

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Request for Review of a Decision of the)	Administrator Correspondence Dated 6/23/18
)	for FRN 1799049263
The School District of Palm Beach County)	
Billed Entity Number 127754)	Submitted August 21, 2018 via ECFS
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6, 96-45
Support Mechanism)	WC 13-184

**REQUEST FOR REVIEW OF DECISION OF THE UNIVERSAL SERVICE
ADMINISTRATION COMPANY, SCHOOLS AND LIBRARIES DIVISION BY THE SCHOOL
DISTRICT OF PALM BEACH COUNTY**

Appellant/Organization Name	The School District of Palm Beach County (BEN 127754)
Application/FRNs included	2017/2018 Form 471 171023567, FRN 1799049263
	2018/2019 Form 471 181011236, FRN 1899018279 (<i>pending appeal #112392 (June 29, 2018) at USAC as of August 9, 2018</i>)

In accordance with sections 54.719 through 54.721 of the Commission's rules, The School District of Palm Beach County ("SDPBC" or "Applicant") requests the Federal Communications Commission's ("FCC" or "Commission") review of a decision of the Schools and Libraries Division of the Universal Service Administrative Company ("USAC" or "Administrator"). SDPBC requests the Commission consider the information set forth in this appeal that supports SDPBC's contention that the Administrator does not have the authority to deny the FRNs for the reasons stated, SDPBC is fully compliant with the Commission's competitive bidding rules and fully reinstate the funding associated with the denied funding requests noted above.

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OVERVIEW

The School District of Palm Beach County (“SDPBC”) is a metropolitan school district comprised of 207 schools and over 172,700 students of which 62% are eligible for free and reduced priced meals.¹ The Applicant is the tenth largest public-school district in the United States and the fifth largest school district in Florida. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts on eligible telecommunications services, Internet access, internal connections, and basic maintenance of internal connections². Under this regulatory authority, SDPBC annually submits E-rate application(s) for discounts on eligible products and services.

REASON(S) FOR DENIAL

We request the Commission overturn the Administrator’s decision to deny Funding Request Numbers 1799049263 and 1899018279.

In its review of the timely appeal(s) submitted by SDPBC³, the Administrator determined there are two distinct reasons for their ultimate denial of the appeals.

Reason #1 *‘the funding request is denied because the documentation that contained information needed for potential bidders to respond to your RFP was not available for 28 days in the E-rate Productivity Portal before selecting your service provider. On 6/2/2017⁴ you uploaded "17C-52J Additional Information Document" that contains significant information for the bidders to be able to respond to the FCC Form 470 and RFP. However, this documentation was not available in E-rate Productivity Portal for 28 days before you selected the service provider. Program procedures (emphasis added) require the FCC Form 470, RFP and any documentation providing the additional or modifying the original information in your FCC Form 470 and/or Request for Proposal be uploaded into the FCC Form 470 in E-rate Productivity Portal and made available for 28 days before selecting a service provider.*

¹ Statistics available at: https://www.palmbeachschools.org/communications/wp-content/uploads/sites/52/2018/04/SDPBC_At-a-Glance-10.pdf

² 47 C.F.R. §§ 54.502, 54.503

³ EPC - FY2017 Appeal # 102397, Filed 5/11/2018 and EPC – FY2018 Appeal # 112392, Filed 6/29/18 (no decision as of 8/9/18 though we expect it too will be denied)

⁴ We have no idea where this date came from, especially considering the associated Form 471 for 2017 was certified on April 26, 2017 however, USAC may mean that this document was *provided* to them on this date in response to a Selective Review Information Request. The inconsistent terminology is troublesome.

Reason #1a: *FCC rules require applicants to submit a complete description of the services they seek so that it may be posted for competing service providers to evaluate and formulate bids. See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9076, FCC 97-157, para. 570, 575 (rel. May 8, 1997). The applicant's FCC Form 470 should inform potential bidders if there is, or is likely to be, an RFP relating to particular services indicated on the form. To the extent that the applicant also relies on an RFP as the basis of its vendor selection, that RFP must also be available to bidders for 28 days. See Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al., Federal-State Joint Board of Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., SLD Nos. 321479, et al., CC Docket Nos. 96-45 and 97-21, Order, 18 FCC Rcd 26423-26424, FCC 03-313 para. 39 (rel. Dec. 8, 2003)'.*

Reason #2 *Additionally, based on the information provided during our review, we determined that the competitive bidding process that was not fair and open, and therefore, the FRN is denied. FCC rules governing the E-rate Program state that the competitive bidding process must be fair and open. Circumstances should not be present that would give an unfair competitive advantage to any service provider and all bidders must be treated the same. The goal of the competitive bidding process is to have as many bidders as possible respond to an FCC Form 470, RFP, or other solicitation method so that the applicant can receive better service and lower prices. Applicants should not set restrictions that limit the number of prospective bidders and/or deter other service providers from submitting a bid for services which may be more cost effective and interferes with the fair and open competitive bidding process required by FCC Rules. In your appeal, you did not demonstrate that USAC's determination was incorrect. Consequently, your appeal is denied.⁵*

A PROGRAM PROCEDURAL “VIOLATION” DOES NOT WARRANT FULL DENIAL

Rebuttal of Reasons #1 and #1a for Denial of FRNs and USAC Appeals

It should be immediately noted that the primary reason(s) for complete denial of the FRNs included in this Appeal/Waiver request is USAC's apparent interpretation that a “program procedure” violation immediately warrants complete denial of the FRNs associated with this Request for Relief.

⁵ See attached file [SDPBC FY2017-18 471#171023567 RFCDL 062318](#)

The standard applied to denial Reason #1 does not hold water as a matter of law and/or the rules governing USAC's **administration** (*emphasis added*) of the E-rate program in that USAC has seemingly created a competitive bidding **policy** in denying the FRNs when they indicated a standard that "*require[s] the FCC Form 470, RFP and any documentation providing the [sic] additional or modifying the original information in your FCC Form 470 and/or Request for Proposal be uploaded into the FCC Form 470 in E-rate Productivity Portal and made available for 28 days before selecting a service provider*" considering this requirement is not stated in any codified rule.

USAC's reasoning is further out of bounds in their determination that SDPBC was in violation of two actual FCC competitive bidding requirements/rules:

*"FCC rules require applicants to submit a complete description of the services they seek so that it may be posted for competing service providers to evaluate and formulate bids"*⁶

and,

*"The applicant's FCC Form 470 should inform potential bidders if there is, or is likely to be, an RFP relating to particular services indicated on the form. To the extent that the applicant also relies on an RFP as the basis of its vendor selection, that RFP must also be available to bidders for 28 days."*⁷

The School District of Palm Beach County unequivocally asserts its absolute compliance with the **codified rules** (*emphasis added*) that govern the Competitive Bidding Process however, we believe that USAC is applying a violation of their "procedures" as the standard for the complete denial of the funding requests.

Competitive Bidding guidance available on USAC's website⁸ reads:

The entity that will run the competitive bidding process - which may be you, a state procurement agency, or another entity that you have authorized to negotiate on your behalf with a Letter of Agency (LOA) - **certifies an FCC Form 470** (Description of Services Requested and Certification) **in the E-rate Productivity Center (EPC)** and must be prepared to receive and evaluate bids and negotiate with service providers.

⁶ See *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9076, FCC 97-157, para. 570, 575 (rel. May 8, 1997)*.

⁷ See Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al., *Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., SLD Nos. 321479, et al., CC Docket Nos. 96-45 and 97-21, Order, 18 FCC Rcd 26423-26424, FCC 03-313 para. 39 (rel. Dec. 8, 2003)*'.

⁸ <https://www.usac.org/sl/applicants/step01/default.aspx>

Applicants can edit some fields in a certified FCC Form 470. Allowable changes include:

- editing an application name
- changing the main contact person and/or technical contact person
- **making minor, non-substantive updates to an RFP**

Applicants must wait at least 28 days from the date the FCC Form 470 is certified before closing the competitive bidding process. **Changes to the FCC Form 470 beyond the allowable changes require applicants to wait 28 days from the date of the change before closing the competitive bidding process.**⁹

Requests for Proposal

The entity filing an FCC Form 470 can issue a request for proposal (RFP) in addition to the FCC Form 470. In general, an RFP is a formal bidding document that describes the project and requested services in sufficient detail so that potential bidders understand the scope, location, and any other requirements. However, we use "RFP" or "RFP document" generically to refer to any bidding document that describes your project and requested services in more detail than in the fields provided on the FCC Form 470.

E-rate Program rules do not require applicants to issue an RFP. Generally, you are not required to issue an RFP unless your state or local procurement rules or regulations require you to do so. However, **if you have issued or will issue an RFP, you must** (*emphasis added*) **upload that document in EPC.**

The guidance in **bold underline** above is what appears to be driving USAC's primary decision to deny the funding requests at issue in this pleading.

The problem with this position is that the guidance in **bold underline** on USAC's website is not codified in any FCC rule. It is *procedural guidance* (using their own words in the appeal denial language) developed by USAC in their interpretive implementation and launch of the E-Rate Productivity Center portal and as such, should not result in a denial of funding under the auspices of a rule violation.

It is presumed from the language in the denials, despite no reference to the actual rule violation, that USAC is asserting a violation of CFR Title 47: Telecommunication, Chapter 1, Subchapter B, Part 54, **§54.503 Competitive bidding requirements**¹⁰ that state:

⁹ This statement is not codified in any FCC rule.

¹⁰ E-CFR at <https://www.ecfr.gov/cgi-bin/text-idx?SID=0e2a5c1047a0e7f1886514fc179e645e&mc=true&node=pt47.3.54&rgn=div5#se47.3.54>

(c) *Posting of FCC Form 470.* (1) An eligible school, library, or consortium that includes an eligible school or library seeking bids for eligible services under this subpart shall submit a completed FCC Form 470 to the Administrator to initiate the competitive bidding process. **The FCC Form 470 and any request for proposal cited in the FCC Form 470 shall include, at a minimum, the following information:**

(i) **A list of specified services for which the school, library, or consortium requests bids;**¹¹

(ii) **Sufficient information to enable bidders to reasonably determine the needs of the applicant;**¹²

(4) **After posting on the Administrator's Web site an eligible school, library, or consortium FCC Form 470,** the Administrator shall send confirmation of the posting to the entity requesting service. **That entity shall then wait at least four weeks from the date on which its description of services is posted on the Administrator's Web site before making commitments with the selected providers of services.**¹³ The confirmation from the Administrator shall include the date after which the requestor may sign a contract with its chosen provider(s).

As evidenced by the language above that is drawn directly from the associated Code of Federal Regulations section that govern compliance with the competitive bidding aspect of Universal Service Support for Schools and Libraries, there is no requirement in the rules that an RFP document and/or any associated addenda MUST be included/uploaded in conjunction with the posting of a Form 470; and, there is certainly no reference that failure to do so will result in denial of any funding requests resulting from said competitive bidding/Form 470 process.

The School District of Palm Beach County clearly complied with the Commission's competitive bidding rules as described in detail in the attached file that comprises the USAC appeal filing(s)¹⁴ however, we will summarize it here in context.

SDPBC posted its 2017/2018 FCC Form 470 #170049830 on January 31, 2017 in the E-Rate Productivity Center ("EPC") portal and, in accordance with USAC procedural guidance, uploaded a comprehensive Invitation to Bid #17C-52J ("ITB") or "RFP" (in USAC terms) document that along with

¹¹ The School District of Palm Beach County is compliant with this requirement.

¹² The School District of Palm Beach County is compliant with this requirement.

¹³ The School District of Palm Beach County is compliant with this requirement.

¹⁴ EPC-FY2017 Appeal #102397, filed 5/11/2018 and EPC – FY2018 Appeal # 112392, Filed 6/29/18 (no decision as of 8/16/18 though we expect it too will be denied) All documents are available within the EPC platform however, if you require copies be expedited directly, please contact us immediately.

five attachments and exhibits that comprised the entire universe of information prospective service providers would need to respond to the solicitation.

As described multiple times throughout the arduous reviews these funding requests have been subject to, there were a total of five documents uploaded to Form 470 #170049830 on January 30, 2017 in advance of certification of the Form and its availability for public consumption.

Inexplicably, sometime between drafting the Form 470 and its final certification, all but two of the documents ‘disappeared’ and were not available in the EPC portal for the requisite 28 days however, they were available via the SDPBC’s procurement website AND their procurement management portal, DemandStar.com¹⁵ for a total of 31 days, which is more than the minimum requirement for E-rate compliance.

It is noteworthy that 2017/2018 was only the second-year applicants were required to file Form 470(s) in EPC and follow USAC’s procedural guidance prescribing the method in which Form 470s that were accompanied by an RFP should be handled. Additionally, EPC was still experiencing significant technical ‘glitches’ in all modules of the platform, including the Form 470 and its ‘upload RFP documents’ feature.

In fact, FCC Chairman Ajit Pai issued a letter to USAC’s CEO on April 17, 2017¹⁶ (almost 4 months AFTER SDPBC posted its 2017 Form 470) in which he indicated, “...***there are serious flaws in USAC’s administration of the E-rate program...***” and, “***The specific problem involves USAC’s development and roll-out of the online E-rate Productivity Center (EPC).***” The letter goes on to state, “***Things have not gone according to plan. The EPC was originally scheduled to be fully operational for applicants by the opening of the funding year 2016 filing window. Yet today [April 17, 2017] it is still not adequately functional...***” Page 2 of Chairman Pai’s letter indicates, “***The current state of affairs is unacceptable,***” and, includes a mandate that “***USAC must ensure that it is taking all necessary measures to swiftly resolve issues that continue to plague the system [and] focus first on supporting and completing the basic EPC functionality needed...***”

Needless to say, the ‘problems’ with EPC were, and are, common knowledge. Most recently, the Commission adopted FCC 18-118 (August 7, 2018)¹⁷ granting relief for the Pribilof School District by waiving the FCC Form 471 filing window for FY 2016 due to a calamity of EPC related problems

¹⁵ We have described DemandStar and its role with the School District of Palm Beach County’s standard procurement processes multiple times throughout the past two taxing years.

¹⁶ <https://www.fcc.gov/document/chairman-pai-letter-regarding-usacs-administration-e-rate>

¹⁷ <https://www.fcc.gov/document/fcc-grants-e-rate-relief-remote-alaskan-school-district>

experienced by the applicant. While the specific circumstances presented by SDPBC are not precisely the same as Pribilof, the underlying cause IS the same; continued EPC related problems. In fact, FCC Commissioner Michael O'Reilly issued a statement¹⁸ in conjunction with FCC 18-118 in which he stated, *"The EPC system's technical problems are well-documented, and I understand that the Chairman and staff are working with USAC to address them, so I will not belabor them here..."*. Commissioner O'Reilly statement continued with a proffered suggestion that, *"...I recommend that the Commission take the next available opportunity to codify a rule that any **funding decision** be communicated by letter and distributed directly to the applicant's designated contact(s), preferably by electronic means. Moreover, such decisions should contain a clear statement of each basis for the decision, including **citations to any relevant statutory provision or Commission rule, order, or policy**"*¹⁹. His statement concludes with, *"Applicants and the American people deserve no less."*

It should again be noted that USAC has NOT provided citations to any **relevant** statutory provision[s] or Commission rule[s], order[s], or policy[ies] in any of the denials issued to date.

In our further research in preparation for this filing, we have come across an interesting set of circumstances that may have contributed to the 'missing' documents in EPC/Form 470.

This Form 470 went from a "Send for Certification" status, back to an "Edit Form" status and back to a "Certify" status, all in the same day, January 31, 2017. It also appears there was a problem with the acceptance of the 'task' for certification.²⁰

Schedule of Events on January 31, 2017 (all times EST)

1. 2:04pm – email from Bruce Walsh indicating all documents uploaded to DemandStar and requesting a modification to the Form 470 regarding the 'range' of bandwidth listed in the pre-populated drop-down options.
2. 2:23pm – email response to Bruce Walsh that the range should be updated to include a higher upper range.
3. 2:27pm – email response from Bruce Walsh indicating that he was unable to make the change to the bandwidth range.
4. 2:34pm – email exchange that describes a 'stuck' status in that since the form was sent for certification, the "task" was now with SDPBC and the form was un-editable by anyone else.
5. 2:36pm – email from Bruce Walsh that he does not know how to re-assign the 'task' to someone else and there does not appear to be an option for that in his portal view/rights.
6. 2:36pm – another email trying to figure out what Bruce Walsh is seeing (or not seeing) on his end because as stated, once the 'task' is accepted by a user, no one but that user can view the form and/or options for the form.

¹⁸ Id at page 7.

¹⁹ As stated on pages 6 and 12 of this document.

²⁰ [Email Chain Form 470 170049830 01312017](#).

7. 2:42pm – email from Bruce Walsh indicating he ‘figured out how to update it’.
8. 2:43pm – email to Bruce Walsh indicating he should update the QUANTITY of circuit(s) as well.
9. 2:45pm – confirmation from Bruce Walsh that he sees the QUANTITY field and confirms the quantity should be “2”.
10. 2:46pm – final ‘check’ email after edits and before certification.
11. 2:51pm – email from Bruce Walsh that when he clicks on ‘edit service request’, the quantity box is not available as an ‘editable’ field. Indicates that he will leave it blank because he cannot edit it.
12. 2:54pm – email to Bruce Walsh that he should just edit the narrative in order to cover himself and in an effort to maintain compliance.
13. 2:58pm – email from Bruce Walsh that he updated the narrative and noted that all of the specifications and bandwidth requirements are [also] outlined in the ‘bid’ (ITB #17C-52J also posted on DemandStar.com) in the event there were any questions or confusion.
14. 3:00pm – email to Bruce Walsh commiserating with the EPC challenges he faced.
15. 3:02pm – Form 470 #170049830 is finally CERTIFIED.

Sometime amongst all of the back and forth with the form in EPC, three of the five attachments that were originally uploaded to the form ‘disappeared’. Is that fallout from the status changes and edits that were made all in the span of about 3 hours? Unfortunately, we really have no idea. However, we are aware of instances such as this happening all throughout EPC and its various modules and, given the known issues with the EPC platform, it is reasonably within the realm of possibility.

The frustration we have had with continuing to receive denial(s) from USAC related to this issue are really two-fold.

First, we have repeatedly demonstrated that despite these documents not being available as part of the original document upload to Form 470 #170049830 in EPC, **each response received** by the SDPBC **included all of the documents** because all the information and associated documents were simultaneously available at DemandStar.com AND on the District’s procurement website. In fact, DemandStar.com is the likely source that any interested respondent would have used to download the documents associated with ITB # 17C-52J because the “Download RFP Documents” feature within an FCC Form 470 filed in EPC simply did not/does not work very well. The fact there were three documents ‘missing’ from the FCC Form 470 in EPC was discovered quite by accident during the document dump associated with the Selective Review Information Request. Also noteworthy is that no vendor complained they could not access the documents because they were available to all via Demandstar. If all vendors had access to the same information, and no vendors expressed any concern, where is the rule violation?

In fact, the narrative section of Form 470 #170049830 included the following additional and substantive information which supplemented the document upload associated with USAC’s procedural guidance:

Quantities on this Form 470 are estimates. This bid is for a total of two circuits. All details on specifications, bandwidths, requirements, and terms are outlined in the Bid # 17C-52j: Internet Services. There is a copy of the bids submitted with this Form 470 on USAC's website. However, the original RFP and all prevailing documents, including addenda, are posted at the district website at the following URL: www.Demandstar.com or for additional information go to: <http://www.palmbeachschools.org/purchasing/bids/purch/vendor/ebidding.pdf>. Any questions concerning conditions and specifications must be submitted by email to Mr. Justin Jaksa at Justin.jaksa@palmbeachschools.org no later than 5:00 p.m. EST, on February 13, 2017. Questions received in writing by the time and date specified will be answered in writing and posted on DemandStar and as part of the FCC Form 470 posting in the E-Rate Productivity Center.

Secondly, we have a significant concern that USAC's administrative decisions to continue to deny the FRNs related to this issue are not based on rule violation(s). Rather, they are grounded in a perceived authority to deny funding based on a violation of an administrative procedure, related solely to the implementation of EPC, which USAC has mistakenly couched as a rule or policy, when in fact USAC is not authorized to make policy, per statute.

The rules governing USAC's administrative authority across all universal service support mechanisms, including the Schools and Libraries program are codified as follows:

§54.701 Administrator of universal service support mechanisms.

(a) The Universal Service Administrative Company is appointed the permanent Administrator of the federal universal service support mechanisms...

§54.702 Administrator's functions and responsibilities.

(c) The Administrator **may not make policy** (emphasis added), **interpret unclear provisions of the statute or rules** (emphasis added), or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.²¹

Recently, the Ohio Information Technology Centers submitted comments to a proceeding requesting comments related to OMB's approval or extension of FCC Forms 470 and 471.²² Their comments present

²¹ https://www.ecfr.gov/cgi-bin/text-idx?SID=0e2a5c1047a0e7f1886514fc179e645e&mc=true&node=pt47.3.54&rgn=div5#se47.3.54_1701

²² Ohio Information Technology Center's Comments in response to Notice and Request for Comments on

the FCC rules and regulations noted above in a context that is germane to our contention when they proposed,

“The FCC must re-assert its obligation to control administration of the E-rate Program.”

“When Congress created the E-rate program it provided that the single entity proposed by the Commission to administer the universal service support mechanisms must be **“limited to implementation of the FCC rules for applications for discounts and processing the applications necessary to determine eligibility for discounts under section 254(h)”** and **“may not administer the programs in any manner that requires that entity to interpret the intent of Congress in establishing the programs or interpret any rule promulgated by the Commission in carrying out the programs, without appropriate consultation and guidance from the Commission.”**²³

“When the FCC created USAC,²⁴ the FCC established very clear **limitations on USAC’s authority** when it stated affirmatively “USAC would apply its expertise to interpreting and applying existing decisional principles, but **would not make policy or create the equivalent of new guidelines** (emphasis added), or interpret the intent of Congress.”²⁵ The FCC further emphasized that: USAC’s function under the revised structure will be exclusively administrative. **USAC may not make policy** (emphasis added), interpret unclear provisions of the statute or rules, or interpret the intent of Congress. The FCC further emphasized that:

USAC’s function under the revised structure will be exclusively administrative. USAC may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. ...Where the Communications Act or the Commission’s rules are unclear, or do not address a particular situation, USAC must seek guidance from the Commission on how to proceed. ... The Commission retains ultimate control over the operation of the federal universal service support mechanisms through its authority to establish the rules governing the support mechanisms and through its review of administrative decisions that are appealed to the Commission.²⁶

Information Collection Being Reviewed by The Federal Communications Commission, Universal Service – Schools and Libraries Universal Service Program, FCC Forms 470, and 471, OMB 3060-0806, WC 13-184, CC 02-6, August 2, 2018 at IV.

<https://ecfsapi.fcc.gov/file/108022666512555/Comments%20of%20Ohio%20ITCs%20-%20Notice%20and%20Request%20for%20Comment%20on%20Information%20Co..pdf>

²³ Section 2005(b)(2)(A).

²⁴ Universal Service (Appointment of Universal Service Administrative Co. as Permanent Administrator), 14 CR 232 (FCC 1998) (“Appointment of USAC”)

²⁵ Appointment of USAC at ¶15 (emphasis added)

²⁶ Id at ¶16.

USAC’S SUBJECTIVE OPINION DOES NOT WARRANT FULL DENIAL

Rebuttal of Reason #2 for Denial of FRNs and USAC Appeals

USAC’s appeal denial included the following language:

*Additionally, based on the information provided during our review, we determined that the competitive bidding process that was not fair and open, and therefore, the FRN is denied. FCC rules governing the E-rate Program state that the competitive bidding process must be fair and open. **Circumstances should not be present that would give an unfair competitive advantage to any service provider and all bidders must be treated the same.** The goal of the competitive bidding process is to have as many bidders as possible respond to an FCC Form 470, RFP, or other solicitation method so that the applicant can receive better service and lower prices. **Applicants should not set restrictions that limit the number of prospective bidders and/or deters other service providers from submitting a bid for services which may be more cost effective and interferes with the fair and open competitive bidding process required by FCC Rules.** In your appeal, you did not demonstrate that USAC’s determination was incorrect. Consequently, your appeal is denied.*

Again, The School District of Palm Beach County is in the unenviable position of having to presume what USAC is referring to in its recent appeal denials related to the FRNs in this pleading²⁷ considering the language in the denial does not provide the specific ‘circumstance’ that prompted the denial nor does it cite any relevant FCC statute or rule.

Based on the sheer volume of questions about a particular component of SDPBC’s procurement process we received through the various reviews these FRNs were subject to, we *presume* USAC has taken issue with ITB 17C-52J’s stated REQUIREMENT that “The prime contracted vendor must be listed in the Gartner Magic Quadrant (“GMQ”) for Network Services, Global.” This is further supported by a phone call from a Senior USAC Official we received on April 10, 2017 indicating USAC had received a “complaint” from an unnamed person (whom we assume was one of the ‘losing’ respondents to the solicitation) alleging an unfair competitive bidding process.²⁸ Again, it is noteworthy that there were no

²⁷ We submitted a Customer Service Case (#244743) in EPC on 8.6.18 requesting clarification of the non-specific reasoning USAC provided in its secondary reason for denial of our funding requests and subsequent appeals. We received a response from USAC that simply reiterated the statement for which we were seeking clarification which is a representative response to a substantive question without repeated follow-up. Please reference attached file: [FY2017-18_SCPBCo_IA Denial ClarRequest_080618.pdf](#)

²⁸ It continues to be a concern that USAC seemingly considers “Whistleblower/Complaint Calls” as an opportunity to put an applicant in a position to ‘prove a negative’ (that something did not happen) and appears to take the alleged violation as an absolute truth from the outset. There are often (not always) disgruntled service providers who use the Whistleblower/Complaint process in a manner to intentionally cause trouble and/or delays for an E-rate applicant.

complaints submitted to SDPBC, only to USAC with the assumed intent to wreak havoc on the approval process.

We do not believe USAC is taking issue with the manner in which the disqualification factor is presented considering they have long provided guidance that “Disqualification Factors” are allowable provided the following conditions are met:²⁹

Disqualification Factors

You can set out specific requirements and disqualify bids that do not meet those requirements as long as you clearly identify the disqualification reasons on your FCC Form 470 and/or your RFP. Disqualification reasons should be determined prior to any substantive bid evaluation.

Disqualification reasons cannot be scored on a range, but rather are binary – i.e., the service provider either meets the standard or does not meet the standard.

The following items are examples of bid disqualification reasons:

1. Service provider must register with the state procurement office
2. Service provider must have a Service Provider Identification Number (SPIN), also known as the service provider's 498 ID
3. Service provider must have a CORES ID
4. Service provider must be bonded

If an applicant specifies these four bid disqualification reasons on its FCC Form 470 and/or RFP, bids from service providers that do not meet all four requirements can be disqualified and not evaluated further. The remaining bids must then be evaluated with the price of the eligible products and services as the factor that is weighted most heavily in the bid evaluation.

This guidance is quite direct, and the SDPBC's solicitation and competitive bidding process is fully compliant with it.

Disqualification factors must be binary.

Yes. The disqualification factor IS BINARY. Either the respondent is or is not listed in the stated GMQ.

Applicants must clearly identify the disqualification reasons on [their] FCC Form 470 and/or [their] RFP.

Yes. The district's disqualification reasons were stated upfront in the solicitation documents. All potential respondents had advance knowledge of the requirement(s) from the Bid materials, Pre-bid Meeting, resulting Q/A sheet and subsequent Addendum posted on the District's Procurement website, DemandStar and EPC. The requirement was also reiterated in Addendum #1 in response to a prospective vendor's question.³⁰

²⁹ <https://www.usac.org/sl/applicants/step02/evaluation.aspx>

³⁰ See attached [SDPBC 17C-52J Internet Services Addendum #1 02152017](#)

The School District of Palm Beach County believes that USAC's statements, "*Circumstances should not be present that would give an unfair competitive advantage to any service provider and all bidders must be treated the same*" and, "*Applicants should not set restrictions that limit the number of prospective bidders and/or deters other service providers from submitting a bid for services which may be more cost effective and interferes with the fair and open competitive bidding process required by FCC Rules*" actually means is that USAC determined that the stated requirement that, "The prime contracted vendor must be listed in the Gartner Magic Quadrant ("GMQ") for Network Services, Global" **was too restrictive**.³¹ SDPBC again contends that this 'determination' by USAC is in violation of FCC rules are outside the scope of USAC's authority for two reasons:

1. It effectively creates policy as it adds a requirement to FCC regulation(s) that are silent on the issue)³² and long-standing guidance related to setting restrictions for E-rate competitive bid solicitations, and;
2. Their decision appears to be completely subjective considering there were 12 vendors listed in the GMQ that could have provided a response, which is hardly a 'limited number'.

Gartner's Magic Quadrant (GMQ) refers to a series published by IT consulting firm Gartner, of market research reports that rely on proprietary qualitative data analysis methods to demonstrate market trends, such as direction, maturity and participants. Their analyses are conducted for several specific technology industries and are periodically updated. Gartner rates vendors upon two criteria: completeness of vision and ability to execute using a methodology which Gartner does not disclose. Large scale customers regularly use these evaluations to identify and rate excellence and suitability of a manufacturer and/or service provider.

Nowhere in FCC regulations or USAC guidance is there a qualifier that USAC is authorized to determine whether a disqualification factor is "appropriate" or "inappropriate".

The GMQ (at the time of the solicitation and Form 470) identified 12 potential service providers for Network Services, Global related to the District's FY2017 FCC Form 470 #170049830 and ITB

³¹ This statement is also supported by comments made in the April 10, 2017 phone call we received from a Senior USAC Official that indicated an initial 'snap' decision that the "complaint" regarding the GMQ requirement supported an 'unfair competitive advantage'.

³² §54.503 Competitive bidding requirements at <https://www.ecfr.gov/cgi-bin/text-idx?SID=0e2a5c1047a0e7f1886514fc179e645e&mc=true&node=pt47.3.54&rgn=div5#se47.3.54>

#17C-52J.³³ USAC appears to believe that GMQ’s identified 12 potential service providers for Category 1 “Network Services, Global” was a “limited” number.

We continue to disagree that requiring a prime contractor to be listed in the GMQ stifles a fair and open competitive bidding process as defined in FCC statute. Gartner identifies strong and suitable candidates, but those providers still need to respond to very exacting solicitations and review processes from customers seeking their products and/or services. Competition occurs naturally because the GMQ does not set any pricing guidelines related to its identified providers. The use of the GMQ does not result in an unfair or otherwise ‘restrictive’ competitive bid process in any shape, form or fashion and USAC’s subjective opinion does not change those facts.

REQUEST FOR RELIEF

The evidence presented throughout this request indicates a clearly compliant competitive bidding process, despite USAC’s protestations to the contrary. There is no suggestion that SDPBC committed waste, fraud or abuse of the E-rate program and denial of these funding requests has placed undue hardship upon the students served by The School District of Palm Beach County. Finally, it is clear the only victim of the denials is The School District of Palm Beach County and continued denial of this critical funding does not further the goals of the program nor is it in the public’s best interest.

We appreciate your consideration of our request, respectfully request expedited review of this pleading and look forward to successful resolution.

Regards,

/s/

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³³ <https://www.gartner.com/doc/3607417> This number was updated on February 13, 2017 to include 16 vendors listed in the GMQ which supports the validity of the reasonable and un-biased process that Gartner uses to vet potential service providers’ qualifications in the various quadrants identified.