

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Requests for Review of
Decisions of the
Universal Service Administrator by
Coolidge Unified School District 21
Coolidge, AZ
Schools and Libraries Universal Service
Support Mechanism
File Nos. SLD-715768, 784759,
841522
CC Docket No. 02-6

ORDER

Adopted: December 19, 2013

Released: December 19, 2013

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

1. Consistent with precedent,1 we grant three requests from Coolidge Unified School District 21 (Coolidge)2 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).3 In its decisions, USAC determined that Coolidge violated the Commission’s competitive bidding requirements by considering the price of eligible and ineligible items

1 See, e.g., Requests for Review of Decisions of the Universal Service Administrator by La Joya Independent School District; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 28 FCC Rcd 7866 (Wireline Comp. Bur. 2013) (finding that the petitioner’s vendor selection processes were not compromised by its technical violation of the Commission’s requirement to consider the price of eligible products and services as the primary factor in selecting the winning bid).

2 See Letter from Ernest N. Nicely, Nicely Done Consulting, LLC, on behalf of Coolidge Unified School District 21, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Aug. 8, 2013) (regarding funding year (FY) 2010 FCC Form 471 application number 715768, funding request number (FRN) 1993528); Letter from Ernest N. Nicely, Nicely Done Consulting, LLC, on behalf of Coolidge Unified School District 21, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Aug. 8, 2013) (regarding FY 2011 FCC Form 471 application number 784759, FRN 2123246); Letter from Ernest N. Nicely, Nicely Done Consulting, LLC, on behalf of Coolidge Unified School District 21, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed July 3, 2013) (regarding FY 2012 FCC Form 471 application number 841522, FRN 2347610) (collectively, Requests for Review).

3 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).

as the primary factor in its vendor selection process.<sup>4</sup> Upon review of the record, we find that the particular facts of this matter support a waiver of the requirements in sections 54.504 (2009) and 54.511<sup>5</sup> of the Commission's rules that applicants use the price of eligible services as the primary factor in selecting the winning offer for E-rate supported services.<sup>6</sup> We therefore grant these appeals and remand the associated applications to USAC for further action consistent with this 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>7</sup> The Commission's rules provide that these entities must seek competitive bids for all services eligible for support.<sup>8</sup> Applicants must submit for posting on USAC's website an FCC Form 470 requesting bids for E-rate eligible services.<sup>9</sup> The Commission's rules require applicants to carefully consider all submitted bids prior to entering into a contract, and to treat the price of eligible products and services as the primary factor in selecting the winning bid.<sup>10</sup>

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<sup>4</sup> See Letter from USAC, Schools and Libraries Division, to Patricia Jimenez, Assistant Superintendent, Coolidge Unified School District 21 (dated July 1, 2013) (regarding FY 2010 FCC Form 471 application number 715768, FRN 1993528); Letter from USAC, Schools and Libraries Division, to Patricia Jimenez, Assistant Superintendent, Coolidge Unified School District 21 (dated July 1, 2013) (regarding FY 2011 FCC Form 471 application number 784759, FRN 2123246); Letter from USAC, Schools and Libraries Division, to Ernest N. Nicely, on behalf of Coolidge Unified School District 21 (dated June 13, 2013) (regarding FY 2012 FCC Form 471 application number 814522, FRN 2347610). The FRNs at issue involve the same services that were initially procured using an FCC Form 470 posted in FY 2009. The two USAC notices dated July 1, 2013 are notifications of commitment adjustments for FRNs 1993528 and 2123246.

<sup>5</sup> See 47 C.F.R. §§ 54.503, 54.511 (2011); 47 C.F.R. §§ 54.504, 54.511 (2009). 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 2010, 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.

<sup>6</sup> 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.

<sup>7</sup> See 47 C.F.R. §§ 54.501-54.502.

<sup>8</sup> See 47 C.F.R. § 54.503 (2011); 47 C.F.R. § 54.504 (2009).

<sup>9</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>10</sup> See 47 C.F.R. § 54.503 (2011); 47 C.F.R. § 54.504 (2009) (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). See also USAC, Schools and Libraries, Competitive Bidding, <http://www.usac.org/sl/applicants/step03/evaluation.aspx> (last visited Dec. 19, 2013) (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).

3. In this instance, Coolidge sought bids for webhosting and design services. The record shows that that Coolidge considered five criteria in its vendor evaluation process: “cost” (with a maximum of 500 available points), “responsiveness of the proposal” (with a maximum of 400 available points), “past performance and references” (with a maximum of 350 available points), “qualifications” (with a maximum of 300 available points), and “quality, effectiveness, and completeness of solution” (with a maximum of 250 available points).<sup>11</sup> Coolidge 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 process.<sup>12</sup> However, according to Coolidge, if the price of ineligible items had been excluded from the “cost” criterion, the contract award would have been the same.<sup>13</sup> In support of its claim, Coolidge 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 number of points each bid received in the bid evaluation with both E-rate eligible and ineligible services under consideration; and (4) the total number of points each bid would have received in the bid evaluation if Coolidge had only considered the costs of E-rate eligible services.<sup>14</sup>

4. The record supports Coolidge’s argument that Coolidge would have selected the same vendor if Coolidge had excluded the price of ineligible items from the “cost” criterion.<sup>15</sup> The spreadsheets and bid evaluation matrixes provided by Coolidge identify the E-rate eligible and ineligible costs for the funding requests at issue.<sup>16</sup> 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 Coolidge had excluded the price of ineligible items from consideration. Given the overall circumstances here, we find that Coolidge’s vendor selection process was not compromised by its technical violation of the Commission’s competitive bidding requirements. We therefore find that Coolidge 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.<sup>17</sup> 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 Coolidge’s applications.

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<sup>11</sup> See Requests for Review at Attach. 1.

<sup>12</sup> See Requests for Review at 1-2.

<sup>13</sup> See Letter from Ernest N. Nicely, Nicely Done Consultants, LLC, on behalf of Coolidge Unified School District 21, to USAC, Schools and Libraries Division (dated Jan. 15, 2013) (Selective Review Response).

<sup>14</sup> See Requests for Review at Attach. 2; Selective Review Response.

<sup>15</sup> 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, 28 FCC Rcd 6026 (Wireline Comp. Bur. 2013), we found that the record did not support the applicant’s claim that the applicant would have selected the same vendor if the applicant had excluded the price of ineligible items from the price criterion.

<sup>16</sup> See Requests for Review.

<sup>17</sup> See *supra* n.6.

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.<sup>18</sup> 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 Coolidge Unified School District 21 ARE GRANTED and the underlying applications ARE REMANDED to USAC for further consideration in accordance with the terms of this Order.

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 Coolidge Unified School District 21 to the limited extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>18</sup> 47 C.F.R. § 54.507(d) (requiring non-recurring services to be implemented by September 30 following the close of the funding year).