

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Request for Review or Waiver by Maniilaq)
Association of Decision of Universal Service)
Administrator)
Rural Health Care Universal Service) WC Docket No. 02-60
Support Mechanism)

ORDER

Adopted: February 19, 2020

Released: February 19, 2020

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

I. INTRODUCTION

1. In this Order, we address a Request for Review or Waiver from Maniilaq Association (Maniilaq) involving a decision by the Universal Service Administrative Company (USAC) to deny funding to Maniilaq under the Rural Health Care Program’s Telecommunications (Telecom) Program for funding year 2017.1 USAC denied the funding requests because Maniilaq did not provide copies of the bids and responses it received as required by the Telecom Program’s competitive bidding rules. Based on our review of the record and the special circumstances presented here, we find that good cause exists for a limited waiver of our competitive bidding rules because Maniilaq’s failure to provide copies of the bids and responses did not compromise fair and open competitive bidding in this instance. Accordingly, we remand the funding requests listed in Appendix A to USAC for further action consistent with this Order. Additionally, we direct USAC to discontinue its recovery actions related to the funding requests listed in Appendix B and to reinstate these funding commitments no later than 60 calendar days from release of this Order.2

1 Request for Review or Limited Waiver of Maniilaq Association, WC Docket No. 02-60 (filed July 2, 2019) (Request). Maniilaq asks that its Request be applied to “[funding year] 2018 or other periods” to the extent USAC’s basis for denying support in funding year 2017 extends to such periods. Request at 1, n.1. The funding request numbers (FRNs) affected by USAC’s decision are listed in Appendix A. USAC has separately commenced recovery actions against Maniilaq for the funding requests listed in Appendix B that are related to the same service provider agreements with GCI Communication Corp. (GCI) that are the subject of this Order. See Commitment Adjustment Letters from Universal Service Administrative Company, Rural Health Care Division, to Christina Hensley, Maniilaq Association (Jan. 15, 2020). Section 54.719(b) of the Commission’s rules provides that any party aggrieved by an action taken by USAC may seek review from the Commission after seeking review by USAC. 47 CFR § 54.719(b). Maniilaq previously sought review by USAC in this proceeding.

2 The recovery actions we order to be discontinued are those based upon the specific violations that are the subject of this Order and not those of any other violation that USAC may determine to be actionable. With respect to the discontinued recovery actions, USAC shall not dismiss under the red light rule any applications from Maniilaq that are pending with it while it works to discontinue the recovery actions. See generally 47 CFR § 1.1910. The release of this Order constitutes “other satisfactory arrangements” under 47 CFR § 1.1910(b)(3) that preclude USAC from dismissing pending applications.

II. BACKGROUND

2. The Telecom Program allows eligible rural health care providers to apply for universal service support for eligible services.³ The Telecom Program rules generally require that entities seek competitive bids for services eligible for support.⁴ In accordance with the Telecom Program's competitive bidding rules, an applicant must initiate the competitive bidding process by submitting a service request using an FCC Form 465 to USAC for posting on the USAC website.⁵ After the FCC Form 465 is posted by USAC, and following a period of at least 28 days, the applicant may enter into a contract with its selected service provider and submit a funding request using FCC Form 466.⁶ Section 54.603(b)(4) of the Commission's rules requires that, as part of its funding request, the applicant include copies of the responses or bids received in response to the request for service.⁷ USAC uses the FCC Form 466 and supporting documentation to determine, among other things, the appropriate support payments from the Universal Service Fund.

3. Maniilaq is the only health care provider serving Alaska Natives and other beneficiaries on behalf of 12 federally recognized tribal governments located in Northwest Alaska.⁸ In 2014 and 2015, Maniilaq commenced separate competitive bidding processes by submitting two FCC Forms 465 requesting the provision of services to the Maniilaq Medical Center (in 2014) and 11 village clinics (in 2015).⁹ The 2014 request prompted a bid from GCI and a "short promotional brochure" from EarthLink, the latter of which according to Maniilaq lacked the technical detail, pricing, or terms of service necessary to qualify as a bid.¹⁰ Maniilaq contacted EarthLink to seek clarification, whereupon it learned that EarthLink did not offer the services that Maniilaq required.¹¹ The 2015 request prompted only a bid from GCI.¹² With GCI deemed the only viable bidder in 2014 and 2015, Maniilaq entered into separate five-year agreements with GCI covering the service requests for both years.¹³ When it submitted the FCC Forms 466 seeking funding for 2014 and 2015 in connection with the two GCI agreements, Maniilaq in both cases indicated that no bids were received in response to the FCC Forms 465.¹⁴ Maniilaq also provided copies of the two GCI agreements with its FCC Forms 466 but not copies of either the EarthLink response from 2014 or the GCI bids from 2014 or 2015.¹⁵

³ See 47 CFR §§ 54.600-54.625 (2018). The prior Telecom Program rules cited herein reflect the rules in effect at all times relevant to this proceeding.

⁴ *Id.* § 54.603 (2018).

⁵ *Id.* § 54.603(b) (2018).

⁶ *Id.* § 54.603(b)(3), (4) (2018).

⁷ *Id.* § 54.603(b)(4) (2018).

⁸ *Request* at 3, note 3. Maniilaq provides health care services to approximately 8,500 people spread across an area approximately 38,000 square miles in size. *Id.* at 3, 4.

⁹ *Id.* at 6, 8.

¹⁰ *Id.* at 6.

¹¹ *Id.*

¹² *Id.* at 8. Earthlink did not respond to Maniilaq's FCC Form 465 submitted in 2015.

¹³ *Id.* at 7, 8.

¹⁴ *Id.*

¹⁵ *Id.*

4. USAC granted both GCI agreements evergreen status when it issued funding commitments in funding years 2014 and 2015.¹⁶ As required when operating under evergreen contracts, Maniilaq filed FCC Forms 466 for each of the FRNs associated with the GCI agreements to request support in each funding year.¹⁷ On November 3, 2017, USAC requested additional information regarding the FRNs for which Maniilaq sought support for funding year 2017.¹⁸ Maniilaq included as part of its response copies of the EarthLink response and GCI bid from 2015 but not a copy of the GCI bid from 2014.¹⁹ USAC denied the funding year 2017 requests because all bids received by Maniilaq were not correctly disclosed as required by section 54.603(b)(4) of the Commission's rules.²⁰ Maniilaq appealed USAC's decision,²¹ which USAC denied on similar grounds – namely, that by not submitting copies of the responses and bids received in response to its FCC Forms 465, Maniilaq violated section 54.603(b)(4) of the Commission's rules.²²

5. Maniilaq requests that the Commission overturn USAC's funding denial on three grounds. First, Maniilaq maintains that it was not required to submit the EarthLink response with the 2014 FCC Form 466 either because it was not a bid and thus not "relevant" to the bid evaluation process or, if the EarthLink response were a bid, it was properly disqualified.²³ Second, Maniilaq argues that it was not required to submit the GCI bids from 2014 and 2015 because, under Commission and USAC "precedent," documentation supporting an FCC Form 466 should include bids only if multiple bids are received in response to a request for service.²⁴ Third, Maniilaq maintains that its "inadvertent" failure to

¹⁶ *Id.* USAC reviews every multi-year contract submitted with an FCC Form 466 to determine whether it is eligible for evergreen designation. A multi-year contract granted evergreen status is exempt from competitive bidding requirements for the remainder of the contract term. See USAC, Rural Health Care, *Evergreen Contracts*, <https://www.usac.org/rhc/telecommunications/health-care-providers/evergreen-contracts.aspx> (last visited Feb. 19, 2020). A contract entered into as a result of competitive bidding may be designated as evergreen if it meets the following requirements: (1) is signed by the individual health care provider or consortium lead entity; (2) specifies the service type, bandwidth, and quantity; (3) specifies the term of the contract; (4) specifies the cost of services to be provided; and (5) includes the physical location or other identifying information of the health care provider sites purchasing from the contract. 47 CFR § 54.622(i)(3)(ii).

¹⁷ *Request* at 9.

¹⁸ See, e.g., Rural Health Care Telecommunications Program Questions regarding FRN 1720870 (Nov. 3, 2017). USAC specifically requested that Maniilaq provide, among other items, copies of all bids received in response to the FCC Forms 465. *Id.* at 1. USAC issued an identical information request for each FRN at issue. *Request* at 9, n.11.

¹⁹ *Request* at 9. Maniilaq states that the missing GCI bid from 2014 was "inadvertently omitted" by Maniilaq but eventually produced as part of its appeal of USAC's funding denial notice. See *Request* at 9, n.12; Letter from Universal Service Administrative Company, Rural Health Care Division, to Christina Hensley, Maniilaq Association at 6, n.42 (May 6, 2019) (*USAC Appeal Denial Letter*).

²⁰ See Emails from USAC, Rural Health Care Division to Christina Hensley et al., Maniilaq Association (Nov. 30, 2018) (*USAC Funding Denial Messages*). The specific bases for the denials provided in the *USAC Funding Denial Messages* confused Maniilaq, which prompted a clarifying conference call between representatives of Maniilaq and USAC on December 13, 2018. *Request* at 11.

²¹ Letter from Geoffrey D. Strommer, Hobbs, Straus, Dean & Walker, LLP, on behalf of Maniilaq Association, to Universal Service Administrative Co., Rural Health Care (Jan. 29, 2019). Maniilaq supplemented its appeal by letter on March 12, 2019, but USAC did not address the arguments raised in the letter because it was submitted after the 60-day deadline to file appeals. See *USAC Appeal Denial Letter* at 1, n.1.

²² *USAC Appeal Denial Letter* at 1. USAC also rejected Maniilaq's argument that its failure to disclose the correct number of bids received and to provide copies of those bids were clerical errors. *Id.* at 7.

²³ *Request* at 13-16.

²⁴ *Id.* at 17-18. Maniilaq specifically relies on language in the background section of a 2015 Wireline Competition Bureau Order describing FCC Form 466 supporting documentation as including "copies of bids (if more than one

indicate that it received bids in response to its FCC Forms 465 (and to provide copies of the EarthLink response and GCI bids should their submission be deemed necessary) were at most “minor clerical errors” comparable to those at issue in prior Commission decisions overturning USAC funding denials.²⁵ In the alternative, Maniilaq requests a limited waiver of section 54.603(b)(4). As grounds for its request, Maniilaq relies on prior Commission decisions waiving rules when an applicant’s violation of the rules constituted “minor procedural error” and special circumstances, including Maniilaq’s “good faith effort” to comply with the Commission’s rules governing bid selection, the “inconsistent and thus confusing” guidance regarding whether service requests resulting in one bid requires submission of the one bid, and “its willingness to cooperate” with USAC staff requesting further instructions.²⁶

III. DISCUSSION

6. Based on a review of the record and the special circumstances presented, we grant Maniilaq’s waiver request, remand the funding requests listed in Appendix A to USAC for further action consistent with this Order, and direct USAC to discontinue its recovery actions related to the funding requests listed in Appendix B that are related to the violation we waive today. The Commission’s rules may be waived for good cause shown.²⁷ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²⁸ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁹ Here, although we conclude that Maniilaq did not fully comply with the requirements of section 54.603(b)(4) when submitting its funding requests or responding to USAC requests, we find that the policy objectives behind our competitive bidding rules will not be compromised, and the public interest best served, by a grant of a waiver in this limited circumstance.

7. Competitive bidding is a fundamental component of the Telecom Program support mechanism, and one that must be conducted in a fair and open manner.³⁰ Competitive bidding is

bid is received.” See *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Order, 30 FCC Rcd 230, 230, para. 2 (WCB 2015). That statement in the 2015 order and Maniilaq’s request cite guidance posted on the USAC website stating that “[i]f the [health care provider] received bids from multiple service providers in response to the posted FCC Form 465, those bids must be submitted to USAC for review.” See USAC, *Rural Health Care, Documentation*, <https://www.usac.org/rhc/telecommunications/health-care-providers/documentation.aspx> (last visited July 19, 2019). The USAC guidance cited by Maniilaq is no longer available on the USAC website. Current guidance on the website (in response to the question “What happens if I only receive one bid?”) directs applicants to “[p]lease be mindful that you must submit ALL bids received including winning, losing and disqualified.” USAC, *Rural Health Care, RHC Program: Competitive Bidding FAQ*, <https://www.usac.org/wp-content/uploads/rural-health-care/documents/handouts/Competitive-Bidding-FAQ.pdf> (last visited Feb. 19, 2020) (emphasis in original) (*USAC Competitive Bidding FAQ*).

²⁵ *Request* at 7, 8, 18-21, citing *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School New Orleans, LA, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316 (2006) (*Bishop Perry Order*) and *Request for Review Bradford Regional Medical Center, Rural Health Care Universal Service Support Mechanism*, WC Docket No. 02-60, Order, 25 FCC Rcd 7221 (WCB 2010).

²⁶ *Request* at 21-23. Maniilaq also explains that grant of its requested waiver will serve the public interest because denial of the more than \$16 million in funding will have a “significant impact on the services Maniilaq is able to provide on behalf of the federal government to Native and other persons in one of the most remote areas of Alaska.” *Id.* at 23.

²⁷ 47 CFR § 1.3.

²⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

²⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*); *Northeast Cellular*, 897 F.2d at 1166.

³⁰ 47 CFR § 54.622(b).

necessary to “help minimize the support required by ensuring that rural [health care providers] are aware of cost-effective alternatives” and “ensures that the universal service fund is used wisely and efficiently.”³¹ Thus section 54.603(b)(4) of our Telecom Program competitive bidding rules requires that an applicant select the most cost-effective method of providing the requested service, with the “most cost-effective method” of providing service defined to be “the method that costs the least after consideration of the features, quality of transmission, reliability, and other factors that the health care provider deems relevant to choosing a method of providing the required health care services.”³²

8. Because competitive bidding is premised on the availability of “cost-effective alternatives,” an applicant can expect to have to compare one competing bid against another to ascertain the most cost-effective method of providing service. However, in the absence of alternatives, as in the case of an applicant receiving only one bid in response to a request for service, such comparisons are not possible. That is the case here. GCI was the only viable bidder responding to the Maniilaq requests for service in 2014 and 2015, thereby making an evaluation of competing bids impossible.

9. Section 54.603(b)(4) requires an applicant to provide “copies of the responses or bids received in response to the requested services.”³³ While Maniilaq did not comply with this requirement,³⁴ we conclude that the failure to do so does not call into question whether the most cost-effective methods were selected. As explained above, Maniilaq had only one service method choice available in 2014 and 2015 given the solitary bid from GCI it received in each year. The missing supporting documentation also did not result in an inefficient use of universal service funds. Our review of the facts supports the conclusion that Maniilaq conducted its competitive bidding processes in a fair and open manner, and that there was no evidence of waste, fraud, or abuse. Importantly, we note that the failure to submit the required supporting documentation did not convey an advantage or benefit to Maniilaq.³⁵ Even if USAC had not discovered Maniilaq’s errors, such errors could not have resulted in more funding for Maniilaq than it was entitled to under either the 2014 or 2015 funding request because only the GCI bids could

³¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9134, para. 688 (1997).

³² 47 CFR § 54.603(b)(4) (2018). *See also* 47 CFR § 54.622(c).

³³ 47 CFR § 54.603(b)(4) (2018).

³⁴ Maniilaq maintains that supporting documentation need only be provided with an FCC Form 466 when the documentation is “relevant” to the bid evaluation process. *Request* at 13-14. While we agree with Maniilaq’s conclusion that the EarthLink response fell short of what is required of a bid, we disagree with the presumption inherent in Maniilaq’s position that applicants alone are in a position to determine relevance in all cases. Rather than permit applicants to make such judgment calls, section 54.603(b)(4) instead requires the submission of copies of *all* responsive documents to USAC for its considered review. 47 CFR § 54.603(b)(4) (2018). *See also* 47 CFR § 54.623(a)(3) (“Applicants must submit documentation to support their certifications that they have selected the most cost-effective option, including a copy of each bid received (winning, losing, and disqualified)”); *USAC Competitive Bidding FAQ* (applicants “must submit ALL bids received including winning, losing and disqualified”) (emphasis in original). We also disagree with Maniilaq’s position that supporting documentation need only be submitted when more than one bid is received. *Request* at 17-18. The sources cited by Maniilaq for support do not address, let alone provide an exception for, the situation where only one bid is received. Maniilaq also describes its failure to indicate on its FCC Forms 466 that it received any bids in 2014 and 2015 as “inadvertent.” *Request* at 7, 8. While we have no basis to question this characterization, we disagree with Maniilaq’s position that these oversights were a “minor clerical error” and emphasize that an applicant has a responsibility to accurately complete its funding request form and to certify as to the accuracy of that form. *See* 47 CFR § 54.623(a)(ii) (requiring an applicant to examine its FCC Form 466 and attachments and to certify that “to the best of his or her knowledge, information, and belief, all statements of fact contained therein are true.”)

³⁵ *See Bishop Perry Order*, 21 FCC Rcd at 5321 (waiving the minimum processing established by USAC in part because applicants’ errors could not have resulted in an advantage for them in the processing of their applications).

have been selected. In light of these special circumstances, we conclude that strict enforcement of section 54.603(b)(4) is not necessary to achieve the policy objectives of the Telecom Program's competitive bidding rules and would otherwise be inconsistent with the public interest.³⁶ Accordingly, we find in this instance that a limited waiver of the Commission's rules is warranted.

10. We emphasize that our decision here is based on the totality of circumstances, including the absence of alternative bids available to Maniilaq and no evidence of waste, fraud, or abuse. A waiver of section 54.603(b)(4) would not be appropriate if Maniilaq received multiple viable bids or there was evidence that it withheld bids from USAC to avoid application review. Finally, our decision should not be construed as a diminution of an applicant's responsibility to comply with the Commission's competitive bidding rules, which remains a bedrock requirement of parties participating in the Universal Service Fund's Rural Health Care programs.

IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED that, 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 1.3 and 54.722(a) of the Commission's rules, 47 CFR §§ 1.3 and 54.722(a), the Request for Review or Limited Waiver filed by Maniilaq Association on July 2, 2019, IS GRANTED.

12. IT IS FURTHER ORDERED, pursuant to the authority contained in section 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 CFR §§ 0.91, 0.291, 1.3 and 54.722(a), section 54.603(b)(4) is WAIVED to the extent described herein.

13. IT IS FURTHER ORDERED, pursuant to authority contained in section 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, sections 0.91, 0.291, 1.3, and 54.722(a), 47 CFR §§ 0.91, 0.291, 1.3 and 54.722(a), that the denied applications identified in Appendix A ARE REMANDED to USAC for further action in accordance with the terms of this Order.

14. IT IS FURTHER ORDERED, pursuant to authority contained in section 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, sections 0.91, 0.291, 1.3, and 54.722(a), 47 CFR §§ 0.91, 0.291, 1.3 and 54.722(a), that USAC SHALL DISCONTINUE its recovery actions related to the rescinded funding requests identified in Appendix B and SHALL REINSTATE these funding commitments no later than 60 calendar days from release of this Order.

15. IT IS FURTHER ORDERED that, pursuant to the authority delegated in section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Ryan B. Palmer
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

³⁶ See *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

Appendix A**Maniilaq FRNs Submitted as a Result of the Funding Year 2014 Competitive Bidding Process**

HCP Name	HCP Number	FRN	Evergreen Determination FRN
Maniilaq Medical Center	10810	1720870	1456414
Maniilaq Medical Center	10810	1720847	1457353
Maniilaq Medical Center	10810	1727453	1457353

Maniilaq FRNs Submitted as a Result of the Funding Year 2015 Competitive Bidding Process

HCP Name	HCP Number	FRN	Evergreen Determination FRN
Maniilaq Association – Kiana Clinic	10249	1720857	1578617
Maniilaq Association – Kiana Clinic	10249	1720860	1578617
Ambler Clinic	10811	1714957	1578619
Buckland Clinic	10812	1720849	1578883
Deering Clinic	10813	1714995	1578888
Kivalina Clinic	10814	1714996	1578889
Kobuk Clinic	10815	1714997	1578890
Noatak Clinic	10816	1720861	1578892
Noatak Clinic	10816	1720862	1578892
Noorvik Clinic	10817	1720854	1573431
Point Hope Clinic	10818	1715126	1578894
Selawik Clinic	10819	1720855	1578896
Shungnak Clinic	10820	1715129	1578898

Appendix B**Maniilaq FRNs Subject to Funding Commitment Adjustments**

HCP Name	HCP Number	FRN	Funding Year
Maniilaq Medical Center	10810	14564141	2014
Maniilaq Medical Center	10810	14573531	2014
Maniilaq Medical Center	10810	14642311	2014
Maniilaq Medical Center	10810	15711251	2015
Maniilaq Medical Center	10810	15711321	2015
Maniilaq Medical Center	10810	15807641	2015
Maniilaq Medical Center	10810	16878981	2016
Maniilaq Medical Center	10810	16904171	2016
Maniilaq Association – Kiana Clinic	10249	15786171	2015
Maniilaq Association – Kiana Clinic	10249	16871081	2015
Ambler Clinic	10811	15786191	2015
Ambler Clinic	10811	16871311	2016
Buckland Clinic	10812	15788831	2015
Buckland Clinic	10812	16871321	2016
Buckland Clinic	10812	16898961	2016
Deering Clinic	10813	15788881	2015
Deering Clinic	10813	16871441	2016
Kivalina Clinic	10814	15788891	2015
Kivalina Clinic	10814	16871451	2016
Kobuk Clinic	10815	15788901	2015
Kobuk Clinic	10815	16871581	2016
Noatak Clinic	10816	15788921	2015
Noatak Clinic	10816	16871591	2016
Noorvik Clinic	10817	15734311	2015
Noorvik Clinic	10817	16871601	2016
Noorvik Clinic	10817	16899001	2016
Point Hope Clinic	10818	15788941	2015
Point Hope Clinic	10818	16871621	2016
Selawik Clinic	10819	15788961	2015

HCP Name	HCP Number	FRN	Funding Year
Selawik Clinic	10819	16871631	2016
Selawik Clinic	10819	16899031	2016
Shungnak Clinic	10820	15788981	2015
Shungnak Clinic	10820	16871641	2016