

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

In the Matter of)	
)	
Request for Review of)	
Decisions of the)	
Universal Service Administrator by)	
)	
Oakland Unified School District)	File No. SLD-414000
Oakland, California)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: February 23, 2012

Released: February 23, 2012

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

I. INTRODUCTION

1. In this order, we grant a request by Oakland Unified School District (Oakland) for review of decisions by the Universal Service Administrative Company (USAC) that rescinded funding committed to Oakland under the E-rate program for funding year 2004.¹ USAC rescinded Oakland's funding on the grounds that the underlying application violated state procurement law and failed to satisfy Commission rules regarding eligible service contracts. In this order, we find that Oakland did not violate state law by entering into agreements preparatory to public works contracts. Consistent with precedent, we also grant Oakland a limited waiver of section 54.504(c) of our rules, which 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."² We therefore grant Oakland's appeal and direct USAC to discontinue recovery actions against Oakland 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 services.³ The Commission's rules provide that

¹ The E-rate program is formally known as the schools and libraries universal service support program. 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). Oakland filed two identical appeals, with minor factual differences, in reference to two of its service providers, JDL Technologies (JDL) and AEKO Consulting, Inc. (AEKO). Letter from Jacqueline P. Minor, Oakland Unified School District, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed May 16, 2011) (JDL Request for Review); Letter from Jacqueline P. Minor, Oakland Unified School District, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed May 16, 2011) (AEKO Request for Review) (together, Request for Review).

² 47 C.F.R. § 54.504(c) (2004).

³ 47 C.F.R. §§ 54.501-54.503.

an eligible school, library, or consortium that includes eligible schools and libraries must seek competitive bids for all services eligible for support.⁴ Applicants thus must submit for posting on USAC's website an FCC Form 470 requesting discounts for E-rate eligible services.

3. After submitting an FCC Form 470, the applicant must wait 28 days before making commitments with the selected service providers.⁵ 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.⁶ 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.⁷

4. In addition to following the Commission's competitive bidding requirements, applicants are also required to follow state and local procurement procedures.⁸ California state procurement law requires public bidders to (1) award the contract to the lowest responsible bidder; (2) not invalidate the bid of an unlicensed bidder; and (3) not enter into a public works contract until the winning bidder is licensed.⁹

5. After posting its FCC Form 470 to seek eligible services under the E-rate program, Oakland entered into agreements preparatory to public works contracts with JDL Technologies (JDL) and AEKO Consulting, Inc. (AEKO) on January 29, 2004 and submitted its FCC Form 471 application for funding year 2004.¹⁰ These agreements identified JDL and AEKO as the winning E-rate bidders, informed the providers that Oakland desired to proceed with purchase orders for the eligible services listed in the providers' winning bids, and requested that JDL and AEKO send their proposed contract language to Oakland for review and possible revision.¹¹ JDL and AEKO received their state contracting licenses on October 5, 2004 and October 8, 2004, respectively.¹² On April 14, 2005, Oakland entered into public works contracts with both licensed companies.¹³ Neither JDL nor AEKO provided any services to Oakland prior to the April public works contracts.¹⁴

⁴ 47 C.F.R. § 54.504.

⁵ 47 C.F.R. §§ 54.504(b)-(c).

⁶ 47 C.F.R. § 54.511(a).

⁷ 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).

⁸ 47 C.F.R. § 54.504(c).

⁹ See Cal. Pub. Cont. Code § 20103.5, 20111.

¹⁰ FCC Form 470, Oakland Unified School District (posted Nov. 19, 2003) (Oakland FCC Form 470); Form 471, Oakland Unified School District (filed Jan. 30, 2004) (Oakland FCC Form 471).

¹¹ Letter from Randolph Ward, State Administrator, Oakland Unified School District, to Gboyega Aladegbami, AEKO Consulting, Inc. (dated Jan. 29, 2004); Letter from Randolph Ward, State Administrator, Oakland Unified School District, to Jon Ebert, Vice President, Business Development, JDL Technologies (dated Jan. 29, 2004).

¹² Request for Review at 2.

¹³ *Id.*

¹⁴ *Id.*

6. USAC conducted an audit in 2008 and found that neither service provider was properly licensed at the time the contract was awarded, allegedly in violation of California procurement law.¹⁵ Because of this finding, USAC rescinded the entire funding commitment for both contracts.¹⁶ Oakland then filed an appeal with the Commission May 16, 2011.¹⁷

7. In its appeal to the Commission, Oakland states that it complied with Commission and state procurement laws.¹⁸ Oakland asserts that it observed state contracting laws by selecting the lowest bidders and by refraining from executing public works contracts until both providers were licensed.¹⁹ Under California law, the lowest bidder may not be disqualified for lack of a license.²⁰ Specifically, Oakland explains that California procurement law does not consider preparatory agreements to be public works contracts.²¹ Additionally, Oakland states that it complied with state procurement law by honoring JDL's and AEKO's low bids despite their lack of licenses.²² Oakland filed its FCC Form 471 application without having entered into eligible services contracts, citing a state law conflict.²³ Instead, Oakland included the preparatory agreements that it had in place with JDL and AEKO.²⁴ Oakland notes that while it technically did not have formal contracts before submitting its FCC Form 471, only the preparatory agreements, Commission precedent allows waiver of the FCC Form 471 eligible services contract provision in instances where, for example, applicants have some form of an agreement with their service providers before submitting their FCC Form 471.²⁵

III. DISCUSSION

8. After reviewing the record before us, we grant Oakland's requests for review. First, we find that USAC erred in finding that Oakland violated California procurement law. Oakland entered into preparatory agreements with JDL and AEKO on January 9, 2004. These providers obtained their state licenses on October 5, 2004 and October 8, 2004, respectively. Oakland did not enter into public works contracts with either provider until April 14, 2005, after both entities had obtained state licenses.

¹⁵ Letter from USAC, Schools and Libraries Division, to Oswaldo A. Galarza, Oakland Unified School District (dated March 16, 2011) (AEKO Notification of Commitment Adjustment Letter); Letter from USAC, Schools and Libraries Division, to Oswaldo A. Galarza, Oakland Unified School District (dated March 16, 2011) (JDL Notification of Commitment Adjustment Letter) (together, Notification of Commitment Adjustment Letter). In its commitment adjustment letter concerning JDL, USAC notified Oakland that it was unable to locate equipment valued at \$24,163 purchased with E-rate funds. JDL Notification of Commitment Adjustment Letter at 4. Oakland concedes that the funds are subject to recovery. Request for Review at 1, n. 2.

¹⁶ Notification of Commitment Adjustment Letter at 4.

¹⁷ Request for Review at 1.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 2.

²⁰ Cal. Pub. Cont. Code § 20103.5.

²¹ Request for Review at 7.

²² *Id.* at 11.

²³ *Id.* at 3.

²⁴ *Id.* at 6.

²⁵ *Id.* at 13.

California law holds that preparatory agreements are not public works contracts.²⁶ Thus, Oakland complied with state law; it neither disqualified low bidders because they lacked licenses nor awarded public service contracts to unlicensed bidders.

9. Based on precedent, we also find good cause exists to justify a limited waiver of section 54.504(c) of our rules, which requires applicants to have entered into a service contract before submitting an FCC Form 471.²⁷ In the *Adams County Order*, the Commission found that such waivers are appropriate in situations where petitioners technically missed the program deadline for having a written contract in place because they were adhering to local or state procurement laws.²⁸ Further, in the *Franklin-McKinley Order*, we found that merely having an agreement to enter into a contract when filing the FCC Form 471, as opposed to the final contract, would justify a waiver of our rules.²⁹ Similarly, here, Oakland had preparatory agreements in place, but could not enter into formal contracts due to conflicting state or local procurement law. Therefore, consistent with the precedent cited, we find that good cause exists to grant a limited waiver of section 54.504(c) of our rules and remand Oakland's appeal to USAC for further processing consistent with our decision.

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 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 and 54.722(a), the request for review and waiver filed by Oakland Unified School District IS GRANTED and the underlying application IS REMANDED to USAC for further consideration in accordance with the terms of this order.

11. 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 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 and 54.722(a), that section 54.504(c) of the Commission's rules, 47 C.F.R. § 54.504(c), IS WAIVED for Oakland Unified School District to the limited extent provided herein.

12. 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 DISCONTINUE recovery actions against Oakland Unified School District, to the extent provided herein.

²⁶ See *Santa Monica Unified Sch. Dist. of Los Angeles Cnty. v. Persh*, 85 Cal. Rptr. 463, 467-68 (Cal. Ct. App. 1970) (holding that the initial agreement between the parties did not immediately bind the district as an enforceable contract because it had not yet been ratified by the school board).

²⁷ 47 C.F.R. § 54.504(c).

²⁸ *Request for Review of the Decision of the Universal Service Administrator by Adams County School District 14, Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-425151, 425211, 425303, 425352, 426285, CC Docket No. 02-6, Order, 22 FCC Rcd 6019, 6023, para. 9 (2007) (*Adams County Order*).

²⁹ See *Request for Review of the Decision of the Universal Service Administrator by Franklin-McKinley School District, Schools and Libraries Universal Service Support Mechanism*, File No. SLD-477732, CC Docket No. 02-6, Order, 23 FCC Rcd 2578, 2580, para. 4 (Wireline Comp. Bur. 2008) (*Franklin-McKinley Order*).

13. 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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