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Decision

Matter of: Level 3 Communications LLC

File: B-412854; B-412854.3; B-412854.4

Date: June 21, 2016

Shelly L. Ewald, Esq., Scott P. Fitzsimmons, Esq., and Eric M. Liberman, Esq., Watt, Tieder, Hoffar & Fitzgerald, L.L.P., for the protester.
Jonathan D. Shaffer, Esq., John S. Pachter, Esq., Mary Pat Buckenmeyer, Esq., and Sean K. Griffin, Esq., Smith Pachter McWhorter PLC, for Verizon Deutschland GmbH, an intervenor.
Travis L. Vaughan, Esq., Department of Defense, Defense Information Systems Agency, for the agency.
Louis A. Chiarella, Esq., and Noah B. Bleicher, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the technical unacceptability of the protester's quotation is denied where the agency reasonably evaluated the quotation in accordance with the solicitation's terms.
2. Protest challenging that awardee's quotation took material exceptions to the terms of the solicitation is denied where the agency reasonably determined that any exceptions taken were not material ones.

DECISION

Level 3 Communications LLC, of Broomfield, Colorado, protests the issuance of a delivery order to Verizon Deutschland GmbH, of Frankfurt, Germany, under request for quotations (RFQ) No. HC1021-15-T-3033,¹ issued by the Department of Defense, Defense Information Systems Agency (DISA), for the installation and

¹ The record reflects the solicitation was referred to as an RFQ in certain instances, and as an "Inquiry/Quotation/Order (IQO)" in other instances. For the sake of consistency, and because the distinction has no bearing on our analysis, we use the terms "RFQ," "quotations," and "vendors" throughout our decision.

maintenance of a telecommunications circuit between Wiesbaden, Germany, and Arifjan, Kuwait. Level 3 argues that the agency's evaluation of vendors' quotations and resulting award decision were improper.

We deny the protest.

BACKGROUND

The RFQ, issued on August 28, 2015, requested quotations from vendors holding existing ordering agreements with DISA for telecommunications services. RFQ at 1, 6. The procurement was conducted under Federal Acquisition Regulation (FAR) Part 12, Acquisition of Commercial Items, and subpart 16.7, Agreements. The solicitation contemplated the issuance of a fixed-price, indefinite-term, delivery order for an estimated 60 months. Id. at 7, 9. Award was to be made to the vendor whose quotation proposed the lowest-priced, technically acceptable solution--based on technical sufficiency, ability to meet the required service date, and satisfactory past performance.² Id. at 8-9. The RFQ also advised vendors the agency intended to make award without discussions; however, the agency reserved the right to conduct discussions if determined necessary by the contracting officer. Id. at 9.

The solicitation required vendors to propose solutions for the installation and maintenance of a protected, synchronous transport module (STM)-64, commercially leased telecommunications circuit between Clay Kaserne, Wiesbaden, Germany, and Camp Arifjan, Arifjan, Kuwait.³ RFQ at 2-3. Vendors were to affirmatively commit to satisfying all technical aspects of the solicitation and address any aspects that the vendor was "unable or unwilling to satisfy." Id. at 6. Among other things, vendors were required to propose a route for the telecommunications circuit that avoided specific countries, including Iran. Id. at 4.

Eight vendors, including Verizon and Level 3, submitted quotations by the October 28 closing date. An agency technical evaluation team (TET) evaluated vendors' quotations for technical acceptability, with the final evaluation ratings and prices of the Verizon and Level 3 quotations as follows:

² After rank-ordering quotations by price, the technical evaluation was to begin with the lowest-priced quotation, and end with the first quotation found to be technically acceptable. Id. at 1.

³ An STM-64 circuit is a fiber optic network transmission that can carry 10 gigabytes per second, and was meant to replace the existing STM-16 circuit (2.5 gigabytes per second). Contracting Officer's Statement, Apr. 8, 2016, at 5-6. The enhanced bandwidth would allow for the transmission of near real-time video, in support of military missions in both the European Command and Central Command areas of responsibility. Id. at 5.

	Verizon	Level 3
Technical Sufficiency	Acceptable	Unacceptable
Service Date	Acceptable	Acceptable
Past Performance	Satisfactory	Satisfactory
Price	\$98,664,800	\$60,128,000

Agency Report (AR), Tab 12, Mar. 2, 2016, Source Selection Decision, at 1-8; Tab 13, Level 3 Debriefing Letter, Mar. 11, 2016, at 1-2.

Relevant to the protest here, the agency found Level 3's quotation to be technically unacceptable in three specific regards, including the agency's view that the vendor's proposed circuit path did not entirely avoid Iran. AR, Tab 10, TET Evaluation Report, Nov. 23, 2015, at 7.

On March 2, 2016, the agency issued the delivery order to Verizon, finding it had submitted the lowest-priced, technically acceptable quotation. AR, Tab 12, Source Selection Decision, Mar. 2, 2016, at 8. On March 14, after receiving notice of award and a written debriefing, Level 3 filed its protest with our Office.

DISCUSSION

Level 3 raises various challenges to the agency's evaluation of vendors' quotations and resulting award decision. The protester first alleges that DISA's determination that Level 3 was technically unacceptable was unreasonable and based upon unstated requirements. Level 3 also contends that Verizon's quotation took exception to various mandatory solicitation requirements, and should have been found technically unacceptable.⁴ We have considered all of Level 3's protest grounds, and although we do not address them all, find they provide no basis on which to sustain the protest.

Evaluation of Level 3's Technical Quotation

Level 3 protests the agency's evaluation of its technical quotation. The protester alleges that the three specific instances where its quotation was found not to comply with solicitation requirements--and which resulted in the determination of technical unacceptability--were unreasonable or based on unstated requirements. Level 3 also alleges that it was prejudiced as a result thereof: had the agency performed a

⁴ Level 3 also protested that DISA improperly held discussions with other vendors but not with Level 3. Protest, Apr. 1, 2016, at 1-6. After receiving the agency report, and learning that no discussions had been held with other vendors, Level 3 withdrew this protest ground. Level 3 Email to GAO, June 3, 2016.

proper evaluation, the protester would have been found to be the vendor with the lowest-priced, technically acceptable quotation.

In reviewing protests challenging an agency's evaluation, our Office does not reevaluate quotations; rather, we review the agency's evaluation to determine whether it was reasonable and consistent with the solicitation, as well as applicable statutes and regulations. Bahrain Telecomms. Co., B.S.C., B-410614.2, Aug. 10, 2015, 2015 CPD ¶ 269 at 4. Clearly stated solicitation technical requirements are considered material to the needs of the government, and a quotation that fails to conform to such material terms is technically unacceptable and may not form the basis for award. 4D Sec. Solutions, Inc., B-400351.2, B-400351.3, Dec. 8, 2008, 2009 CPD ¶ 5 at 4. A vendor is responsible for affirmatively demonstrating the merits of its quotation and risks the rejection of its quotation if it fails to do so. UNISSET Co., LLC, B-411792, Sept. 11, 2015, 2015 CPD ¶ 297 at 3. A protester's mere disagreement with the agency's evaluation judgments, without more, does not establish that the evaluation was unreasonable. See HP Enter. Servs., LLC, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 5. Our review of the record provides us no basis to find the agency's evaluation here was unreasonable or otherwise objectionable.

As set forth above, the RFQ required vendors to propose a route for the telecommunications circuit that avoided specific locations. Specifically, the solicitation mandated that "[n]o part of the working path service shall go through or touch Iran, Saudi Arabia, Syria, Jordan, Israel, Oman, Egypt, Suez Canal, United Arab Emirates, India, Arabian Sea, Mediterranean Sea, Black Sea and Red Sea."⁵ RFQ at 4. The solicitation also specified the circuit documentation that vendors were to provide with their quotations:

[P]ath documentation shall be submitted with the quote for the Government to complete the evaluation and its accuracy confirmed by the supplier prior to being considered for an award. Format for path documentation must either be .kmz or .kml routing maps^[6] depicting the physical route for the terrestrial segments at a sufficient level of detail to identify each central office or switching stations, cable heads,

⁵ The RFQ specified locations to be avoided for both the "working path" (i.e., "dry," terrestrial route) and the "protect path" (i.e., "wet" route using submarine cables) requirements. RFQ at 4; Contracting Officer's Statement, Apr. 8, 2016, at 7. It is only Level 3's working path that is at issue in this protest.

⁶ .Kml and .kml are the file extensions for placemark files used by Google Earth, the former being a compressed version of the latter. Contracting Officer's Statement, Apr. 8, 2016, at 8; see also https://developers.google.com/kml/documentation/kml_tut (last visited June 7, 2016).

cable stations and the approximate routing for undersea cable segments of the lease.^[7]

Id. at 11.

Level 3, as part of its quotation, stated that it understood and would comply with the requirement to avoid all prohibited locations, including Iran. AR, Tab 8, Level 3 Quotation, Oct. 28, 2015, at 5, 38, 54. The vendor also submitted a series of small-scale maps with its quotation demonstrating its intended circuit path.⁸ Significantly, Level 3's maps showed at one point a black line representing the vendor's circuit path on top of a yellow line representing the Iran/Iraq border. Id. at 49, 51; see also Contracting Officer's Statement, Apr. 8, 2016, at 10.

Moreover, Level 3 did not include actual electronic .kmz/.kml routing map files with its quotation, depicting the route of its working path; instead, Level 3's quotation provided only print-out maps (i.e., screenshots) made from Google Earth files.⁹ Id. at 49-52.

In performing its evaluation the TET found that Level 3's quotation failed to demonstrate that it avoided all prohibited locations, including Iran. AR, Tab 10, TET Evaluation Report, Nov. 23, 2015, at 7. The agency concluded that notwithstanding Level 3's narrative representations, the maps which the vendor submitted indicated noncompliance with a key solicitation requirement. Id.; Contracting Officer's Statement, Apr. 8, 2016, at 9-10. The TET found that Level 3 had also failed to submit the actual .kmz/.kml files depicting its circuit path, as required by the solicitation. AR, Tab 10, TET Evaluation Report, Nov. 23, 2015, at 7. Without these electronic files, the agency evaluators were unable to "zoom[] in" and examine in

⁷ The purpose for the circuit documentation requirement was to ensure that vendors complied with the location avoidance requirement: .kmz/.kml files would allow the evaluators to review the entire length of a vendor's circuit route using the Google Earth program, and compare circuit routes to political boundaries with a high degree of specificity. Contracting Officer's Statement, Apr. 8, 2016, at 8.

⁸ The printed maps which Level 3 elected to submit with its quotation were of such low detail that the black line evidencing the vendor's circuit path appeared to be, in relation to the scale of the maps, up to 50 miles wide, whereas the right-of-way for the actual circuit was approximately 50 feet. Protest, Mar. 14, 2016, Declaration of Level 3 Sales Engineer, Mar. 14, 2016, at 1.

⁹ As Level 3's quotation was submitted as a .pdf file, it was possible to enlarge portions of Level 3's maps when determining whether the black line representing the vendor's intended circuit path avoided the yellow line representing the Iran/Iraq border.

greater detail the exact route of Level 3's circuit. Contracting Officer's Statement, Apr. 8, 2015, at 10.

Level 3 argues the agency had no rational basis for finding its quotation violated the solicitation's avoidance requirements. While the protester does not dispute that its maps showed the line representing the vendor's circuit path overlapping the line representing the Iranian border, Level 3 essentially characterizes this particular representation as accidental and the result of the scale of the maps it used. Level 3 also argues that the black line representing its circuit path does not "entirely cross[] the yellow line" representing the Iranian border. Protest, Mar. 14, 2016, at 8. We find Level 3's arguments unavailing.

It is a vendor's responsibility to submit a well-written quotation, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. Axxon Int'l, LLC, B-412147, Dec. 22, 2015, 2015 CPD ¶ 399 at 4; InTec, LLC, B-408178.4, Feb. 12, 2014, 2014 CPD ¶ 109 at 4. Moreover, blanket statements of compliance are generally not sufficient to demonstrate technical acceptability; rather, a vendor must affirmatively establish compliance with the requirements. Axxon Int'l, LLC, supra; see Trimble Navigation Ltd., B-258672, Jan. 30, 1995, 95-1 CPD ¶ 138 at 8.

Here, the printed maps which Level 3 elected to furnish with its quotation indicated noncompliance with the RFQ's location avoidance requirement. Moreover, nothing precluded Level 3 from including more detailed maps--or .kmz/.kml files as required by the RFQ--with its quotation to clearly indicate that the vendor's circuit path did not enter or touch Iran.¹⁰ Since Level 3 failed to demonstrate that its proposed circuit path would meet the solicitation requirements, we find that the agency reasonably concluded that Level 3's quotation was technically unacceptable.¹¹ Level 3 also alleges that because its quotation stated its proposed circuit path was "identical to the current STM-16 [circuit path] from Camp Arifjan to Wiesbaden," AR, Tab 8, Level 3 Quotation, Oct. 28, 2015, at 49, and the agency evaluators knew that

¹⁰ We also find no logic in Level 3's assertion that its circuit path line did not "cross entirely over" the Iranian border line, Protest, Mar. 22, 2016, at 7, as the RFQ mandated that "[n]o part of the working path service shall go through or touch Iran" RFQ at 4.

¹¹ We also find Level 3's reliance on our decision in Applied Electro Mechanics, Inc., B-214673, Sept. 10, 1984, 84-2 CPD ¶ 271, to be misplaced. In Applied Electro, we found the agency had reasonably concluded that a picture of a product which exceeded solicitation requirements did not render ambiguous a bidder's narrative description of a product which met requirements. Quite simply, in contrast to the facts here, the picture which the awardee in Applied Electro included with its bid did not evidence nonconformity with the solicitation's requirements.

Level 3's current circuit path did not touch or enter Iran, this was information "too close at hand" for the agency to ignore. Protest, Mar. 22, 2016, at 8. We find no merit to this assertion. We have recognized that in certain limited circumstances involving past performance information, an agency has an obligation (as opposed to the discretion) to consider "outside information" bearing on the vendor's quotation when it is "too close at hand" to require vendors to shoulder the inequities that spring from an agency's failure to obtain and consider the information. See, e.g., International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5.

No part of this concept, however, is intended to remedy a vendor's failure to include information in its own quotation. See Affordable Eng'g Servs., Inc., B-407180.4 et al., Aug. 21, 2015, 2015 CPD ¶ 334 at 13; Great Lakes Towing Co. dba Great Lakes Shipyard, B-408210, June 26, 2013, 2013 CPD ¶ 151 at 8. Where a vendor is in control of the information contained in its quotation--and not reliant on third parties to submit that information--it exercises its own judgment as to the information that the agency should consider. See L-3 Servs., Inc., B-406292, Apr. 2, 2012, 2012 CPD ¶ 170 at 12 n.10. Accordingly, we conclude the agency had no obligation to seek out and favorably consider information that the protester was in fact required to have included in its quotation.

Next, Level 3 challenges the determination that its quotation was technically unacceptable for failing to include .kmz/.kml files as part of circuit documentation. The protester does not dispute that it did not include such electronic files with its quotation showing its planned circuit path--only print-outs prepared using .kmz/.kml files. Rather, Level 3 argues that there was no requirement that vendors submit actual electronic files, and that the agency imposed a requirement not set forth in the solicitation. We disagree.

As set forth above, with regard to pre-award circuit documentation, the RFQ stated that "path documentation shall be submitted with the quote for the Government to complete the evaluation and its accuracy confirmed by the supplier prior to being considered for an award. Format for path documentation must either be .kmz or .kml routing maps depicting the physical route for the terrestrial segments" RFQ at 11.

The protester essentially argues that the solicitation provision here is ambiguous--that the RFQ did not require path documentation to be submitted in an electronic format--and that its interpretation was a reasonable one. The agency and intervenor argue the solicitation requirement is unambiguous and means what it says--that the format for path documentation must either be .kmz or .kml routing maps depicting the vendor's proposed circuit route.

When a dispute arises as to the actual meaning of solicitation language, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. See KAES Enters., LLC, B-411225

et al., June 18, 2015, 2015 CPD ¶ 186 at 5. A solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. Id.

Here, we have reviewed the RFQ and agree with the agency that the required path documentation format was actual .kmz/.kml routing maps, and that the protester's allegations are premised on an unreasonable interpretation of the RFQ. The solicitation expressly stated that vendors were to submit circuit path documentation in .kmz/.kml format, and not merely screenshots thereof. Moreover, the submitted path documentation was to depict the vendor's physical route in sufficient detail for the agency to complete its evaluation. Accordingly, the RFQ when read as a whole is susceptible to only one reasonable interpretation--that actual Google Earth files were required. We conclude that Level 3's interpretation of the RFQ, by contrast, fails to give effect to the unequivocal RFQ language providing that the path documentation was to be in .kmz/.kml file format.¹² In sum, Level 3's decision to submit only high-level screenshots of its path documentation failed to comply with unambiguous solicitation requirements, and the agency's evaluation thereof was reasonable.

Level 3 also challenges the third reason why its quotation was found to be technically unacceptable, that regarding the accreditation of telecommunication providers in North Atlantic Treaty Organization (NATO) countries. The protester alleges that the agency evaluators again imposed an evaluation criterion that was not set forth in the solicitation. We disagree.

The solicitation provided, in relevant part, that:

One or more end points of this circuit terminate in NATO countries that have National Long Lines Agencies (NALLAs) and NALLA accredited Telecommunication Providers (TPs). . . . Therefore, only TPs accredited by NALLAs of respective NATO countries will be eligible to receive any Order or Circuit Demand resulting from this Inquiry, for NATO country portions of this circuit. Additionally, only NALLA accredited TPs can be used as subcontractor TP[s] in NATO countries. . . . Quotes shall identify portions of service that will be

¹² In any event, even assuming that Level 3's interpretation was also reasonable, the resulting ambiguity was readily apparent from the face of the solicitation. Thus, to be timely, any protest on this ground had to be filed prior to the closing time for submission of proposals. See 4 C.F.R. § 21.2(a)(1); Apptis, Inc., B-299457 et al., May 23, 2007, 2008 CPD ¶ 49 at 16. Since it was not, and since the agency's interpretation of the required format for path documentation was reasonable, we have no basis to question the agency's conclusion that Level 3's quotation was noncompliant and technically unacceptable for failing to include the required .kmz/.kml files.

provided using TP's own facilities as well as those that will be provided by subcontractor TPs, and shall identify all subcontractor TPs. Additionally, quotes shall provide evidence TP and all subcontractor TPs possess required NALLA accreditations . . . for countries where this circuit terminates.

RFQ at 7.

Level 3's quotation set forth that it planned to use subcontractor [DELETED], and second-tier subcontractor [DELETED], for that portion of its circuit path through Turkey. AR, Tab 8, Level 3 Quotation, Oct. 28, 2015, at 53-54. Level 3 did not state that either of its proposed subcontractors here (at either level) was NALLA-accredited for Turkey. In fact, Level 3 planned on using Turkish Telecom AC as its third-tier subcontractor in Turkey.¹³ Level 3 Comments, Apr. 25, 2016, at 8-9. Level 3's planned use of Turkish Telecom, however, was not mentioned in the vendor's quotation. See AR, Tab 8, Level 3 Quotation, Oct. 28, 2015, at 53-54. The TET found that because Level 3's quotation referenced only the planned use of subcontractors [DELETED] and [DELETED], it failed to identify a NALLA-accredited subcontractor for its circuit path through Turkey. AR, Tab 10, TET Evaluation Report, Nov. 23, 2015, at 2, 7.

Level 3 argues the agency's evaluation was improper insofar as the vendor was only required to provide evidence of NALLA accreditation for the NATO country where the circuit terminated (Germany) and not all NATO countries traversed by its circuit path. The protester, however, ignores the fact that pursuant to the RFQ: (1) only NALLA-accredited TPs were eligible to perform work in respective NATO countries; (2) only NALLA-accredited TPs could be used as subcontractors in NATO countries; and (3) vendors were required to "identify portions of service that will be provided using TP's own facilities as well as those that will be provided by subcontractor TPs, and shall identify all subcontractor TPs." RFQ at 7.

Here, Level 3 planned on using NALLA-accredited Turkish Telecom for the portion of its circuit through Turkey, but failed to identify this subcontractor in its quotation as required by the RFQ. Quite simply, Level 3's quotation identified its first and second-tier subcontractors for Turkey who were not NALLA accredited, but not the third-tier subcontractor that was so accredited and whom Level 3 intended to employ. As Level 3 failed to identify all subcontractors that it planned to use, and failed to identify that only NALLA-accredited TPs were to be used as subcontractors

¹³ Turkish Telecom is in fact the only NALLA-accredited telecommunications provider for Turkey. AR, Tab 10, TET Evaluation Report, Nov. 23, 2015, attach. 1, NALLA Points of Contact, at 13; Contracting Officer's Statement, Apr. 8, 2016, at 11.

in NATO countries, the agency reasonably concluded that Level 3 was therefore technically unacceptable.¹⁴

Evaluation of Verizon's Quotation

Level 3 also challenges the agency's evaluation of Verizon's quotation.¹⁵ Specifically, the protester alleges the awardee took exception to several mandatory requirements of the RFQ, each of which should have resulted in disqualification. The agency argues that because Verizon's quotation merely restated provisions of the vendor's basic ordering agreement with DISA, and was consistent with customary commercial practice, the agency concluded that Verizon had not taken exception to the solicitation. Although we do not specifically address all of Level 3's

¹⁴ Lastly, Level 3 alleges the agency's evaluation was improper because the TET originally found the vendor to be technically acceptable and was persuaded to change its evaluation by an agency contracting official. We have repeatedly held that the overriding concern for our purposes is not whether an agency's final evaluation conclusions are consistent with earlier evaluation conclusions, but rather, whether they are reasonable and consistent with the stated evaluation criteria, and reasonably reflect the relative merits of the offerors' submissions. See, e.g., SRA Int'l, Inc., B-407709.5, B-407709.6, Dec. 3, 2013, 2013 CPD ¶ 281 at 11; J5 Sys., Inc., B-406800, Aug. 31, 2012, 2012 CPD ¶ 252 at 13. Here the agency's final conclusion was that Level 3 submitted a quotation that was technically unacceptable in several regards, and our review finds that evaluation was reasonable.

¹⁵ As a preliminary matter, we conclude that Level 3 is an interested party to challenge the evaluation of Verizon's quotation, even though the protester's quotation was found technically unacceptable. In order for a protest to be considered by our Office, a protester must be an interested party, which means that it must have a direct economic interest in the resolution of a protest issue. 4 C.F.R. §§ 21.0(a)(1), 21.1(a); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1. A protester is generally an interested party to challenge the evaluation of the selected vendor's quotation where there is a reasonable possibility that the protester's quotation would be in line for selection if its protest were sustained. Allied Tech. Group, Inc., B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 10 n.12. However, since Verizon was the only vendor determined to have submitted an acceptable quotation--DISA did not evaluate the technical acceptability of all quotations, but stopped with the lowest-priced, technically acceptable one--if the protest here were sustained, Verizon would not be eligible for award and the agency may be faced with resoliciting the requirement. Since Level 3 would be eligible to compete on such a resolicitation, Level 3 is an interested party. See CGI Fed. Inc., B-410714, Jan. 28, 2015, 2015 CPD ¶ 67 at 5 n.2.

arguments regarding the agency's determination of Verizon's acceptability, we have fully considered them and find they provide no basis on which to sustain the protest.

For example, Level 3 argues that Verizon's quotation is unacceptable because it failed to comply with the fixed-price requirement. The RFQ required that vendors submit fixed-priced quotations, which accounted for all applicable charges, for the life of the delivery order.¹⁶ RFQ at 7. Verizon's quotation stated:

Verizon's quoted rates are firm fixed and include all current applicable charges. In the event a new tax or similar charge arises or becomes applicable during the term and has a material impact on circuit cost, such an event would be beyond Verizon's control and Verizon will work with the Government to revise contract rates to address the change.

AR, Tab 9, Verizon Quotation, Oct. 28, 2015, at 26.

We find DISA's determination that Verizon's quotation complied with the fixed-price requirement, notwithstanding the aforementioned "exception," to be reasonable. First, the solicitation itself contemplates that future tariff charges could result in permissible changes to the awardee's price. This is consistent with the terms of the basic ordering agreements that DISA had previously entered into with Verizon (and other vendors), which included Defense Federal Acquisition Regulation Supplement (DFARS) clauses 252.239-7005 (Rates, Charges, and Services), and 252.239-7006 (Tariff Information). AR, Apr. 29, 2016, attach. 2, DISA Basic Agreement with Verizon, at 3. These clauses essentially anticipate new taxes or tariffs imposed by outside governmental bodies, and contemplate how such charges may be passed on to the government in a commercial manner. Thus, the language in Verizon's quotation essentially restates terms of the vendor's basic ordering agreement that would be incorporated by reference into any awarded delivery order. See RFQ at 6.

Moreover, Verizon's quotation did not state that the awardee would refuse to perform in the event a new or similar charge impacted its cost, nor did Verizon state that it would be entitled to a price adjustment. Verizon's quotation stated only that it would seek through negotiation a price adjustment from the agency. As such, the agency reasonably found that Verizon's quotation was compliant with the RFQ's fixed-price requirement. We therefore see no merit in Level 3's argument that Verizon took exception to the solicitation's fixed-price requirement, or that the language in Verizon's quotation mandated a determination of unacceptability.

¹⁶ The RFQ also stated, however, that charges required by tariffs be identified in the quotation, and that any future tariff changes were to be electronically submitted (with the tariff transmittal and accompanying pages) to DISA. RFQ at 7.

As another example, Level 3 argues that Verizon's quotation is unacceptable because it failed to comply with the service date requirement. The RFQ required vendors to commit to a service date of May 2, 2016. RFQ Amend. 002, at 3. Verizon's quotation expressly stated that it would comply with the RFQ's service date requirement, AR, Tab 9, Verizon Quotation, Oct. 28, 2015, at 21; however, the awardee also included a "force majeure" provision stating that the vendor was not liable for failure to perform for causes beyond its reasonable control, including events such as "cable cuts." Id. at 17. Level 3 argues that this amounted to an improper condition on Verizon's willingness to comply with the service date requirement.

We again find that Verizon's quotation essentially does no more than restate the terms of its basic ordering agreement with the agency. The ordering agreement included FAR clause 52.212-4 (Contract Terms and Conditions – Commercial Items) which expressly stated in relevant part that the contractor was not liable for nonperformance caused by an occurrence beyond the reasonable control of the contractor and without its fault or negligence (e.g., acts of God or the public enemy, acts of the Government in either a sovereign or contractual capacity, fires, floods, epidemics, strikes, unusually severe weather). AR, Apr. 29, 2016, attach. 2, DISA Basic Agreement with Verizon, at 20. The protester fails to show how Verizon's "force majeure" provision, including the apparently offensive "cable cuts" language, exceeds in any meaningful way the excusable delays already permitted and enumerated in the awardee's basic ordering agreement or otherwise reflects a material exception to the terms of the solicitation. In sum, we find no merit in Level 3's assertions that any of the language in Verizon's quotation warranted a determination of unacceptability.

The protest is denied.

Susan A. Poling
General Counsel