

February 23, 2018

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 02-6 – Request for Appeal and/or Waiver filed by Beaumont, Texas, Independent School District, Application No. 161001013 (Funding Year 2016)¹

Dear Ms. Dortch:

The Beaumont Independent School District (“Beaumont ISD” or “the District”) respectfully requests that the Commission reverse the decision of the Universal Service Administrative Company (USAC) to deny funding for its Internet access and voice services for funding year 2016. USAC found that the District issued a Request for Proposal (RFP) without indicating that it planned to do so. The District, however, did not release an RFP under any reasonable definition of that term, including how it is defined by Texas law. All the District did was respond to questions from potential bidders. The fact that USAC found that a response to vendor questions constituted an RFP shows how overly broad USAC’s definition of that term is.

If the Commission agrees with USAC that the District’s response to bidders constituted an RFP, then the District requests a waiver of the FCC Form 470’s requirement that an applicant indicate it intends to issue an RFP. The District acted in good faith to ensure all bidders had the same information, which is the purpose behind the requirement to indicate that an RFP is available. In addition, the competitive bidding process was consistent in every other way with the Commission’s rule that the process be fair and open. The District received four bids and selected the least expensive bidder.

Finally, Beaumont was severely affected by Hurricane Harvey this year and the denial of funding would significantly harm the District. Should the Commission find Beaumont erred here, given that there was no harm to the competitive bidding process, and the denial of funding would significantly harm the District after suffering a natural disaster, the Commission should find it is in the public interest to grant a waiver of the rule.

I. Background

Beaumont Independent School District is a public school district serving Beaumont and Bevil Oaks, in southeast Texas. The district operates 29 schools: a Head Start center, a pre-kindergarten center, 14 elementary schools, six middle schools, four high schools, and three specialized and alternative learning centers. The District has nearly 19,000 students and approximately 1,500 full-time equivalent staff members.

¹ FRNs 11699000997, 1699001002, 1699001031, 1699001040, 1699001424

On November 21, 2014, the District submitted an FCC Form 470 to obtain broadband services (November 2014 Form 470). The District received various questions from potential vendors related to that Form 470, and in response consolidated the questions and its responses into a single document and sent that document to all bidders (“Q&A Document”).² The District further clarified a few of the questions on January 6, 2015.³ The District received six bids in response to the Form 470 posting; two were from cellular companies offering services the District did not request. The other four were from AT&T, Conterra, Time Warner, and WanRack.

The District had indicated that it wanted bids for “1 plus Gb services.” The District determined that it wanted to select a higher bandwidth speed and wanted to make sure that the description on its Form 470 supported that selection. The District received conflicting answers from USAC as to whether the language was specific enough to seek funding for 10 Gbps circuits. As a result, on February 9, 2015, the District submitted a new FCC Form 470 (February 2015 Form 470) clarifying that the District was seeking bids for 1 Gbps circuits as well as 10 Gbps circuits.⁴ The only change between the two Forms 470 was the clarification that the District was seeking bids for both 1 Gbps and 10 Gbps circuits for its WAN services. The USAC staff that the District contacted did not tell the District that its Form 470 was in any other way deficient, so it did not make any other changes.

On February 10, 2015, the District notified the four vendors that had submitted responses to the November 2014 Form 470 that they would need to resubmit their bids in response to the new Form 470. It also re-sent the original Q&A Document to the four responsive bidders from the original bidding process, as well as to another vendor that had inquired about the February 2015 Form 470.⁵

The same four bidders—AT&T, Conterra, Time Warner, and WanRack—responded to the second Form 470 posting. AT&T was the least expensive bidder with a \$27,240 monthly charge for WAN services and \$11,898 monthly charge for Internet access.⁶ The District entered into contracts with AT&T for the requested services.

On December 28, 2016, USAC denied the District’s FY 2016 application because USAC claimed that the District’s Q&A Document was an RFP, and the District had not indicated that it would be releasing an RFP.⁷ Beaumont timely filed an appeal. USAC denied the appeal on August 16, 2017, citing the same rationale.⁸

² The list of questions and responses document has no more than two pages of questions per type of service. See Beaumont ISD Technical Specifications, Exhibit 1 (“Q&A Document”).

³ Amended Q&A Document, Exhibit 2.

⁴ February 2015 FCC Form 470, Exhibit 3.

⁵ Q&A Document.

⁶ WanRack did not submit a bid for Internet access.

⁷ See FCDL Comments for FRNs, Exhibit 4.

⁸ See Post-Commitment Rationale, FCDL Comments for FRNs, Exhibit 4.

Pursuant to FCC rules, Beaumont's appeal would have been due by October 15, 2017. However, Beaumont is located in an area that was declared a Major Disaster Area by the Federal Emergency Management Agency (FEMA) due to Hurricane Harvey.⁹ As such, Beaumont hereby is using the waiver for appeal filing deadlines granted in the Wireline Competition Bureau's (Bureau) Order dated October 6, 2017.¹⁰ Beaumont notes that its appeal deadline was after the release of the order, as required by the Bureau. Beaumont is filing this appeal by the 150-day deadline established in the Order.¹¹

II. Beaumont Did Not Release an RFP and Therefore Did Not Violate the FCC's Rule Requiring Applicants to Notify Potential Vendors of an RFP.

Beaumont ISD asks the Commission to reverse USAC's finding that Beaumont's communications with vendors following its submission of a new FCC Form 470 constituted an RFP. USAC's definition of "RFP" is absurdly broad: virtually any communication between an applicant and bidders is an RFP in USAC's view. The Q&A Document that USAC concluded was an RFP was not a solicitation for bids, request for bids, or invitation to bid. It was simply a response to bidders who had requested additional information. Furthermore, the Q&A Document did not constitute an RFP as that term is defined by Texas law.

Merely answering bidder questions, which is all Beaumont did here, is not an RFP under any reasonable definition of the term, and USAC's contrary position makes it extremely difficult for applicants to ensure compliance with Commission rules when filing their FCC Forms 470. If, however, the Commission agrees with USAC that the District's response to bidders was an RFP, the District respectfully requests a waiver of the requirement that an applicant indicate on its FCC Form 470 that it intends to issue an RFP.

A. USAC's Definition of RFP is So Broad That Any Applicant Response to a Vendor Question Would Constitute an RFP.

According to USAC's website, an RFP is "any bidding document that describes your project and requested services in more detail than in the fields provided on the FCC Form 470."¹² This is USAC's own definition; it does not appear that the Commission itself has defined "RFP" in the E-rate program or suggested guidelines for distinguishing RFPs from other types of communications with potential bidders.

USAC's definition of RFP is so vague that it limits a district's ability to keep the bidding process open and fair. USAC's website states that any document that describes a project in more detail than the Form 470 fields is an RFP. This could be interpreted to mean that a printed copy of an e-mail response from the district, to one vendor, which is sent to all

⁹ Beaumont is in Jefferson County, Texas. See FEMA-4332-DR, Texas Disaster Declaration as of 10/11/17, <https://www.fema.gov/disaster/4332>.

¹⁰ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, et al., Order, DA 17-984 (WCB 2017).

¹¹ The due date according to the order is March 5, 2018.

¹² <http://www.usac.org/sl/applicants/step01/default.aspx>.

other potential vendors by a district, would be an RFP as it includes more detailed information about the services requested. In effect, USAC's definition means that any—literally any—document that contains supplemental information constitutes an RFP. Perhaps the Commission could solve these problems by changing its terminology on the Form 470. Instead of using the term “RFP,” the Commission could indicate that districts could note if any additional information would be available to potential vendors.

USAC's overbroad definition of RFP, along with its decision here, make it extremely difficult for applicants to ensure compliance with Commission rules when filing the FCC Form 470. Even if an applicant has no plans to issue an RFP, it seems necessary to indicate on its Form 470 nonetheless that it does plan to issue an RFP, just in case it has to respond to questions from vendors. But if vendors ask no questions, the applicant will have violated the rules by indicating it was planning to release an RFP and then not issuing one. On the other hand, if an applicant does *not* indicate on its Form 470 that it plans to issue an RFP, it cannot answer questions from vendors, because if it does it will have violated the rules by issuing an RFP after having failed to indicate its intent to do so on the Form 470. The EPC system, which was not in use at the time of this procurement, could help vendors identify if additional information is uploaded that is not an RFP.

Here, Beaumont's Q&A Document was created in response to vendor questions and in an attempt to keep the process open and fair. To make things easier on potential vendors, the District organized responses to the questions in a single document that was provided to all bidders. Beaumont ISD went above and beyond to provide answers to vendor questions in an efficient and easy to read manner, and has been punished for its quality of work with a denial.

Neither the FCC nor USAC has a rule that says answers to vendor questions cannot be put into a document and shared. In fact, there is no guidance at all from the FCC or USAC on what method districts should use to respond to vendors or in what ways are acceptable and unacceptable. Applicants are required to give vendors all the information they need in order to provide accurate and competitive bids, and to provide more information to bidders when they request it, which the District did. But this requirement is undermined by USAC's overbroad definition of an RFP, which constrains applicants' ability to communicate with bidders in a manner that the Commission itself has never sanctioned.

B. Beaumont's Response to Vendor Questions Was Not an RFP Under Texas Law.

USAC found that Beaumont's responses to vendor questions constituted an RFP. Under Texas law, however, Beaumont's document was not an RFP. Under Texas law, a “Request for Proposal” is a formal designation that requires a public entity to provide specific information and follow a certain process. Beaumont was not required to and did not want to issue an RFP under Texas law.

The Texas Education Agency (TEA) defines an RFP and has established clear criteria for what constitutes a RFP, and the document in question does not meet that criteria. TEA defines an RFP as a formal invitation to a potential respondent to submit a proposal. The

District's Q&A Document did not constitute an RFP—or any other type of solicitation for bids—under Texas law.

Here are some of the criteria that must be included in an “RFP” under Texas law:¹³

- Statute that authorizes procurement
- Contract name and number
- RFP objectives
- Contract terms
- Statement of Work/Agency Duties and Responsibilities
 - What will the agency provide to contractor?
 - Payment frequency to vendor
 - Complete and specific description of work to be performed
 - Regulations and laws the contractor must follow
 - List of project deliverables, performance standards, timelines, reporting
- Acknowledgement form/response sheet

FCC rules require a district to file a FCC Form 470.¹⁴ No Commission rule requires applicants to release an RFP. Further, the Commission has found when a district is not required by its state laws to issue an RFP, it does not have to under E-rate rules.¹⁵ FCC rules do require applicants to respond to questions from potential bidders and share that information with all bidders as part of ensuring the competitive bidding process is “fair and open”.¹⁶

Beaumont filed an FCC Form 470, pursuant to Commission rules. No vendor complained that its 470 did not provide sufficient information, but vendors did ask additional questions. In fact, USAC did not tell Beaumont that either of its Forms 470 were deficient, even though USAC provided conflicting views on whether that Form 470 would allow Beaumont to select a bidder offering a higher bandwidth.

Beaumont did not issue an RFP nor did it intend to issue an RFP. As you can see, an RFP under Texas law is a detailed document that must meet many specific criteria. For Beaumont, issuing an RFP when the E-rate program does not require one would have greatly increased the amount of work and the cost to conduct a procurement, both for Beaumont and for responding vendors. If the District had indicated on its FCC Form 470 that it was releasing an RFP, it would have been required by Texas law to undertake this formal process. The District did not believe such additional work was necessary—and would have been overly burdensome to responding carriers—to procure the Internet and WAN services it was requesting.

¹³ See Exhibit 5, Sample TEA RFP.

¹⁴ 47 C.F.R. § 54.503(c).

¹⁵ *Request for Review of a Decision By the Universal Service Administrator by Keyport School District*, CC Docket 02-6, Order, 24 FCC Rcd 12702, 04-05 (TAPD 2009).

¹⁶ 47 C.F.R. § 54.503(a). See also <http://www.usac.org/sl/applicants/step01/bidding.aspx> (“Open” means there are no secrets in the process – such as information shared with one bidder but not with others – and that all bidders know what is required of them.).

Yet, the District also wanted to make sure that all potential vendors had access to the responses it provided. It created the Q&A document to provide the responses to all of the potential vendors so that the competitive bidding process was fair and open. The Q&A document was not an RFP under Texas law and the District provided the relevant information to all bidders, thus ensuring that the competitive bidding process was fair and open.

III. If the Commission Believes Beaumont’s Q&A Document Is an RFP, a Grant of This Appeal Is in the Public Interest Because the Competitive Bidding Process Was Fair and Open and Because Beaumont Was Severely Affected by Hurricane Harvey.

The Commission has granted appeals and waiver requests when the competitive bidding process was not harmed by an applicant’s failure to indicate that it planned to release an RFP. As explained above, Beaumont—and Texas law—did not consider Beaumont’s Q&A Document an RFP. Only under an unreasonably broad definition of the term could a list of vendor questions and school district responses be considered an RFP. However, if the Commission disagrees, Beaumont respectfully requests that the Commission waive the requirement that the intent to issue an RFP be indicated on an applicant’s Form 470. There was no harm to the competitive bidding process because the vendors had enough detail to determine the services being requested, because all vendors had access to the same information, and because Beaumont selected the least expensive vendor to provide services.

In addition, Beaumont was significantly affected by Hurricane Harvey last fall. The grant of E-rate funding will help the District recover from the unprecedented storm that damaged one of its high schools beyond repair, and significantly harmed the rest of its District.

A. A Waiver Is in the Public Interest Because the Competitive Bidding Process Was Not Harmed.

In *Approach Learning and Assessment*, the Wireline Competition Bureau considered nine appeals in which the applicants argued that documents they released were either not RFPs or did not meet state RFP requirements.¹⁷ The Commission granted the appeals for the nine petitioners, finding that all bidders were on an even playing field.¹⁸ Specifically, the Bureau noted that the applicants’ FCC Forms 470 contained enough detail for service providers to identify the desired services and to formulate bids, and that it appeared that all interested bidders also had access to whatever additional information petitioners

¹⁷ *Requests for Review of Decisions By the Universal Service Administrator by Approach Learning and Assessment Centers*, CC Docket No. 02-6, Order, 23 FCC Rcd 15510, 15513-14 ¶¶ 7-8 (WCB TAPD 2008) (*Approach Learning and Assessment*); *see also Request for Review of Decisions By the Universal Service Administrator by Northeast Arizona Technological Institute of Vocational Education*, CC Docket No. 02-6, Order, 27 FCC Rcd 2266 (WCB TAPD 2012) (granting a similar request after concluding that there had been no harm to the competitive bidding process).

¹⁸ *Approach Learning and Assessment*, 23 FCC Rcd at 15510, 15514 ¶ 8.

provided in the auxiliary documents.¹⁹ The Bureau also found there was no actual harm to the competitive bidding process.²⁰

Beaumont's situation is exactly like that of the petitioners in *Approach Learning and Assessment*. First, all bidders had equal access to the additional information. Checking the box to indicate that an RFP will be issued is to ensure that all potential vendors have the same information.²¹ Beaumont gathered the questions of each of the bidders and shared the document with every interested potential vendor. There is no evidence of any party being disadvantaged.

Conducting an open and fair process means all vendors need to have the same amount of information and be treated in the same way. It is efficient and effective for a district to compile vendor questions, answer them all at once, and share those answers with every vendor at the same time in order to satisfy this requirement. The District has only demonstrated its willingness to be as open and fair as possible, yet it is being punished due to USAC's overly broad definition of RFP, and the lack of program guidelines on acceptable practices for responding to vendors.

Second, the potential vendors had enough information to determine the services being requested. The FCC Form 470 indicated that the District was seeking WAN and Internet access services, the capacity of those services, and the number of entities to be served.²² The District is not required to provide every piece of information that potential vendors may desire. The District then answered every question and all of those responses provided to each interested vendor, thus ensuring that every potential vendor had access to the additional information. In addition, the District specifically asked USAC about the sufficiency of its Form 470 and was not told it needed to make any other changes.

Third, there was no actual harm to the competitive bidding process. Four bidders offering the services the District requested submitted timely bids. The bidders were significant, competitive companies that were able to provide the scope and type of services the District requested. The District evaluated each of the bidders using several factors, and ultimately chose AT&T as the winning bidder. AT&T not only received the most total points in the process, but also had the lowest cost bid.²³

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Request for Review by Ysleta Independent School District of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Red 26407,26424, para. 39 (2003) (noting that "the intent of the FCC Form 470 is to provide potential bidders with as much information as possible in order to maximize competition for applicant's contracts.").

²² See Feb. 9, 2015 FCC Form 470.

²³ In other competitive bidding issues, the Commission has granted appeals where the applicant selected the lowest-cost bidder, even where it found a technical violation of the competitive bidding rules. *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).

If the Bureau agrees with USAC that Beaumont's document was an RFP, it should grant a waiver in this instance as the policy goals behind the rule were satisfied, the competitive bidding process was fair and open, and there was no actual harm to the competitive bidding process.

B. A Waiver Is in the Public Interest Because Beaumont Was Severely Affected by Hurricane Harvey.

Finally, the Beaumont was severely affected by Hurricane Harvey last fall. Hurricane Harvey had a lasting impact on Beaumont ISD. Due to the unprecedented amount of rain (between 45 and 55 inches over four days) from this storm in the District's area, Beaumont was not able to start school on the scheduled first day of school. Because of the flooding, the city's water treatment plant and pumping stations were underwater and severely damaged as a result. It took two and a half weeks for the water to recede enough for the city to bring the system back online to supply safe drinking water to the city.

The District itself had several campuses that were damaged by flooding. One of its high schools, Central High School, had major damage to the main building, which caused the district to have to close the building and move students to a temporary location for the remainder of the school year. The building to which these students were moved had two programs for students that then had to be moved to other locations. After assessing the damaged main building, it was determined that the main building would have to be permanently closed. The District then decided to merge Central High School with Ozen High School beginning next school year. The moves to the temporary campuses were an enormous undertaking for many district personnel, and now the district faces the daunting task of making repairs to the Ozen campus, which also sustained damage in the storm, as well as, building more classroom space to accommodate the increased student population of the new combined campus, all of which must be completed within the next six months for the start of next school year.

In addition to all of this work in the District, many of the staff and students are still dealing with repairing or rebuilding their flood-damaged homes, yet all have bravely moved forward in continuing the mission of teaching and learning. The grant of a waiver in this instance where the District did truly strive to follow all program rules and have an open and competitive bidding process is critical in helping the district continue to recover from the devastation caused by Hurricane Harvey.

IV. Conclusion

For the foregoing reasons, we respectfully request that you overturn the denial and restore full funding of these FRNs. Thank you for reviewing this appeal. Please use the contact information below if you have any questions.

Sincerely,
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CC: Universal Service Administrative Company
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Enclosures:

- Exhibit 1 - Beaumont ISD Technical Specifications
- Exhibit 2 - Amended Q&A Document
- Exhibit 3 - February 2015 FCC Form 470
- Exhibit 4 - FCDL Comments and Post-Commitment Rationale for FRNs
- Exhibit 5 - TEA example RFP