

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
Requests for Review)
Wyoming Department of Education) File Nos. SLD-387256, 440458
Cheyenne, Wyoming)
Schools and Libraries Universal Service) CC Docket No. 02-6
Support Mechanism)

ORDER

Adopted: July 25, 2006

Released: July 25, 2006

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant two Requests for Review filed by the Wyoming Department of Education, Cheyenne, Wyoming (Wyoming). Wyoming seeks review of decisions by the Universal Service Administrative Company (USAC) denying Wyoming's Funding Year 2004 and Funding Year 2005 applications for discounted services under the schools and libraries universal service support mechanism. USAC found that Wyoming violated the Commission's competitive bidding requirements by not using price as the primary factor in vendor selection. For the reasons set forth below, we find that a competitive bidding violation did not occur, and remand Wyoming's Funding Year 2004 and 2005 applications to USAC for further consideration consistent with this Order. We direct USAC to issue a decision on the underlying applications no later than 60 days from the release of this Order.

II. BACKGROUND

2. Under the schools and libraries universal service support mechanism, also known as the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connections. The Commission's rules provide that, with one limited exception for existing, binding contracts, an

1 Letter from Clementina Jimenez, Wyoming Department of Education, to Federal Communications Commission, filed Dec. 13, 2005; Letter from Clementina Jimenez, Wyoming Department of Education, to Federal Communications Commission, filed Dec. 15, 2005 (collectively, Requests for Review). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of Universal Service Administrative Company (USAC) may seek review from the Commission. 47 C.F.R. § 54.719(c).

2 Letter from Schools and Libraries Division, Universal Service Administrative Company, to Clementina Jimenez, Wyoming Department of Education, dated Feb. 24, 2005; Letter from Schools and Libraries Division, Universal Service Administrative Company, to Clementina Jimenez, Wyoming Department of Education, dated Nov. 17, 2005 (collectively, Administrator's Decisions on Appeal).

3 47 C.F.R. §§ 54.501-54.503.

eligible school, library, or consortium that includes eligible schools and libraries must seek competitive bids for all services eligible for support.⁴ Generally, applicants file with USAC, for posting to its website, an FCC Form 470 requesting competitive bids for the services for which discounts are sought.⁵ The applicant must wait 28 days before entering into an agreement with a service provider for the requested services and submitting an FCC Form 471 requesting support for the services ordered by the applicant.⁶ USAC reviews the FCC Forms 471 that it receives and issues funding commitment decisions in accordance with the Commission's rules.

3. Consistent with these requirements, Wyoming public school districts submitted FCC Form 470 applications to USAC to initiate the competitive bidding process for E-rate eligible services.⁷ On April 3, 1998, Wyoming entered into a multi-year contract with US West Communications (now Qwest Interprise America, Inc. (Qwest)), to provide telecommunications services, Internet access, and internal connections to all public schools in the state of Wyoming.⁸ The term of the original contract was from July 1, 1998, through June 30, 2003, and was later extended to June 30, 2006.⁹ Subsequently, Wyoming filed its FCC Form 471 applications on behalf of all Wyoming public schools in accordance

⁴ 47 C.F.R. §§ 54.504(a), 54.511(c).

⁵ 47 C.F.R. § 54.504(b). *See also* Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (Funding Years 2000, 2001, 2002 FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (April 2002) (Funding Year 2003 FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (May 2003) (Funding Year 2004 FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (Funding Year 2005 FCC Form 470) (collectively, FCC Form 470).

⁶ 47 C.F.R. § 54.504(b)-(c). *See* Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (December 1997) (Funding Year 1999 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1999) (Funding Year 2000 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000) (Funding Year 2001 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2001) (Funding Year 2002 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2003) (Funding Year 2004 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (Funding Year 2005 FCC Form 471) (collectively, FCC Form 471).

⁷ *See, e.g.*, FCC Form 470, Fremont School District No. 1, posted Nov. 28, 2001; FCC Form 470, Weston County School District No. 1, posted Nov. 28, 2001.

⁸ *See* Requests for Review at 3-4.

⁹ *See* Requests for Review at 3-4. Because Wyoming originally bid the contract in 1998, we apply the Commission's rules in effect at that time. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029, para. 481 (1997) (*Universal Service Order*) (subsequent history omitted) (stating that price should be the primary factor in selecting a bid, but applicants are given maximum flexibility to take service quality into account and may choose the offering that meets their needs most effectively and efficiently); *see also Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734 (1999) (*Tennessee Order*) (concluding that price and other factors, such as prior experience, personnel qualifications, and management capability, may form a reasonable basis on which to evaluate whether an offering is cost-effective).

with program rules.¹⁰ USAC denied Wyoming's applications on the ground that the documentation provided by Wyoming during the selective review process demonstrated that price was not the primary factor in selecting Qwest as the service provider.¹¹ USAC later affirmed its decisions on appeal.¹² Wyoming then filed the instant Requests for Review.¹³

III. DISCUSSION

4. For the reasons discussed below, we grant Wyoming's Requests for Review. We find that, contrary to USAC's finding, Wyoming did comply with the Commission's competitive bidding requirements in place at the time Wyoming executed its service contract with Qwest.¹⁴ In particular, we find that Wyoming considered price, as well as other factors, in determining the most cost-effective bid.

5. In its Requests for Review, Wyoming states that it was directed by the Wyoming State Supreme Court to establish a statewide network that would ensure equal opportunity for a proper education for every student in Wyoming.¹⁵ In accordance with this directive, the State Superintendent of Public Instruction established the Wyoming Equality Network (WEN), a statewide, high-speed data and video network that connects all Wyoming public schools.¹⁶ The purpose of the WEN is to improve education in Wyoming by providing equitable delivery of high-quality educational material throughout Wyoming, including its sparsely populated areas.¹⁷

6. Pursuant to state legislation enacted in February 1997, Wyoming issued a Request for Proposal (RFP) to solicit responses from the telecommunications industry for the design, development, implementation, and support of the WEN.¹⁸ The RFP asked potential bidders to propose one of three

¹⁰ See FCC Form 471, Wyoming Department of Education, filed Jan. 24, 2004; FCC Form 471, Wyoming Department of Education, filed Jan. 19, 2005.

¹¹ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Linda Carter, State of Wyoming, Department of Administration and Information, dated June 29, 2005 (Funding Year 2004 Funding Commitment Decision Letter); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Linda Carter, State of Wyoming, Department of Administration and Information, dated Sept. 14, 2005 (Funding Year 2005 Funding Commitment Decision Letter). See also Requests for Review at 1 (listing FRNs that are the subject of this appeal). USAC selects some applications for Selective Review to ensure that certain FCC program rules are followed. Applications are reviewed to examine compliance with the following: 1) competitive bidding process; 2) necessary resources certification; 3) endowment qualifications; and 4) consortia qualifications. See USAC's website regarding the Selective Review process, <http://www.universalservice.org/sl/applicants/step08>.

¹² See Administrator's Decisions on Appeal.

¹³ Requests for Review.

¹⁴ See *supra* n.9. See also *Request for Review by the Wyoming Department of Education*, CC Docket No. 02-6, Order, DA 06-485 (rel. Feb. 28, 2006) (the Wireline Competition Bureau granted Wyoming's waiver request finding that a competitive bidding violation did not occur and remanded its Funding Year 2003 application to the Universal Service Administrative Company (USAC)).

¹⁵ Requests for Review at 3 (*citing Campbell Co. School District v. Wyoming*, 907 P.2d 1238 (Wyo. 1995)) (directing the Wyoming state legislature to design the best education system by identifying the proper educational package each Wyoming student is entitled to have).

¹⁶ Requests for Review at 3.

¹⁷ *Id.*

¹⁸ *Id.* (*citing* 1997 Session Laws of Wyoming, Chapter 65, Section 1 W.S. § 21-2-202(a)(xx)).

options: (1) expansion of the existing infrastructure; (2) complete replacement of the existing infrastructure, with new cost-effective services; or (3) a combination of existing infrastructure and new services.¹⁹ The RFP emphasized that the proposed facilities must be compatible with existing telecommunications-based delivery systems in use by the state.²⁰ The RFP listed five criteria, from highest priority to lowest priority, to be used for evaluation purposes: functionality, pricing, vendor support, vendor qualifications, and project plan.²¹ Each criterion was weighted as a percentage. Functionality was given the highest weight of 30 percent; pricing and vendor support were 20 percent; and vendor qualifications and project plan were 15 percent.²²

7. In its Request for Review, Wyoming states that it was necessary to assign the highest weight to “functionality” because Wyoming had to select a service provider that was capable of providing telecommunications services to all schools over a large and diverse geographic area.²³ Wyoming asserts that the statewide data and two-way video conferencing connections also had to be compatible with the existing facilities so operation and maintenance on a statewide level would be more cost-effective.²⁴ Wyoming further maintains that although functionality was required to be given the highest weight, pricing was still a primary factor in awarding the contract to Qwest.²⁵ Wyoming states that it requested bidders to provide in their proposals detailed information regarding one-time costs and recurring costs associated with the project, as well as a cost structure for possible contract extensions.²⁶ Additionally, evaluators were asked to review the cost structures with the public and state’s best interest in mind.²⁷ Wyoming asserts that the evaluator’s recommendation to select Qwest was based on Qwest’s ability to provide cost-effective services to all entities throughout the state.²⁸ Therefore, Wyoming maintains that the service contract with Qwest was executed in accordance with state procurement law, state legislation, and E-rate program rules.²⁹

8. As noted above, the Commission’s rules require eligible schools, libraries, and consortia that include eligible schools and libraries to seek competitive bids on the services for which they seek discounts.³⁰ In selecting a provider of eligible services, schools and libraries must carefully consider all bids submitted and must select the most cost-effective offering.³¹ These rules apply in addition to state

¹⁹ See Request for Proposal at 19 (attached to Requests for Review).

²⁰ *Id.*

²¹ *Id.* at 22.

²² See Requests for Review at 4.

²³ *Id.* at 5.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ 47 C.F.R. §§ 54.504(a), 54.511(c).

³¹ 47 C.F.R. § 54.511.

and local competitive bidding requirements and are not intended to preempt such state or local requirements.³² Although the Commission determined that price should be the primary factor in selecting a bid, applicants are given maximum flexibility to take service quality into account and may choose the offering that meets their needs most effectively and efficiently.³³ In this regard, the Commission concluded that other factors, such as prior experience, personnel qualifications, and management capability, may form a reasonable basis on which to evaluate whether an offering is cost-effective.³⁴

9. The record in this case indicates that Wyoming's procurement process required selection of the most cost-effective bid after evaluating price as a primary factor. The typical method for procuring supplies, materials, equipment, and services for use by the State of Wyoming is by competitive sealed bidding, in order to secure acceptable products at the lowest possible cost to the taxpayers of the State.³⁵ According to Wyoming procurement regulations, awards are given to the lowest responsive and responsible bidder, based on criteria specified in the RFP.³⁶ The underlying record shows that Qwest's proposal satisfied the objectives set forth in Wyoming's RFP; it not only received the highest number of points in the bid evaluation, but it also represented the lowest cost of the proposals submitted.³⁷ These factors support the conclusion that the procurement process at issue did not violate our competitive bidding requirements. We therefore grant Wyoming's Requests for Review.

IV. ORDERING CLAUSES

10. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Requests for Review filed by Wyoming Department of Education on December 13, 2005, and December 15, 2005 are GRANTED and REMANDED to USAC for further consideration in accordance with the terms of this Order.

³² 47 C.F.R. § 54.504 (a).

³³ See *Universal Service Order*, 12 FCC Rcd at 9029, para. 481.

³⁴ *Id.*; see also *Tennessee Order*, 14 FCC Rcd at 13739-40, para. 10.

³⁵ See Department of Administration and Information, Procurement Section, Procurement Procedures Manual at section 2703.00 (1999).

³⁶ See Requests for Review at Attachment 2 (Administration and Information, General Services Division, "A Vendor's Guide: How to do Business with the State of Wyoming").

³⁷ See Requests for Review at Attachment 7.

11. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that USAC SHALL COMPLETE its review of Wyoming Department of Education's Funding Year 2004 and 2005 applications and ISSUE a decision on the underlying applications no later than 60 days from the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief
Wireline Competition Bureau