

Before the
Federal Communications Commission
Washington, DC 20554

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

ORDER

Adopted: May 3, 2013

Released: May 3, 2013

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

1. In this order, we deny a request from Henrico County School District (Henrico) seeking review of a decision made by the Universal Service Administrative Company (USAC) under the E-rate program (more formally known as the schools and libraries universal service support program). In its decision, USAC determined that Henrico violated the Commission's competitive bidding rules by failing to use price as the primary factor in its vendor selection process. Based on our review of the record, we agree with USAC's determination and find that Henrico violated the Commission's competitive bidding rules.

2. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible services. The Commission's rules provide that these entities must seek competitive bids for all services eligible for support. Applicants must submit for posting on USAC's website an FCC Form 470 requesting discounts for E-rate eligible services or any

1 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) (Request for Review) (regarding funding year 2008 FCC Form 471 application number 607894 (funding request numbers (FRNs) 1700625 and 1077654)).

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 Dr. Paul F. Kolmetz, Henrico County School District (dated Feb. 3, 2009) (regarding funding year 2008 FCC Form 471 application number 607894 (FRNs 1700625 and 1700654); see also 47 C.F.R. §§ 54.504, 54.511 (2008); 47 C.F.R. §§ 54.503, 54.511 (2011) (requiring applicants to use price as the primary factor in the vendor selection process).

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

5 47 C.F.R. §§ 54.501-54.502.

6 47 C.F.R. § 54.504 (2008); see also 47 C.F.R. § 54.503 (2011).

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 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.⁹ When evaluating bids, however, applicants must have a separate "cost category" and that category must be given more weight than any other single factor.¹⁰

3. After reviewing the record, we find that USAC correctly denied Henrico's request for support.¹¹ Specifically, we find that Henrico failed to comply with the Commission's competitive bidding requirements for FRNs 1700625 and 1077654, because it did not assign the highest weight to price as required by our rules in its vendor selection process.¹² The record shows that Henrico considered six criteria in its vendor evaluation process: (1) "functional requirements" (representing 25 percent of the total evaluation weighting); (2) "implementation services" (representing 25 percent of the total evaluation weighting); (3) "experience and qualifications of firm" (representing 15 percent of the total evaluation weighting); (4) "experience and qualifications of proposed staff" (representing 10 percent of the total evaluation weighting); (5) "price" (representing 20 percent of the total evaluation weighting); and (6) "quality of proposal submission/oral presentations" (representing 5 percent of the total evaluation weighting).¹³

4. In its appeal, Henrico concedes that it made an error when assigning the weight to price, but argues that its vendor selection committee placed a prime emphasis on price when evaluating the four proposals submitted in response to Henrico's Invitation for Bid (IFB).¹⁴ Henrico maintains that if it had re-scored the responses using a weight of 30 percent for price and a weight of 20 percent for the functional requirements and implementation services criteria, the same vendor would have been selected to provide the services at issue.¹⁵ We are not persuaded by this argument. The fact that Henrico can, with the benefit of hindsight, find one way to re-engineer its bidding process to reach an identical result using price as the primary factor does not demonstrate compliance with the Commission's rules. There is no way to know what weight Henrico would have assigned to price, if it had properly assigned the greatest weight to price in its bid evaluation process, nor is there a way to know what weight it would have then assigned to the other criteria. As a result, there is no way to know whether Henrico would have reached

⁷ See 47 C.F.R. § 54.504 (2008); 47 C.F.R. § 54.503 (2011). See also 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, 54.511 (2008); 47 C.F.R. §§ 54.503, 54.511 (2011). See also *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); *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 (2003) (*Ysleta Order*).

⁹ *Universal Service First Report and Order*, 12 FCC Rcd at 9029-30, para. 481; see also 47 C.F.R. § 54.511.

¹⁰ 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.

¹¹ The Bureau must conduct a *de novo* review of requests for review of decisions issued by USAC. 47 C.F.R. § 54.723.

¹² See 47 C.F.R. §§ 54.504, 54.511 (2008); see also 47 C.F.R. §§ 54.503, 54.511 (2011).

¹³ See Request for Review.

¹⁴ *Id.*

¹⁵ *Id.*

the same outcome. We note that, on occasion, we have 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.¹⁶ In this case, however, the record demonstrates that the winning vendor's cost proposal was higher than competing bids.¹⁷ We therefore find that Henrico failed to comply with the Commission's rules to assign the highest weight to price when evaluating bids and that there is no justification for a waiver of those rules.¹⁸ As the Commission has previously indicated, we are deeply concerned about practices that undermine the framework of the competitive bidding process.¹⁹ When an applicant constructs a bid evaluation process that circumvents the Commission's competitive bidding requirements, the applicant suppresses fair and open competitive bidding and ultimately damages the integrity of the program.

5. 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 Henrico County School District IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁶ See, e.g., *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) (finding that a waiver of the Commission's competitive bidding rules was in the public interest where the petitioners did not assign the highest weight to price when evaluating bids, but ultimately selected the vendor with the least expensive service offering). We stress that, under the Commission's rules, applicants need not select the lowest-priced service provider, but must assign the greatest weight to price when evaluating competing bids. See 47 C.F.R. §§ 54.504, 54.511 (2008); 47 C.F.R. §§ 54.503, 54.511 (2011); *Ysleta Order*, 18 FCC Rcd at 26429, para. 50.

¹⁷ See Request for Review.

¹⁸ See 47 C.F.R. §§ 54.504, 54.511 (2008); see also 47 C.F.R. §§ 54.503, 54.511 (2011).

¹⁹ 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).