

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of	)	
	)	
Request for Waiver by	)	
	)	
Maryland Department of Juvenile Services	)	File No. SLD-505753
Baltimore, Maryland	)	
	)	
Schools and Libraries Universal Service	)	CC Docket No. 02-6
Support Mechanism	)	

**ORDER**

**Adopted: May 4, 2011**

**Released: May 4, 2011**

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

**I. INTRODUCTION**

1. In this order, we deny the petition of the Maryland Department of Juvenile Services (Juvenile Services) seeking a waiver of section 54.503 of the Commission’s competitive bidding rules to enable Juvenile Services to use an existing multi-year contract without filing an FCC Form 470 and initiating a new competitive bidding process under the E-rate program (more formally known as the schools and libraries universal service support program).<sup>1</sup>

**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.<sup>2</sup> 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.<sup>3</sup> An existing contract, however, signed on or before July 10, 1997, is exempt from the competitive bidding requirements.<sup>4</sup>

3. In accordance with the Commission’s competitive bidding requirements, each applicant 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

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<sup>1</sup> See Letter from Gilbert Becker, Maryland Department of Juvenile Services, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Jan. 6, 2006) (Request for Waiver); 47 C.F.R. § 54.504(b). 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).

<sup>2</sup> 47 C.F.R. §§ 54.501-54.502.

<sup>3</sup> 47 C.F.R. § 54.503.

<sup>4</sup> See 47 C.F.R. § 54.511(c).

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 eligible 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>

4. After submitting an FCC Form 470, the applicant must wait 28 days before making commitments with the selected service providers.<sup>9</sup> The Commission's rules require that an applicant must carefully consider all submitted bids prior to entering into a contract.<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> USAC assigns a funding request number (FRN) to each request for discounted services and issues funding commitment decision letters (FCDLs) approving or denying the requests for discounted services.<sup>12</sup>

5. *State Master Contracts.* Applicants may purchase eligible services from "master contracts" negotiated by a third party such as a governmental entity.<sup>13</sup> The third party initiating the master contract

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<sup>5</sup> 47 C.F.R. § 54.503.

<sup>6</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No.96-45, Report and Order, 12 FCC Rcd 8776, 9078-79, para. 575 (1997) (*Universal Service First Report and Order*) (subsequent history omitted).

<sup>7</sup> See *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 FCC Form 470.

<sup>9</sup> 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) (*Approach Learning Order*).

<sup>10</sup> 47 C.F.R. § 54.511(a). Subsequent to FY 2001, the Commission revised its rules to provide that applicants must also 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. See *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 26406, 26429, para. 50 (2003). This rule was codified in 2003. See *Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202 (2004) (codifying 47 C.F.R. § 54.511(a)); see also *School and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808 (2004) (codifying 47 C.F.R. § 54.504(b)(2)(vii) and 47 C.F.R. § 54.504(c)(1)(xi)).

<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> See USAC website, *Schools and Libraries, Funding Commitment Decision Letter*, <http://www.universalservice.org/sl/applicants/step09/funding-commitment-decision-letter.aspx> (last visited Mar. 28, 2011).

<sup>13</sup> 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).

must comply with the Commission's competitive bidding requirements and state procurement laws.<sup>14</sup> The applicant is not required to satisfy the program's competitive bidding requirements if it takes service from a master contract that either has been competitively bid under the Commission's rules or qualifies for the existing contract exemption.<sup>15</sup> If a third party has negotiated a master contract without complying with the Commission's competitive bidding requirements, then the applicant must comply with the Commission's competitive bidding requirements (i.e., carefully consider and compare all bids submitted and select the most cost-effective offering with price being the primary factor considered in the selection process) and state and local procurement laws before it may receive discounts or reduced rates for services purchased from that master contract.<sup>16</sup> If the applicant initiates a competitive bidding process by filing its own FCC Form 470 and considers a state master contract as one of the bids, then the applicant must comply with the Commission's competitive bidding requirements and state and local procurement law.<sup>17</sup> The applicant must certify such compliance when submitting its FCC Form 471 application.<sup>18</sup> Compliance with state and local procurement requirements does not relieve a school from its obligation also to follow E-rate procurement procedures.<sup>19</sup>

6. Request for Waiver. Juvenile Services seeks a waiver of section 54.503 of the Commission's rules to enable it to seek support for eligible services under its multi-year contract without having to initiate a new competitive bidding process.<sup>20</sup> Juvenile Services asserts that all telecommunications services procured by Maryland state government entities must follow procurement laws as published in the Code of Maryland Regulations.<sup>21</sup> These regulations provide, among other things, that contracts in excess of \$25,000 shall be awarded by competitive bidding.<sup>22</sup> Juvenile Services states that it complied with state procurement regulations when it entered into a five-year contract with Verizon Select Services, Inc. (Verizon) in June 2005.<sup>23</sup> Juvenile Services further states that its contract with

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<sup>14</sup> 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*).

<sup>15</sup> *Id.* at 5452-53, para. 233; see also *supra* n.3.

<sup>16</sup> *Fourth Reconsideration Order*, 13 FCC Rcd at 5452-53, para. 233; see also *Request for Review of the Decision of the Universal Service Administrator by Patterson School District, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 21 FCC Rcd 13101 (2006) (*Patterson Order*); USAC website, Schools and Libraries, Contract Guidance, <http://www.usac.org/sl/applicants/step04/contract-guidance.aspx> (last visited Mar. 28, 2011); see also 47 C.F.R. §§ 54.503, 54.511.

<sup>17</sup> See USAC website, Schools and Libraries, Contract Guidance, <http://www.usac.org/sl/applicants/step04/contract-guidance.aspx> (last visited Mar. 28, 2011); see also 47 C.F.R. § 54.511.

<sup>18</sup> See FCC Form 471, Block 6.

<sup>19</sup> See *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, 26424-26, paras. 41-44 (2003) (*Ysleta Order*).

<sup>20</sup> See Juvenile Services Request for Waiver at 1-2, 47 C.F.R. § 54.503.

<sup>21</sup> Juvenile Services Request for Waiver at 1. See also COMAR 21.01.03.02.

<sup>22</sup> *Id.* at 1. See also COMAR 21.05.01.02.

<sup>23</sup> *Id.* at 1-2. Note that Juvenile Services entered into a contract with Verizon for the provision of telecommunications services for approximately \$218,000. See FCC Form 471, Maryland Department of Juvenile Services (filed Feb. 16, 2006).

Verizon resulted in the lowest prices for the requested services.<sup>24</sup> Accordingly, Juvenile Services asks the Commission to waive the requirement that applicants file an FCC Form 470 to initiate a competitive bidding process, because it believes that the lowest possible prices had been procured with the June 2005 contract.<sup>25</sup>

### III. DISCUSSION

7. In this order, we deny Juvenile Service's request for waiver of section 54.503 of the Commission's competitive bidding rules.<sup>26</sup> The Commission has repeatedly emphasized the importance of competitive bidding, concluding that competitive bidding is the most efficient means for ensuring both that eligible schools and libraries are informed about the choices available to them and that prices are not unnecessarily high, thereby minimizing the amount of support needed.<sup>27</sup> In adopting the FCC Form 470 posting requirement, the Commission established a minimally burdensome means for schools and libraries to inform the public of services they seek and for providers to review and submit bids in response to requests for services.<sup>28</sup> Based on our review of the record, an FCC Form 470 was not submitted for the state master contract at issue.<sup>29</sup> In addition, we find that this contract does not qualify for the existing contract exemption because it was signed after 1997.<sup>30</sup> Therefore, we find that the state master contract was not competitively bid.

8. Because the state master contract was not competitively bid in accordance with Commission rules, Juvenile Services was required to comply with the Commission's competitive bidding requirements before receiving E-rate discounts for services purchased from the master contract. The record reveals, however, that Juvenile Services posted an FCC Form 470 for the services at issue approximately six months after it had awarded the service contract to Verizon.<sup>31</sup> As Commission rules require that applicants seek bids before entering into contracts with service providers, we find that

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<sup>24</sup> *Id.* at 2.

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

<sup>26</sup> *Id.* The Commission may waive any provision of its rules on its own motion and for good cause shown. 47 C.F.R. § 1.3. A rule may be waived 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, 1157, (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972). In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. *Northeast Cellular*, 897 F.2d at 1166; *Network IP v. FCC*, 548 F.3d 116, 127-28 (D.C. Cir. 2008). *Accord*, *Network IP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

<sup>27</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029, para. 480 (1997) (subsequent history omitted); *Ysleta Order*, 18 FCC Rcd at 26417, para. 22; *Requests for Review by Caldwell Parish School District, et al. of the Decisions of the Universal Service Administrator*, CC Docket No. 02-6, Order, 23 FCC Rcd 2784 (2008).

<sup>28</sup> *Id.* at 9078, para. 575.

<sup>29</sup> See Letter from Gilbert Becker, Maryland Department of Juvenile Services, to USAC, Schools and Libraries Division (dated Nov. 3, 2006) (referencing Maryland State Master Contract No. 050B6800003).

<sup>30</sup> See Juvenile Services Request for Waiver at 1; see also 47 C.F.R. § 54.511(c) (stating that an existing contract signed on or before July 10, 1997 is exempt from the competitive bidding requirements).

<sup>31</sup> FCC Form 470, Maryland Department of Juvenile Services (posted Dec. 29, 2005).

Juvenile Services violated section 54.503 of the Commission's rules. Therefore, we do not believe that a waiver of section 54.503 of the Commission's rules in this instance is in the public interest and deny Juvenile Service's request for waiver.

#### IV. ORDERING CLAUSES

9. ACCORDINGLY, IT IS 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 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 waiver of section 54.503 of the Commission's rules filed by the Maryland Department of Juvenile Services on January 3, 2006, is DENIED.

10. 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

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