

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
Request for Review of)
Decisions of the)
Universal Service Administrator by)
SEED Public Charter School of) File Nos. SLD-153177, 194747
Washington, D.C.)
Washington, D.C.)
Schools and Libraries Universal Service) CC Docket No. 02-6
Support Mechanism)

ORDER

Adopted: September 30, 2011

Released: September 30, 2011

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

I. INTRODUCTION

1. In this order, we address a consolidated appeal by SEED Public Charter School of Washington, D.C. (SEED) of three decisions by the Universal Service Administrative Company (USAC) denying requests for funding under the E-rate program (more formally known as the schools and libraries universal service support program), on the grounds that the underlying applications violated the Commission’s competitive bidding requirements.1 As explained below, we find that SEED did not violate the Commission’s competitive bidding rules.2 We therefore grant the appeal and direct USAC to discontinue recovery actions against SEED and its service providers, Verizon-Washington, D.C., Inc., Avaya, Inc., America Online, CDW Computer Centers, Inc., Dell Marketing, LP, Nextel Communications of Mid-Atlantic, Inc., Starpower Communications, LLC, and Infosys Services, Inc., consistent with this order.

II. BACKGROUND

2. E-rate Program Rules and Requirements. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible

1 See Petition for Review of the Universal Service Administrator by SEED School, Washington, D.C., CC Docket Nos. 96-45 and 97-21 (filed Apr. 1, 2003) (concerning FCC Form 471 application number 153177, funding request numbers (FRNs) 271130, 271137, 272098, and 292927, and FCC Form 471 application number 194747, FRNs 421348, 421510, 423217, 423302, 423374, 423446, 424629, and 424915) (Request for Review). In this order, we use the term “appeals” to refer generally to requests for review of decisions by USAC. 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 See Request for Review.

services.³ 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.⁴ Applicants must submit for posting on USAC's website an FCC 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.⁵ The applicant must describe the services with sufficient specificity to enable potential service providers to submit bids for such services.⁶ 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.⁷ The RFP must be available to all potential bidders for the duration of the bidding process.⁸

3. After the FCC Form 470 is posted to USAC's web site, the applicant must wait 28 days before making commitments with the selected service providers and submitting an FCC Form 471.⁹ Section 54.504(a) of our rules also states that the FCC Form 471 requesting support for the services ordered by the applicant shall be submitted "upon signing a contract for eligible services."¹⁰ Thus, applicants must have a "signed contract" or a "legally binding agreement" with the service provider "for all services" ordered on the FCC Form 471.¹¹

4. Applicants are expected to comply with their state's or territory's contract law when entering into an agreement with their selected service provider(s).¹² Applicants are also required to comply with state and local procurement procedures in addition to following the Commission's competitive bidding requirements.¹³ Applicants must certify compliance with all applicable state and local procurement laws when submitting their FCC Form 471 applications.¹⁴ A request for support for E-

³ 47 C.F.R. §§ 54.501-54.502.

⁴ 47 C.F.R. § 54.503. 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).

⁵ 47 C.F.R. § 54.503(c).

⁶ *Id.*

⁷ *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).

⁸ *See* FCC Form 470.

⁹ 47 C.F.R. §§ 54.504(a).

¹⁰ 47 C.F.R. § 54.504(c); *see also Request for Review of Waldwick School District, Schools and Libraries Universal Service Support Mechanisms*, File No. SLD-234540, CC Docket No. 02-6, Order, 18 FCC Rcd 22994, 22995, para. 3 (Wireline Comp. Bur. 2003) (*Waldwick Order*); *Request for Review of St. Joseph High School, Schools and Libraries Universal Service Support Mechanisms*, File No. SLD-234540, CC Docket Nos. 96-45, 97-21, Order, 17 FCC Rcd 22499, 22500-01, para. 4 (Wireline Comp. Bur. 2002) (*St. Joseph Order*).

¹¹ *See* Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (FCC Form 471 Instructions).

¹² *See* <http://www.usac.org/sl/applicants/step04/contract-guidance.aspx> (last visited Apr. 1, 2011).

¹³ 47 C.F.R. § 54.503.

¹⁴ *See* FCC Form 471, Block 6.

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.¹⁵

5. *Request for Review.* On March 5, 1999, and December 18, 1999, USAC posted SEED's FCC Forms 470 to initiate the competitive bidding process for eligible services under the E-rate program for funding year (FYs) 1999 and 2000, respectively.¹⁶ SEED subsequently entered into contracts with its respective service providers and submitted its FCC Form 471 applications for FYs 1999 and 2000.¹⁷ On November 23, 1999, and February 2, 2001, USAC approved SEED's requests for support.¹⁸ During post-funding review in 2003, however, USAC determined that SEED violated the Commission's competitive bidding requirements and thus rescinded SEED's funding commitments.¹⁹ Specifically, USAC determined that SEED: (1) violated section 38-1802.04(c)(1)(B)(i) of the D.C. Code by not submitting copies of its E-rate contracts to the Public Charter School Board (Board) within three days of the execution of those contracts;²⁰ (2) violated section 38-1802.04(c)(1)(A)(i) of the D.C. Code by not publishing notification of its intention to seek bid proposals for E-rate eligible services;²¹ and (3) did not execute a legally binding agreement with the selected service provider.²² SEED subsequently appealed USAC's commitment adjustment action to the Commission.²³

¹⁵ See 47 C.F.R. § 54.503.

¹⁶ FCC Form 470, SEED Public Charter School of Washington, D.C. (posted Mar. 5, 1999); FCC Form 470, SEED Public Charter School of Washington, D.C. (posted Dec. 18, 1999).

¹⁷ FCC Form 471, SEED Public Charter School of Washington, D.C. (filed Apr. 6, 1999); FCC Form 470, SEED Public Charter School of Washington, D.C. (filed Jan. 19, 2000).

¹⁸ Letter from USAC, Schools and Libraries Division, to Leslie Poole, SEED Public Charter School of Washington, D.C. (dated Nov. 23, 1999); Letter from USAC, Schools and Libraries Division, to John Ciccone, SEED Public Charter School of Washington, D.C. (dated Feb. 2, 2000).

¹⁹ See Letter from USAC, Schools and Libraries Division, to Lesley Poole, SEED Public Charter School of Washington, D.C. (dated Jan. 31, 2003) (concerning FCC Form 471 application number 153177, FRNs 271130, 271137, 272098, and 292927); Letter from USAC, Schools and Libraries Division, to John Ciccone, SEED Public Charter School of Washington, D.C. (dated Jan. 31, 2003) (concerning FCC Form 471 application number 194747, FRN 424915); Letter from USAC, Schools and Libraries Division, to John Ciccone, SEED Public Charter School of Washington, D.C. (dated Jan. 31, 2003) (concerning FCC Form 471 application number 194747, FRNs 421348, 421510, 423217, 423302, 423374, 423446, and 424629) (collectively, SEED COMAD Letters).

²⁰ See SEED COMAD Letters; Request for Review at 2. Section 38-1802.04(c)(1)(B)(i) of the D.C. Code provides that "[w]ith respect to any contract [...] that is awarded by a public charter school, the school shall submit to the eligible chartering authority, not later than 3 days after the date on which the award is made, all bids for the contract received by the school, the name of the contractor who is awarded the contract, and the rationale for the award of the contract." See D.C. Code § 38-1802.04(c)(1)(B)(i) (2001).

²¹ See SEED COMAD Letters; Request for Review at 2. Section 38-1802.04(c)(1)(A)(i) of the D.C. Code provides that "[w]ith respect to any procurement contract proposed to be awarded by the public charter school and having a value equal to or exceeding \$25,000, the school shall publish a notice of a request for proposals in the District of Columbia Register and newspapers of general circulation not less than 7 days prior to the award of the contract." See D.C. Code § 38-1802.04(c)(1)(A)(i) (2001).

²² See SEED COMAD Letters.

²³ See Request for Review.

6. In its appeal to the Commission, SEED explains that the purpose of the contract submission requirement is to notify the Board that a contract exists; it is not to obtain the Board's approval of the contract.²⁴ SEED states that it subsequently submitted its E-rate contracts to the Board and that the Board waived the requirement to submit the contracts within three days of execution.²⁵ With regard to the publication requirement, SEED states that it secured competitive bids, without the need for local publication, by submitting its FCC Form 470 to USAC for posting on its website.²⁶ SEED thus asserts that, although it did not comply with its local notice and publication requirements, these violations did not cause any legal harm and did not warrant the commitment adjustment action by USAC.²⁷ SEED further argues that it obtained a retroactive waiver from the Board of the procurement requirements, thereby putting SEED in compliance with the D.C. Code during the competitive bidding process.²⁸ Lastly, with regard to USAC's determination that SEED did not have a legally binding contract with its selected service provider, SEED argues that it complied with the Uniform Commercial Code (U.C.C.) and the D.C. Code by having a record "sufficient to indicate that a contract for sale has been made between the parties."²⁹ SEED states that its acceptance of the written price quotation from the service provider, Dell Marketing, LP (Dell), and full performance by SEED and Dell under the purchase agreement between them satisfies this requirement and is sufficient to establish a binding agreement fully enforceable by either party under the U.C.C.'s statute of frauds.³⁰ SEED therefore requests that the Commission review USAC's commitment adjustment.³¹

III. DISCUSSION

7. We grant SEED's request for review.³² Based on the record before us, we find that SEED did not violate the Commission's competitive bidding rules.³³ Specifically, we find that the waivers obtained from the Board cured SEED's violations of local procurement procedures as set forth in the D.C. Code.³⁴ Further, we note that by posting an FCC Form 470, SEED satisfied E-rate program rules

²⁴ *Id.* at 3.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 2-4.

²⁸ *Id.* at Attachment B.

²⁹ *Id.* at 7-8 (citing U.C.C. § 2-201). The District of Columbia has adopted the U.C.C.'s requirements for contract formation. *See* D.C. Code § 28:2-201 (2001); Request for Review at 7.

³⁰ Request for Review at 8 (*citing Andersen v. Cross*, 527 N.E. 2d 1098 (Ill. App. 1988) (subsequent history omitted) (holding that performance under the agreement can serve as a substitute for a writing).

³¹ *Id.* at 1.

³² *See* 47 C.F.R. § 54.723. We estimate that the appeal granted in this order involves applications for approximately \$426,000 in funding. 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 2011 (Jan. 31, 2011). We thus determine that the action we take today should have minimal impact on the universal service fund as a whole.

³³ 47 C.F.R. §§ 54.503, 54.511.

³⁴ *See* Request for Review at 2.

requiring applicants to seek competitive bids for eligible products and services.³⁵ In fact, the record shows that SEED conducted a robust competitive bidding process as it received five bids for internal connections products and services, two bids for data servers, three bids for telecommunications service, two bids for cellular telephone service, two bids for pager service, and three bids for telephone and data connections.³⁶ We also find that SEED entered into a legally binding agreement by accepting a written price quotation from its selected service provider, consistent with the U.C.C., the D.C. Code and D.C. procurement requirements.³⁷ We therefore grant SEED's appeal and direct USAC to discontinue recovery actions against SEED and its service providers, Verizon-Washington, D.C., Inc., Avaya, Inc., America Online, CDW Computer Centers, Inc., Dell Marketing, LP, Nextel Communications of Mid-Atlantic, Inc., Starpower Communications, LLC, and Infosys Services, Inc.³⁸

IV. ORDERING CLAUSES

8. 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 SEED Charter School of Washington, D.C. on April 1, 2003, IS GRANTED.

9. 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 SEED Charter School of Washington, D.C., and its service providers, Verizon-Washington, D.C., Inc., Avaya, Inc., America Online, CDW Computer Centers, Inc., Dell Marketing, LP, Nextel Communications of Mid-Atlantic, Inc., Starpower Communications, LLC, and Infosys Services, Inc., to the extent provided herein.

10. 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, 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, 54.722(a), that USAC SHALL REFUND SEED Charter School of Washington, D.C., Verizon-Washington, D.C., Inc., Avaya, Inc., America Online, CDW Computer Centers, Inc., Dell Marketing, LP, Nextel Communications of Mid-Atlantic, Inc., Starpower Communications, LLC, and Infosys Services, Inc., any funds that have already been recovered no later than 60 calendar days from the release date of this order.

³⁵ 47 C.F.R. §§ 54.503, 54.504, 54.511.

³⁶ See Request for Review at Attachment B.

³⁷ See U.C.C. § 2-201; see also D.C. Code § 28:2-201 (2001) (stating that "a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought"; a contract is enforceable, with respect to goods for which payment has been made and accepted or which have been received and accepted). See also 47 C.F.R. § 54.504(c); *Request for Review of Adams County School District 4, et al., Schools and Libraries Universal Service Support Mechanisms*, File Nos. SLD-425151, et al., CC Docket No. 02-6, Order, 22 FCC Rcd 6019 (2007) (granting a waiver of section 54.504(c) of the Commission's rules where the petitioners had some form of agreement with their service providers before submitting their FCC Forms 471).

³⁸ Nothing in this order is intended to authorize or require payment of any claim that has previously been released by a service provider or applicant, including in a civil settlement or criminal plea agreement with the United States.

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

FEDERAL COMMUNICATIONS COMMISSION

Gina Spade
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