

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Requests for Review of
Decisions of the
Universal Service Administrator by
La Joya Independent School District
La Joya, TX
Schools and Libraries Universal Service
Support Mechanism
File Nos. SLD-744699, 745640,
745681, 745720, 745879, 745908,
745964, 746017, 746036, 746065
746145, 748103
CC Docket No. 02-6

ORDER

Adopted: May 29, 2013

Released: May 29, 2013

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

1. In this Order, we address 13 requests from La Joya Independent School District (La Joya) seeking review of decisions made 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). In its decisions, USAC determined that La Joya violated the Commission's competitive bidding requirements by considering the price of eligible and ineligible items as the primary factor in its vendor selection process. Upon review of the record, we find that the particular facts of this matter support a waiver of the requirements in sections 54.504 and 54.511 of the Commission's rules that applicants use price of eligible services as the primary factor in selecting the winning offer for E-rate supported services. We therefore grant these appeals and remand the associated applications to USAC for further action consistent with this order.

1 See Appendix A.

2 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).

3 See Appendix B.

4 See 47 C.F.R. §§ 54.504, 54.511 (2009); 47 C.F.R. §§ 54.503, 54.511 (2011). Generally, the Commission's rules may be waived if good cause is 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. Northeast Cellular, 897 F.2d at 1166.

2. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible services.⁵ The Commission's rules provide that eligible entities must seek competitive bids for all services eligible for support.⁶ Applicants must submit for posting on USAC's website an FCC Form 470 requesting discounts for E-rate eligible services or any services for which the applicant is seeking a new contract.⁷ The Commission's rules require applicants to carefully consider all submitted bids prior to entering into a contract, and that the price of eligible products and services must be the primary factor in selecting the winning bid.⁸

3. In this instance, the record shows that La Joya considered five criteria in its vendor evaluation processes: "price" (representing 75 percent of the total evaluation weighting), "reputation of the vendor" (representing 5 percent of the total evaluation weighting), "quality of the vendor's goods or services" (representing 10 percent of the total evaluation weighting), "vendor's past relationship with the district" (representing 4 percent of the total evaluation weighting), and "K-12 construction experience" (representing 6 percent of the total evaluation weighting).⁹ La Joya does not dispute USAC's finding that it included the price of both E-rate eligible and ineligible items as the primary factor in its vendor selection processes.¹⁰ However, according to La Joya, if the price of ineligible items had been excluded from the "price" criterion, the contract awards would have been the same.¹¹ In support of its claim, La Joya provides spreadsheets and bid evaluation matrixes for each application identifying: (1) the name of each bidder; (2) the total proposed cost of each bid including both E-rate eligible and ineligible services; (3) the total proposed cost of each bid including only E-rate eligible services; (4) the total number of points each bid received in the bid evaluation with both E-rate eligible and ineligible services under consideration; and (5) the total number of points each bid received in the bid evaluation with only the costs of E-rate eligible services under consideration.¹²

⁵ 47 C.F.R. §§ 54.501-54.502 (2009); *see also* 47 C.F.R. §§ 54.501-54.502 (2011).

⁶ 47 C.F.R. § 54.504 (2009); *see also* 47 C.F.R. § 54.503 (2011).

⁷ *See id.*; Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (FCC Form 470).

⁸ *See* 47 C.F.R. § 54.504 (2009); 47 C.F.R. § 54.503 (2011) (stating that an eligible entity shall seek competitive bids for all services eligible for support); 47 C.F.R. § 54.511 (stating that when selecting a provider of eligible services, the applicant shall select the most cost-effective service offering with price being the primary factor considered); USAC, Schools and Libraries, Competitive Bidding, *available at* <http://www.usac.org/sl/applicants/step03/evaluation.aspx> (last visited May 22, 2013) (Competitive Bidding Guidance) (noting that the most heavily weighted price factor cannot include ineligible costs, although those costs can be included in an evaluation as long as they are in a separate price factor that is weighted less heavily). *See also* *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029-30, para. 481 (1997) (subsequent history omitted) (noting that price should be the primary factor in selecting a bid, but acknowledging that applicants may also take other factors into consideration); *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, 26429-31, paras. 50-53 (2003) (stating that applicants may take other factors into consideration, but in selecting the winning bid, price [of eligible items] must be given more weight than any other single factor); *Request for Review of a Decision of the Universal Service Administrator by Tulsa Technology Center; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 26 FCC Rcd 13006 (Wireline Comp. Bur. 2011) (specifying that "[a]pplicants cannot consider the cost of ineligible services in selecting a winning bidder").

⁹ *See* Requests for Review.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

4. The record supports La Joya's argument that the same vendor would have been selected for each funding request if the price of ineligible items had been excluded from the "price" criterion.¹³ The spreadsheets and bid evaluation matrixes provided by La Joya identify the E-rate eligible and ineligible items included in each bid for the funding requests at issue, and the price for those items.¹⁴ A comparison of the bid evaluation sheets for those items to the bid evaluation sheets for E-rate eligible items confirms that the winning vendor would have been the same if the price of ineligible items had been excluded from consideration. Given the overall circumstances here, we find that La Joya's vendor selection processes were not compromised by its technical violation of the Commission's competitive bidding requirements. Further, we find that La Joya has demonstrated that good cause exists for us to waive sections 54.504 (2009) and 54.511 of the Commission's rules for the FRNs at issue, and that such waivers are in the public interest and consistent with the policy goals underlying the Commission's competitive bidding rules.¹⁵ In addition, at this time, there is no evidence of waste, fraud and abuse in the record. We therefore remand the underlying 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 and issue an award or a denial based on a complete review and analysis no later than 90 calendar days from the release date of this order. In remanding these applications to USAC, we make no finding as to the ultimate eligibility of the services or La Joya's applications.

5. Additionally, on our own motion, we waive section 54.507(d) of the Commission's rules and applicable USAC procedural deadlines, such as the invoicing deadline, that are necessary to effectuate our ruling.¹⁶ We find good cause to waive section 54.507(d) and applicable USAC procedural deadlines because filing an appeal is likely to cause the petitioner to miss the program's subsequent procedural deadlines in that funding year.

6. 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), that the Requests for Review filed by La Joya Independent School District ARE GRANTED and the underlying applications ARE REMANDED to USAC for further consideration in accordance with the terms of this Order.

¹³ By contrast, in *Requests for Review of Decisions of the Universal Service Administrator by Spokane School District 81; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 13-885 (Wireline Comp. Bur. rel. May 10, 2013), we found that the record did not support the applicant's claim that the same vendor would have been selected if the price of ineligible items had been excluded from the price criterion.

¹⁴ See Requests for Review.

¹⁵ See *supra* n.4.

¹⁶ 47 C.F.R. § 54.507(d) (requiring non-recurring services to be implemented by September 30 following the close of the funding year).

7. 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 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 sections 54.504 (2009), 54.507(d) and 54.511 of the Commission's rules, 47 C.F.R. §§ 54.504 (2009), 54.507(d) and 54.511, ARE WAIVED for La Joya Independent School District to the limited extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Kimberly A. Scardino
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

APPENDIX A

FCC Form 471 Application Number	Funding Request Number	Date of Appeal
744699	2012235	Jan. 30, 2013
745640	2012328	Jan. 30, 2013
745681	2012426	Jan. 30, 2013
745720	2012579	Jan. 30, 2013
745879	2012975	Jan. 30, 2013
745908	2013082	Jan. 30, 2013
745964	2013209	Jan. 30, 2013
746017	2013377	Jan. 30, 2013
746036	2013425	Jan. 30, 2013
746065	2013558	Jan. 30, 2013
746100	2013664	Jan. 30, 2013
746145	2013796	Jan. 30, 2013
748103	2019696	Jan. 30, 2013

APPENDIX B

FCC Form 471 Application Number	Funding Request Number	Date of USAC Funding Commitment Decision Letter
744699	2012235	Sept. 4, 2012
745640	2012328	Sept. 4, 2012
745681	2012426	Sept. 4, 2012
745720	2012579	Sept. 4, 2012
745879	2012975	Sept. 4, 2012
745908	2013082	Sept. 4, 2012
745964	2013209	Sept. 4, 2012
746017	2013377	Sept. 4, 2012
746036	2013425	Sept. 4, 2012
746065	2013558	Sept. 4, 2012
746100	2013664	Sept. 4, 2012
746145	2013796	Sept. 4, 2012
748103	2019696	Sept. 4, 2012