



Federal Communications Commission
Washington, D.C. 20554

DA 06-156

January 26, 2006

Mr. Howard A. Kalmenson
President
Lotus Communications Corporation
3301 Barham Boulevard, Suite 200
Los Angeles, CA 90068

Jerome S. Boros
Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104

Re: FM Broadcast Auction No. 62 – Short-form Applications of Lotus Communications Corporation and Aurora Communications Inc.

Dear Messrs. Kalmenson and Boros:

Lotus Communications Corporation (“Lotus”) and Aurora Communications Inc. (“Aurora”) each filed a short-form application to participate in Auction No. 62, an upcoming auction of certain FM broadcast construction permits.¹ Both applicants certified that they had not entered into any agreements or understandings with any other parties (except those identified in their applications) regarding the amount of their bids, bidding strategies or the particular licenses on which they would or would not bid;² neither application identified the existence of any bidding agreements or arrangements. In Lotus’s short-form application, Mr. Lynden Williams was identified as one of its authorized bidders.³ In Aurora’s short-form application, Mr. Williams was identified as Aurora’s vice president and the holder of 50% of the issued and outstanding voting stock in Aurora as well as senior vice president of Lotus.⁴ Lotus selected four permits. Aurora selected all 171 FM radio construction permits being offered in Auction No. 62.

As in all auctions, applicants in Auction No. 62 that select on their applications any of the same construction permits must affirmatively avoid all communications with each other that affect, or have the potential to affect, bids or bidding strategy,⁵ unless the applicants identified each other on their short-form applications (FCC Form 175) as parties with which they have entered into a bidding agreement. This prohibition applies to all applicants regardless of whether such applicants become qualified bidders or

¹ Short-form application of Lotus Communications Corporation (filed Aug. 12, 2005) (“Lotus Short Form”); Short-form application of Aurora Communications Inc. (filed Aug. 12, 2005) and amendment (filed Nov. 28, 2005) (“Aurora Short Form”). Short-form applications of all Auction No. 62 applicants may be viewed online at: <https://auctionfiling.fcc.gov/form175/search175/index.htm>.

² See 47 C.F.R. §1.2105(a)(2)(ix) (anti-collusion certification requirement); see also 47 C.F.R. §1.2105(a)(2)(viii) (requirement to identify parties to agreements relating to licenses being auctioned).

³ See Lotus Short Form.

⁴ See Aurora Short Form.

⁵ “Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005; Notice and Filing Requirements, Minimum Opening Bids and Other Procedures for Auction No. 62,” *Public Notice*, 20 FCC Rcd 10492, 10497-500 (2005) (“*Auction No. 62 Procedures Public Notice*”), citing 47 C.F.R. §§ 1.2105(a)(2)(viii), 1.2105(c)(1); 73.5002(d). See also Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Seventh Report and Order*, 16 FCC Rcd 17546 (2001).

actually bid.⁶ For purposes of this prohibition, the definition of applicant includes all controlling interests in the applicant, including all officers and directors of an entity submitting a short-form application.⁷ The anti-collusion rule became applicable for Auction No. 62 at the short-form application filing deadline on August 12, 2005 and will remain applicable until the post-auction down payment deadline.⁸

On November 8, 2005, separate letters were sent to each applicant expressing concerns about the applicants' compliance with the Commission's anti-collusion rule as a result of the overlapping positions of Mr. Williams in Lotus and Aurora and the absence of any disclosure concerning bidding arrangements or understandings. Pursuant to Section 1.2105(b)(2), the applicants were provided with an opportunity to cure the specified defects in their applications.⁹ Lotus made no changes to its application. Aurora submitted an amendment to its application during the resubmission period.¹⁰ Neither Lotus nor Aurora submitted an upfront payment, and both applicants have been found unqualified to participate in the bidding.¹¹

Because Mr. Williams is an officer of both Lotus and Aurora, for purposes of the anti-collusion rule he is an applicant with respect to both Lotus's and Aurora's applications to participate in Auction No. 62. Because the same person is considered to be the applicant in both instances, the bids and bidding strategies of one applicant are necessarily conveyed to the other applicant.¹² As noted above, the anti-collusion rule applies to all applicants, whether they qualify to bid or not, from the short-form filing deadline until the post-auction down payment deadline.

⁶ *Auction No. 62 Procedures Public Notice*, 20 FCC Rcd at 10498. *See also, e.g.*, Application of Star Wireless, LLC, *Forfeiture Order*, 19 FCC Rcd 18626 (Enf. Bur. 2004); Letter to Robert Pettit from Margaret W. Wiener, 16 FCC Rcd 10080 (Auctions Div. 2000).

⁷ *Auction No. 62 Procedures Public Notice*, 20 FCC Rcd at 10498, citing 47 C.F.R. § 1.2105(c)(7)(i). *See also* 47 C.F.R. § 1.2110(c)(2)(ii)(F). In establishing the definition of "applicant" for purposes of the anti-collusion rule, the Commission stated, "Indeed, if holders of attributable interests were not considered applicants, collusive arrangements would be possible simply through the creation of a separate entity to act as the 'applicant.'" Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Memorandum Opinion and Order*, 9 FCC Rcd 7684, 7687-88 ¶ 9 (1994).

⁸ *Auction No. 62 Procedures Public Notice*, 20 FCC Rcd at 10498, citing 47 C.F.R. § 1.2105(c)(1).

⁹ 47 C.F.R. § 1.2105(b)(2). Consistent with usual practice, Commission staff spoke with the applicants' designated contacts during the resubmission period concerning the indicated deficiencies.

¹⁰ In that submission, Aurora confirmed Mr. Williams's position as senior vice president of Lotus. Amendment to Short-form Application of Aurora Communications Inc. (filed Nov. 28, 2005). Aurora also requested that the four permits also selected by Lotus be removed from its application. *Id.* (Changes in the license areas selected on a short-form application are considered major amendments and are not permitted after the short-form filing deadline. *See* 47 C.F.R. § 1.2105(b)(2).) Aurora stated that "Lotus has removed Lynden Williams as an authorized bidder," but Lotus made no such change to its application.

¹¹ *See* "Auction of FM Broadcast Construction Permits; 212 Bidders Qualified to Participate in Auction No. 62," DA 05-3204 (rel. Dec. 21, 2005). Although Lotus and are not eligible to bid, each applicant remains subject to the anti-collusion rule until the post-auction down payment deadline. *See* 47 C.F.R. § 1.2105(c)(1).

¹² *See* Letter to Colby M. May, counsel to TCCSA, Inc., from Barbara A. Kreisman, Chief, Video Division, Media Bureau and Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, DA 05-2445 (rel. Sept. 13, 2005) (finding apparent violation of anti-collusion rule where applicants for the same construction permits shared an officer and director and applicants had not identified one another on short-form applications). We note that, even had Lotus removed Mr. Williams as an authorized bidder, Mr. Williams remained an officer of Lotus and Aurora after the short-form application filing deadline and thus he would still be an "applicant" with respect to both Lotus and Aurora. 47 C.F.R. § 1.2105(c)(7)(i).

Accordingly, because no agreement between the two applicants was disclosed, and Lotus and Aurora both have selected several of the same construction permits in Auction 62, they appear to be in violation of the anti-collusion rule.

Sincerely,

Margaret W. Wiener
Chief, Auctions and Spectrum Access Division
Wireless Telecommunications Bureau