

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Request for Review of a
Decision of the
Universal Service Administrator by
Keyport School District
Keyport, New Jersey
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-388346
CC Docket No. 02-6

ORDER

Adopted: October 20, 2009

Released: October 20, 2009

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

I. INTRODUCTION

1. In this order, we address an appeal by Keyport School District (Keyport) of a decision by the Universal Service Administrative Company (USAC) denying Keyport's request for funding under the schools and libraries universal service support mechanism, also known as the E-rate program, on the ground that the underlying application violated the Commission's competitive bidding requirements. As explained below, we find that Keyport did not violate the Commission's competitive bidding rules. We therefore grant the appeal and direct USAC to discontinue recovery actions against Keyport consistent with this order.

II. BACKGROUND

2. Under 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 an eligible school, library, or consortium that includes eligible schools and libraries must seek competitive bids for all services eligible for support. Applicants thus must submit for posting on USAC's website an FCC Form 470 requesting discounts for

1 See Letter from Jessica A. Nilsen, Thomas Communications and Technologies, on behalf of Keyport School District, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (dated Oct. 26, 2006) (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).

2 47 C.F.R. §§ 54.504, 54.511.

3 47 C.F.R. §§ 54.501-54.503.

4 47 C.F.R. § 54.504. An existing contract signed on or before July 10, 1997 is exempt from the competitive bidding requirements. See 47 C.F.R. § 54.511(c).

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.<sup>5</sup> The applicant must describe the requested services with sufficient specificity to enable potential service providers to submit bids for such services.<sup>6</sup> The applicant must provide this description on its FCC Form 470 or indicate on the form that it has a request for proposal (RFP) available providing detail about the requested services.<sup>7</sup> The RFP must be available to all potential bidders for the duration of the bidding process.<sup>8</sup>

3. After submitting an FCC Form 470, the applicant must wait 28 days before making commitments with the selected service providers.<sup>9</sup> 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.<sup>10</sup> Once the applicant has selected a provider and entered into a service contract, the applicant must file an FCC Form 471 requesting support for eligible services.<sup>11</sup>

4. In addition to following the Commission's competitive bidding requirements, applicants are also required to follow state and local procurement procedures.<sup>12</sup> Specifically, an applicant must certify compliance with applicable state and local procurement laws when submitting its FCC Form 471 application.<sup>13</sup> A request for support for E-rate eligible services could be denied if it is determined that the applicant did not comply with program rules, including any applicable state and local procurement requirements.<sup>14</sup>

5. Request for Review. On October 22, 2003, USAC posted Keyport's FCC Form 470 to initiate the competitive bidding process for eligible services under the E-rate program for funding year 2004.<sup>15</sup> Keyport subsequently entered into a contract with its selected service provider and submitted its

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<sup>5</sup> 47 C.F.R. § 54.504(b).

<sup>6</sup> *Id.*

<sup>7</sup> *See, e.g.,* Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (current FCC Form 470).

<sup>8</sup> *See, e.g.,* Schools and Libraries Universal Service, Description of Services Requested and Certification Form, Instructions for Completing the Schools and Libraries Universal Service Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 470 Instructions); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, Instructions for Completing the Schools and Libraries Universal Service Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (current FCC Form 470 Instructions).

<sup>9</sup> 47 C.F.R. §§ 54.504(b)-(c).

<sup>10</sup> 47 C.F.R. § 54.511(a).

<sup>11</sup> *See* Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000) (FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (current FCC Form 471).

<sup>12</sup> 47 C.F.R. § 54.504(a).

<sup>13</sup> *See* FCC Form 471, Block 6.

<sup>14</sup> *See* 47 C.F.R. § 54.504(c)(1)(viii).

<sup>15</sup> FCC Form 470, Keyport School District (posted Oct. 22, 2003) (Keyport FCC Form 470).

FCC Form 471 application for funding year 2004.<sup>16</sup> On July 20, 2004, USAC approved Keyport's request for support.<sup>17</sup> During post-funding review, however, USAC determined that it was unable to verify Keyport's compliance with Commission and state and local competitive bidding requirements because Keyport failed to provide documentation of its competitive bidding process (e.g., an RFP, bid evaluation sheets, or copies of bids submitted).<sup>18</sup> USAC therefore rescinded Keyport's funding commitment.<sup>19</sup> USAC later affirmed its decision on appeal.<sup>20</sup> Keyport then filed the instant request for review with the Commission.<sup>21</sup>

6. In its appeal to the Commission, Keyport states that it complied with Commission and state and local procurement laws.<sup>22</sup> Specifically, Keyport explains that New Jersey procurement law does not require a school district to competitively bid for purchases under \$25,000 if the purchasing agent for the school is a "qualified" agent.<sup>23</sup> Keyport states that, because the purchase price for the services at issue was under \$25,000 and Keyport's purchasing agent was "qualified," it was not required under state law to seek competitive bids.<sup>24</sup> Keyport thus maintains that, consistent with state law, it did not post an RFP for the services at issue.<sup>25</sup> Keyport, however, asserts that it complied with the Commission's competitive bidding requirements by submitting an FCC Form 470 to USAC for posting on its website and observing the 28-day waiting period before entering into a service contract.<sup>26</sup> Keyport states that it indicated on the FCC Form 470 that it had not released an RFP.<sup>27</sup> Lastly, Keyport indicates that it received one bid in response to the FCC Form 470 posting.<sup>28</sup>

### III. DISCUSSION

7. We grant Keyport's request for review. Based on the record before us, we find that Keyport's competitive bidding process complied with E-rate program rules.<sup>29</sup> We disagree with USAC's

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<sup>16</sup> FCC Form 471, Keyport School District (filed Feb. 3, 2004) (Keyport FCC Form 471).

<sup>17</sup> Letter from USAC, Schools and Libraries Division, to Jessica Nilsen, Keyport School District (dated July 20, 2004) (Keyport Funding Commitment Decision Letter).

<sup>18</sup> See Letter from USAC, Schools and Libraries Division, to Jessica Nilsen, Keyport School District (dated Apr. 28, 2006) (Keyport COMAD Letter).

<sup>19</sup> *Id.*

<sup>20</sup> See Letter from USAC, Schools and Libraries Division, to Jessica Nilsen, Keyport School District (dated Aug. 28, 2006) (Keyport Appeal Decision).

<sup>21</sup> See Request for Review.

<sup>22</sup> *Id.* at 2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; see also Keyport FCC Form 470.

<sup>27</sup> Request for Review at 3.

<sup>28</sup> *Id.*

<sup>29</sup> See 47 C.F.R. §§ 54.504, 54.511.

determination that funding should be denied on the ground that Keyport failed to provide copies of its RFP, bid evaluation sheets, or other documentation related to the bidding process.<sup>30</sup> The record shows that Keyport posted an FCC Form 470 to USAC's website soliciting bids for the services at issue.<sup>31</sup> Under New Jersey law, Keyport was not required to release an RFP because Keyport's purchasing agent was "qualified" and the cost of the services at issue was \$13,740.<sup>32</sup> Therefore, consistent with state law, Keyport was not required to have created an RFP.

8. Moreover, prior to funding year 2005, the Commission had not adopted rules describing the types of documents E-rate program participants were required to keep in order to demonstrate compliance with the Commission's competitive bidding rules.<sup>33</sup> Rather, the Commission's rules in effect at the time of Keyport's application required each entity to maintain, for their purchases of telecommunications and other supported services, "the kind of procurement records that they maintain for other purchases."<sup>34</sup> Keyport, therefore, had no obligation to produce documentation that it would not normally maintain for other purchases, particularly where the state law did not require Keyport to seek competitive bids. We thus find, based on our review of the record, that Keyport complied with the Commission's competitive bidding requirements.<sup>35</sup> In addition, we find no evidence of waste, fraud, or abuse, or misuse of funds, or a failure to adhere to core program requirements with respect to this procurement. We therefore grant Keyport's request for review and direct USAC to discontinue recovery actions against Keyport.

9. We emphasize 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. Although we grant the appeal addressed herein, 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 disbursed improperly or in a manner inconsistent with the statute or the Commission's rules. To the extent the Commission finds that funds were not used properly, the Commission will require USAC to recover such funds through its normal processes. We emphasize that the Commission retains 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. The Commission remains 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.

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<sup>30</sup> See *supra* para. 5.

<sup>31</sup> Keyport FCC Form 470.

<sup>32</sup> Request for Review at 2, citing N.J.S.A. 18A-1, *et seq.* (providing that a school is not required to solicit bids for purchases under \$25,000 when the purchasing agent for the school is a qualified agent).

<sup>33</sup> See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808 (2004) (*Schools and Libraries Fifth Report and Order*) (adopting more stringent document retention requirements).

<sup>34</sup> *Id.* at 15823, para. 45.

<sup>35</sup> 47 C.F.R. §§ 54.504, 54.511.

**IV. ORDERING CLAUSES**

10. ACCORDINGLY, IT IS ORDERED, 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 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 54.722(a), that the request for review filed by Keyport School District on October 26, 2006, IS GRANTED.

11. IT IS FURTHER ORDERED, 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 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 54.722(a), that USAC SHALL DISCONTINUE its recovery action against Keyport School District.

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

FEDERAL COMMUNICATIONS COMMISSION

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