful market research regarding this clause. Instead, the agency offers two arguments in support of its characterization of the clause as a customary commercial practice. As discussed below, we conclude that neither of these arguments demonstrates that the price maintenance clause conforms to customary commercial practice.

First, the agency argues that Verizon has already agreed to a similar price maintenance clause in a BPA with the Air Force for wireless services. This clause requires Verizon to provide equal or better pricing to customers under the BPA as compared to other similarly situated customers, as follows:

The Contractor shall also review pricing for both equipment and airtime on a regular basis to ensure that pricing remains equal to or better than the best pricing offered to enterprise customers purchasing under a similar scope and magnitude, and the same terms and conditions hereunder, including Federal Government agencies. Price changes require the approval of the BPA Contracting Officer through a modification to the BPA. However, special promotions, discounts, and bulk purchases on approved plans may be offered and do not need a formal modification to the BPA as long they meet the following conditions:

- Are offered to all users under the BPA or in direct response to a competed RFQ

- Have been reviewed and approved by the BPA Contracting Officer

Special promotions and discounts will be posted to the ACC-APG, BPA Army Knowledge Online (AKO) and Air Force web site.

AR, Tab 3, Air Force Wireless BPA, at 12.

Verizon argues that the two clauses are materially different. As the protester notes, the Air Force clause requires the vendor to ensure that the Air Force receives prices that are “equal to or better than” prices charged to “customers purchasing under a similar scope and magnitude, and the same terms and conditions hereunder, including Federal Government agencies.” Id. In contrast, as noted above, the RFQ clause requires the vendor to provide a discount in the event the vendor offers lower prices to any of the broad range of entities identified in ADM 4800.2G, regardless of the terms and conditions. RFQ amend. 0004 at 47. Further, as also discussed above, the terms of the RFQ clause apply to any “offer” by the vendor, whereas the Air Force BPA requires price reductions where there is an offer and a purchase. Id.; AR, Tab 3, Air Force Wireless BPA, at 12. On this record, we agree with Verizon that the two clauses are materially different. For this reason, we do not agree with the agency that Verizon's acceptance of the clause for the Air Force BPA demonstrates that the price maintenance clause here can be properly considered a customary commercial practice.

Next, the agency submitted a declaration by the wireless FSSI program manager as evidence of its market research. AR, Tab 28, Decl. of GSA Program Manager, ¶¶ 3-7. The declaration by the program manager, however, does not provide specific details, such as the text or specific provisions of the allegedly similar clauses, and therefore does not provide a basis to conclude that the RFQ's clause reflects customary commercial practice. For example, the program manager states as follows:

4. A number of other agencies are already using something like this price maintenance clause in their contracts. [Department of Defense] BPAs use price matching/price guarantee language for cellular services including those with Verizon and Sprint. . . .

5. Outside of the federal government, state governments (Virginia, New York, others) and some larger local governments (large cities and county governments) require these terms on a broad set of telecommunications contracts. Terms vary with some mirroring the Wireless FSSI (which allows spot discounting up to 10% and also applies only to Federal Government customers). Other contracts are more aggressive than the terms in the Wireless FSSI in that all pricing

(no spot discounting up to 10%) and all markets (commercial and government) are applicable for the price comparison.

Id. ¶¶ 4-5. Although the program manager contends that similar clauses are used in commercial practice, the information provided in the declaration does not discuss the clauses in a manner that demonstrates that they are comparable to the disputed terms in the RFQ clause here.

Additionally, the program manager cites his personal experience working for the wireless industry, and states that similar price clauses are used in commercial contracts. Id. ¶¶ 6-7. Here again, however, the program manager does not provide specific examples of the purportedly similar clauses.

In light of GSA's representation that the Air Force BPA is an example of a similar contract provision, we do not accept the agency's representation that other, unspecified contracts have terms similar to the RFQ's price maintenance clause. On this record, we conclude that GSA has not shown that the RFQ's price maintenance clause conforms to customary commercial practice, and we sustain the protest on this basis.

Sales Leakage Clause

Next, Verizon argues that the sales leakage clause is inconsistent with customary commercial practice. This clause requires the vendor to audit purchases of products and services by entities that are eligible to use the BPA, but that elect to place orders under different contract vehicles. The clause also requires the vendor to "deem" orders for products and services placed under other arrangements to have occurred under the BPA, and thus provide such customers with the same terms and prices offered under the BPA. Vendors are also required to take "commercially reasonable action" to direct the sales from other contract vehicles to the BPA. The clause sets out these requirements as follows:

2.11.5 Sales Leakage

The goals of this program can only be realized through cooperation between the Government and the Contractor to direct all appropriate purchases through this contract vehicle. All orders placed by government entities for products or services described and priced under this agreement shall be deemed to have been made through this agreement and thus eligible for the terms and prices provided by this agreement. This requirement is applicable for all distribution outlets, such as web, direct sales, and retail.

The Contractor shall establish a process to regularly audit sales to entities as listed in ADM4800.2E Appendix A, determine where sales

outside the contract vehicle are occurring (i.e., sales leakage), and take commercially reasonable action to direct further sales through the contract vehicle for all Agencies that have committed to using this contract vehicle. Results of these audits will be presented as an agenda item during Program Management Reviews.

With Ordering Entity authorization, the Contractor shall move all identified instances of Agency sales leakage to this contract vehicle. The Government will issue a task order to the Contractor in order to facilitate such transitions.

RFQ amend. 0004 at 26.

Verizon argues that the sales leakage clause would effectively modify all of Verizon's existing contracts by deeming sales under other contracts to have occurred under the terms and prices of the BPA; Verizon also argues that this clause is inconsistent with customary commercial practice.

GSA argues that the clause is consistent with commercial practice, based on the experience of its program manager. See AR Tab 28, Decl. of GSA Program Manager ¶¶ 8-15. Here again, however, the information provided by the GSA program manager does not provide specific examples of where this particular clause is in use as a customary commercial practice. Instead, the agency cites examples of state agencies, such Virginia and Missouri, which the agency contends use mandatory statewide contracts. See id. ¶ 13. The references provided by the agency do not discuss sales leakage clauses, and therefore do not demonstrate that the RFQ clause here is a customary commercial practice.

Verizon also argues that the clause is inconsistent with GSA regulations which do not require vendors to report sales made under non-FSS schedule contracts to be reported as FSS sales, thereby requiring payment of the 0.75% industrial funding fee (IFF) by the vendor to GSA. See 48 C.F.R. 552.238-74(a)(3) (2012). The protester argues that requiring the vendor to direct sales from other contract vehicles to the BPA would subject those sales to the IFF payment requirements. GSA did not respond to this argument.

On this record, we conclude that the agency does not demonstrate that the sales leakage clause is a customary commercial practice, and we sustain the protest on this basis.

Deactivation of International Roaming

Next, Verizon argues that the solicitation requirement for deactivation of international roaming is not a customary commercial practice. GSA contends that this requirement is necessary because government employees working on the U.S. border could incur roaming charges without crossing the border if their wireless signal is carried by telecommunications equipment on the other side of the border, e.g., cellular towers in Canada or Mexico. AR Tab 28, Decl. of GSA Program Manager ¶ 17. The RFQ required offerors to offer deactivation of international roaming as follows:

2.2.3 Base Cellular Phone and Service Capabilities

At a minimum, the Contractor shall provide the following cellular phone and service capabilities at no additional charge to the Government:

* * * * *

4. Deactivate International Roaming – The ability to deactivate international roaming, which require additional service fees, shall be included[.]

RFQ amend. 0004 at 13.

Verizon states that the deactivation of international roaming is not a feature offered by the protester as a “base” commercial service. In this regard, the protester contends that commercial wireless service plans are designed to allow international roaming, provided that a device is capable of such a service, and that deactivation of such a feature would require “[deleted] which are not consistent with customary commercial practice.” Protest at 22.

GSA contends that other companies are performing this requirement for other agencies, and that it is therefore a customary commercial practice: “Sprint, AT&T, and T-Mobile all offer standard approaches via deactivation of international roaming so that international roaming is not billed in these use cases.” AR, Tab 28, Decl. of GSA Program Manager ¶ 17. The agency does not, however, provide any information concerning the other firms’ approaches to this requirement. For example, the agency does not address whether the firms offered this feature to the government in response to this RFQ, or whether it is a customary commercial practice currently offered by these firms. In this regard, the agency states that the three firms “understand and have addressed this issue in a manner that indicates they have successfully mitigated this issue[] with other customers in the past.” Id. ¶ 18. Notably, this statement does not indicate whether the agency in fact knows whether deactivation of international roaming is a feature successfully implemented

by the three firms. Because GSA has not provided relevant details about the features offered by these firms, we cannot conclude, on this record, that the agency reasonably determined that deactivation of international roaming is a customary commercial practice, and we sustain the protest on this basis.

Pooling of Unused Minutes

Finally, Verizon argues that the solicitation clause pertaining to pooling or sharing of plan minutes is inconsistent with commercial practice. This clause requires the vendor to credit unused minutes to the accounts of other users within a particular ordering unit, prior to the triggering of overage charges, on a proportional basis, as follows:

2.3.1 Pooling

Pooling of domestic voice and data shall occur at a level specified by the Ordering Entity. For example, minutes may be pooled across an entire Agency, a Bureau within an Agency, or a billing account.

Pooling shall occur across all pooled plans regardless of the device type. For example, the minutes from a smartphone plan with 400 minutes shall be included in the same pool as a cellular phone with 900 minutes. Thus, if a Bureau has 100 users on a 100 minute pooled plan and 100 users on a 400 minute pooled plan, there would be 50,000 minutes available for those 200 users before overages are charged.

Overage minutes and data usage shall be allocated proportionately to those users exceeding their individual plan minutes or [megabytes (MBs)] (e.g., 400 minutes, 900 minutes). Alternatively, at the Contractor's option, the Contractor may waive all overage charges if the Ordering Entity increases their total number of pooled minutes or MBs to at least the amount of pooled minutes or MBs used during the month in which the overage occurred. This purchasing increase in minutes or MBs shall occur for at least 30 days.

RFQ amend. 0004 at 16-17.

Verizon argues that the requirement to credit the unused minutes from individual plans on a proportional basis to users who have exceeded their allocations of minutes is inconsistent with its current commercial practice. The protester states that its current commercial plans [deleted]. Supp. Protest at 4, citing Letter from GSA to Verizon (July 20, 2012), at 6-7.

Despite two requests from our Office to address this protest ground, the agency did not respond to the merits of this argument. Instead, GSA simply asserted that Verizon's protest is untimely, an argument we have rejected for the reasons stated above. See Supp. AR at 2-3; Agency Response to GAO Request for Additional Information (Aug. 29, 2012) at 1. Where, as here, an agency expressly declines to address an issue raised by a protester, and does not appear to contest the merits of the argument, we view the agency as having effectively conceded that the protester's argument is correct. See TriCenturion, Inc.; SafeGuard Services, LLC, B406032 et al., Jan. 25, 2012, 2012 CPD ¶ 52 at 17. Alternatively, to the extent that the agency did not intend to concede this issue, its response does not provide us with a basis to conclude that agency had a valid basis to find that this clause was consistent with customary commercial practice. See id. On this record, we sustain the protest.

RECOMMENDATION

For the reasons discussed above, we conclude that the record does not demonstrate that the four disputed clauses in the RFQ are consistent with commercial practice.⁴ We recommend that GSA amend the RFQ to remove the challenged provisions, and request new quotations. In the alternative, if the agency continues to believe that the provisions are needed, the agency should either confirm through appropriately documented market research that the provisions are consistent with customary commercial practice or obtain a waiver pursuant to FAR § 12.302(c). We also recommend that Verizon be reimbursed the costs of filing and pursuing its protests, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claims for costs, detailing the time

⁴ The protester also argues that the disputed clauses are unduly restrictive of competition and would be unreasonable, even if the agency reasonably found that they were consistent with customary commercial practice or had executed a waiver of FAR §§ 12.301, 12.302. Because we conclude that the agency does not demonstrate that the disputed clauses conform to customary commercial practice, and there was no waiver regarding these clauses, we need not address these arguments. We note, however, that decisions by our Office and the Court of Federal Claims stand for the proposition that agencies must, even in the event of a valid waiver, set forth a reasonable basis for the use of particular clauses or terms that deviate from customary commercial practice. See U.S. Foodservice, Inc.; Labatt Food Services, LP, B-404786 et al., May 13, 2011, 2011 CPD ¶ 102 at 3-4; PWC Logistics Servs. Co., B-400660, Jan. 6, 2009, 2009 CPD ¶ 67 at 5-6; U.S. Foodservice, Inc. v. United States, 100 Fed. Cl. 659, 681-83 (2011); CW Government Travel, Inc. v. United States, 99 Fed. Cl. 666, 679-680 (2011).

expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel