

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Request for Review of a Decision of the
Universal Service Administrator by
Harbor Beach Community School District
Harbor Beach, MI
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-553882
CC Docket No. 02-6

ORDER

Adopted: May 31, 2013

Released: May 31, 2013

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

1. In this Order, we grant a request for review from Harbor Beach Community School District (Harbor Beach) of a decision of the Universal Service Administrative Company (USAC) under the E-rate program (more formally known as the schools and libraries universal service support program) for funding year 2007. In its decision, USAC found that the vendor selected to provide eligible services under the E-rate program, Zimco, Incorporated/Air Advantage, LLC (Zimco/Air Advantage), assisted Harbor Beach in filing its FCC Form 470; and therefore, denied Harbor Beach's funding request.

2. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for universal service support for eligible services. E-rate program rules provide that these entities must seek competitive bids for services eligible for support. 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. The applicant must describe the requested services with sufficient specificity to enable potential service providers to submit bids for such services. After submitting an FCC Form 470, the

1 See Letter from Ronald L. Kraft, Harbor Beach Community School District, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Sept. 24, 2010) (relating to application number 553882, funding request number (FRN) 1527997).

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 Letter from USAC, Schools and Libraries Division, to Steve Hill, Harbor Beach Community School District (dated Aug. 16, 2010) (USAC Funding Commitment Decision Letter (FCDL)).

4 47 C.F.R. §§ 54.501-54.502 (2007); see also 47 C.F.R. §§ 54.501-54.502 (2012).

5 47 C.F.R. § 54.504 (2007); see also 47 C.F.R. § 54.503 (2012).

6 47 C.F.R. § 54.504(b) (2007); see also 47 C.F.R. § 54.503(c) (2012).

7 47 C.F.R. § 54.503(c) (1)(ii) (2012).

applicant must wait 28 days before making commitments with the selected service providers.⁸ 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.⁹ 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.¹⁰ USAC assigns an FRN to each request for discounted services and issues FCDLs approving or denying the requests for discounted services.¹¹

3. The competitive bidding process must be fair and open and must not have been compromised because of improper conduct by the applicant, service provider, or both parties.¹² Under the Commission's rules, a service provider participating in the competitive bidding process cannot be involved in the preparation of the entity's technology plan, FCC Form 470 or RFP.¹³ In addition, all

⁸ 47 C.F.R. § 54.504(b) (4) (2007); *see also* 47 C.F.R. § 54.503(c)(4) (2012). *See also 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 (Wireline Comp. Bur. 2008).

⁹ 47 C.F.R. § 54.511(a) (2007); *see also* 47 C.F.R. § 54.511(a) (2012).

¹⁰ *See Schools and Libraries Universal Service, Services Ordered and Certification Form*, OMB 3060-0806 (November 2004) (FCC Form 471).

¹¹ *See* USAC, Schools and Libraries, Funding Commitment Decision Letter, *available at* <http://www.universalservice.org/sl/applicants/step05/default.aspx> (last visited May 29, 2013).

¹² In the *Schools and Libraries Sixth Report and Order*, the Commission codified the requirement that the E-rate competitive bidding process be fair and open. *See Schools and Libraries Universal Service Support Mechanism; A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Sixth Report and Order, 25 FCC Rcd 18762, 18798-800, paras. 85-86 (2010) (*Schools and Libraries Sixth Report and Order*). *See* 47 C.F.R. § 54.503(a) (2012). *See also Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc.; Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028, 4033 (2000) (*MasterMind Order*) (finding that when an applicant delegates the power to control the dissemination of information regarding requested services to an entity that also participates in the bidding process as a prospective service provider, the applicant impairs its ability to hold a fair competitive bidding process); *Request for Review of the Decision of the Universal Service Administrator by Dickenson County Public Schools; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 97-21, 17 FCC Rcd 15747, 15748, para. 3 (Wireline Comp. Bur. 2002) (noting that an applicant impairs its ability to hold a fair and open competitive bidding process when the applicant's FCC Form 470 contact person is also a service provider participating in the bidding process as a bidder); *Requests for Review of the Decisions of the Universal Service Administrator by Approach Learning and Assessment Center; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 22 FCC Rcd 5296, 5303, para. 19 (Wireline Comp. Bur. 2007) (finding that service provider participation suppressed fair and open competitive bidding); *Requests for Review of Decisions of the Universal Service Administrator by Marana Unified School District et al.*, CC Docket No. 02-6, Order, 27 FCC Rcd 1525, 1529-30, para. 8 (Wireline Comp. Bur. 2012) (finding that the applicant violated the Commission's competitive bidding rules when that applicant and the service providers engaged in routine and numerous contacts discussing all aspects of the applicant's technology needs and request for proposal (RFP), and the applicant provided the service provider with information about its current needs and advised the service provider on what it should include in its bid response).

¹³ *See, e.g., MasterMind Order*, 16 FCC Rcd at 4033, para. 11; *Request for Review of the Decision of the Universal Service Administrator by Consorcio de Escuelas y Bibliotecas de Puerto Rico et al.; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 97-21, Order, 17 FCC Rcd 13624, 13626, paras. 6-8 (Wireline Comp. Bur. 2002) (finding that the applicant violated the competitive bidding rules when it listed an employee of a service provider selected to provide E-rate services as the contact for technical details and other information about E-rate supported services); *Requests for Review of Decisions of the Universal Service Administrator by Central Islip Free Union School District et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 26 FCC Rcd 8630, (continued...)

potential bidders and service providers must have access to the same information and must be treated in the same manner throughout the procurement process.¹⁴

4. In this instance, USAC denied Harbor Beach's funding request on the basis that Zimco/Air Advantage assisted Harbor Beach in filling out Harbor Beach's FCC Form 470.¹⁵ Upon review of the record, we find no evidence supporting USAC's determination that Zimco/Air Advantage assisted Harbor Beach in filling out Harbor Beach's application. The record does include a representation from Zimco/Air Advantage that "during the normal course" of Zimco/Air Advantage's business relationship with Harbor Beach it "may have been asked [by Harbor Beach employee's] questions regarding internet bandwidth usage, anticipated new internet applications and its effect on current bandwidth provided, or other general internet related questions."¹⁶ We do not consider this representation evidence that Harbor Beach failed to comply with the Commission's competitive bidding requirements for the E-rate program. In particular, we find that the communication between Harbor Beach and Zimco/Air Advantage, concerning Harbor Beach's existing services and needs as part of their ongoing business relationship, did not adversely influence Harbor Beach's competitive bidding process. We therefore grant Harbor Beach's request for review and remand the underlying application to USAC for further action consistent with this order. To ensure that the underlying application is resolved expeditiously, we direct USAC to complete its review of the underlying application no later than 60 calendar days from the release date of this order. In remanding this application to USAC, we make no finding as to the ultimate eligibility of the services or the underlying application.

5. Lastly, on our own motion, we waive section 54.507(d) of the Commission's rules with respect to Harbor Beach's funding year 2007 FCC Form 471 application, and direct USAC to waive any procedural deadline, such as the invoicing deadline, that might be necessary to effectuate our ruling.¹⁷ We find good cause to waive section 54.507(d) because filing an appeal of a denial of support is likely to cause the petitioner to miss the program's subsequent procedural deadlines in that funding year.¹⁸

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 request for review filed by Harbor Beach Community School District, Harbor Beach, Michigan IS

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8636, para. 14 (finding that "[a] person assisting in the preparation of a technology plan can influence the products and services that are requested" and "[w]hen an applicant allows an entity to formulate a technology plan and also participate in the competitive bidding process as a prospective service provider, the applicant impairs its ability to hold a fair and open competitive bidding process").

¹⁴ See *Schools and Libraries Sixth Report and Order*, 25 FCC Rcd at 18799, para. 86.

¹⁵ See USAC FCDL.

¹⁶ *Id.* See Letter from Dawn Zimmer, Scott Zimmer, Zimco Incorporated/Air Advantage, LLC, to USAC, Schools and Libraries Division (dated Apr. 19, 2010).

¹⁷ 47 C.F.R. § 54.507(d).

¹⁸ 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.

GRANTED, that section 54.507(d) of the Commission's rules, 47 C.F.R. § 54.507(d), IS WAIVED to the limited extent provided herein, and the underlying application IS REMANDED to USAC for further consideration in accordance with the terms of this Order.

FEDERAL COMMUNICATIONS COMMISSION

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