

**Howard Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Request for Review of a)	
Decision of the)	
Universal Service Administrator by)	
)	
Katy Independent School District)	File No. SLD- 457543
Katy, Texas)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: December 7, 2011

Released: December 7, 2011

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

I. INTRODUCTION

1. In this order, we deny an appeal filed by Katy Independent School District (Katy) seeking review of a decision by the Universal Service Administrative Company (USAC) denying funding under the E-rate program (more formally known as the schools and libraries universal service support program).¹ USAC rescinded the funding commitment for one of Katy's funding requests on the ground that Katy violated the Commission's competitive bidding requirements because it did not consider price as the primary factor in the vendor selection process.² We agree with USAC that Katy did not give overall preference to cost when evaluating the bids and, thus, affirm USAC's decision to rescind Katy's funding commitment for FRN 1297321. To the extent funds have already been disbursed under this funding request to Katy or its service provider, Phonoscope, we direct USAC to institute or continue recovery actions against them.

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 telecommunications services, Internet access services and internal connections.³ The Commission's rules

¹ See Letter from Diana Beltran-LaFleur, Katy Independent School District, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed July 23, 2009) (Request for Review) (regarding FCC Form 471 application number 457543, funding request number (FRN) 1297321). In this order, we use the term "appeal" to generically refer to Katy's request for review of USAC's decision. 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.

³ 47 C.F.R. §§ 54.501-54.503.

provide that these entities must seek competitive bids for all services eligible for support.⁴

3. In accordance with the Commission's competitive bidding rules, 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 requested 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 The Commission has determined that a service provider participating in the competitive bidding process cannot be involved in the preparation of the entity's FCC Form 470.⁹

4. After submitting an FCC Form 470, the applicant must wait 28 days before making commitments with the selected service providers.¹⁰ The Commission's rules require that an applicant carefully consider all submitted bids prior to entering into a contract, and price must be the primary factor in selecting the winning bid.¹¹ 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.¹² USAC assigns an FRN to each request for discounted services and issues funding commitment decision letters (FCDLs) approving or denying the requests for discounted services.¹³

5. *Price as the Primary Factor in Selecting a Vendor.* Under the Commission's competitive bidding rules, applicants must select the most cost-effective service offerings, and price must be the primary factor in determining whether a particular vendor is the most cost-effective.¹⁴ Applicants may

⁴ 47 C.F.R. § 54.504. The Commission's rules provide one exception to the competitive bidding requirement for existing, binding contracts signed on or before July 10, 1997. See 47 C.F.R. § 54.511(c).

⁵ 47 C.F.R. § 54.504(b).

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 See *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.*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028, 4033 (2000) (*Mastermind Order*).

¹⁰ 47 C.F.R. § 54.504(b)-(c). See, e.g., *Request for Review of the Decision of the Universal Service Administrator by Approach Learning and Assessment Center, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 23 FCC Rcd 15510 (2008) (*Approach Learning Order*).

¹¹ 47 C.F.R. § 54.511(a).

¹² 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).

¹³ See USAC website, Schools and Libraries, Funding Commitment Decision Letter, <http://www.universalservice.org/sl/applicants/step09/funding-commitment-decision-letter.aspx> (last visited Nov. 29, 2011).

¹⁴ 47 C.F.R. §§ 54.504(b)(2)(vii), 54.511(a); see also *Federal-State Joint Board on Universal Service*, CC Docket (continued....)

also consider relevant factors other than the pre-discount prices submitted by providers, such as prior experience, personnel qualifications, management capability, and environmental objectives.¹⁵ When evaluating bids, however, applicants must have a separate “cost category” and that category must be given more weight than any other single factor.¹⁶

6. *Request for Review.* In December 2004, Katy submitted an FCC Form 470 application to USAC to initiate the competitive bidding process for E-rate eligible services for funding year (FY) 2005.¹⁷ Katy subsequently entered into service contracts and filed its FCC Form 471 application with USAC for FY 2005.¹⁸ In September 2005, USAC approved Katy’s FY 2005 FCC Form 471 application for Internet access.¹⁹ During post-funding review, however, USAC rescinded Katy’s funding commitment for FRN 1297321 as part of its FY 2005 FCC Form 471 application on the ground that Katy violated the Commission’s competitive bidding requirements.²⁰ Specifically, USAC found that Katy did not consider price as the primary factor in the vendor selection process.²¹ USAC later affirmed its decision on appeal.²² Katy then filed the instant appeal with the Commission.²³

7. In its appeal, Katy argues that USAC misinterpreted the scoring matrix used in Katy’s vendor selection process.²⁴ Katy maintains that the weighted subtotal line for two evaluation criteria, technical solution and cost, each show a total of 80 points but that these numbers do not reflect the actual weight of the evaluation criteria.²⁵ Katy explains that the 80 points reflects the subtotal after the weight had already been applied.²⁶ Katy further explains that a weight of four was assigned to the technical solution criteria and a weight of five was assigned to the cost criteria.²⁷ Thus, Katy maintains that its vendor selection process complied with program rules because cost was weighted the highest in its

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No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029, para. 481 (1997) (*Universal Service First Report and Order*) (subsequent history omitted); *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 26407 (2003) (*Ysleta Order*).

¹⁵ *Universal Service First Report and Order*, 12 FCC Rcd at 9029-30, para. 481; see also 47 C.F.R. § 54.511(a).

¹⁶ *Ysleta Order*, 18 FCC Rcd at 26429, para. 50. For example, if an applicant assigns 10 points to reputation and 10 points to past experience, the applicant would be required to assign at least 11 points to price. *Id.* at n.138.

¹⁷ See FCC Form 470, Katy Independent School District (posted Dec. 23, 2004).

¹⁸ See FCC Form 471, Katy Independent School District (filed Feb. 17, 2005).

¹⁹ See Letter from USAC, Schools and Libraries Division, to Anna E. Gerdes, Katy Independent School District (dated Sept. 1, 2005).

²⁰ See Letter from USAC, Schools and Libraries Division, to Anna E. Gerdes, Katy Independent School District (dated Jan. 15, 2009) (Notification of Commitment Adjustment Letter (COMAD)).

²¹ See *id.*

²² See Letter from USAC, Schools and Libraries Division, to Anna E. Gerdes, Katy Independent School District (dated May 22, 2009).

²³ See Request for Review.

²⁴ See *id.*

²⁵ See *id.* Katy assigned 20 points to technical solution, multiplied by a weighted value of 4; it assigned 16 points to cost, multiplied by a weighted value of five. *Id.* at Attachment 3.

²⁶ See *id.*

²⁷ See *supra* n. 25.

evaluation of bids.²⁸

III. DISCUSSION

8. We deny Katy's appeal. After review of the record, we find that Katy failed to comply with the Commission's competitive bidding requirements for FRN 1297321, as part of its FY 2005 FCC Form 471 application, because it did not consider price as the primary factor in the vendor selection process.²⁹ As the Commission has stated previously, competitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed about all of the choices available to them.³⁰ Competitive bidding also helps to achieve the Commission's goals of full and open competition resulting in the most cost-effective use of limited program funds. Absent competitive bidding, prices charged to schools and libraries for eligible products and services may be needlessly high, resulting in greater demand being placed on the universal service fund.

9. Katy failed to consider price as the primary factor in vendor selection because the weighted subtotal for its two criteria, technical solution and cost, were ultimately the same at 80 points apiece. Thus, Katy failed to comply with the Commission's rules. As the Commission instructed in the *Ysleta Order*, applicants are required to assign the highest number of points to the cost category.³¹ The cost category must receive preference over any other evaluation criteria at each stage of review during the evaluation process. In this instance, Katy assigned 20 points to "technical solution" with a weight of four and 16 points to "cost" with a weight of five, yielding the same total number of points for each evaluation criteria.³² Even though Katy weighted the cost category greater than the technical solution category, it assigned fewer points to cost than to technical solution. As a result, the cost category did not receive the highest number of points in Katy's vendor selection process and Katy's selection process violated the Commission's rules. Applicants are not free to construct evaluation criteria that circumvent the Commission's rules. Because Katy did not give overall preference to cost when evaluating the bids, we agree with USAC's determination that price was not the primary factor in Katy's vendor selection process, in violation of the Commission's competitive bidding rules. Accordingly, we deny Katy's request for review and affirm USAC's decision to rescind Katy's funding commitment for FRN 1297321.³³ To the extent funds have already been disbursed under this funding request to Katy or its service provider, Phonoscope, USAC shall institute or continue recovery actions against them.

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, 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 the request for review filed by Katy Independent School District on July 23, 2009, IS DENIED.

²⁸ See Request for Review.

²⁹ The Bureau must conduct a *de novo* review of requests for review of decisions issued by USAC. 47 C.F.R. § 54.723.

³⁰ See *Universal Service First Report and Order*, 12 FCC Rcd at 9029, para. 480.

³¹ See *supra* n.16.

³² See *supra* n. 25.

³³ See COMAD.

11. 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 RESCIND the funding commitment for funding request number 1297321 as part of Katy Independent School District's FY 2005 FCC Form, and, to the extent any funds have already been disbursed to Katy Independent School District or its service provider, Phonoscope, SHALL CONTINUE recovery actions against them.

12. 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

Gina Spade
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