

8/2/2019

Letter of Appeal
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554
CC Docket No. 02-6

Re: Request for Review of Denial Notification of Application #191014300 dated 6/12/2019

I am submitting this letter of appeal regarding the Denial notification issued for Application #191014300 on the grounds that, the reasons cited were ministerial/clerical errors which 1) did not result in waste, fraud or abuse, 2) did not benefit Cherry Creek School district and provided no harm to service providers and 3) did not result in the district agreeing to pay a higher price than is otherwise commercially available. Denial of the application would be an extreme undue hardship on the school district and therefore not in the best public interest.

Appellant Name:	e2e Exchange, LLC
Applicant Name:	Cherry Creek School District
471 Application Number:	191014300
Billed Entity Number:	142140
FRN:	1999027960
Service Provider:	Global Technology Resources

SLD Explanation: (1) We have determined that the RFP was not available for 28 days from when the FCC Form 470 was posted to USAC's website. Your FCC Form 470 #190001575 was posted on 01/07/2019 but your RFP due date was 01/30/2019. The bid due date on the RFP is before the Allowable Contract Date on the FCC Form 470. (2) It was determined that FRN 1999027960 will be denied because the FCC Form 470 #190001575 RFP that you have cited contains a particular manufacturer's name, brand, product and service but did not include the words "or equivalent" to describe the requested products and services.

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Background

Cherry Creek has filed for E-rates each year since the beginning of the program in 1998. Each of these funding years, Cherry Creek has filed all Form 470s and 471s properly in all respects and within the applicable filing periods. For 2017 and 2018 Cherry Creek filed a Form 470 for internal connections requirements and followed all proper USAC procedures. Both applications were approved.

Cherry Creek School District discovered more equipment was required for the network to function as best as intended. Therefore Cherry Creek filed a 2019 Form 470 for additional internal connections needed that were not approved or purchased in FY 2017 or FY 2018. Due to the size and scope of the additional anticipated projects, the district felt it best to include a Request for Proposal (RFP) with the Form 470 for certification. The original intention was to post the RFP and Form 470 on January 2nd, 2019 with a submission due date of January 30th, 2019, and a selection award date of February 4th. This would meet the 28 day requirement. However, the Form 470 could not be posted until January 7th due to additional time needed for district preparation. On page 5 of the RFP the schedule of events was supposed to be updated to an RFP posted date of January 7th, 2019 and an RFP Due Date of February 4th, 2019. However, a ministerial/clerical error occurred where the RFP due date did not get updated to the new date of February 4th, 2019 to coincide with the 28 day requirement. Furthermore, the following narrative is included with the schedule of events on page 5 that “the following RFP Schedule of Events represents the best estimate of the schedule the District will follow, which is subject to change at the District’s discretion. The District has performed extensive planning work and plans to meet the dates described below. The District reserves the right to add or

delete events as may be necessary”. Cherry Creek School District did indeed go out to bid for the required 28 days, in fact a full 52 days to be exact, before awarding the project on February 28th, 2019 to the only vendor who responded. The district is not aware of any service providers that wanted to bid for the relevant services but did not do so.

As explained, the RFP due date of January 30th, 2019 is a ministerial/ clerical error as a result of originally intending to certify the Form 470 on January 2nd. Cherry Creek School District had every intention of meeting the 28 day requirement, and ultimately did so despite the ministerial/clerical error on the RFP itself. We have shown that Cherry Creek School District did not violate the minimum 28 day bidding requirement and therefore the application should not be denied for this reason.

The FY 2017 Form 470 was the beginning of the recent Category 2 projects, where over \$800,000.00 of expenditure was awarded to Cherry Creek School District after a Form 470 and Form 471 were properly completed. In the 2017 RFP, the required term “or equivalent” was included and specifically indicated that bids of other make/models would be considered and fairly evaluated. Additionally, Cherry Creek School District included on page 25 of the 2017 RFP that the equipment posted for was to be purchased between the periods of 2017-2020: “The following hardware list is potential network equipment planned for purchase should the Cherry Creek school 2016 bond is passed in November 2016. The list is enclosed for example only and will be revised to reflect more current equipment available or equipment that better fills the districts needs at the time of purchase”. The RFP included a request for a possible \$3.5 million

in equipment. Of this request, only \$800,000.00 pre-discount expenditure was awarded and purchased in 2017.

The FY 2018 Form 470 re-requested items listed on the 2017 Form 470 to give all vendors an opportunity to bid on the internal connections and services. In this funding year, \$144,264.90 pre-discount expenditure was awarded. Cherry Creek School District intended to complete the remainder of the Category 2 infrastructure needs during FY 2019. The FY 2019 Form 470 again re-requested items listed on the 2017 Form 470 to give all vendors an opportunity to rebid on the internal connection's equipment. The specific term of "or equivalent" was omitted from the RFP per ministerial/clerical error. This omission did not result in an unfair outcome as only one service provider submitted a bid. The school district waited longer than the 28 day period in case additional submissions would come through, but no further interest was indicated. The district is not aware of any service providers that wanted to bid for the relevant services but did not do so.

Furthermore, it is imperative to also take into consideration the financial burden and undue hardship that a large school district would need to undertake if they were to accept a proposal for new equipment of a dissimilar make/model of what currently exists for the network infrastructure. Such a project would certainly disrupt the school year and interfere with the education of students. This result would not be in the best public interest. As previously demonstrated, Cherry Creek School District has properly bid for Category 2 services in prior funding years and included the terms "or equivalent" when expressing the potential need to purchase over \$3.5 million in equipment and services. The omission of the words "or equivalent" on the 2019 RFP uploaded to the Form 470 was a ministerial/ clerical error, but also

in this particular case, would not have resulted in any greater benefit to the school district to have done so, being that the requested 2019 equipment is being incorporated into the projects from 2017 and 2018. There are no examples of waste, fraud or abuse in this particular case.

Supporting Cases

In Application for Review of the Decision of the Universal Service Administrator by Aberdeen School District, Aberdeen, WA, et al., Schools and Libraries Universal Service Support Mechanism, File Nos. SLD-297249, et al., CC Docket No. 02-6, Order, 22 FCC Rcd 8757 (2007) (“Aberdeen School District Order”), the FCC noted: “The Commission may waive any provision of its rules on its own motion and for good cause shown. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.” (Aberdeen School District Order).

In the Aberdeen matter, the FCC ruled: “Based on the facts and the circumstances of these specific cases, we find that good cause exists to waive section 54.504(b)(4) of the Commission’s rules, which requires applicants to wait 28 days after posting an FCC Form 470 to USAC’s website before entering into an agreement with a service provider for the requested services. We find that Petitioners’ errors related to the competitive bidding process do not warrant a complete rejection of their applications. We have examined the facts of each of these appeals and found that a waiver is warranted based on the circumstances presented and based on the facts that there is no evidence of waste, fraud or abuse. The goal of the competitive

bidding process is to ensure that funding is not wasted because an applicant agrees to pay a higher price than is otherwise commercially available. We find no indication in the record that, as a result of these errors, applicants benefited from their mistakes or that any service provider was harmed. Specifically, there is no evidence in the record that other bids were not considered because these applicants did not fully comply with our competitive bidding rules. We find that the policy underlying these rules, therefore, was not compromised due to Petitioners' errors. In fact, those Petitioners with multiyear contracts complied with our competitive bidding rules when their requests for service were initially posted. Furthermore, we find that several of these Petitioners, while not waiting the full 28 days before entering into an agreement, only missed the 28-day deadline by a minimal number of days (i.e., one to three days) and therefore their requests for discounted services were subject to competitive bidding for a meaningful period of time. While we emphasize that our competitive bidding rules are important to ensure a fair bidding process, we find that denying these Petitioners requests for funding would create undue hardship and prevent these potentially otherwise eligible schools and libraries from receiving E-rate funding." (Aberdeen School District Order).

The same conclusion was met In Application for Review of the Decision of the Universal Service Administrator by Albert Lea Area Schools, Albert Lea, Minnesota, et al., Schools and Libraries Universal Service Support Mechanism, File Nos. SLD-517274, et al., CC Docket No. 02-6, Order, 24 FCC Rcd 4533 (2009). The Aberdeen case was referenced extensively with a similar explanation of "... petitioners' errors here could not have resulted in an advantage for them in the processing of their E-rate application. That is, the petitioners mistake, if not caught by

USAC, could not have resulted in the petitioners receiving more E-rate funding than they were entitled to receive” (Albert Lea Area Schools Order).

The facts of Cherry Creek’s Application are substantially similar to those that supported waiver of the 28-day rule in Aberdeen and in Albert Lea. Good cause exists to waive the 28-day rule and the “or equivalent” rule in the case of Cherry Creek’s Application:

- 1) The errors related to the competitive bidding process in this case do not warrant a complete rejection of Cherry Creek’s Application;
- 2) No evidence exists of waste, fraud or abuse;
- 3) Cherry Creek did not agree to pay a higher price than is otherwise commercially available;
- 4) No evidence exists that, as a result of the errors, Cherry Creek benefited from the mistakes or that any service provider suffered harm;
- 5) No evidence exists that Cherry Creek did not consider other bids;
- 6) Although the RFP for Cherry Creek indicates a competitive period of less than 28 days, Cherry Creek officially waited a full 28 days for quotes, before awarding the project to the only bidder.
- 7) Denying the requests for funding would create undue hardship.

In sum, Cherry Creek complied with the FCC requirement that applicants conduct a fair and open competitive bidding process. The competitive bidding process was fair and open because the district submitted the relevant FCC Forms 470 requesting E-rate eligible services, described the requested services with sufficient specificity to enable potential service providers to submit

bids, treated all potential bidders equally and fairly during the bidding process, did not engage in any of the activities or behaviors of the FCC's rules presumed to result in a competitive bidding process that is not fair and open, and did not solicit or accept any gift, gratuity, favor, entertainment, loan, or any other thing of value from a service provider. In other words, the district did everything it is required to do to prevent waste, fraud and abuse. The schedule of dates and the exclusion of the words "or equivalent" on the related RFP were a ministerial/clerical error and did not impact the evaluation or selection of vendor. Having followed all key program requirements, with the exception of the ministerial/clerical errors, the Commission should not allow such a harsh outcome of denial to prevail. Furthermore, under the Northeast Cellular Telephone Co. decision, the Commission may grant a waiver if special circumstance warrant a deviation from the general rule, and such deviation would better serve the public interest, than strict adherence to the general rule.

Summary

If the commission finds the districts competitive bidding process was deficient, we respectfully request a limited waiver of the commission's rule.

The commission's rules provide that the Commission may waive any provision of its rules "if good cause therefore is shown". 47 C. F.R. 1.3. The commission "may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis".

We have explained in detail how the district's identification of Cisco as the make on the RFP was in the best interests of the district and community, and that the ministerial/clerical error of

excluding the words “or equivalent” did not result in affecting the overall competitive bidding process. Furthermore, the district verbally informed all interested bidders that a proposal of equivalent items would be considered and included in evaluations.

The district never attempted to favor some bidders to the detriment of others, or to engage in a scheme to violate the Commission’s rules or policies. In fact, the districts inclusion of the precise list of equipment was specifically intended to preserve the integrity, fairness and openness of the competitive process by ensuring all interested vendors had a comparison to work with and submit equally competitive bids. The districts interest was simply getting the best services at the best possible price in compliance with the Commission’s rules. A complete denial of Cherry Creek’s School District FY2019 Category 2 application for ministerial/ clerical errors which did not result in affecting the competitive process would be unfair to the extreme.

Cherry Creek School District represents children in dire need of funding. A large portion of the students serviced by Cherry Creek School District are from households whose income is below the federal poverty guidelines, qualifying the district for an 85% Erate discount. These are precisely the students that the E-rate program is intended to assist.

Conclusion

There is no evidence that Cherry Creek deliberately engaged in any activity intended to defraud or abuse the program and there was no waste fraud or abuse. Based on the small ministerial error and unintentional omission, the denial of this application would severely impact the school district and penalize the students. Therefore, a denial of this application is not in the best public interest. The Bishop Perry Order officially sets forth a remedy for errors

where “there is no evident of waste, fraud or abuse, or misuse of funds”. We have shown that Cherry Creek School District has not benefited from these ministerial/clerical errors by receiving access funds that they should otherwise have not been approved for.

We respectfully request that the FCC waive these program rules in favor of application approval. We respectfully request that you approve for full eligible funding. Thank you for reviewing this appeal. Please use the contact information below.

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Sincerely,
E2e exchange, LLC
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Director of Operations