

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Petition for Reconsideration by
Henrico County School District
Henrico, VA
Schools and Libraries Universal Service
Support Mechanism
File No. SLD- 607894
CC Docket No. 02-6

ORDER ON RECONSIDERATION

Adopted: September 11, 2013

Released: September 11, 2013

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

1. Consistent with precedent, we deny a petition for reconsideration filed by Henrico County School District (Henrico). The Henrico Order affirmed the decision of the Universal Service Administrative Company (USAC) to deny funding under the E-rate program (more formally known as the schools and libraries universal service support program) for funding year 2008. In its decision, USAC found that Henrico failed to use price as the primary factor in its vendor selection process in violation of the Commission’s competitive bidding requirements. Based upon our review of the record, we affirmed USAC’s decision and denied Henrico’s request for review.

1 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) (stating that price must be the primary factor in selecting the winning bid); Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District et al., CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407, 26429, para. 50 (2003) (Ysleta Order) (stating that when evaluating bids, the “cost category” must be given more weight than any other single factor).

2 The Bureau has the authority to act on petitions requesting reconsideration of final actions taken pursuant to delegated authority. 47 C.F.R. § 1.106(a)(1); Letter from Peter Taylor, Henrico County School District, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed June 3, 2013) (Petition for Reconsideration) (regarding funding year 2008 FCC Form 471 application number 607894 (funding request numbers (FRNs) 1700625 and 1077654)).

3 See Request for Review of a Decision of the Universal Service Administrator by Henrico County School District; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 28 FCC Rcd 6277 (Wireline Comp. Bur. 2013) (Henrico Order); 47 C.F.R. §§ 54.504, 54.511 (2008); see also 47 C.F.R. §§ 54.503, 54.511 (2011) (requiring applicants to use price as the primary factor in the vendor selection process). In this order, we describe the requirements of the E-rate program as they currently exist, but because the order involves an application from funding year 2008, and the Commission has reorganized the E-rate rules since then, where the Commission’s codification of the rules in the Code of Federal Regulations has changed, we also cite to the relevant rules as they existed during the relevant funding year.

4 See Henrico Order; 47 C.F.R. §§ 54.504, 54.511 (2008); see also 47 C.F.R. §§ 54.503, 54.511 (2011).

5 See Henrico Order.

2. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible services.<sup>6</sup> The Commission's rules provide that these entities must seek competitive bids for all services eligible for support.<sup>7</sup> 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.<sup>8</sup> The Commission's rules require applicants to carefully consider all submitted bids prior to entering into a contract, and that they treat the price of eligible products and services as the primary factor in selecting the winning bid.<sup>9</sup> 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.<sup>10</sup> When evaluating bids, however, applicants must have a separate "cost category" and that category must be given more weight than any other single factor.<sup>11</sup>

3. In the *Henrico Order*, we found that Henrico failed to comply with the Commission's competitive bidding requirements for funding request numbers (FRNs) 1700625 and 1077654, because it did not assign the greatest weight to price in selecting Verizon as its vendor.<sup>12</sup> We rejected Henrico's argument that it would have selected Verizon if it had assigned price a weight of 30 percent, which would have been the highest weight assigned to any factor.<sup>13</sup> We explained that Henrico's ability to find, with the benefit of hindsight, a way to re-engineer its bidding process after the conclusion of its competitive bidding process to reach an identical result using price as the primary factor did not demonstrate compliance with the Commission's competitive bidding rules at the time of its vendor selection process.<sup>14</sup> Additionally, we determined that the underlying record did not reveal any special circumstances that would justify a waiver of the Commission's competitive bidding rules.<sup>15</sup>

4. In its petition for reconsideration, Henrico raises new arguments that it did not previously present in its initial request for review. While Henrico acknowledges that price was not the primary consideration in its vendor evaluation process, it now argues that a waiver of the E-rate program rules is

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<sup>6</sup> 47 C.F.R. §§ 54.501-54.502.

<sup>7</sup> 47 C.F.R. § 54.504 (2008); *see also* 47 C.F.R. § 54.503 (2011).

<sup>8</sup> *See id.* *See also* Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (FCC Form 470).

<sup>9</sup> *See* 47 C.F.R. §§ 54.504, 54.511 (2008); 47 C.F.R. §§ 54.503, 54.511 (2011). *See also Universal Service First Report and Order*, 12 FCC Rcd at 9029, para. 481; *Ysleta Order*, 18 FCC Rcd at 26429, para. 50.

<sup>10</sup> *Universal Service First Report and Order*, 12 FCC Rcd at 9029-30, para. 481. *See also* 47 C.F.R. § 54.511.

<sup>11</sup> *See 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.

<sup>12</sup> *See Henrico Order*, 28 FCC Rcd at 6278-79, para. 4; 47 C.F.R. §§ 54.504, 54.511 (2008); *see also* 47 C.F.R. §§ 54.503, 54.511 (2011).

<sup>13</sup> *See Henrico Order* at 6278-79, para. 4.

<sup>14</sup> *Id.*

<sup>15</sup> *See id.* (stating that the winning vendor's proposal was higher than competing bids); 47 C.F.R. §§ 54.504, 54.511 (2008); *see also* 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.

warranted consistent with the *Allendale Order*, which waived the Commission's rules for applicants that failed to use price as the primary factor in its vendor evaluation process, but selected the lowest-cost provider.<sup>16</sup> Specifically, Henrico argues that if it had known that the Commission would allow applicants to ignore non-responsive bids, as it did in *Allendale*, then it would have emphasized on its vendor evaluation sheets that the lowest bid, submitted by Sprint Communications, was not responsive and should have been excluded from consideration.<sup>17</sup> Henrico asserts that its selection of the Verizon proposal would then have been justified under the *Allendale Order* because it was the lowest responsive bid.<sup>18</sup> The Commission's rules specify that a petition for reconsideration may be dismissed or denied where the petition relies on facts or arguments not presented in the original appeal.<sup>19</sup> We therefore conclude that, because Henrico did not afford the Bureau an opportunity to address this argument as part of its initial request for review, we will not consider this argument at this stage of the process.<sup>20</sup>

5. As an alternative and independent basis for rejecting Henrico's petition for reconsideration seeking a waiver of the Commission's rules, we deny the petition for reconsideration on the merits.<sup>21</sup> As the Commission has previously indicated, we are deeply concerned about practices that undermine the framework of the competitive bidding process.<sup>22</sup> Henrico could have structured its vendor evaluation process in a manner that disqualified or excluded non-responsive bids, even before the issuance of the *Allendale Order*.<sup>23</sup> In fact, in its petition for reconsideration, Henrico acknowledges that it is the prerogative of the contracting entity to deem a bid unresponsive when a vendor responds to a bid with an unusually low price and virtually no evidence that the vendor is able to perform the work.<sup>24</sup> Yet, at the conclusion of its bid evaluation process, Henrico did not exclude the Sprint Communications bid as being non-responsive nor did the bid evaluation sheets specify that the Sprint Communications bid should be

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<sup>16</sup> See Petition for Reconsideration at 1-2; *Request for Review of Decisions of the Universal Service Administrator by Allendale County School District et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 26 FCC Rcd 6109 (Wireline Comp. Bur. 2011) (*Allendale Order*) (finding that a waiver of the Commission's competitive bidding rules was in the public interest where the petitioners selected the least expensive responsive service offering).

<sup>17</sup> See Petition for Reconsideration at 3.

<sup>18</sup> *Id.*

<sup>19</sup> See 47 C.F.R. § 1.106(p)(2) (stating that petitions for reconsideration of a Commission action, not warranting consideration by the Commission, may be "dismissed or denied by the relevant bureau(s) or office(s) where the petition relies on facts or arguments which have not previously been presented to the Commission and which do not meet the requirements of paragraphs (b)(2), (b)(3), or (c) of this section"). The Petition for Reconsideration does not meet the requirements of paragraphs (b)(2), (b)(3), and (c) of section 1.106 of the Commission's rules because it does not relate to events which have occurred or circumstances which have changed since Henrico's last opportunity to present such matters to the Commission. See *infra* para. 5. See also 47 C.F.R. §§ 1.106(b)(2), (b)(3), (c).

<sup>20</sup> See 47 C.F.R. § 1.106(p)(2).

<sup>21</sup> See Petition for Reconsideration at 2.

<sup>22</sup> See *Universal Service First Report and Order*, 12 FCC Rcd at 9076-80, paras. 570-80 (requiring applicants to conduct a fair and open competitive bidding process when seeking support for eligible products and services); *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, 5425-26, para. 185 (1997) (stating that competitive bidding is a key component of the Commission's effort to ensure that universal service funds support services that satisfy the precise needs of an institution, and that the services are provided at the lowest possible rates).

<sup>23</sup> See *Allendale Order*.

<sup>24</sup> See Petition for Reconsideration at 4.

excluded as non-responsive. Further, Henrico did not make this argument in its initial appeal to the Commission.<sup>25</sup> Thus, the record does not support a determination that the Sprint Communications bid was unresponsive. Instead, it appears that on reconsideration, Henrico is simply offering yet another way to re-engineer its competitive bidding process after the conclusion of that process to reach its desired result. As we explained in the *Henrico Order*, the fact that Henrico can find a way to re-engineer the process to reach its desired result does not demonstrate compliance with the Commission's competitive bidding rules at the time of its vendor selection process.<sup>26</sup> We therefore find that Henrico has not provided special circumstances justifying a waiver of the Commission's rules and has not otherwise demonstrated that such waiver will serve the public interest. Consequently, we find no basis upon which to grant the requested relief, and we deny Henrico's petition for reconsideration.

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, 1.106, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, 1.106, and 54.722(a), that the Petition for Reconsideration filed by Henrico County School District on June 3, 2013 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>25</sup> See Letter from Dr. Paul F. Kolmetz, Henrico County School District, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Mar. 12, 2009).

<sup>26</sup> *Id.*