



WILTSHIRE
& GRANNIS LLP

February 6, 2014

Ex Parte

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Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Mr. Jonathan Sallet
Acting General Counsel
Federal Communications Commission
441 12th Street, S.W.
Washington, DC 20553

Re: *Telephone Number Portability, et al.*, CC Docket No. 95-116; WC Docket No. 07-149; WC Docket No. 09-109

Dear Ms. Veach and Mr. Sallet:

On behalf of Telcordia Technologies, Inc. (d/b/a iconectiv), we write to address the arguments made in Neustar, Inc.'s letters of January 15 and February 3, 2014. The Bureau should reject Neustar's demand for another round of best and final offers ("BAFOs"), and proceed to an award based on existing offers, for each of four reasons:

- (1) Neither Neustar nor any other bidder had any reasonable expectation that there would be more than one round of BAFOs. The RFP emphasized that award might be made based on initial proposals. Given that fact, Neustar had no basis to expect or demand even one BAFO, let alone two. Neustar's claims that it is "unfair" not to issue a second BAFO, and that Neustar would be prejudiced without a second BAFO, are baseless. If Neustar or any other bidder made bad tactical choices in presenting its "Best and Final Offer"—which by its name alone connotes no further bidding—that was its own choice.
- (2) The timing of Neustar's sudden request for a second round of BAFOs—and its inability to provide any rational explanation for that request—strongly suggest that Neustar has obtained confidential, non-public information about its competitive standing

and price relative to the other bidders. Allowing Neustar to submit a new BAFO with the benefit of such information would be highly prejudicial to Telcordia and any other bidders participating in the competition. The solution is easy: The Commission can simply make award based on existing proposals. Under these circumstances, that is the only way to ensure the integrity of the competitive process.

- (3) It appears that Neustar chose not to offer its most competitive price in either its initial proposal or its BAFO, and is instead trying to preserve as much as possible the premium associated with its sole source contract and incumbent status. The competitive bidding process should not be twisted to allow the incumbent successively to fine tune its bid to extract the maximum incumbency premium, *i.e.*, to try iteratively to discover the maximum extent to which it can exceed a low bid and still be selected. Such an approach is not fair to the telecommunications consumers who ultimately pay the local number portability administrator costs assessed on carriers.
- (4) Any delay benefits only the incumbent, and works to the disadvantage of consumers, who will continue to pay inflated and uncompetitive fees driven by the incumbent's sole source contract. As evidenced by Neustar's suggestion that the Bureau submit the issue of a second round of BAFOs to public notice and comment — which we believe has never been done in any federal procurement — Neustar's goal is to delay award of a new contract at a competitive price, and thereby further prolong its over-priced sole source contract. Neustar today garners \$466 million per year from the NPAC contract — an amount that will increase again before the current contract's scheduled expiration in 2015. It is in the interests of everyone but Neustar to move expeditiously to award of a competitively priced contract.

Proceeding to award based on the existing BAFOs is entirely consistent with the RFP, and more than satisfies the need for competition to ensure a fair and reasonable price. In contrast, inviting a second round of BAFOs endangers the fairness and integrity of this procurement, and may needlessly prolong the existing uncompetitive, no-bid contract. We therefore request that the Bureau reject Neustar's self-serving and baseless demand for a second round of BAFOs, and proceed expeditiously to award based on existing proposals.

We also reiterate our request that the Commission or Bureau, directly or through the NANC Selection Working Group or the NAPM FoNPAC, publish an anticipated schedule for award so that prospective vendors other than the incumbent can adequately plan and prepare for

implementation and performance. Delay in doing so — and delay in making an award — prejudice all non-incumbents, who must incur costs to be ready to implement and perform, without being able to support those costs from an ongoing NPAC contract.

In his letter of February 3, 2014, counsel for Neustar requests a meeting with Commission staff to discuss appropriate procedures. Telcordia does not believe such a meeting is necessary. To the extent the Commission staff believes a meeting is necessary, we respectfully suggest that any such meeting be held with both Neustar and Telcordia present, as would be the case in a restricted proceeding.

I. Neustar Had No Reason to Expect Multiple BAFOs

Both the express language of the RFP, and the announced timeline for this procurement, put all offerors — including Neustar — on notice that award might be made on the basis of initial proposals, without any BAFOs at all.¹ The RFP informed all offerors that

selection of the LNPA will be made *without the requirement of discussions* or interviews, but discussions and interviews may be held if desired by the FoNPAC. *All Respondents are encouraged to submit their best proposal*; each Respondent's proposal in response to this RFP survey should contain the Respondent's best terms from a technical, management, and cost standpoint, as outlined in Section 14.1.1.

RFP § 14.1 (emphasis added). In federal procurements, discussions are the mechanism through which agencies negotiate with offerors, and allow them to submit revised proposals. FAR 15.306(d). A statement in an RFP that award may be made without discussions has been held to put offerors on notice that they should not expect to have an opportunity to revise their proposals. *Robotic Sys. Tech.*, Comp. Gen. Dec. B-278195.2, 98-1 CPD ¶ 20 (Jan. 7, 1998); *Scientific-Atlanta, Inc.*, Comp. Gen. Dec. B-255343.2, B-255343.4, 94-1 CPD ¶ 325 (Mar. 14, 1994).² Thus, all offerors here were on notice that there might be no BAFOs at all.

The RFP language on which Neustar relies — RFP § 13.6 — confirms that all offerors knew that there might be no BAFOs, and the decision whether to request BAFOs is in the

¹ The RFP is available at https://www.napmlc.org/pages/npacrfp/npacRFP_RefDocs.aspx.

² Given the Commission's control over the final content of the RFP and the final award decision, and the use of federally mandated fees as a funding source, this competition is a federal (not private) procurement, and federal procurement law is therefore controlling. Moreover, regardless of whether federal procurement law is controlling, both that law and standard procurement practices show that Neustar's supposed expectations were unreasonable.

discretion of the FoNPAC. RFP § 13.6 states that “[a] best and final offer *may* be requested. . . .” (Emphasis added.) Thus, there was never any guarantee of even one BAFO, let alone two.

Were that not enough, the RFP’s announced timeline for award drives the point home. The RFP called for submission of proposals in April 2013, and announced that the FoNPAC intended to complete the evaluation and recommend an awardee just four months later, on August 5, 2013. RFP § 16.1. It was obvious to all offerors that such a schedule would not permit time for multiple BAFOs. On July 23, 2013, the FoNPAC updated its schedule to provide that it would recommend an awardee by November 14. At the time that it requested BAFOs, the FoNPAC did not revise its projected date for recommending an awardee, which remained November 14. In fact, at the NANC meeting held on September 18, 2013, the NAPM reiterated that the FoNPAC anticipated recommending an awardee by November 14, 2013.³ Thus, when offerors submitted their BAFOs on September 18, 2013, they knew that the FoNPAC planned to recommend an awardee less than two months later. With such a schedule, no offeror could reasonably expect another round of BAFOs.

Nor is another round of BAFOs necessary to obtain adequate price competition or to establish price reasonableness — even without consideration of evidence that the incumbent may have obtained confidential source selection or bid and proposal information, as discussed in Section II below. Adequate price competition has been achieved when “[t]wo or more responsible offerors, competing independently, submit priced offers that satisfy the Government’s expressed requirement. . . .” FAR 15.403-1(c)(1)(i). And that is sufficient to establish reasonableness. FAR 15.404-1(b)(1). Thus, the submission of initial proposals by the offerors was sufficient by itself to establish price reasonableness. Where that is the case, there is no need to conduct another round of BAFOs based on the mere possibility that doing so might result in an even better deal for the government. *E.g.*, *Harry A. Stroh Assocs., Inc.*, Comp. Gen. Dec. B-274335, 97-1 CPD ¶ 18 (Dec. 4, 1996); *Lloyd-Lamont Design, Inc.*, Comp. Gen. Dec. B-270090.3, 96-1 CPD ¶ 71 (Feb. 13, 1996). Here, the FoNPAC did more than was required by obtaining one round of BAFOs, and the competition for this procurement has therefore been more than adequate. No second round of BAFOs is necessary — nor, as explained below, would it be fair or desirable given the circumstances of this procurement.

Straining to justify its demand for another round of BAFOs, Neustar has publicly claimed that another round of BAFOs is needed because the PSTN-to-IP transition “had not been fully articulated at the time the RFP was issued,” supposedly rendering the RFP “stale.” Neustar has not made this argument in its ex parte letter to the Commission — presumably because it is so transparently wrong. The RFP specifically required the offerors to propose a NPAC/SMS architecture that is sufficiently flexible to support the PSTN-to-IP transition. *See* RFP § 7.2.5.

³ *See* North American Portability Management (NAPM) LLC, Report to NANC September 18, 2013, available at: http://www.nanc-chair.org/docs/mtg_docs/Sep13_NAPM_LLC_Report.doc.

Ms. Julie Veach
Mr. Jonathan Sallet
February 6, 2014
Page 5 of 8

Thus, offerors were required to address that transition in their *initial proposals*, and no BAFOs are needed to address this issue. Moreover, if Neustar truly thought the RFP was stale, it should have raised those concerns prior to proposal submission in April — not nine months later. Any such complaint is thus not just meritless, but also untimely. *See, e.g., Blue & Gold Fleet L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007) (solicitation defects must be raised prior to proposal submission); *Caddell Constr. Co.*, Comp. Gen. Dec. B-401281, 2009 CPD ¶ 130 (June 23, 2009) (same).

Given the plain language of the RFP and the announced timeline for award, Neustar's claim that it expected multiple rounds of BAFOs is simply not credible. The RFP advised offerors to submit their best proposals with their initial submissions, because they might not get any chance to revise their proposals. Neustar apparently ignored that advice — and then ignored it again when submitting its BAFO. If Neustar did not take the two opportunities it was given to submit its best proposal, it has no one to blame except itself. Its accusations of unfair treatment are meritless.⁴

II. Another Round of BAFOs Would Endanger the Integrity of the Procurement

The FoNPAC should not conduct, and the Commission should not authorize, another round of BAFOs because doing so would imperil the integrity of the procurement, and impose a severe risk of competitive prejudice on all bidders other than the incumbent. As explained above, Neustar has failed to articulate any reasonable basis for expecting a second round of BAFOs. As a result, there must be some other reason why Neustar suddenly, on October 21, 2013 — less than five weeks after submitting its “Best and Final Offer” — began demanding another opportunity to revise its bid.

In this procurement, the RFP was issued on February 5, 2013; initial proposals were submitted on April 22, 2013; and BAFOs were submitted on September 18, 2013. Not once during that time period did Neustar ever raise a concern about or desire for multiple BAFOs. As far as can be determined from publicly available information, it did not submit a vendor question on that issue, nor did it file any letters with the Commission. Thus, Neustar apparently did not

⁴ Neustar has also publicly asserted that it has a unique skillset, and that transition to a new contractor introduces risk. Every incumbent on a government contract believes that, and yet contracts — including contracts far more complex than this one — transition from one contractor to another all the time. This contract is no different. The RFP required each offeror to demonstrate that it has a sound technical approach and a sound plan for transition to ensure success and minimize risk. *See* RFP § 12.3 (requiring transition plan). As a result, those factors are being assessed as part of the evaluation process leading to award. Neustar is not the only company capable of performing, no matter how much it might wish otherwise.

Ms. Julie Veach
Mr. Jonathan Sallet
February 6, 2014
Page 6 of 8

become convinced of the need for a second round of BAFOs until after existing BAFOs were submitted.

On October 21, however, Neustar suddenly began clamoring for an opportunity to submit another BAFO — apparently because it desperately wants to reduce its price.⁵ In fact, Neustar was so anxious to inform the FoNPAC that it would cut its price that it unilaterally submitted a revised BAFO without waiting for permission to do so. Coming just weeks after the offerors' submission of BAFOs on September 18, these actions strongly suggest that Neustar obtained confidential source selection information concerning its competitive standing relative to other bidders and their highly proprietary prices.

We can think of no other reason for Neustar's abrupt desire to reduce its price (assuming that is what it is proposing), and we are therefore deeply concerned that a second round of BAFOs would be severely prejudicial to other bidders. Neustar should not be able to reset its price based on a superior, improper, and unfair understanding of the competitive landscape. It is precisely to avoid this kind of prejudice that federal law prohibits an offeror from obtaining source selection information, or another offeror's bid and proposal information, related to an open federal procurement. 41 U.S.C. § 2102; FAR 3.104-3. And where an offeror violates that prohibition, a federal agency must take steps to address the violation. FAR 3.104-7.

Appropriate steps include disqualification of the violator, or a refusal to consider revised pricing that may have been tainted by improperly obtained information. *See Kellogg Brown & Root Servs., Inc.* Comp Gen. Dec. B-400787.2, 2009 CPD ¶ 54 (Feb. 23, 2009) (offeror properly disqualified where its employee received an email from the contracting officer containing proprietary information, and had not immediately deleted it); *Computer Tech. Assoc., Inc., Com.* Gen. Dec. B-288622, 2001 CPD ¶ 187 (Nov. 7, 2001) (reasonable to disqualify offeror whose employees had seen transcripts of other offerors' oral presentations); *ST Aerospace Engines Pte., Ltd., Com.* Gen. Dec. B-275725.3, 97-2 CPD ¶ 106 (Oct. 17, 1997) (agency refusal to permit price revisions was reasonable where offeror's price had been released).

Given the risk to the integrity of the procurement process, and the potential for severe competitive prejudice to other bidders, Neustar's demand for another round of BAFOs should be denied. Making award based on the existing "Best and Final Offers" — which, as described

⁵ The case cited in footnote three of Neustar's January 15, 2014 letter to the Commission involves an offeror who proposed to slash its price, suggesting that Neustar seeks to do the same thing here. *See Burron Med. Prods., Inc., Com.* Gen. Dec. B-176407, 1972 WL 6292 (Sept. 27, 1972).

Ms. Julie Veach
Mr. Jonathan Sallet
February 6, 2014
Page 7 of 8

above, is consistent with the RFP and more than satisfies the need for competition — will ensure fairness and avoid the appearance of any impropriety.⁶

III. Delay Would Benefit No One but Neustar, and Would Harm Consumers

The Commission should also reject Neustar’s demand for another round of BAFOs, and for a public notice and comment process, because doing so will needlessly delay the procurement, benefiting only the incumbent, and harming consumers.

If Neustar were to succeed in its demand for a “do-over” BAFO, and an associated notice and comment period, there is a significant risk that the procurement could be so delayed that the Commission would be forced to extend Neustar’s incumbent contract. Such a result is contrary to the interests of the Commission, the carriers, and the consumers. Neustar’s current contract is the result of a sole source award, and its prices under that contract do not reflect the forces of competition. As such, they are unnecessarily high — currently running at over \$466 million per year — and impose needlessly high fees on consumers. It is in the interests of everyone but the incumbent to move expeditiously to a competitively awarded contract.

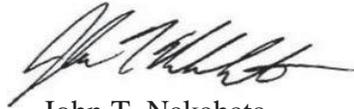
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⁶ For all the reasons stated, the FoNPAC and the Commission should not entertain Neustar’s demand for another round of BAFOs. If such a round is nonetheless considered, it is imperative that the Commission, as the ultimate procuring agency, conduct a full review to determine what confidential information may have been obtained by Neustar.

Ms. Julie Veach
Mr. Jonathan Sallet
February 6, 2014
Page 8 of 8

For these reasons, we request that the Commission direct the FoNPAC to reject Neustar's insistence on another round of BAFOs, and to promptly recommend award to one (or more) of the offerors based on the existing BAFOs. We also request that the Commission publish an updated procurement timeline to ensure transparency and allow for appropriate planning.

Sincerely,



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