

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

In the Matter of)	
)	
Requests for Review of)	
Decisions of the)	
Universal Service Administrator by)	
)	
Allendale County School District)	File Nos. SLD-415662, <i>et al.</i>
Cedar Mountain, North Carolina, <i>et al.</i>)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: April 21, 2011

Released: April 21, 2011

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

I. INTRODUCTION

1. In this order, we address 19 appeals of decisions by the Universal Service Administrative Company (USAC) denying requests for funding under the E-rate program (more formally, the schools and libraries universal service support program).¹ USAC denied funding to the petitioners on the grounds that the underlying applications violated the Commission's competitive bidding requirements because they either did not consider price as the primary factor in the vendor selection process or they did not carefully consider all bids submitted in response to their FCC Form 470 postings. Upon review of the record, we find that seven of the petitioners did not violate the Commission's competitive bidding requirements.² In 12 other instances, we find that a waiver of sections 54.503(c)(2)(vii) and 54.511(a) of the Commission's rules, which require applicants to use price as the primary factor in the vendor selection process, is in the public interest.³ We therefore grant these appeals and remand the associated 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 each application listed in the appendices and issue a decision no later than 120 calendar days from the release date of this order.

¹ See Appendices A-C for a list of appeals. In this order, we use the term "appeals" to refer generally to requests for review of decisions issued 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 Appendices A and C.

³ See Appendix B; 47 C.F.R. §§ 54.503(c)(2)(vii), 54.511(a). Irving Independent School District filed two separate appeals for its FCC Form 471 applications submitted in funding years (FY) 2005 and 2006. See Appendix B.

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 services.⁴ The Commission's rules provide that these entities must seek competitive bids for all services eligible for support.⁵ 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.⁶ The applicant must describe the requested services with sufficient specificity to enable potential service providers to submit bids for such services.⁷ 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.⁸ The RFP must be available to all potential bidders for the duration of the bidding process.⁹ 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 470.¹⁰

3. After submitting an FCC Form 470, the applicant must wait 28 days before making commitments with the selected service providers.¹¹ 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.¹² 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.¹³ USAC assigns a funding request number (FRN) to each

⁴ 47 C.F.R. §§ 54.501-54.502.

⁵ 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).

⁶ 47 C.F.R. § 54.503(c).

⁷ *Id.*

⁸ *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); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2010) (current FCC Form 470).

⁹ *See* FCC Form 470.

¹⁰ *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*).

¹¹ 47 C.F.R. § 54.503(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).

¹² 47 C.F.R. § 54.511(a).

¹³ *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); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2010) (current FCC Form 471).

request for discounted services and issues funding commitment decision letters (FCDLs) approving or denying the requests for discounted services.¹⁴

4. *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.¹⁵ Applicants may also consider relevant factors other than the pre-discount prices submitted by providers, such as prior experience, personnel qualifications, management capability, and environmental objectives.¹⁶ When evaluating bids, however, applicants must have a separate "cost category" and that category must be given more weight than any other single factor.¹⁷

5. *State Master Contracts.* Applicants may purchase eligible services from "master contracts" negotiated by a third party such as a governmental entity.¹⁸ The third party initiating the master contract must comply with the Commission's competitive bidding requirements and state procurement laws.¹⁹ An applicant is not required to satisfy the competitive bidding requirements if it takes service from a master contract that either has been competitively bid or qualifies for the existing contract exemption.²⁰ If a third party has negotiated a master contract without complying with the competitive bidding requirements, then the applicant must comply with the competitive bidding requirements before it may receive discounts or reduced rates for services purchased from that master contract.²¹ The applicant must certify such compliance when submitting its FCC Form 471 application.²² Compliance with state and local procurement requirements does not relieve a school from its obligation also to follow E-rate procurement procedures.²³

¹⁴ See USAC website, Schools and Libraries, Funding Commitment Decision Letter (FCDL), <http://www.universalservice.org/sl/applicants/step09/funding-commitment-decision-letter.aspx> (last visited Apr. 4, 2011).

¹⁵ 47 C.F.R. §§ 54.503(c)(2)(vii), 54.511(a); 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 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*).

¹⁶ *Universal Service First Report and Order*, 12 FCC Rcd at 9029-30, para. 481; see also 47 C.F.R. § 54.511(a).

¹⁷ *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.

¹⁸ See 47 C.F.R. § 54.500(g) (defining "master contract" as a contract negotiated with a service provider by a third party, the terms and conditions of which are then made available to an eligible school, library, rural health care provider, or consortium that purchases directly from the service provider).

¹⁹ See *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, and 95-72, Report and Order and Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5452-53, para. 233 (1997) (*Fourth Reconsideration Order*).

²⁰ *Id.* at 5452-53, para. 233; see also *supra*, paras. 2-3.

²¹ *Fourth Reconsideration Order*, 13 FCC Rcd at 5452-53, para. 233.

²² See FCC Form 471, Block 6.

²³ See *Ysleta Order*, 18 FCC Rcd at 26424-26, paras. 41-44.

6. *Requests for Review.* The petitioners submitted their FCC Forms 470 to USAC to initiate the competitive bidding process for E-rate eligible services.²⁴ Subsequently, the petitioners entered into contracts with their respective service providers and filed their FCC Form 471 applications for funding years (FYs) 2003-2008.²⁵ USAC denied the petitioners' applications on the grounds that the petitioners violated the Commission's competitive bidding rules.²⁶ Specifically, the petitioners' requests for funding

²⁴ FCC Form 470, Allendale County School District (posted Dec. 19, 2003); FCC Form 470, Benson Unified School District 9 (posted Mar. 29, 2000); FCC Form 470, Chesterfield County School District (posted Jan. 3, 2007); FCC Form 470, Compton Unified School District (posted Nov. 18, 2003); FCC Form 470, Florence County School District 3 (posted Dec. 21, 2004); FCC Form 470, Galena Park Independent School District (posted Nov. 4, 2004); FCC Form 470, Hmong Academy Charter School (posted Dec. 12, 2005); FCC Form 470, Goose Creek Consolidated Independent School District (posted Nov. 17, 2003); FCC Form 470, Irving Independent School District (posted Dec. 10, 2003); FCC Form 470, Killeen Independent School District (posted Dec. 20, 2003); FCC Form 470, Lee County School District (posted Dec. 6, 2004); FCC Form 470, Meridian Joint School District 2 (posted Dec. 30, 2005); FCC Form 470, Our Lady of Fatima School (posted Nov. 29, 2005); FCC Form 470, Point Pleasant Board of Education (posted Sept. 16, 2003); FCC Form 470, Richland County School District 1 (posted Oct. 10, 2003); FCC Form 470, School District of the City of River Rouge (posted Jan. 8, 2003) (River Rouge FCC Form 470); FCC Form 470, St. Cecilia School (posted Nov. 19, 2007); FCC Form 470, Whittier City School District (posted Jan. 17 2006) (Whittier FCC Form 470).

²⁵ FCC Form 471, Allendale County School District (filed Jan. 30, 2004); FCC Form 471, Benson Unified School District 9 (filed Feb. 16, 2005) (Benson FCC Form 471); FCC Form 471, Chesterfield County School District (filed Feb. 7, 2007); FCC Form 471, Compton Unified School District (filed Feb. 4, 2004); FCC Form 471, Florence County School District 3 (filed Jan. 28, 2005); FCC Form 471, Galena Park Independent School District (filed Feb. 8, 2005) (Galena Park FCC Form 471); FCC Form 471, Goose Creek Consolidated Independent School District (filed Feb. 2, 2004); FCC Form 471, Hmong Academy (filed Feb. 7, 2006); FCC Form 471, Irving Independent School District (filed Feb. 15, 2005); FCC Form 471, Irving Independent School District (filed Feb. 15, 2006); FCC Form 471, Killeen Independent School District (filed Feb. 2, 2004); FCC Form 471, Lee County School District (filed Jan. 31, 2005); FCC Form 471, Meridian Joint School District 2 (filed Feb. 16, 2006); FCC Form 471, Our Lady of Fatima School (filed Feb. 8, 2006); FCC Form 471, Point Pleasant Board of Education (filed Feb. 3, 2004); FCC Form 471, Richland County School District 1 (filed Feb. 13, 2006); FCC Form 471, School District of the City of River Rouge (filed Feb. 6, 2003); FCC Form 471, St. Cecilia School (filed Feb. 7, 2008); FCC Form 471, Whittier City School District (filed Feb. 16, 2007).

²⁶ See Letter from USAC, Schools and Libraries Division, to Tom Traywick, on behalf of Allendale County School District (dated Mar. 24, 2005) (Allendale FCDL); Letter from USAC, Schools and Libraries Division, to Rubin Cochran, Benson Unified School District (dated Nov. 2, 2005) (Benson FCDL); Letter from USAC, Schools and Libraries Division, to John Wagnon, Chesterfield County School District (dated Nov. 29, 2007) (Chesterfield FCDL); Letter from USAC, Schools and Libraries Division, to Kevin Evans, Compton Unified School District (dated June 30, 2004) (Compton FCDL); Letter from USAC, Schools and Libraries Division, to Tom Traywick, on behalf of Florence County School District 3 (dated May 5, 2006) (Florence FCDL); Letter from USAC, Schools and Libraries Division, to Dr. Jeffrey Lorentz, Galena Park Independent School District (dated May 5, 2006) (Galena Park FCDL); Letter from USAC, Schools and Libraries Division, to Frankie Jackson, Goose Creek Consolidated Independent School District (dated May 10, 2005) (Goose Creek FCDL); Letter from USAC, Schools and Libraries Division, to Christianna Hang, Hmong Academy (dated Apr. 17, 2007) (Hmong FCDL); Letter from USAC, Schools and Libraries Division, to Alice Owen, Irving Independent School District (dated Nov. 9, 2005) (Irving 2005 FCDL); Letter from USAC, Schools and Libraries Division, to Alice Owen, Irving Independent School District (dated Sept. 19, 2006) (Irving 2006 FCDL); Letter from USAC, Schools and Libraries Division, to Michael Bernstein, Killeen Independent School District (dated Dec. 4, 2004) (Killeen FCDL); Letter from USAC, Schools and Libraries Division, to Tom Traywick, on behalf of Lee County School District (dated Dec. 14, 2005) (Lee County FCDL); Letter from USAC, Schools and Libraries Division, to Jill Hernandez, Our Lady of Fatima School (dated Dec. 27, 2006) (Fatima School FCDL); Letter from USAC, Schools and Libraries Division, to Denise DeRosa, Point Pleasant Board of Education (dated April 26, 2004) (Point Pleasant FCDL); Letter from USAC, Schools and Libraries Division, to Jeff Ostendorf, Richland County School District 1 (Feb. 6, 2007) (Richland FCDL); Letter from USAC, Schools and Libraries Division, to Donald Fitzpatrick, School District of the City of

were denied because USAC found that the petitioners either did not consider price as the primary factor in the vendor selection process or did not carefully consider all bids submitted in response to their FCC Form 470 postings.²⁷ USAC later affirmed these decisions on appeal.²⁸ The petitioners then filed the instant requests for review with the Commission.²⁹

III. DISCUSSION

7. We grant these 19 appeals and remand to USAC for further processing.³⁰ In 17 appeals, USAC denied the petitioners' funding requests because USAC found that the petitioners did not consider price as the primary factor.³¹ In five of these 17 instances, we find that the petitioners selected their respective vendors using price as the primary consideration in accordance with E-rate program rules.³² For the remaining 12 instances, we find that a waiver of sections 54.503(c)(2)(vii) and 54.511(a) of the Commission's rules, which require applicants to use price as the primary factor in the vendor selection

River Rouge (dated June 30, 2003) (River Rouge FCDL); Letter from USAC, Schools and Libraries Division, to Dan Ladik, St. Cecilia School (dated July 22, 2008) (St. Cecilia FCDL); Letter from USAC, Schools and Libraries Division, to Jamie Mayhew, Whittier City School District (dated Nov. 14, 2006) (Whittier FCDL) (collectively referred to as FCDLs); *see also* Letter from USAC, Schools and Libraries Division, to Jerry Reininger, Meridian Joint School District 2 (dated Oct. 14, 2008) (Meridian Commitment Adjustment Letter (COMAD)).

²⁷ *See* FCDLs.

²⁸ *See* Letter from USAC, Schools and Libraries Division, to Tom Traywick, on behalf of Allendale County School District (dated Mar. 9, 2006); Letter from USAC, Schools and Libraries Division, to Connie Ayres, Benson Unified School District 9 (dated July 3, 2007); Letter from USAC, Schools and Libraries Division, to Tom Traywick, on behalf of Florence County School District 3 (dated Aug. 23, 2006); Letter from USAC, Schools and Libraries Division, to Mike Seale, Galena Park Independent School District (dated Aug. 8, 2006); Letter from USAC, Schools and Libraries Division, to Frankie Jackson, Goose Creek Consolidated Independent School District (dated Sept. 21, 2005); Letter from USAC, Schools and Libraries Division, to Christianna Hang, Hmong Academy (dated July 23, 2007); Letter from USAC, Schools and Libraries Division, to Alice Owen, Irving Independent School District (dated Feb. 22, 2006); Letter from USAC, Schools and Libraries Division, to Alice Owen, Irving Independent School District (dated Jan. 3, 2007); Letter from USAC, Schools and Libraries Division, to Michael Bernstein, Killeen Independent School District (dated Oct. 30, 2006); Letter from USAC, Schools and Libraries Division, to Tom Traywick, on behalf of Lee County School District (dated Aug. 8, 2006); Letter from USAC, Schools and Libraries Division, to Jill Hernandez, Our Lady of Fatima School (dated Feb. 13, 2007); Letter from USAC, Schools and Libraries Division, to Denise DeRosa, Point Pleasant Board of Education (dated Sept. 19, 2005); Letter from USAC, Schools and Libraries Division, to Walter Fox, Richland County School District 1 (dated Mar. 27, 2007); Letter from USAC, Schools and Libraries Division, to Dan Ladik, St. Cecilia School (dated Sept. 5, 2008); Letter from USAC, Schools and Libraries Division, to Reinera Dixon, Whittier City School District (dated Mar. 15, 2007) (collectively referred to as Administrative Decision Letters (ADLs)). Note that Chesterfield, Compton, and River Rouge submitted appeals of USAC's FCDLs with the Commission.

²⁹ *See* Appendices A-C.

³⁰ We estimate that the appeals granted in this order involve applications for approximately \$3.4 million 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 Fourth Quarter 2010 (Aug. 2, 2010). We thus determine that the action we take today should have minimal impact on the universal service fund as a whole.

³¹ *See* Benson FCDL; Chesterfield FCDL; St. Cecilia FCDL; Florence FCDL; Galena Park FCDL; Goose Creek FCDL; Allendale FCDL; Fatima FCDL; Hmong FCDL; Irving 2005 FCDL; Irving 2006 FCDL; Killeen FCDL; Lee County FCDL; Meridian COMAD; Richland FCDL; Compton FCDL; Point Pleasant FCDL.

³² *See* Appendix A.

process, is in the public interest.³³ USAC also denied two petitioners' funding requests because USAC found that the petitioners did not carefully consider all bids submitted in response to their FCC Form 470 postings.³⁴ We find that these two petitioners carefully considered all bids submitted in response to their FCC Form 470 postings and, therefore, did not violate the Commission's rules. We discuss these groups of appeals separately, below.

8. Price as the Primary Factor in Selecting a Vendor. USAC denied 17 petitioners' funding requests on the ground that they failed to use price as the primary factor in their respective vendor selection processes.³⁵ Specifically, USAC rejected these funding requests because the petitioners did not provide documentation demonstrating that price was given the highest weight during their respective bid evaluation processes.³⁶

9. We find that the five petitioners listed in Appendix A gave the most weight to price when evaluating bids.³⁷ The record shows that each applicant submitted documentation to USAC detailing the

³³ See 47 C.F.R. §§ 54.503(c)(2)(vii), 54.511(a); Appendix B. Generally, the Commission's rules may be waived for good cause shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

³⁴ See Appendix C.

³⁵ See Benson FCDL; Chesterfield FCDL; St. Cecilia FCDL; Florence FCDL; Galena Park FCDL; Goose Creek FCDL; Allendale FCDL; Fatima FCDL; Hmong FCDL; Irving 2005 FCDL; Irving 2006 FCDL; Killeen FCDL; Lee County FCDL; Meridian COMAD; Richland FCDL; Compton FCDL; Point Pleasant FCDL. We note that during post-funding review, USAC determined that Killeen, Compton, and Meridian failed to provide documentation to indicate that price was the primary factor in the vendor selection process. See Killeen Request for Review at 4-5; Compton Request for Review at 1; Meridian Request for Review at 2. Killeen, Compton, and Meridian were then subject to funding commitment adjustments by USAC, whereby USAC rescinded their funding commitments. See Killeen Request for Review at 4-5; Compton Request for Review at 1; Meridian Request for Review at 2. In light of our decision herein, we direct USAC to discontinue recovery actions against Killeen, Compton, and Meridian pending completion of its review of Killeen, Compton, and Meridian's underlying applications on remand.

³⁶ See Benson FCDL; Chesterfield FCDL; St. Cecilia FCDL; Florence FCDL; Galena Park FCDL; Goose Creek FCDL; Allendale FCDL; Fatima FCDL; Hmong FCDL; Irving 2005 FCDL; Irving 2006 FCDL; Killeen FCDL; Lee County FCDL; Meridian COMAD; Richland FCDL; Compton FCDL; Point Pleasant FCDL.

³⁷ See 47 C.F.R. § 54.723 (setting forth the Wireline Competition Bureau's obligation to conduct a *de novo* review of appeals of decisions made by USAC). Allendale considered five criteria, including cost, which was given the highest weight. In order to break a tie between two vendors receiving the same rating, however, Allendale re-evaluated the cost-effectiveness of each vendor's bid, which included a review of whether the vendor had knowledge of the district's network, facilities, staff, and the type of technical support that would be available. See Allendale Request for Review at 2-3. Chesterfield considered 16 criteria, including cost, which was 30 percent of the total evaluation weighting, while the next most heavily weighted factor represented 25 percent. See Chesterfield Request for Review at Exhibit B. Goose Creek evaluated eight criteria. Two criteria, price and long-term costs, related to price and, when combined, had more weight than any other evaluation criteria. See Goose Creek Request for Review at 1, Attachment 1. Richland considered five criteria in its evaluation process, including a cost criterion, which was 25 percent of the total evaluation weighting. See Richland Request for Review at 2. The next most heavily weighted factor represented 20 percent of the total evaluation weighting. *Id.* Richland states that it selected the vendor with the highest number of cumulative points. *Id.* at 2-5, Exhibit C. Compton asserts that it selected a

competitive bidding process, including bid requests, bid proposals, and cost evaluation criteria.³⁸ We find no evidence in the record that these petitioners failed to conduct a competitive bidding process that adhered to relevant state and local procurement laws.³⁹ Based on these factors, we find that the petitioners' competitive bidding processes did not violate program rules. In addition, in the record at this time, there is no evidence of waste, fraud or abuse, or misuse of funds, or a failure to adhere to core program requirements.

10. USAC also determined that the 11 petitioners listed in Appendix B, who in the aggregate are appealing the denial of 12 applications, failed to assign the highest weight to the price category during their respective bid evaluations, and thus violated the Commission's competitive bidding requirements.⁴⁰ We agree with USAC's determination that the petitioners did not comply with the Commission's rule to assign the highest weight to price when evaluating bids. Nevertheless, the record shows that for seven petitioners,⁴¹ the winning vendor's cost proposal was lower than the competing bids and therefore the applicants selected the least expensive service offering.⁴² With regard to three other petitioners, Killeen,

vendor from a California state master contract that was competitively bid at the state level and therefore a local bidding process was not necessary. *See* Compton Request for Review at 1-2; California Multiple Award Schedule (CMAS), No. 3-03-70-0255(M). Compton provides a copy of the state master contract from which its vendor was selected. *Id.* at Attachment 7.

³⁸ *See* Allendale Request for Review; Chesterfield Request for Review; Compton Request for Review; Goose Creek Request for Review; Richland Request for Review.

³⁹ *Id.* *See also infra* para. 5 (indicating that applicants may purchase eligible services from "master contracts" negotiated by a third party such as a governmental entity and that an applicant is not required to satisfy the competitive bidding requirements if it takes service from a master contract that either has been competitively bid or qualifies for the existing contract exemption).

⁴⁰ *See* Appendix B; *see also Ysleta Order*, 18 FCC Rcd at 26429, para. 50.

⁴¹ These seven petitioners are Galena Park, Fatima, St. Cecilia, Benson, Hmong, Meridian, and Irving (which has two separate applications at issue in this order).

⁴² Specifically, Irving used seven criteria in its vendor selection process to evaluate two vendors. *See* Irving 2006 Request for Review at Attachments 2 and 5; Irving 2007 Request for Review at Attachments 2 and 5. Higher points were awarded for lower costs, better reputation, better quality of goods or services, and other factors on a scale of 1 to 10. *Id.* Irving selected the vendor with the highest number of points in each of the cost categories and the highest overall point total. *Id.* The winning vendor's cost proposal was nearly half the cost of the competing proposal. *Id.* Galena Park considered two criteria in its vendor selection process, the direct costs of each bidder and the cost of transition to another provider. *See* Galena Park Request for Review at 2. Galena Park selected Nextel of Texas, Inc., because it offered the lowest price, it had previous working experience with the school, and there would be no disruption in service. *Id.* According to the evaluation worksheet used in Fatima's vendor selection process, each of the five evaluation criteria was given equal weighting. *See* Fatima Request for Review at 1, Attachment 6. Ultimately, however, the vendor selected offered the lowest price. *Id.* at 1. The decision matrix used in St. Cecilia's vendor selection process shows that "price" was given a weighting of 30 points, while the "requirements match" category was given a value of 50 points. *See* St. Cecilia Request for Review at 1, Attachment 1. After evaluating three bids, St. Cecilia selected the vendor that offered the lowest price. *Id.* at 1. Benson and Hmong each considered "cost" as a separate evaluation criterion, but neither applicant assigned the greatest weight to that criterion for bid evaluation purposes. Using existing Arizona state procurement standards, Benson gave equal weight to two of its evaluation criteria, i.e., cost and conformity with specification terms and conditions and other RFP requirements. *See* Benson Request for Review at 1-2. Hmong gave equal weight to each of the five evaluation criteria used in its process, i.e., ability to provide service, committed time by vendor, cost, past experience, and penalties for switching. *See* Hmong Request for Review at Attachment 3. Benson and Hmong ultimately selected the vendor with the highest number of points in the cost category and the lowest proposed price. *See* Benson Request for Review at 1-2; Hmong Request for Review at 1-2. The bid evaluation sheet used in Meridian's vendor selection process shows that the "quality of service, skill of vendor, and ongoing service and maintenance" category

Lee, and Florence, the record shows that each petitioner considered multiple bids, but only one bid was responsive to the FCC Form 470 postings.⁴³ As a result, in each of these three instances, the responsive bid necessarily offered the lowest price.⁴⁴ Therefore, consistent with the policy goals underlying the Commission's competitive bidding rules, the least expensive responsive service offering was ultimately selected by 10 of the 11 petitioners that failed to assign the highest weight to the price category.

11. Point Pleasant was the other applicant that involved a failure to assign the highest weight to the price category for purposes of bid evaluations. The record shows that Point Pleasant had a choice of two vendors from a New Jersey state master contract, Arch Wireless and Mid-State Paging, Inc.⁴⁵ When evaluating each proposal, Point Pleasant assigned an 80 percent weight to performance and a 20 percent weight to price.⁴⁶ In its request for review, Point Pleasant explains that it gave performance a higher weighting because based on its past experience, it wanted to ensure that the school received a functional service.⁴⁷ Point Pleasant explains that, in the previous funding year, it selected Arch Wireless because its proposal offered the lowest price.⁴⁸ Its equipment, however, did not work in Point Pleasant's buildings.⁴⁹ We understand why, in these specific circumstances, Point Pleasant considered it important to protect itself from a recurrence of that situation. In that regard, we note that consistent with E-rate program rules, Point Pleasant could have set up the bidding process in a way that disqualified Arch Wireless before even

was given 20 points, while the "price" category was given 10 points. *See* Meridian Request for Review at Attachment 1. Meridian, however, selected the vendor that offered the lowest price. *Id.* at 1.

⁴³ Killeen used a "Bid Evaluation Matrix" to determine whether two bids it received were responsive to its RFP. *See* Killeen Request for Review at 2-3. One bid was incomplete and was disqualified from further consideration. *Id.* Five criteria, including price, technical solution, vendor references, performance history, and distance from district, were used to evaluate the remaining bid. *Id.* According to Killeen, the remaining bid was selected because the vendor offered the lowest price. *Id.* Lee County and Florence each considered two bids in their vendor selection processes. *See* Lee County Request for Review at 2-3; Florence Request for Review at 3. Each had one bid that offered services that were not requested in the petitioners' FCC Forms 470. *Id.* Lee County and Florence each selected the vendor with the lowest proposed price and whose service offering was responsive to the FCC Forms 470. *Id.*

⁴⁴ *See* Killeen Request for Review at 2-3; Lee County Request for Review at 2-3; Florence Request for Review at 3.

⁴⁵ *See* Point Pleasant Request for Review at 2. We note that USAC also rejected three other funding requests of Point Pleasant on the ground that it did not have a contract in place when it submitted its FY 2004 FCC Form 471. *See* Point Pleasant Request for Review at 2 (regarding funding request numbers (FRN) 1170034, 1163803, and 1163830). However, we find, based on our review of the record, that USAC's findings in this regard were incorrect. Our review reveals that Point Pleasant signed a contract with Xtel Communications, Inc., on February 2, 2004, for FRN 1170034 and a multi-year contract with Business Automation Technologies, dba Data Network Solutions, on October 30, 2002, for FRNs 1163803 and 1163830. *Id.* at Attachments 3, 4. The record also shows that Point Pleasant filed its FCC Form 471 on February 3, 2004, after each contract was signed. *See* FCC Form 471, Point Pleasant Board of Education (filed Feb. 3, 2004). We therefore grant Point Pleasant's request for review with regard to these FRNs and remand the underlying application to USAC for further processing consistent with this order.

⁴⁶ *See* Point Pleasant Request for Review at 2.

⁴⁷ *Id.* Point Pleasant selected Mid-State Paging, Inc. for FY 2004 because its paging service was functional in its buildings and thus was the most cost-effective choice. *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

considering price as a factor.⁵⁰ We therefore grant its waiver request based on these unique circumstances. We recognize that if the petitioner had disqualified Arch Wireless from the bidding process based on past performance, then Mid-State Paging, Inc. would have been the lowest qualified bidder. Given these circumstances, we find that a waiver of our rules in Point Pleasant's case is appropriate and in the public interest.

12. In sum, based upon our review of the underlying record, we find that the 12 appeals by the petitioners listed in Appendix B conducted a competitive bidding process that resulted in the selection of the most cost-effective service offering.⁵¹ Moreover, we find no evidence of any violation of state or local procurement laws. We thus believe that rejecting the petitioners' funding requests is not warranted in these circumstances. Rather, we find that a limited waiver of sections 54.503(c)(2)(vii) and 54.511(a) of the Commission's rules is in the public interest given the facts of each case and that this determination results in more effective implementation of Commission policy on competitive bidding.⁵² In addition, in the record at this time, there is no evidence of waste, fraud or abuse, or misuse of funds. Accordingly, we waive sections 54.503(c)(2)(ii) and 54.511(a) of the Commission's rules for the petitioners listed in Appendix B and remand the underlying applications to USAC for further action consistent with this order.

13. *Consideration of All Bids Submitted.* USAC denied funding to two petitioners, the School District of the City of River Rouge (River Rouge) and Whittier City School District (Whittier), on the ground that they failed to consider all bids submitted in response to their FCC Form 470 postings.⁵³ Specifically, the record shows that River Rouge received two bids in response to its FCC Form 470 posting and request for quotes (RFQ), one from Advanced Networking Group (ANG) and the other from SER Communications.⁵⁴ River Rouge evaluated each bid, despite the fact that they were both filed after the submission deadline.⁵⁵ Based on state and local bidding requirements for establishing a qualified bid,

⁵⁰ Specifically, Point Pleasant could have used a multi-tiered bid evaluation process in which the first tier could have assessed whether a proposal satisfied minimum technical capabilities, such as the quality of service. Bids under this tier could have been evaluated on a pass-fail basis, which is currently allowed. All bids satisfying first tier requirements then could have moved to the next tier of the evaluation process where other criteria could have been assessed, including price. See USAC website, Schools and Libraries, Schools and Libraries Applicants, Service Providers, <http://www.usac.org/sl/applicants/step04/construct-evaluation.aspx> (last visited Apr. 5, 2011).

⁵¹ See Irving 2005 Request for Review at Attachments 2 and 5; Irving 2006 Request for Review at Attachments 2 and 5; Compton Request for Review at 1-2, Attachment 7; Killeen Request for Review at 2-3; Meridian Request for Review at 1-2; Galena Park Request for Review at 2; Fatima Request for Review at 1; St. Cecilia Request for Review at 1; Lee County Request for Review at 2-3; Florence Request for Review at 3; Benson Request for Review at 1-2; Hmong Request for Review at Attachment 3; Point Pleasant Request for Review at 2.

⁵² 47 C.F.R. §§ 54.504(b)(2)(vii), 54.511(a).

⁵³ See Whittier ADL (stating that Whittier did not carefully consider the wireless Internet access proposal submitted by Advanced Scientific Applications, Inc.); Letter from USAC, Schools and Libraries Division, to Donald Fitzpatrick, River Rouge Senior High School (dated Oct. 12, 2007) (River Rouge COMAD) (stating that, during post-funding review, River Rouge failed to provide documentation to indicate that it carefully considered all bids received and chose the most cost-effective solution). River Rouge was then subject to a funding commitment adjustment by USAC, which rescinded its funding commitment. See River Rouge COMAD. In light of our decision herein, we direct USAC to discontinue recovery action against River Rouge pending completion of its review of River Rouge's underlying application on remand consistent with this order.

⁵⁴ See River Rouge Request for Review at 4-5; River Rouge FCC Form 470.

⁵⁵ River Rouge Request for Review at 5.

River Rouge subsequently rejected SER Communications' bid because it was incomplete and failed to respond to all of the items requested in the RFQ.⁵⁶ In its request for review, River Rouge argues that it used price as a primary consideration in selecting the ANG proposal and determined that ANG presented the most cost-effective service offering.⁵⁷ We find that nothing in the record indicates that River Rouge evaluated the responsive bidders in a manner inconsistent with E-rate program rules. The record shows that River Rouge considered each bid it received and rejected the SER Communication's bid only after determining that the bid was incomplete. Finally, nothing in the record demonstrates any evidence of waste, fraud or abuse, or misuse of funds.

14. The record shows that Whittier also considered all bids. Whittier received two bids in response to its FCC Form 470 posting seeking wireless Internet access on a district-wide basis.⁵⁸ One bid, submitted by its current Internet service provider, Trillion Partners, Inc., (Trillion), proposed to provide wide area network (WAN) services for wireless Internet access to all 14 district sites for a monthly charge of \$17,571.⁵⁹ According to Whittier, the Trillion proposal was reflected in a detailed proposed service agreement.⁶⁰ The other bid, submitted by Advanced Scientific Applications, Inc., (ASA) proposed a monthly charge of \$69,986 for dedicated wireless Internet access for digital signal level 3 (DS3) lines for each district site.⁶¹ No other detail was provided in the ASA proposal.⁶² Upon further inquiry into the specifics of ASA's proposal, Whittier learned that ASA could not provide wireless Internet access on a district-wide basis, which was precisely the service that Whittier was seeking.⁶³ Based on our review of the record, we find that Whittier also evaluated the responsive bidders consistent with E-rate program rules. The fact that Whittier initiated contact with ASA to discuss the proposal's terms and conditions, and only rejected the proposal after learning that ASA could not provide the requested services leads us to conclude that Whittier carefully considered ASA's submission. Moreover, there is no evidence of waste, fraud or abuse, or misuse of funds.

IV. ORDERING CLAUSES

15. 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 requests for review for those petitioners listed in Appendices A and C ARE GRANTED and REMANDED to USAC for further consideration in accordance with the terms of this order.

16. 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 sections 1.3

⁵⁶ *Id.*

⁵⁷ *Id.* at 6.

⁵⁸ See Whittier Request for Review at 5-6; Whittier FCC Form 470.

⁵⁹ Whittier Request for Review at 5.

⁶⁰ *Id.*

⁶¹ *Id.* at 6.

⁶² *Id.*

⁶³ *Id.* at 6-7. Whittier also argues that ASA had no wireless capability and that its bid was unresponsive, incorrect and incomplete. *Id.* at 14.

and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 1.3 and 54.722(a), sections 54.503 and 54.511 of the Commission's rules, 47 C.F.R. §§ 54.503, 54.511 ARE WAIVED for those petitioners listed in Appendix B to the extent provided herein.

17. 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 actions against Killeen Independent School District, Compton Unified School District, Meridian Joint School District 2, and the School District of the City of River Rouge, to the extent provided herein.

18. 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 COMPLETE its review of the remanded applications and SHALL ISSUE an award or a denial based on a complete review and analysis no later than 120 calendar days from the release date of this order.

19. 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
Deputy Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

APPENDIX A

Applicants Selecting Vendor Based on Price as the Primary Factor

Applicant	Application Number	Funding Year	Date of Appeal
Allendale County School District/ Service Associates, Inc. Cedar Mountain, NC	415662	2004	Mar. 20, 2006
Chesterfield County School District/ CNIC, Inc. Chesterfield, SC	581950	2007	Dec. 19, 2007
Compton Unified School District Compton, CA	409682	2004	Oct. 3, 2005
Goose Creek Consolidated Independent School District Baytown, TX	410801, 411530, 414988, 415200, 415431	2004	Nov. 22, 2005
Richland County School District One Columbia, SC	507445	2006	May 18, 2007

APPENDIX B

Applicants Receiving Waiver of the Commission's Rules

Applicant	Application Number	Funding Year	Date of Appeal
Benson Unified School District 9 Benson, AZ	473356	2005	Aug. 22, 2007
Florence County School District 3/ Service Associates, Inc. Lake City, SC	449171	2005	Sept. 12, 2006
Galena Park Independent School District Houston, TX	445018	2005	Oct. 10, 2006
Hmong Academy Charter School Saint Paul, MN	512377	2006	Sept. 20, 2007
Irving Independent School District Irving, TX	463711	2005	Apr. 25, 2005
Irving Independent School District Irving, TX	517462	2006	Jan.31, 2007
Killeen Independent School District Killeen, TX	418306	2004	Dec. 20, 2006
Lee County School District/ Service Associates, Inc. Bishopville, SC	449189	2005	Aug. 25, 2006
Meridian Joint School District 2 Meridian, ID	518833	2006	Nov. 21, 2008
Our Lady of Fatima School Jackson Heights, NY	528095	2006	Mar. 23, 2007

Point Pleasant Board of Education Point Pleasant, NJ	404069	2004	Nov. 18, 2005
St. Cecilia School Pennsauken, NJ	636075	2008	Sept. 30, 2008

APPENDIX C

Applicants Considering all Submitted Bids

Applicant	Application Number	Funding Year	Date of Appeal
School District of the City of River Rouge River Rouge, MI	381953	2003	Dec. 12, 2007
Whittier City School District Whittier, CA	536931	2006	May 14, 2007