

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Requests for Review of the
Decisions of the
Universal Service Administrator by
Long Beach Unified School District
Long Beach, California, et al.
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-367370, et al.
CC Docket No. 02-6

ORDER

Adopted: March 13, 2007

Released: March 13, 2007

By the Acting Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we address three appeals of decisions by the Universal Service Administrative Company (USAC) denying requests for funding under the schools and libraries universal service support mechanism. The decisions at issue involve the denial of funding on the ground that the underlying applications violated the Commission's competitive bidding requirements. As discussed below, we find that the Petitioners complied with the Commission's competitive bidding requirements in place at the time of their applications. We therefore grant the appeals and remand the underlying applications to USAC for further action consistent with this Order. To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of the applications and issue a decision based on a complete review and analysis no later than 90 days from release of this Order.

1 Letter from James Keck, Long Beach Unified School District, to Federal Communications Commission, dated May 25, 2004 (regarding Application No. 367370, FRN 1000487) (Long Beach); Letter from Augusto Hernandez, Asociacion de Educacion Privada de Puerto Rico, on behalf of Advance Bilingual School, to Federal Communications Commission, dated February 10, 2005 (regarding Application No. 348377) (Advanced Bilingual School); Letter from Larry Patrick, Smoky Hill Education Service Center, to Federal Communications Commission, dated August 24, 2004 (regarding Application No. 350004) (Smoky Hill) (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 USAC may seek review from the Commission. 47 C.F.R. § 54.719(c).

2 For purposes of this Order, decisions by both the Schools and Libraries Division and USAC will be referred to as decisions issued by USAC.

3 Although we grant the appeals addressed here, we make no findings as to the ultimate eligibility of the requested services.

II. BACKGROUND

2. Application Process. Under the schools and libraries universal service support mechanism, also known as E-rate, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connections.⁴ 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.⁵

3. In accordance with the Commission's rules, applicants must submit for posting on USAC's website an FCC Form 470 (Form 470) requesting discounts for E-rate eligible services, such as tariffed telecommunications services, month-to-month Internet access, or any services for which the applicant is seeking a new contract.⁶ The applicant must describe the desired services with sufficient specificity to enable potential service providers to submit bids for such services.⁷ The applicant must consider all submitted bids prior to entering into a contract and price must be the primary factor in selecting the winning bid.⁸

4. Competitive Bidding. Prior to Funding Year 2004, the Commission released only one order addressing an appeal of the requirement that price be a primary factor in selecting the winning bid. Specifically, in the *Tennessee Order*, released in 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.⁹ The Commission further concluded that other factors, such as prior experience, personnel qualifications, and management capability, also may form a reasonable basis on which to evaluate whether an offering is cost-effective.¹⁰

5. 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*.¹¹ In the *Ysleta Order*, the Commission concluded that price must be the primary factor

⁴ 47 C.F.R. §§ 54.501-54.503.

⁵ 47 C.F.R. §§ 54.504, 54.511(c).

⁶ 47 C.F.R. § 54.504(b).

⁷ *Id.*

⁸ 47 C.F.R. § 54.511(a).

⁹ See *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, 13737-39, paras. 7-9 (1999) (*Tennessee Order*). The Commission, however, used two different phrases to discuss how price should be taken into account; it said price should be "a primary factor," but in discussing prior precedent, the order also said price should be "the primary factor." *Id.* at 13739-40, paras. 10-11. See also *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).

¹⁰ *Id.* at 13739-40, para. 10; see also 47 C.F.R. §§ 54.504(b)(2)(vii), 54.511(a).

¹¹ 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, 26429, para. 50 (2003) (*Ysleta Order*).

in selecting a winning bid.¹² 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.¹³ The Commission stated that if, for example, a school assigns 10 points to reputation and 10 points to past experience, the school would be required to assign at least 11 points to price.¹⁴ The Commission also acknowledged that its varying phraseology created ambiguity on this issue.¹⁵ Because the Commission’s clarifications in the *Ysleta Order* were not provided until after the completion of Petitioners’ competitive bidding processes, we find Petitioners’ use of price as a primary factor rather than *the* primary factor appropriate.

6. Requests for Review. The Petitioners identified herein submitted Form 470 applications to USAC to initiate the competitive bidding process for E-rate eligible services.¹⁶ Subsequently, Petitioners entered into contracts with their respective service providers and filed their Form 471 applications for Funding Years 2002 or 2003.¹⁷ USAC denied the Petitioners’ applications on the ground that the documentation provided by Petitioners during the selective review process demonstrated that Petitioners violated the Commission’s competitive bidding rules. USAC later affirmed these decisions on appeal. Petitioners then filed the instant Requests for Review.¹⁸

III. DISCUSSION

7. We find that USAC improperly denied Petitioners’ funding requests because it erroneously required Petitioners to give more weight to price in the competitive bidding process than to any other factor. These Petitioners filed their applications and initiated their competitive bidding process prior to the conclusion of Funding Year 2003. As such, USAC should have allowed Petitioners to consider price as a primary factor in determining whether a vendor is most cost-effective, and should not have reviewed whether price was weighted the highest during bid evaluations.¹⁹

8. The record shows that Long Beach conducted a competitive bidding process that adhered to relevant state and local procurement laws.²⁰ Long Beach submitted documentation to USAC detailing the competitive bidding process, including bid requests, bid proposals, and cost evaluation criteria.²¹ It

¹² *Id.* This rule was originally codified in 2003. See *Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202 (2004) (codifying 47 C.F.R. § 54.511(a)); see also *School and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808 (2004) (codifying 47 C.F.R. § 54.504(b)(2)(vii) and 47 C.F.R. § 54.504(c)(1)(xi)).

¹³ See *Ysleta Order*, 18 FCC Rcd at 26429, para. 50.

¹⁴ *Id.* at n.138.

¹⁵ *Id.* at 50.

¹⁶ See FCC Form 470, Long Beach Unified School District, posted December 13, 2002; FCC Form 470, Smoky Hill Education Service Center, posted October 31, 2002; FCC Form 470, Advance Bilingual School, posted December 2, 2002.

¹⁷ See FCC Form 471, Long Beach Unified School District, filed February 4, 2003; FCC Form 471, Smoky Hill Education Service Center, filed January 23, 2003; FCC Form 471, Advance Bilingual School, filed January 20, 2003.

¹⁸ See Requests for Review.

¹⁹ Compare *Tennessee Order*, 14 FCC Rcd at 13737-13739, paras. 7-9, with *Ysleta Order*, 18 FCC Rcd at 26429, para. 50.

²⁰ Long Beach Request for Review at 3-4.

²¹ *Id.* at Attachments A, B, D, and H.

appears that, during its evaluation process, Long Beach considered several criteria, including (1) functionality (*i.e.*, whether the proposal was a viable solution); (2) whether the proposal was the best value to the district; and (3) previous experiences with the vendor.²² Long Beach states that it administered a basic networking exam to all bidders to determine whether they could manage Long Beach's complex network.²³ After vendors were pre-qualified based on availability and technical knowledge of the products deployed in the district, vendor selection was based on cost.²⁴ According to Long Beach, the vendor selected, Malcolm McColl, Jr., Inc., dba SystemLink, was the only vendor that met Long Beach's minimum requirements and was the most cost-effective choice.²⁵

9. The record shows that Smoky Hill considered three criteria in its evaluation process—price, support, and warranty. According to Smoky Hill, price was the overall determining factor in the selection process.²⁶ The other Petitioner, Advance Bilingual School, considered at least six evaluation criteria in its vendor selection process.²⁷ Two of these criteria, price and ability to meet the needs of member schools, were given the highest weight.²⁸ Ultimately, Advance Bilingual School selected the vendor with the highest number of points in each of these categories.²⁹

10. Based on our review of the record, we find that the Petitioners evaluated the responsive bidders, using price as a primary consideration, and selected the vendor that offered the most cost-effective offering. Accordingly, we conclude that the Petitioners' competitive bidding processes did not violate program rules. In addition, there is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements. Furthermore, we emphasize that our actions taken in this Order should have minimal effect on the overall federal Universal Service Fund (USF or the Fund), because the monies needed to fund these appeals have already been collected and held in reserve.³⁰ We therefore grant and remand the underlying application to USAC for further consideration in accordance with the terms of this Order. To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of the applications and issue a decision based on a complete review and analysis no later than 90 days from release of this Order.

²² *Id.* at Attachment B.

²³ See Letter from Jim Keck, Long Beach Unified School District, to Schools and Libraries Division, Universal Service Administrative Company, dated December 16, 2003.

²⁴ *Id.*

²⁵ *Id.* See also Long Beach Request for Review at Attachment D.

²⁶ See Smoky Hill Request for Review at 2.

²⁷ Advance Bilingual School Request for Review at 3. The vendor selection process was based on the following criteria and weights: price (15 points), ability to meet the general and specific needs of member schools (15 points), compliance with the bidding procedures of the Asociacion de Educacion Privada de Puerto Rico (10 points), expertise (10 points), experience with educational institutions (5 points), and service reputation (5 points), among others. *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ We note that USAC has already reserved sufficient funds to address outstanding appeals. See, *e.g.*, Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Second Quarter 2007, dated January 31, 2007. Thus, we determine that the action we take today should have minimal impact on the Universal Service Fund as a whole.

11. Finally, we are committed to guarding against waste, fraud, and abuse, and ensuring that funds disbursed through the E-rate program are used for appropriate purposes.³¹ Although we grant the appeals addressed here, this action in no way affects the authority of the Commission or USAC to conduct audits and investigations to determine compliance with the E-rate program rules and requirements. Because audits or investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or Commission rules, such proceedings can reveal instances in which universal service funds were improperly disbursed or in a manner inconsistent with the statute or the Commission's rules. To the extent we find that funds were not used properly, we will require USAC to recover such funds through its normal processes. We emphasize that we retain the discretion to evaluate the uses of monies disbursed through the E-rate program and to determine on a case-by-case basis that waste, fraud, or abuse of program funds occurred and that recovery is warranted. We remain committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under our own procedures and in cooperation with law enforcement agencies.

IV. ORDERING CLAUSES

12. 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 pursuant to the authority delegated under sections 0.91, 0.291, 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 54.722(a), that the Requests for Review filed by Long Beach Unified School District on May 25, 2004; Smoky Hill Education Service Center on August 25, 2004; and Asociacion de Educacion Privada de Puerto Rico, on behalf of Advance Bilingual School, on February 10, 2005, are GRANTED and REMANDED to USAC for further consideration in accordance with the terms of this Order.

13. 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 pursuant to authority delegated under sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, USAC SHALL COMPLETE its review of the remanded applications and ISSUE an award or a denial based on a complete review and analysis no later than 90 days from release of this Order.

³¹ *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-487170, *et al.*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316 (rel. May 19, 2006).

14. IT IS FURTHER ORDERED that, pursuant to authority delegated under sections 0.91, 0.291 and 1.102 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.102, this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Renée R. Crittenden
Acting Deputy Chief
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