

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Requests for Review of
Decisions of the
Universal Service Administrator by
Delano Joint Union High School District
Delano, California
Cityroots, Inc.
Bakersfield, California
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-319862
File No. SLD-319862
CC Docket No. 02-6

ORDER

Adopted: October 30, 2008

Released: October 30, 2008

By the Acting Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant two appeals filed by Delano Joint Union High School District (Delano) and Cityroots, Inc. (Cityroots), one of Delano’s selected service providers, of decisions by the Universal Service Administrative Company (USAC) seeking to recover funding already disbursed to Delano and its service providers – Cityroots, SBC DataComm (SBC), Inter’L, Compaq Computer Corporation (Compaq) – under the schools and libraries universal service support mechanism, also known as the E-rate program, on the ground that there was improper service provider involvement in the competitive bidding process. We find that the record demonstrates that the Commission’s competitive bidding requirements were not violated. To ensure that this matter is resolved expeditiously, we direct USAC to discontinue recovery actions against Delano and its service providers and, to the extent any funds have already been recovered from the parties, to refund the parties no later than 60 days from the release of this Order.

II. BACKGROUND

2. Under the schools and libraries universal service support mechanism, 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

1 Letter from William A. Hornback, Delano Joint Union High School District to Federal Communications Commission (dated Dec. 28, 2006) (Delano Request for Review); Letter from Deborah Ramirez, Cityroots, Inc. (dated Mar. 20, 2007) (Cityroots 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 USAC may seek review from the Commission. 47 C.F.R. § 54.719(c). Hewlett Packard Company subsequently acquired Compaq Computer Company in 2002. See http://www.pcworld.com/article/id,97944-page,1/article.html (retrieved Aug. 11, 2008).

2 47 C.F.R. §§ 54.501-54.503.

that an eligible school, library, or consortium that includes eligible schools and libraries must seek competitive bids for all services eligible for support.³ Thus, an applicant must post an FCC Form 470 on USAC's website requesting discounts for E-rate eligible services, including tariffed telecommunications services, month-to-month Internet access, or any services for which the applicant is seeking a new contract.⁴ The applicant must describe the desired services with sufficient specificity to enable potential service providers to submit bids for such services.⁵ This description must be provided on the FCC Form 470 itself or it must be indicated on the form that there is a Request for Proposal (RFP) available that provides detail about the requested services.⁶ After submitting an FCC Form 470, the applicant must wait 28 days before making commitments with the selected service providers.⁷ The applicant must then submit a completed FCC Form 471 to notify USAC of the services that have been ordered, the service providers with which the applicant has entered into an agreement, and an estimate of funds needed to cover the discounts to be given for eligible services.⁸

3. The FCC Form 470 describes the applicant's planned service requirements, as well as other information regarding the applicant and its competitive bidding process that may be relevant to the preparation of bids.⁹ In particular, in Item 6 of the FCC Form 470, an applicant must name a person whom prospective service providers may contact for additional information about the application (known as the "Item 6 contact person").¹⁰ In addition, in Item 11 of the FCC Form 470, an applicant may, at its option, name another contact person who can provide additional technical details or answer specific questions from service providers about the services sought (known as the "Item 11 contact person").¹¹ This may, but need not be, the same person listed as the Item 6 contact person for the entire application.¹² If the applicant provides an RFP, it must provide a website where the RFP can be viewed or must identify whether the contact person listed in Block 1, Item 6 or Block 2, Item 11 will provide the RFP upon request.¹³

³ 47 C.F.R. §§ 54.504(a)-(c), 54.511.

⁴ 47 C.F.R. § 54.504(b).

⁵ *Id.*

⁶ *See, e.g.,* Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 470). The RFP must be available to all potential bidders for the duration of the bidding process. *See* Schools and Libraries Universal Service, Description of Services Requested and Certification Form, Instructions for Completing Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 470 Instructions).

⁷ 47 C.F.R. § 54.504(b)(4).

⁸ 47 C.F.R. § 54.504(c).

⁹ 47 C.F.R. § 54.504(b).

¹⁰ *See* FCC Form 470, Item 6; *see also* FCC Form 470 Instructions at 7.

¹¹ *See* FCC Form 470, Item 11; *see also* FCC Form 470 Instructions at 10. Although naming an Item 11 contact person is optional, once the option is exercised, the competitive bidding concerns arise to the same degree as if naming the Item 11 contact person had been mandatory. *See Request for Review of the Decision of the Universal Service Administrator by Consorcio De Escuelas Y Bibliotecas De Puerto Rico and Academia Adventista Del Oeste, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 97-21, Order, 17 FCC Rcd 13624, 13627, para. 8 (Wireline Comp. Bur. 2002); *see also Request for Review by St. Margaret's School, Schools and Libraries Universal Service Support Mechanism*, File No. SLD-368113, CC Docket No. 02-6, Order, 20 FCC Rcd 8166, 8168, para. 6 (Wireline Comp. Bur. 2005) (*St. Margaret's School*).

¹² *See* FCC Form 470 Instructions at 10.

¹³ *See* FCC Form 470, Item 2.

4. In the *MasterMind Order*, the Commission found that the contact person influences an applicant's competitive bidding process by controlling the dissemination of information regarding the services requested.¹⁴ For this reason, the Commission determined that when an applicant delegates that power to an entity that also participates in the bidding process as a prospective service provider, the applicant impairs its ability to hold a fair competitive bidding process.¹⁵ Thus, the Commission concluded that an applicant would be in violation of its competitive bidding rules "when a service provider that is listed as the contact person on the FCC Form 470 also participates in the competitive bidding process as a bidder."¹⁶ The Bureau has determined that this reasoning applies to contacts named in Item 11 of the FCC Form 470 as well as to contacts named in Item 6.¹⁷ More recently, in the *Approach Learning Order*, the Bureau addressed decisions by USAC denying funding after finding that applicants' respective FCC Forms 470 contained improper service provider contact information, finding that the appeals should be granted in those cases where the contact information was simply incorrect and in other cases where there had never been any affiliation between the named contact person and the service provider. The Bureau denied one request for review where the petitioner was unable to demonstrate this lack of affiliation.¹⁸ Thus, the Bureau granted only those petitions where, despite petitioners' errors in completing their Forms 470, the record revealed no actual, improper vendor involvement in petitioners' applications.¹⁹

5. Delano submitted its FCC Form 470 to USAC to initiate the competitive bidding process for E-rate eligible services.²⁰ Subsequently, Delano entered into service contracts with four service providers under four different RFPs – SBC, Inter'L, Compaq,²¹ and Cityroots – and filed its FCC Form 471 for Funding Year 2002.²² This FCC Form 471 application reflects Delano's selection of these four service providers. After review of the FCC Form 471, USAC issued a Funding Commitment Decision Letter reporting its funding commitment to Delano for this application.²³ On November 2, 2006, USAC issued a commitment adjustment (COMAD) letter to Delano seeking to recover the funding commitment

¹⁴ *Request for Review by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SPIN-143006149, CC Docket No. 96-45, Order, 16 FCC Rcd 4028, 4033, para. 10 (2000) (*MasterMind Order*).

¹⁵ *Id.*

¹⁶ *Id.* at 4032, para. 9 ("[T]o the extent a [service provider] employee was listed as the contact person on the FCC Form 470 that initiated a competitive bidding process in which [the service provider] participated, such Forms 470 were defective and violated our competitive bidding requirements. In the absence of valid Forms 470, the requests for support were properly denied.").

¹⁷ See, e.g., *Request for Review by Consorcio de Escuelas y Bibliotecas de Puerto Rico, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-228216, CC Docket Nos. 96-45 and 97-21, Order, 17 FCC Rcd 13624 (Wireline Comp. Bur. 2002).

¹⁸ See *Requests for Review by Approach Learning and Assessment Center, et al., Schools and Libraries Universal Support Mechanism.*, File Nos.-140957. *et al.*, CC Docket No. 02-6, Order, 22 FCC Rcd 5296 (2007) (*Approach Learning Order*). During reviews of funding commitments, USAC may determine that funds were committed and/or disbursed in error and therefore will adjust those funding commitments or recover such disbursements to ensure that no funds are used in violation of program rules. See USAC website, Commitment Adjustment (COMAD), <http://www.universalservice.org/sl/about/commitments-adjustments.aspx> (retrieved Aug. 11, 2008).

¹⁹ See *Approach Learning Order*, 22 FCC Rcd at 5301-02, paras. 15-16.

²⁰ FCC Form 470, Delano Joint Union High School District (posted on Nov. 29, 2001).

²¹ See *supra* n.1.

²² FCC Form 471, Delano Joint Union High School District (filed on Jan. 16, 2002).

²³ See Funding Commitment Decision Letter from Schools and Libraries Division, Universal Service Administrative Company to Bonnie Armendariz, Delano Joint Union High School District (dated Oct. 8, 2002).

it made to Delano in full.²⁴ On this same day, USAC issued identical COMAD letters to each of the service providers, including Cityroots, that had been selected by Delano.²⁵ USAC issued these COMAD letters because it found that Delano's FCC Form 470 contained improper service provider contact information related to the RFP under which a contract was awarded to SBC. In the COMAD letters, USAC explained that the improper service provider contact information resulted in a competitive bidding violation that tainted all four service contracts.²⁶ Accordingly, USAC sought to recover funding already disbursed from all entities associated with this application.²⁷ Subsequently, on December 15, 2006, Cityroots filed an appeal with USAC, which was denied on March 5, 2007.²⁸

6. *Requests for Review.* Delano filed its Request for Review with the Commission on December 28, 2006, and Cityroots filed its Request for Review with the Commission on March 20, 2007.²⁹ In its Request for Review, Delano contends that although an employee of Inter'L (a service provider that it contracted with for Funding Year 2002), was provided as a contact person on one of its four RFPs, providing this contact's name was a clerical error and that this contact's name was never listed on its FCC Form 470.³⁰ Delano explains that, in prior years, this person served as a technology advisor for Delano and that Delano's clerical staff inadvertently failed to remove this individual's name from the old RFP when preparing the subject RFP for acquisition of electronic equipment.³¹ Delano became aware of this error on December 26, 2001, when two potential bidders inquired about the equipment RFP.³² On the day it discovered the mistake, Delano states that it called all vendors who had picked up that year's E-rate package to inform them of the error and that Bonnie Armendariz, IT Director for Delano Joint Union High School District, was the sole contact person. Delano also released an addendum to the RFP, removing the incorrect name and replacing it with Ms. Armendariz as the contact person.³³ Delano also

²⁴ See Notification of Commitment Adjustment Letter to Bonnie Armendariz, Delano Joint Union High School District, from the Schools and Libraries Division, Universal Service Administrative Company (dated Nov. 2, 2006).

²⁵ See Letter from Schools and Libraries Division, Universal Service Administrative Company, to Alice Martinez, SBC Datacomm, Inc. (dated Nov. 2, 2006) (SBC COMAD Letter); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Lisa Ford, Hewlett Packard Company (dated Nov. 2, 2006) (Hewlett Packard COMAD Letter); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Wayne Wheeler, Inter'L (dated Nov. 2, 2006) (Inter'L COMAD Letter); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Deborah Lango, Cityroots, Inc. (dated Nov. 2, 2006) (Cityroots COMAD Letter).

²⁶ See SBC COMAD Letter, Hewlett Packard COMAD Letter, Inter'L COMAD Letter, and Cityroots COMAD Letter. See also *MasterMind Order*, 16 FCC Rcd at 4033, para. 10; *St. Margaret's School*, 20 FCC Rcd at 8168, para. 7. In *St. Margaret's School*, the Bureau interpreted the Commission's *MasterMind Order* to establish the rule that, if the competitive bidding process tied to a particular FCC Form 470 was found to be tainted by improper service provider involvement, all funding request numbers associated with that FCC Form 470 would be denied funding. See *St. Margaret's School*, 20 FCC Rcd at 8168, para. 7.

²⁷ See SBC COMAD Letter, Hewlett Packard COMAD Letter, Inter'L COMAD Letter, and Cityroots COMAD Letter.

²⁸ See Letter from Deborah Ramirez, Cityroots, Inc. to Schools and Libraries Division of Universal Service Administrative Company (dated Dec. 15, 2006); Letter from Schools and Libraries Division of Universal Service Administrative Company to Deborah Ramirez, Cityroots, Inc. (dated March 5, 2007).

²⁹ See Delano Request for Review; Cityroots Request for Review.

³⁰ Delano Request for Review at 3-5.

³¹ *Id.* at 4.

³² Email from William Hornback, Delano Joint Union High School District to Karen Johnson, Federal Communications Commission (dated July 18, 2007) (July 18 Email).

extended the deadline by which to respond to the RFP from Jan. 3 to Jan. 7.³⁴ In addition, Delano asserts that even if it had not corrected its equipment RFP, the individual it used as its contact did not play any role in the preparation, review, or any other part of the District's bidding process for Funding Year 2002 and was not authorized, or intended, to receive bids on behalf of the District for Funding Year 2002.³⁵ Delano moreover received two bids on the electronic equipment described in the RFP, and neither bid was from Inter'L.³⁶ In support of its appeal, Delano submits a declaration under penalty of perjury by Bonnie Armendariz setting forth these facts.³⁷

7. In its Request for Review, Cityroots argues that it did not send bids to Inter'L or any of its employees and that Cityroots sent all of its bids directly to Delano, addressed directly to Bonnie Armendariz.³⁸ Cityroots also maintains that it had no relationship or interaction with Inter'L or Inter'L employees.³⁹ Notably, Cityroots asserts that the bid notifications to which it responded did not include a reference to Inter'L or an Inter'L employee as the contact person.⁴⁰

III. DISCUSSION

8. We grant Delano's and Cityroots' Requests for Review. After reviewing the underlying record, consistent with Bureau precedent, we find sufficient evidence demonstrating that there was no improper vendor involvement in Delano's competitive bidding process.⁴¹ In the *Approach Learning Order*, the Bureau concluded rejection of petitioners' application was not warranted when applicants mistakenly listed the wrong contact information on their FCC Form 470s.⁴² Here, Delano mistakenly listed an employee of a service provider that participated in the competitive bidding process as a bidder as a contact person on one of its four RFPs.⁴³ As in *Approach Learning*, based on the record, we find that this error was inadvertent and that Delano took all reasonable steps to correct the mistake. Notably, as soon as Delano became aware of the mistake, Delano corrected it by calling all vendors that had received the RFP, by amending the RFP, and by extending the deadline by which vendors had to respond to the RFP.⁴⁴ Accordingly, based on the record before us, we find that Delano has demonstrated that there was no harm to the competitive bidding process and that it did not violate the Commission's competitive bidding rules. In addition, at this time, there is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements. To ensure that this matter is resolved expeditiously, we direct USAC to discontinue recovery actions against Delano and its service providers and, to the extent

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³³ Delano Request for Review at 3; *see also* Letter to E-rate Y-5 Vendors from Bonnie Armendariz (dated Jan. 2, 2002) (explaining that the new bid date was extended to January 7, 2002, and copy of the bids should only be sent to the District Office, not Mr. Wayne Wheeler).

³⁴ Delano Request for Review at 3-4.

³⁵ *Id.* at Exhibit 3.

³⁶ *Id.* at 4. We note that the two service providers that inquired about the RFP contact information, SBC DataComm and Expanets, placed the two bids. *See* July 18 Email.

³⁷ Delano Request for Review at Exhibit 3.

³⁸ Cityroots Request for Review at 1-2.

³⁹ *Id.* at 2.

⁴⁰ *Id.*

⁴¹ Delano Request for Review at 2-5.

⁴² *See Approach Learning Order*, 22 FCC Rcd at 5301-02, paras. 15-16.

⁴³ Delano Request for Review at 3-5.

⁴⁴ *See supra* para. 6.

any funds have already been recovered from the parties, to refund the parties, such recovered moneys, no later than 60 days from the release of this Order.⁴⁵

9. We emphasize the limited nature of this decision. The Commission's competitive bidding rules serve as a central tenet of the E-rate program. They ensure more efficient pricing for telecommunications and other eligible services purchased by schools and libraries and help deter waste, fraud and abuse.⁴⁶ Although we grant the subject appeals before us, our action here does not eliminate or mitigate any of our competitive bidding requirements or the obligations of participants in the E-rate program to comply with the Commission's rules.

10. We stress that the Commission is committed to guarding against waste, fraud, and abuse, and ensuring that funds disbursed through the E-rate program are used for appropriate purposes.⁴⁷ Although we grant the requests for review addressed here, this action does not affect the authority of the Commission or USAC to conduct audits or 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 the Commission's 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 the Commission's procedures and in cooperation with law enforcement agencies.

IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED, pursuant to authority contained in sections 1-4 and 254 of the Communications Act, as amended, 47 U.S.C. §§ 151-154 and 254, and 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 Delano Joint Union High School District, Delano, California on December 28, 2006 and the Request for Review filed by Cityroots, Inc., Bakersfield, California on March 20, 2007 ARE GRANTED.

12. IT IS FURTHER ORDERED, pursuant to authority contained in sections 1-4 and 254 of the Communications Act, as amended, 47 U.S.C. §§ 151-154 and 254, and 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 Universal Service Administrative Company SHALL DISCONTINUE recovery actions against Delano Joint Union High School District, and its service providers, SBC DataComm, Inter'L, Compaq Computer Corporation, and Cityroots, Inc., and, to the extent any funds have already been recovered from the parties, SHALL REFUND the parties no later than 60 days from the release of this Order.

⁴⁵ Additionally, nothing in this order is intended: (1) to authorize or require payment of any claim that previously may have been released by a service provider or applicant, including in a civil settlement or plea agreement with the United States; or (2) to authorize or require payment to any person or entity that has been debarred from participation in the E-rate program.

⁴⁶ See *Adams County Order*, 22 FCC Rcd at 6022, para. 8.

⁴⁷ See *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 (2006).

13. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. §1.102(b)(1), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Jennifer K. McKee
Acting Chief
Telecommunications Access Policy Division
Wireline Competition Bureau