

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
Request for Review)
Wyoming Department of Education) File No. SLD-338550
Cheyenne, Wyoming)
Schools and Libraries Universal Service) CC Docket No. 02-6
Support Mechanism)

ORDER

Adopted: February 28, 2006

Released: February 28, 2006

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant a Request for Review filed by the Wyoming Department of Education, Cheyenne, Wyoming (Wyoming). Wyoming seeks review of a decision by the Universal Service Administrative Company (USAC, or Administrator) denying Wyoming's Funding Year 2003 application for discounted services under the schools and libraries universal service support mechanism on the ground that Wyoming violated the Commission's competitive bidding requirements by not using price as a primary factor in the vendor selection. For the reasons set forth below, we find that a competitive bidding violation did not occur, and remand Wyoming's Funding Year 2003 application to USAC for further consideration consistent with this Order.

II. BACKGROUND

2. Under the schools and libraries universal service support mechanism, commonly referred to 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 eligible school, library, or consortium that includes eligible schools and libraries must seek competitive bids for all services eligible for support. Generally, applicants file with USAC, for posting

1 Letter from Clementina Jimenez, Wyoming Department of Education, to Federal Communications Commission, filed April 18, 2005 (Request for Review). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Universal Service Administrative Company (Administrator) 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 February 24, 2005 (Administrators Decision on Appeal).

3 47 C.F.R. §§ 54.501-54.503.

4 47 C.F.R. §§ 54.504, 54.511(c).

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 Subsequently, Wyoming entered into a multi-year contract with US West Communications (now Qwest Interprise America, Inc. (Qwest)), to provide telecommunications service, Internet access, and internal connections to all public schools in the state of Wyoming.⁸ On February 4, 2003, Wyoming filed its FCC Form 471 application on behalf of all Wyoming public schools in accordance with program rules.⁹ USAC denied Wyoming's application 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.¹⁰ USAC later affirmed this decision on appeal.¹¹ Wyoming then filed the instant Request for Review.

⁵ See Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 470).

⁶ 47 C.F.R. § 54.504(c); see also Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 471).

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

⁸ See Request for Review at 3-4. On April 3, 1998, Wyoming entered into a five-year contract with US West (now Qwest) to create a telecommunications network within the State of Wyoming. The term of the original contract was from July 1, 1998 through June 30, 2003. *Id.* In 2001, the term of the contract was extended to June 30, 2006. *Id.* at 4. In addition to providing telecommunications services, Internet access, and internal connections for Wyoming, Qwest serves as the agent for the following local independent telecommunications providers: TCT West, Inc., Union Telecommunications Company, Tri-County Telephone Association, Inc., Dubois Telephone Exchange, Inc., Century Telecommunications of Wyoming Inc., RT Communications, Inc., Range Telephone Cooperative, Inc., Sprint/United Telephone Company of the West, Silver Star Telephone Company, Inc., All West Communications, Inc., and Project Telephone Company, Inc. See Letter from Clementina Jimenez, Wyoming Department of Education, to Schools and Libraries Division, Universal Service Administrative Company, dated November 17, 2003.

⁹ See FCC Form 471, Wyoming Department of Education, filed February 4, 2003. In Funding Years 2000 and 2001, Wyoming requested support for the services underlying the Wyoming-US West state master contract at issue here. USAC denied these funding requests because the contract was signed before the end of the 28-day waiting period. Subsequently, Wyoming sought Commission review of these decisions. See Request for Review by the State of Wyoming, to Federal Communications Commission, SLD File No. 202111, filed December 20, 2002; Request for Review by the State of Wyoming, to Federal Communications Commission, SLD File No. 218236, filed February 12, 2003. In a separate order released today, the Bureau denies Wyoming's Requests for Review, but, on its own motion, grants a waiver of section 54.504(b) of the Commission's rules. Specifically, the Bureau finds that a waiver of the 28-day competitive bidding rule is appropriate to enable Wyoming public schools to obtain services from the Wyoming state master contract. See *Request for Review by the Wyoming Department of Education of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, Order, DA 06-484 (Wireline Comp. Bur. 2006).

¹⁰ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Linda Carter, State of Wyoming, Department of Administration and Information, dated June 29, 2004 (Funding Commitment Decision Letter). See also Request for Review at 1 (listing FRNs that are the subject of this appeal).

III. DISCUSSION

4. For the reasons discussed below, we conclude that, contrary to USAC's finding, Wyoming did comply with the Commission's competitive bidding requirements. In particular, we find that Wyoming considered price, as well as other factors, in determining the most cost-effective bid. We therefore grant Wyoming's Request for Review.

5. As a preliminary matter, we note that at the time Wyoming initiated its competitive bidding process for Funding Year 2003, the Commission had released only one order addressing the requirement that price be a primary factor in selecting the winning bid.¹² In the *Tennessee Order*, released on August 11, 1999, the Commission determined that a competitive bidding process complies with program rules if price is taken into account during bid selection and the contract is awarded to the most cost-effective bidder.¹³ The Commission explained that:

a school should have flexibility to select different levels of service, [...] but when selecting among comparable services, a school should be guided by price in its selection. Even among bids for comparable services, however, this does not mean that the lowest bid must be selected. Price, however, should be carefully considered at this point to ensure that any considerations between price and technical excellence (or other factors) are reasonable.¹⁴

6. In its Request 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

¹¹ See Administrative Decision on Appeal; Letter from Clementina Jimenez to Schools and Libraries Division, to Schools and Libraries Division, Universal Service Administrative Company, dated August 24, 2004.

¹² See *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, Order, 14 FCC Rcd 13734 (1999) (*Tennessee Order*).

¹³ *Id.* at 13737-38, paras. 7-8.

¹⁴ *Id.* at 13739, para. 9. Four years later, after the conclusion of the Funding Year 2003 competitive bidding process, the Commission released the *Ysleta Order* in which it revised the policies established in the *Tennessee Order*. See *Request for Review by Ysleta Independent School District of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26406 (2003) (*Ysleta Order*). In *Ysleta*, the Commission concluded that price must be the primary factor in selecting a winning bid. *Id.* The Commission explained that if a school were to assign 10 points to reputation and 10 points to past experience, the school would be required to assign at least 11 points to price. *Id.* at n. 138. This policy differs from the direction given in the *Tennessee Order* in that schools are now required to have a separate "cost category" when evaluating bids and that category must be given more weight than any other category. Because the *Ysleta Order* was released after the completion of Wyoming's competitive bidding process in Funding Year 2003, however, it is not applicable here. We therefore look to the *Tennessee Order* for guidance.

¹⁵ Request for Review at 3, citing *Campbell Co. School District v. Wyoming*, 907 O.2d 1238 (Wyo. 1995).

¹⁶ Request for Review at 3.

Wyoming's sparse population.¹⁷ 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

7. The RFP asked potential bidders to propose one of three 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 emphasizes 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, which contained several sub-components, was weighted with a percentage: Functionality was given the highest weight of 30 percent; pricing and vendor support was 20 percent; and vendor qualifications and project plan was 15 percent.²²

8. 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 states 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 state level would be more cost-effective.²⁴ Wyoming further maintains that although functionality was given the highest weight, pricing was still a primary factor in awarding the contract to Qwest.²⁵ Wyoming asserts 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 Wyoming states that 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 Thus, Wyoming maintains that the service contract with Qwest was executed in accordance with state procurement law, state legislation, and E-rate program rules.²⁹

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See* Wyoming Request for Proposal at 19.

²⁰ *Id.*

²¹ *Id.* at 22.

²² *See* Request for Review at 4.

²³ *Id.* at 5.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

9. 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 Although the Commission has concluded 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.³² In this regard, the Commission has 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.³³ These rules apply in addition to state and local competitive bidding requirements and are not intended to preempt such state or local requirements.³⁴

10. 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 Request for Review.

³⁰ 47 C.F.R. §§ 54.504, 54.511(c).

³¹ 47 C.F.R. § 54.511.

³² 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).

³³ *Id.*; *Tennessee Order*, 14 FCC Rcd 13739-40, para. 10. See also 47 C.F.R. §§ 54.504(b)(2)(vii), 54.511(a).

³⁴ 47 C.F.R. § 54.504(a).

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

³⁶ See Request 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 Request for Review at Attachment 7; see also para. 7, *supra*.

IV. ORDERING CLAUSE

11. ACCORDINGLY, IT IS ORDERED, pursuant to 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 Request for Review filed by Wyoming Department of Education on April 18, 2005 is GRANTED and remanded to USAC for further consideration.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief
Wireline Competition Bureau