

ENA router as a backup connection. The Contractor will provide and maintain data connectivity between the ENA NOC and any of its' operational sites as needed.

- A.11.3. Office Space. The State shall provide a reasonable amount of office space and utilities for the Contractor to locate and operate the ENA NOC at the Andrew Johnson Building in Nashville, TN. The Contractor personnel will have 24 hour access within the framework of state building security regulations that apply to senior level state managers.
- A.11.4. Toll-Free Telephone Service. The Contractor will provide 1-800 toll free telephone service for authorized K-12 public school personnel to contact the ENA NOC.
- A.11.5. Circuit information. The State will provide all existing circuit information, along with circuit numbers and network diagrams.
- A.11.6. Maintenance Contracts. The State will provide the Contractor all necessary information on maintenance contracts for existing equipment as described in the RFP. This will allow the Contractor to coordinate services to manage the ENA network.
- A.11.7. Agency Letters. The State agrees to provide the Contractor with copies of letters of agency to be sent to any of its' existing service providers prior to the signing of this Agreement. The letters of agency will serve as the State's authorization for the Contractor to act on behalf of the State with regard to changing existing services.
- A.11.8. Replacement spares. All existing replacement spares that are currently maintained by the State will be transferred as part of the State's equipment, in exchange for the salvage value. Such items shall be maintained by the Contractor at the ENA NOC to support the existing replacement program. The Contractor will determine and provide all items and quantities to be maintained for the life of the Contract.
- A.11.9. State-Provided Software. Any software provided by the State pursuant to this contract will be licensed pursuant to the software manufacturer's standard software licensing agreement.
- A.11.10. Payment. The State agrees to pay within forty-five (45) days after receipt of the invoice covering the delivered items or services in accordance with the Prompt Pay Act of 1985 (TCA 12-4-703). The State is not responsible for any discounts received by the Contractor from the E-rate Fund, as described in the proposal. The State shall pay the one-time costs and recurring monthly cost for basic service, upon provision of service, as defined as "Total All Payments" (line d.v) Exhibit 3 for No E-Rate funding. The payment for the ConnecTEN network will be received as a credit that will be applied by the State against invoices received from ENA by September 30, 1998 for basic services. If it is determined by the State, in the State's sole discretion, that such payment arrangement is not authorized, then ENA shall pay the State of Tennessee the purchase price for the network by cashier's check or similar form acceptable to the State, on July 1, 1998. To the extent that E-Rate funding is available, the Contractor will apply all E-Rate supplements to enhancing the basic services as defined in Exhibit 1. The State may withhold payment for failure to respond as stated in this contract or other non-performance of responsibilities.
- A.11.11. In the event the substance of the transfer of ConnecTEN that is described in the Proposal is not approved separately and expressly in writing by May 15, 1998, by the Commissioner of Finance and Administration, the Comptroller, and the Commissioner of Education, then this contract is voidable by the State at the State's option upon written notice. The parties agree that such finding shall not place either party in breach of contract or result in either party being liable to the other for any amount or for any type of damages.
- A.11.12. State Backbone. Pursuant to Section 5.3.4 of the RFP, the State will provide to the Contractor the use of the State Backbone, State routers, modem pools with dial-up access lines at 28kbps, and Internet services. The State, through the Office of Information Resources, will provide a T-1 capacity access link in each of the 95 counties from the County ECR to the State Backbone connection. Such service shall be provided to the Contractor for a total charge of \$2,013,200

annually. Contractor will have access to all existing ConneCTEN network sites and coordinate with OIR for access to State Backbone network sites. The State will coordinate on implementation and routing to establish the service levels in the Contractor's response.

A.12 Incorporation of Proposal

The Request for Proposals for RFS 97-2, as Amended and as clarified by the written answers to vendor questions, and the Contractor's response to RFS 97-2, as supplemented by clarifications requested by the State are hereby incorporated into this contract.

B.

CONTRACT TERM:

- B.1 Contract Term. This Contract shall be deemed effective as of March 20, 1998, upon full execution with defined services to be provided for the period commencing on July 1, 1998 and ending on Dec. 31, 2001. The State shall have no obligation for services rendered by the Contractor which are not performed within the specified period.

C. PAYMENT TERMS AND CONDITIONS:

- C.1. Maximum Liability. In no event shall the maximum liability of the State under this Contract exceed Twenty-five million two hundred eighty thousand dollars (\$25,280,000.00), per the No E-Rate funding schedule, Exhibit 3. This amount shall constitute the entire compensation due the Contractor for the Service and all of the Contractor's obligations hereunder regardless of the difficulty, hours worked, or materials or equipment required, or the FCC E-Rate discounts due to the proposer. The Contract Amount includes, but is not limited to, all applicable taxes, fees, overhead, profit, and all other direct and indirect costs incurred or to be incurred by the Contractor.
- C.2. Compensation Firm. The maximum liability of the State under this Contract is firm for the duration of the Contract and is not subject to escalation for any reason unless amended.
- C.3. Payment Methodology. Upon completion and acceptance of the work described in Section A of this Contract, the Contractor shall submit an invoice, in form and substance acceptable to the State and with all of the necessary supporting documentation, prior to any payment. Contractor shall also submit an invoice, in form and substance acceptable to the FCC E-Rate Fund and with all of the necessary supporting documentation, and receive payment according to FCC E-Rate Fund regulations. The State shall in no way be responsible for the discounted portion that the FCC E-Rate Fund has agreed to pay to the contractor other than the State's obligations to submit Form 470, 471 and 486 to the FCC E-Rate Fund.
- C.4. Travel Compensation. Compensation to the Contractor for travel, meals, or lodging shall be in the amount of actual costs, subject to maximum amounts and limitations specified in the "State Comprehensive Travel Regulations," as they are amended from time to time. There shall be no travel compensation without the prior approval of the State, and will not exceed ten thousand dollars (\$10,000) during the period of the Contract.
- C.5. Payment of Invoice. The payment of the invoice by the State shall not prejudice the State's right to object to or question any invoice or matter in relation thereto. Such payment by the State shall neither be construed as acceptance of any part of the work or service provided nor as an approval of any of the amounts invoiced therein.
- C.6. Invoice Reductions. The Contractor's invoice shall be subject to reduction for amounts approved by the FCC for E-Rate discounts. The Contractor's invoice shall also be subject to reduction for amounts included in any invoice or payment theretofore made which are determined by the State, on the basis of audits conducted in accordance with the terms of this contract, not to constitute proper remuneration for compensable services.
- C.7. Deductions. The State reserves the right to deduct from amounts which are or shall become due and payable to the Contractor under this or any contract between the Contractor and the State of Tennessee any amounts which are or shall become due and payable to the State of Tennessee by the Contractor.
- C.8. Automatic Deposits. The Contractor shall complete and sign an "Authorization Agreement for Automatic Deposits (ACH Credits) Form." This form shall be provided to the Contractor by the State. Once this form has been completed and submitted to the State by the Contractor, all payments to the Contractor, under this or any other contract the Contractor has with the State of Tennessee, shall be made through the State of Tennessee's Automated Clearing House wire transfer system. The Contractor shall not invoice the State for services until the Contractor has completed this form and submitted it to the State. The debit entries to correct errors authorized by the "Authorization Agreement for Automatic Deposits Form" shall be limited to those errors detected prior to the effective date of the credit entry. The remittance

advice shall note that a correcting entry was made. All corrections shall be made within two banking days of the effective date of the original transaction. All other errors detected at a later date shall take the form of a refund or, in some instances, a credit memo if additional payments are to be made.

D. STANDARD TERMS AND CONDITIONS:

- D.1. Required Approvals. The State is not bound by this Contract until it is approved by the appropriate State officials in accordance with applicable State laws and regulations.
- D.2. Modification and Amendment. This Contract may be modified only by a written amendment executed by all parties hereto and approved by the appropriate State officials in accordance with applicable State laws and regulations.
- D.3. Termination for Convenience. The State may terminate the Contract by giving the Contractor at least sixty days (60) days written notice before the effective termination date. In that event, the Contractor shall be entitled to receive equitable compensation for satisfactory, authorized services completed as of the termination date.
- D.4. Termination for Cause. If the Contractor fails to fulfill its obligations under this Contract in a timely or proper manner, or if the Contractor violates any terms of this Contract, the State shall have the right to immediately terminate the Contract and withhold payments in excess of fair compensation for completed services. Notwithstanding the above, the Contractor shall not be relieved of liability to the State for damages sustained by virtue of any breach of this Contract by the Contractor.
- D.5. Subcontracting. The Contractor shall not assign this Contract or enter into a subcontract for any of the services performed under this Contract without obtaining the prior written approval of the State. If such subcontracts are approved by the State, they shall contain, at a minimum, sections of this Contract pertaining to Conflicts of Interest and Nondiscrimination (Sections D.6 and D.7).
- D.6. Conflicts of Interest. The Contractor warrants that no part of the total Contract Amount shall be paid directly or indirectly to an employee or official of the State of Tennessee as wages, compensation, or gifts in exchange for acting as an officer, agent, employee, subcontractor, or consultant to the Contractor in connection with any work contemplated or performed relative to this Contract.
- D.7. Nondiscrimination. The Contractor hereby agrees, warrants, and assures that no person shall be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination in the performance of this Contract or in the employment practices of the Contractor on the grounds of handicap and/or disability, age, race, color, religion, sex, national origin, or any other classification protected by Federal, Tennessee State constitutional, or statutory law. The Contractor shall, upon request, show proof of such nondiscrimination and shall post in conspicuous places, available to all employees and applicants, notices of nondiscrimination.
- D.8. Records. The Contractor shall maintain documentation for all charges against the State under this Contract. The books, records, and documents of the Contractor, insofar as they relate to work performed or money received under this contract, shall be maintained for a period of three (3) full years from the date of the final payment and shall be subject to audit at any reasonable time and upon reasonable notice by the State, the Comptroller of the Treasury, or their duly appointed representatives. The financial statements shall be prepared in accordance with generally accepted accounting principles.
- D.9. Monitoring. The Contractor's activities conducted and records maintained pursuant to this Contract shall be subject to monitoring and evaluation by the State, the Comptroller of the Treasury, or their duly appointed representatives.
- D.10. Progress Reports. The Contractor shall submit brief, periodic, progress reports to the State as requested.
- D.11. Strict Performance. Failure by any party to this Contract to insist in any one or more cases upon the strict performance of any of the terms, covenants, conditions, or provisions of this Contract shall not be construed as a waiver or relinquishment of any such term, covenant, condition, or provision. No term or

condition of this Contract shall be held to be waived, modified, or deleted except by a written amendment signed by the parties hereto.

D.12. Independent Contractor. The parties hereto, in the performance of this Contract, shall be acting in their individual capacities and not as employees, partners, joint venturers, or associates of one another. It is expressly acknowledged by the parties hereto that such parties are independent contracting entities and that nothing in this Contract shall be construed to create an employer/employee relationship or to allow either to exercise control or direction over the manner or method by which the other transacts its business affairs or provides its usual services. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purpose whatsoever.

The Contractor, being an independent contractor and not an employee of the State, agrees to carry adequate public liability and other appropriate forms of insurance, including adequate public liability and other appropriate forms of insurance on the Contractor's employees, and to pay all applicable taxes incident to this Contract.

D.13. State Liability. The State shall have no liability except as specifically provided in this Contract.

D.14. Hold Harmless. The Contractor agrees to indemnify and hold harmless the State of Tennessee as well as its officers, agents, and employees from and against any and all claims, liabilities, losses, and causes of action which may arise, accrue, or result to any person, firm, corporation, or other entity which may be injured or damaged as a result of acts, omissions, bad faith, negligence, or willful misconduct on the part of the Contractor, its employees, or any person acting for or on its or their behalf relating to this Contract. The Contractor further agrees it shall be liable for the reasonable cost of attorneys for the State in the event such service is necessitated to enforce the terms of this Contract or otherwise enforce the obligations of the Contractor to the State.

In the event of any such suit or claim, the Contractor shall give the State immediate notice thereof and shall provide all assistance required by the State in the State's defense. The State shall give the Contractor written notice of any such claim or suit, and the Contractor shall have full right and obligation to conduct the Contractor's own defense thereof. Nothing contained herein shall be deemed to accord to the Contractor, through its attorney(s), the right to represent the State of Tennessee in any legal matter, such rights being governed by *Tennessee Code Annotated*, Section 8-6-106.

D.15. State and Federal Compliance. The Contractor shall comply with all applicable State and Federal laws and regulations in the performance of this Contract.

D.16. Governing Law. This Contract shall be governed by and construed in accordance with the laws of the State of Tennessee. The Contractor agrees that it will be subject to the exclusive jurisdiction of the courts of the State of Tennessee and the courts of the United States which are located within the State of Tennessee in actions that may arise under this Contract. The Contractor acknowledges and agrees that any rights or claims against the State of Tennessee or its employees hereunder, and any remedies arising therefrom, shall be subject to and limited to those rights and remedies, if any, available under *Tennessee Code Annotated*, Sections 9-8-101 through 9-8-407.

D.17. Completeness. This Contract is complete and contains the entire understanding between the parties relating to the subject matter contained herein, including all the terms and conditions of the parties' agreement. This Contract supersedes any and all prior understandings, representations, negotiations, and agreements between the parties relating hereto, whether written or oral.

D.18. Severability. If any terms and conditions of this Contract are held to be invalid or unenforceable as a matter of law, the other terms and conditions hereof shall not be affected thereby and shall remain in full force and effect. To this end, the terms and conditions of this Contract are declared severable.

D.19. Headings. Section headings of this Contract are for reference purposes only and shall not be construed as part of this Contract.

E. SPECIAL TERMS AND CONDITIONS:

E.1. Conflicting Terms and Conditions. Should any of these special terms and conditions conflict with any other terms and conditions of this Contract, these special terms and conditions shall control.

E.2. Force Majeure. Contractor shall not be responsible for performance standards due to conditions that are due to Acts of God.

E.3. Communications and Contacts. All instructions, notices, consents, demands, or other communications required or contemplated by this Contract shall be in writing and shall be made by facsimile transmission, by overnight courier service, or by first class mail, postage prepaid, addressed to the respective party at the appropriate facsimile number or address as set forth below or to such other party, facsimile number, or address as may be hereafter specified by written notice.

The State:

Jacqueline B. Shrago, Project Director, ConnectEN
Department of Education, 6th Floor
710 James Robertson Pkwy., Nashville, TN. 37243
(o) 615-532-1229 (fax) 615-532-4791

The Contractor:

Albert F. Ganier, III, President
Education Networks of America
209 10th Avenue, South, Suite 500, Nashville, Tennessee 37203
(o) 615-429-5178
(fax) 615-252-5425

All instructions, notices, consents, demands, or other communications shall be considered effectively given as of the day of delivery, as of the date specified for overnight courier service delivery, as of three (3) business days after the date of mailing; or on the day the facsimile transmission is received mechanically by the telefax machine at the receiving location and receipt is verbally confirmed by the sender if prior to 4:30 p.m. CST. Any communication by facsimile transmission shall also be sent by United States mail on the same date of the facsimile transmission.

IN WITNESS WHEREOF:

Education Networks of America, LLC:



Albert F. Ganier, III

DATE: 4/7/98

Department of Education:



Jane Walters, Commissioner

DATE: 4-7-98

APPROVED:

DEPARTMENT OF FINANCE AND ADMINISTRATION:



John D. Ferguson, Commissioner

DATE: 4/7/98

COMPTROLLER OF THE TREASURY:



William R. Snodgrass, Comptroller of the Treasury

DATE: 4-7-58



DON SUNDQUIST
GOVERNOR

TENNESSEE
STATE DEPARTMENT OF EDUCATION
6TH FLOOR, GATEWAY PLAZA
710 JAMES ROBERTSON PARKWAY
NASHVILLE, TN 37243-0375

JANE WALTERS, Ph.D.
COMMISSIONER

April 2, 1998

Mr. Paul C. Ney, Jr., Esq.
Doramus, Trauger & Ney
The Southern Turf Building
222 Fourth Avenue North
Nashville, Tennessee 37219

Dear Mr. Ney:

On March 30, 1998, I received your letter of protest and petition for Stay of Award based on RFS No. 97-2 Amended, based on the Notice of Intent to Award the contract to Education Networks of America, LLC (ENA) issued March 20, 1998.

I have investigated each of the allegations in your letter. As a result of my investigations, discussions, and a careful study of all the documents, I have reached the following conclusions:

1. ENA passed the required test and so did ISIS2000.
2. ENA's proposal does not misrepresent the E-rate Rules and Funding.
3. The Secretary of State has provided the department with a Certificate of Existence for Education Networks of America, LLC, which makes it a legal entity to contract with.
4. ENA has provided proper documentation of its financial resources.
5. The cost proposals were only submitted in separately sealed, marked envelopes, and remained sealed in the Commissioner's office.

Upon further review of the cost for services, I find that ISIS2000 submitted costs that were incomplete and confusing, while ENA was able to propose a plan that would maximize the state's dollars by securing Federal dollars while providing more services for the children of Tennessee.

Pursuant to T.C.A. Section 12-4-109 I have determined that there is no reason the contract should not be awarded to ENA. The protest is denied and I am recommending that the stay be lifted immediately.

Sincerely,

A handwritten signature in cursive script that reads "Jane Walters".

Jane Walters

Enclosure: Report from J. Shrago

Cc: Natasha K. Metcalfe, Esq. (via facsimile and state messenger)
Patricia J. Cottrell, Esq. Wyatt, Tarrant & Combs (via facsimile and U.S. Mail)
Jeff Husted, ISIS2000 (via facsimile and U.S. Mail)
Albert F. Ganier, III, Education Networks of America (via facsimile and U.S. Mail)



DON SUNDQUIST
GOVERNOR

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STATE DEPARTMENT OF EDUCATION
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NASHVILLE, TN 37243-0375

JANE WALTERS, Ph.D.
COMMISSIONER

April 2, 1998

To: Jane Walters

From: Jackie Shrago

Re: Report in Response to ISIS2000 Letter of Protest and Petition for Stay of Award, RFP 97-2

1. ENA Failed to Complete the Required Tests.

Response:

1.1. The State defined two tests of proposer equipment and communications lines as defined in RFP section 5.2.4.2.3. These tests had two purposes. Purpose (1) to have proposers offer equipment and communication lines which are currently on the market and that provide equivalent functionality to the existing network (defined as "throughput" in technical terms). Purpose (2) to have proposers demonstrate that their equipment and lines will work with the existing state network backbone. Section 3.5 stated, "The use of the terms Must/ Shall/ Will/ Should indicates a specific requirement which the State of Tennessee, Department of Education considers essential to this Request for Proposal. Failure to adhere to this definition *may* result in bidder disqualification."

The State determined that both vendors, ENA and ISIS2000, met the requirements of the RFP for the two demonstration tests. Each proposer relied on different approaches to meet the RFP requirements, therefore the tests varied because the proposals were different.

1.2. Both vendors completed the test for 30 computers at functionality equivalent to the existing network. Neither vendor completed the test for 60 computers at equivalent functionality to the existing network.

1.2.1. At the request of the State, ENA did not perform the 60-computer test because of time constraints. ENA had requested 3 hours to perform their tests; the state reduced the time to 1.5 hours because of the state's delay during the test period in establishing the benchmark for the existing network. ENA was prepared to perform the test for 60 computers, but the state determined that it would revise the tests required due to the time constraints. The state determined that it was not necessary to perform the 60-computer test given that (a) the test for 30 computers was successfully completed, and (b) the addition of an extra ISDN line to the same equipment was somewhat redundant. The state, however required that they perform the 120-computer test because it used a *different* type of communication line, i.e., a CDS line. ENA successfully performed this test.

1.2.2. ISIS2000 performed the 60-computer test but the result took 39% more time than the benchmark. This was substantially longer than the equivalent functionality of the benchmark. Again, because of the delay in starting the tests, the state determined that we would accept the results given that the test for 30 computers was successfully completed.

1.2.3. ISIS2000 never performed a throughput test of their proposed use of a frame relay circuit for a communications line.

1.3. The State determined on the day of the equivalent functionality test that both vendors met the requirement of the RFP, disregarding the test for 60-computers for both vendors. This was stated to both vendors on Saturday, March 7, 1998.

1.4. ENA successfully met all of the required tests of interoperability proving that its proposed types of lines and equipment operated successfully with the State network as required in the RFP. ISDN, CDS, and its proposed equipment were demonstrated at the Tennessee Tower test-bed. ISIS2000 argues that the dual ISDN was not demonstrated. A test of two ISDN lines is not functionally different from one ISDN line for the interoperability test.

1.5. The state determined, and specified to both vendors, that they had met the criteria of the RFP, therefore each was awarded two points in the technical evaluation. The ENA proposal was functionally responsive and ISIS2000's statement regarding ENA's proposal is untrue.

2. The ENA Cost Proposal Misrepresents the E-rate Rules and Funding.

Response to A: "The current network . . . is not eligible for E-rate funding as a capital expenditure . . ."

2.1. Schools are required to obtain services through a competitive bidding process that meets state procurement rules (Exhibit 1, FCC quote #1 and #2). The RFP states (section 5.3.1) that "Any consideration of purchase of existing equipment, resale or salvage of existing equipment shall be calculated as savings to the State and Local recurring resources." Further, in Cost Proposal Format Attachment 9.2, the state allows "Other Funding offered by proposer could be an amount offered to the state as salvage value for state's existing equipment." The State will not own any equipment, and is not making a capital expenditure, it will only procure services from ENA. The State is permitted on FCC form 471 to indicate one-time fees and monthly fees.

2.2. ISIS2000's concern about the eligibility of ENA's service charges to the State for providing the services on July 1 is based on ISIS2000's lack of understanding of the nature of ENA's proposal and the State's undertaking. ENA will be selling no equipment to the State (actually, ENA will purchase the ConnectTEN network), and the State will not submit to the FCC any requests for reimbursement to the State after June 30.

Response to B: "The ISDN tariffs used by ENA in their cost calculations are, however, not eligible for the E-rate funding pursuant to a February 3, 1998, Tennessee Regulatory Authority ruling . . ."

2.3. The State is procuring Internet access as specifically identified by the FCC as eligible for E-rate discounts. AOL, for example, or any other independent service provider is not required to disclose and have separately qualified every element of its operation (equipment purchased, personnel activities) which produces the service being purchased. Similarly, the state's purchase of services for its schools makes the eligibility of separate components of ENA's operational plans to deliver those services irrelevant since neither the schools nor the State are purchasing those separate elements (Exhibit 1, FCC quote 4)

Response to C: "The amount of time allocated to the web content belies ENA's claim that the web content that it proposes to provide is sufficiently 'minimal' and the most cost-effective means of providing the Internet service to spare that element of the ENA proposal from being characterized as non-eligible services."

- 2.4. The State is not purchasing web content services or any other separate components as described in the previous answer in paragraph 2.3. The State is purchasing the most cost-effective means of providing Internet access. The FCC has ruled that content must be "unbundled" from an Internet Service Provider's price, but that such pricing may include "minimal content" and "email service". (Exhibit 1, FCC quote #5). Further, the FCC has ruled that it urges schools to seek cost competitive solutions with maximum flexibility to meet school needs (Exhibit 1, FCC quote #6). The Department of Education fully expects that the costs pertaining to the services of the ENA proposal are well within the guidelines of the FCC definition of Internet access and will be approved as cost-effective.

Response to D: "ENA proposes to use an eight-person team representing 56,000 staff hours, to perform content, training and survey functions. These functions, contrary to ENA's cost proposal, are not eligible for E-rate funding, and they are beyond the scope of services requested by the State."

- 2.5. The State requested proposers to offer as much functionality as possible to meet school needs. The FCC has put forth hundreds of pages of rulings on the E-rate fund, but has consistently ordered that schools will decide how best to meet their requirements in order to obtain the best use of technology in the classroom (Exhibit 1, FCC quote #7). There are no specifications on what an Internet Service Provider can offer with the exception of content and the expectation that cost guidelines are met (described in "C" above). ISIS2000 quotes the FCC statement incorrectly in its letter.

The correct statement from the FCC (FCC97-157, paragraph 481) clarifies competitive bidding (see ISIS2000 appendix 2):

"First, in response to a number of commenters, we note that the Joint Board intentionally did not recommend that the Commission require schools and libraries to select the lowest bids offered but rather recommended that the Commission permit schools and libraries 'maximum flexibility' to take service quality into account and to choose the offering or offerings that meets their needs 'most effectively and efficiently,' where this is consistent with other procurement rules under which they are obligated to operate."

- 2.6. In terms of the State specified scope of services, following the state's procurement rules, a high priority was placed on "Responsiveness to K-12 needs" (RFP section 5.2.4.1.2.), "Variations due to Local Education Agencies" (RFP section 5.2.4.2.2), and limitations of technical capability of school personnel (RFP section 1.1, Statement of Purpose). ENA describes functions that are related solely to operating the network in support of non-technical personnel in 1600 schools. The staff time of ENA personnel represents 10 hours per school per year. The State has determined that this is definitely within the scope of the services requested.
- 2.7. ISIS2000 states in section 5.2.4.1.1 Scalability, that two of its top priorities, items 3 and 4 (page 6) are changes in the state backbone. The state backbone is the responsibility of the State Office of Information Resources and not the Department of Education, and therefore outside the scope of the RFP 97-2.

Response to E: The State apparently intends to award a \$74 million contract to ENA . . . , when ISIS2000 proposed comparable service to the State, for \$23 million less.

- 2.8. In the RFP Statement of Purpose (section 1.1), the State stated: "As much functionality as possible is desired within the State's budgetary constraints and discounts provided through the FCC E-rate Universal Service order. . ." Further in Cost Proposal Evaluation (section 6.2.7) the State specifies: "Under no circumstance can the Total State and Local funds exceed amount specified in Cost Proposal Format (\$17,783,322). The State further described that the Cost Proposal

evaluation could be "improved by "increasing "Total State, Local, Other Funding, Savings and associated FCC funds paid to proposer".

2.9. ISIS2000 raises a concern about ENA's costs. The State will pay either proposer the same amount of dollars. ENA demonstrated its understanding of the State's RFP requirements and maximized the opportunity of obtaining FCC E-rate funds on behalf of the State's children. The cost formula (RFP section 6.2.7) clearly showed, by comparison examples, that there was an advantage to including Other Funds in the proposer's submission (RFP section 5.4.5.1), because the State specified that it would apply such funds to increase network functionality. This was further clarified in writing in response in State's Written Clarifications Question 53, as quoted in this protest letter by ISIS2000. ISIS2000 did not raise objection during the RFP process, and therefore waived its rights to challenge the Cost Proposal evaluation.

2.10. The FCC expects that because schools or consortia are paying a portion of the costs, that they should have wide latitude in determining the services they need to meet their educational objectives and that they will use their best judgment in securing those through the competitive bidding process. (Exhibit 1, FCC Quote #3)

2.11. ISIS2000 states that ENA should be disqualified based on price being a primary factor in selecting a bid. The State specified 45 pages of requirements in its RFP as 'relevant factors other than price.' The FCC adopted rules in its 4th order with maximum flexibility for schools (Exhibit 1, FCC Quote #5) and allowed school administrators to determine the most efficient and effective means for providing educational applications (Exhibit 1, FCC quote #7). All four evaluators graded the ENA proposal as superior in technical points to the ISIS2000 proposal in meeting the needs of Tennessee schools and students, before any consideration of cost was included. The State, by its stated criteria and RFP specified point system, judged the ENA proposal to be superior and in the state's best interest. The State has met the order of the FCC in its procurement process and has evaluated proposals consistent with FCC orders and state procurement rules. It therefore awarded the contract accordingly.

3. The Legal Status of ENA to Participate in this Process is Questionable.

Response:

The legal existence of ENA has always been valid and is valid now as established in the Secretary of State's Office as required by law, per attached confirmation (Exhibit 2).

4. ENA lacks the Requisite Financial Responsibility to fulfill its Obligations under its Proposal.

Response:

Specifics, paragraph 1: "In the event that the E-rate funds are unavailable to the State for this program, ENA's financial statement shows that it will not be able to deliver even the basic services as proposed."

4.1 Section 5.2.2.10 of the State's RFP requires "documentation of financial responsibility, financial stability, and sufficient financial resources to provide the scope of services to the state in the volume projected and within the time frames required and within the constraints of receipt of discounts from the FCC E-rate fund." All of the required items were included in ENA's proposal. These included description of proposer's organization, statement of any proposer's filing of bankruptcy or receivership, other pertinent financial information including the most recent audited financial statements. All items were reviewed by the evaluators and scored accordingly. The State finds no misrepresentation in the documents provided by ENA.

5. ENA Apparently Failed to Submit Cost Data in a Sealed Envelope.

Response:

The page labeled

"Reviewer Questions for ENA Response to RFP 97-2

March 10, 1998

Deliver via email with confirmation phone call to Jackie Shrago" was the heading on the document provided to ENA. (See Exhibit 3).

In response to this question, ENA delivered the first two pages of the Protest exhibit describing services, but no cost information was provided to any evaluator when the response was delivered. All cost information was provided in a sealed envelope and only in a sealed envelope. The envelope remained sealed in the Commissioner's office until the RFP coordinator had transferred all evaluator technical scores to the Summary Sheet, signed and dated that Summary Sheet, and two additional persons had confirmed the accuracy of the scores transferred.

6. ISIS2000 has made some questionable statements in its response with respect to its understanding of the E-rate program and the state's requirement for equity among schools.

6.1 ISIS2000, in response to RFP Section 5.2.4.1.5 on Migration Plan makes a statement that describes an illegal use of E-Rate funding. "E-Rate discounts will be aggressively used to upgrade ConnectTEN in a manner that will ensure an improved quality of service, while simultaneously ensuring that the network continues to be affordable in the event of reduced or discontinued E-Rate funding. One component of this aggressive strategy will be to target school systems with the higher E-Rate discount percentages for early upgrade, with the E-Rate matching from those implementations used to continue to fund the network upgrade." It has been a requirement of the Congress in passing the law, all implementation documentation by the FCC and the submission forms themselves, which requires that "[e]ach eligible school, school district, library or library consortia will be credited with the discount to which it is entitled." (47 C.F.R. Section 54.505(d)). (Exhibit 1, FCC quotes #8 and #9)

6.2 Further, in its Migration Plan response (section 5.2.4.1.5), ISIS2000 has stated: "When a school desires to add additional computers to the network, they will be provided the option to increase their available bandwidth and pay the rate associated with the next higher category of size." This unspecified cost generates inequities among schools because of their ability or inability to pay. Therefore, it violates one of the stated requirements in the RFP Statement of Purpose (section 1.1), "The upgrade of the ConnectTEN network must provide fair and equitable access to the Internet for all public K-12 schools and their students."

7. ISIS2000 has provided limited E-rate cost information and supplemental E-rate cost information with apparent inaccuracies.

7.1. ENA has documented in very clear terms in its Cost Proposal all of the conditions that are possible under all of the E-rate scenarios, including no E-rate funding at all, no E-rate funding after 18 months, no E-rate funding after 30 months. All were found to be financially sound and reasonable within the maximum funds that the state is offering. The ENA technical proposal clearly describes all of these scenarios and the services that will be delivered, with and without E-rate funding in every period, including downsizing the network if E-rate funding is not available.

7.2. ISIS2000 only documented the scenario for full E-rate funding in its Cost Proposal. ISIS2000 provided confusing information in its technical proposal regarding E-rate scenarios. ISIS2000 did not provide cost information as specified in section 5.3.1 for the scenario of no E-rate funding after 18 months, and no E-rate funding after 30 months.

- 7.3. In the supplemental E-rate funding cost information, ISIS2000 failed to multiply the monthly cost by 6 to obtain the 6-month cost. The "Total 6 Month Cost Per Site" appears to be miscalculated. Refer to Exhibit 4 that notes the "Estimated Monthly Cost Per Site". The "Total 6 Month Cost Per Site" is understated because it only includes the cost for one month, not six months. The Total 6 Month Cost is actually a sum of the One-Time Cost and the Monthly Cost. It would seem that Total 6 Month Cost should be the sum of the One-Time Cost and six times the Monthly Cost. (Exhibit 4)

Exhibits:

- (1) **Federal Communication Commission (FCC) Quotes**
- (2) **Confirmation of ENA legal status from Secretary of State**
- (3) **Requested Clarifications from ENA indicating mislabeled heading**
- (4) **ISIS2000 E-rate Cost Supplement**

EXHIBIT 1

Department of Education Response

Exhibit 1: Federal Communications Commission (FCC) Quotes

Quote #1

FCC 97-420, paragraph 222

In the *Order*, the Commission concluded that any school, library or rural healthcare provider that is eligible to receive supported services will be required to seek competitive bids for all services eligible for support pursuant to section 254(h) by submitting a bona fide request for services to the Administrator that includes a description of the services that the school, library or health care provider seeks.

Quote #2

FCC 97-420, paragraph 225

"In the *Order*, the Commission explained that the universal service competitive bid process is not intended to be a substitute for state, local or other procurement processes."

Quote #3

FCC 97-157, paragraph 432

"Because we will require schools and libraries to pay a portion of the costs of the services they select, we agree with the Joint Board that, as recognized by most commenters, allowing schools and libraries to choose the services for which they will receive discounts is most likely to maximize the value to them of universal service support [E-Rate] and to minimize inefficient uses of services."

Quote #4

FCC 97-157, paragraph 428

"According to the Joint Board, Internet access should be defined as basic conduit, i.e., non-content access from the school or library to the backbone Internet network, which would include the communications link to the Internet service provider, whether through dial-up access or via a leased line, the links to other Internet sites via the Internet backbone, generally provided by an Internet service provider for a monthly subscription fee, if applicable, and electronic mail.

Quote #5:

FCC 97-157, paragraph 445

"The Joint Board recommended that we solve the problem of bundling content and "conduit" (access) to the Internet by not permitting schools and libraries to purchase a package including content and conduit, unless the bundled package included minimal content and provided a more cost-effective means of securing non-content access to the internet than other non-content alternatives."

Quote #6

FCC 97-157, paragraph 428

"In the Recommended Decision, the Joint Board recommended that the Commission adopt rules that give schools and libraries the maximum flexibility to purchase whatever package of telecommunications services they believe will meet their telecommunications needs most effectively and efficiently."

Quote #7

FCC 97-157, paragraph 432

"As the Joint Board recognized, the establishment of a single set of priorities for all schools and libraries would substitute our judgment for that of individual school administrators throughout the nation, preventing some schools and libraries from using the services that they find to be the most efficient and effective means for providing the educational applications they seek to secure."

Quote #8

FCC 97-420, paragraph 184

"State telecommunications networks must take reasonable steps to ensure that service providers apply appropriate discount amounts on the portion of the supported telecommunications used by each eligible school or library".

Quote #9

FCC 97-420, paragraph 200

The Commission established that, for eligible schools ordering telecommunications and other supported services at the school district or state level, the individual schools with the highest percentages of economically disadvantaged students should continue to receive the higher discount for which they are eligible. ... "the state or the district shall strive to ensure that each school receives the full benefit of the discount to which it is entitled."

Secretary of State
Corporations Section
James K. Polk Building, Suite 1800
Nashville, Tennessee 37243-0306

REQUEST NUMBER: 98086130
TELEPHONE CONTACT: (615) 741-6488

CHARTER/QUALIFICATION DATE: 05/28/1996
STATUS: ACTIVE
CORPORATE EXPIRATION DATE: PERPETUAL
CONTROL NUMBER: 0312658
JURISDICTION: TENNESSEE

EXHIBIT 2

TO:
BOULT CUMMINGS CONNERS & BERRY
P.O. BOX 198062
NASHVILLE, TN 37219

REQUESTED BY:
BOULT CUMMINGS CONNERS & BERRY
P.O. BOX 198062
NASHVILLE, TN 37219

CERTIFICATE OF EXISTENCE

I, RILEY C DARNELL, SECRETARY OF STATE OF THE STATE OF TENNESSEE DO HEREBY CERTIFY THAT

"EDUCATION NETWORKS OF AMERICA, LLC"

A LIMITED LIABILITY COMPANY DULY FORMED UNDER THE LAW OF THIS STATE WITH DATE OF FORMATION AND DURATION AS GIVEN ABOVE;
THAT ALL FEES, TAXES, AND PENALTIES OWED TO THIS STATE WHICH AFFECT THE EXISTENCE OF THE LIMITED LIABILITY COMPANY HAVE BEEN PAID;
THAT THE MOST RECENT LIMITED LIABILITY ANNUAL REPORT REQUIRED HAS BEEN FILED;
THAT ARTICLES OF DISSOLUTION HAVE NOT BEEN FILED; AND
THAT ARTICLES OF TERMINATION OF THE EXISTENCE HAVE NOT BEEN FILED.

FOR: REQUEST FOR CERTIFICATE

ON DATE: 03/27/98

FROM:
BOULT, CUMMINGS, CONNERS & BERRY
P. O. BOX 198062
NASHVILLE, TN 37219-0000

RECEIVED: FEES \$20.00 \$0.00
TOTAL PAYMENT RECEIVED: \$20.00

RECEIPT NUMBER: 00002278436
ACCOUNT NUMBER: 00000413



Riley C Darnell

RILEY C. DARNELL
SECRETARY OF STATE

EXHIBIT 3

REQUESTED CLARIFICATIONS

Reviewer Questions for ENA Response to RFP 97-2
March 10, 1998

Monday Mar 16

Please provide answers by 4:00pm. CST, Friday, March 13, 1998

Deliver via email with confirmation phone call to Jackie Shrago (shrago@ten-nash.ten.k12.tn.us), 615-532-1229.

1. **Proposer Qualifications (5.2.2.7, p 26)** Is the answer "no" or "yes, but will not impair the proposer's performance?"
2. **Project Understanding (5.2.4.1, p40).** While a good idea, Content Services seems to be beyond the scope of the project. Please explain its inclusion.
3. **Scalability (5.2.4.1.1, p 46 and following re: caching).** Please explain if any caching server outage is transparent to the end user except for degraded response time.
4. **Quality of Service (5.2.4.1.4, p. 67).** ENA states that CDS service levels are expected to be at 99%. What is the reliability of achieving the published bandwidth on an actual basis? In other word, if you order T-1 capacity, what is the reliability for getting T-1 capacity?
5. **Variations due to Local Education Agencies (5.2.4.2.2, p 81).** Migrating to TCP/IP is a good strategy, it seems to be out of scope for this RFS. Please explain your rationale for including it.
6. **Management Plan (5.2.4.3.1 & 5.2.4.3.11, p 86-87)** ENA School Partners and TC Web page seem also to be out of scope functions. How much time will the 8 person team spend performing this function? How does the TC web page support ENA's responsibilities?
7. **Appendix G Site by Site changes.** Please describe how ENA would work with a school with a PC count identified (a) if the count is less than the number in Appendix G, and (b) if the count is greater than the number in Appendix G.
8. **E-Rate Form 471 filing for the first E-Rate period requires a detailed list of services.** Please provide sufficient detail for July 1-Dec 31, 1998. Costs for these items will also need to be detailed but should be provided in a separately sealed cost information package which will be opened at the time that the Cost Proposals are opened.
9. **Section 5.2.2.1, Page 14,**
Please elaborate and explain in more detail what was done specifically by the ENA group, in the "design, and implemented the existing ConnectTEN Network." Does this mean that ENA was responsible for the entire design and implementation from the Education County Routers to the schools? If so, please explain the role of others that were involved in the process.
10. **Section 5.2.2.2, Page 18,**
Please identify and explain the role that ENA was responsible for and what is meant by the statement "provided services for the overall design and implementation of the ConnectTEN project development, installation, operations - selection of vendors for entire network." Is this meant to include all vendors such as Concepts In Communications and all other multiple vendors such as NCR that were used to assist in placing the network in service and perform maintenance, analysis of network performance etc after it became operational.

EXHIBIT 4

ISIS 2000 Proposed Plan

BLC Service Provider Number	Services or Products	# of Sites	Estimated One Time Cost per Site	Estimated One Time Prediacount Cost	Estimated Monthly Cost per Site	Estimated Monthly Prediacount Cost	Estimated Total 6 Mo Cost per Site	Estimated Total 6 Mo Prediacount Cost
"Shared" Services								
143006684 County	Frame Relay	95	-	-	-	-	-	-
	Router	95	10,298	978,109	-	-	10,298	978,109
	POTS	95	-	-	-	-	-	-
	Installation & Maintenance	95	376	35,825	1,552	147,400	1,927	183,025
				<u>10,671</u>	<u>1,013,734</u>	<u>1,552</u>	<u>147,400</u>	<u>12,222</u>
State	Frame Relay	1	-	-	-	-	-	-
	Internet Access	1	53,532	53,532	1,043,183	1,043,183	1,096,715	1,096,715
	E-mail	1	92,500	92,500	-	-	92,500	92,500
	Installation & Maintenance	1	1,037,446	1,037,446	-	-	1,037,446	1,037,446
			<u>1,183,478</u>	<u>1,183,478</u>	<u>1,043,183</u>	<u>1,043,183</u>	<u>2,228,661</u>	<u>2,228,661</u>
"Site Specific" Services								
Small Schools (Sites w/ < 30 computers)	ISDN	400	-	-	360	144,000	360	144,000
	Fractionalized T1	400	-	-	-	-	-	-
	Frame Relay	400	-	-	-	-	-	-
	Internet Access	400	-	-	433	173,111	433	173,111
	Router	400	-	-	-	-	-	-
	Installation & Maintenance	400	-	-	-	-	-	-
			-	-	<u>793</u>	<u>317,111</u>	<u>793</u>	<u>317,111</u>
Medium Schools (Sites w/ 30-80 computers)	ISDN	1000	-	-	360	360,000	360	360,000
	Fractionalized T1	1000	-	-	-	-	-	-
	Frame Relay	1000	-	-	-	-	-	-
	Internet Access	1000	-	-	868	865,555	868	865,555
	Router	1000	-	-	-	-	-	-
	Installation & Maintenance	1000	-	-	-	-	-	-
			-	-	<u>1,228</u>	<u>1,225,555</u>	<u>1,228</u>	<u>1,225,555</u>
Large Schools (Sites w/ 81-120 computers)	ISDN	300	-	-	-	-	-	-
	Fractionalized T1	300	-	-	795	238,500	795	238,500
	Frame Relay	300	-	-	795	238,500	795	238,500
	Internet Access	300	-	-	1,731	519,333	1,731	519,333
	Router	300	2,067	620,052	267	80,016	2,334	700,068
	Installation & Maintenance	300	438	131,250	-	-	438	131,250
			<u>2,504</u>	<u>751,302</u>	<u>3,688</u>	<u>1,078,349</u>	<u>6,092</u>	<u>1,827,651</u>
X-Large Schools (Sites w/ > 120 computers)	ISDN	100	-	-	-	-	-	-
	Fractionalized T1	100	-	-	795	79,500	795	79,500
	Frame Relay	100	-	-	795	79,500	795	79,500
	Internet Access	100	-	-	3,462	346,222	3,462	346,222
	Router	100	5,234	523,381	604	60,403	5,838	583,784
	Installation & Maintenance	100	438	43,750	-	-	438	43,750
			<u>8,671</u>	<u>567,131</u>	<u>5,658</u>	<u>565,625</u>	<u>11,328</u>	<u>1,132,766</u>
Total Proposed Plan			<u>1,202,325</u>	<u>3,516,645</u>	<u>1,056,997</u>	<u>4,376,223</u>	<u>2,258,322</u>	<u>7,890,868</u>

X 6 months
6,335,982

$(3,515,645) + (6 \text{ MONTHS OF } 4,375,223) = 29,766,983$

Presentation to the Review Committee, RFS 97-2, Hearing on Protest
April 6, 1998
Jacqueline B. Shrago, Department of Education

We seek today to resolve the protest so that the State of Tennessee may enter into a contract with the bidder who most fulfilled the request for proposal for the Expansion and Network Operation of ConnectTEN.

Before I begin to respond specifically to the protest presented by Mr. Ney for his client, ISIS, I would like to review the purpose of our endeavor. Reading selections, from the RFP Statement of Purpose, I will attempt to summarize where we started and why we are doing this.

K-12 Need

"The K-12 school environment is very different from that of business. Money has been and will continue to be an overriding factor in determining what kind of technology is employed across most of the classrooms of Tennessee. The upgrade of the ConnectTEN network must provide fair and equitable access to the Internet for **all** public K-12 schools and their students. This upgrade must be planned and executed to minimize lack of network availability for students and teachers "

"The ConnectTEN project was started with the vision of connecting all of Tennessee's K-12 public schools to the Internet with a minimum of one computer connected in the school library (and network access of one hour per week per child). Since the number of students per computer is quite high, the computers are often in continual use. The purpose of the Internet connections is to provide instructional opportunities for use by all students, organized by classroom teachers. Fair and equitable treatment must be provided to all school sites and all local education agencies. Functionality, reliability and improved security are of significant important to allow teachers to use the network for instructional purposes in classrooms."

Tennessee's ConnectTEN

Those of you on the review panel know our schools and our Tennessee students. We have many school libraries where there are no books that anticipate man on the moon. We have students in some isolated areas that have never been to McDonald's or stepped onto an escalator. For them, the Internet opens the world! Through it, they see pictures, meet people, explore ideas and both receive and create information that changes their lives. The excitement in our schools for ConnectTEN is thrilling. It motivates poor students, enlivens teachers who have gotten "burned out", it offers resources of the world's best libraries and museums to **all** of our children. So those in Rhea County have the same opportunity as those in Williamson. Parents in Polk County climbed ladders and pulled wired so that every one of their classrooms could get connected. The Johnson County school board put up the largest expenditure ever to purchase computers so they would have enough for their students. We planned ConnectTEN for 7,000 computers, we now have 50,000 on line but we expect 90,000 over the next two years. This expansion

and capability would be impossible for a state like Tennessee, except for a very new and dynamic program. It is called the E-Rate.

E-Rate

The Congress and the President realized that for our schools to really have enough technology, major new initiatives would have to occur and creative funding sources would need to be found. Together they agreed on a special provision in the Telecommunications Act of 1996. Wiring and connection to the Internet have been understood to be extremely important, assuring that the "have's" and "have nots" are treated equally and have access to information for today's world. They created the E-Rate program allowing schools and libraries to submit application, based on the percentage of free and reduced lunch students, for substantial discounts off telecommunications and computer networking services.

In 1934, this country made a similar commitment so that every home could be wired with a telephone, no matter how isolated. It is that same law that was expanded with a similar commitment to wire every classroom. 1998 is the first year for this program. They didn't set it up as a grant program because they wanted schools to be committed and ready to use the technology. There are a variety of rules. Schools have to have plans, they have to provide part of the funding, they have to assure that teachers will be trained and that they have enough computers to make use of the network. But they also established wide flexibility so that schools could decide what they need in their communities and not try to establish the services from Washington. This provision passed the Congress by overwhelming bi-partisan margins. Its continuation has been once again affirmed, including the money being established at \$2.25 Billion, and obtained, not as a federal budget item, but as contributions from corporations as a result of deregulation of the telecommunications industry.

Now

Tennessee, when compared to all of the states in the country, was one of the first to realize the power and potential of the networks and connection to the Internet. So, Tennessee has been a leader in working with the parties in Washington to clarify, refine and get the initial program up and running in record time. Tennessee was also prepared to take advantage of this unique opportunity to get discounts for services for Tennessee schools.

The Federal Communications Commission and its administrative arm, the Schools and Library Corporation was charged with establishing the program. They established that schools would have to apply each year for discounts, and that it would be approved on a "first come, first serve" basis. However, in this, the first year, they established a 75 day window meaning that all who apply within that time would be treated on an equal priority basis and equally eligible for the discounts. They have received 40,000 initial applications with the specific requests for funding due with all paperwork received by April 15, 1998.

E-Rate and the RFP

The State issued an RFP where proposers were given wide opportunity to offer the maximum service levels possible for the public schools of Tennessee. However, a proposer was also expected to offer services responding to the situation of receiving E-Rate funding and the possibility of not receiving funding, not only in 1998, but also in 1999, 2000, and 2001. This uncertainty, because the State can apply for only one calendar year of funding and the contract with the state was defined as 3.5 years, left the burden of adjusting to the funding variations as the responsibility of the bidder. Obviously, the bidder would not be required to deliver the same services with and without the funding. However, the difficulty in a network is that once you purchase equipment and establish connections that deliver one level of service, you then have to reduce that capacity in order to reduce the substantial recurring costs, if the funding level drops. Proposers were required to describe service levels with and without the E-rate funding in each 6-month period of the contract.

Cost Formula

The Evaluation and Contract Award section 6 fully described the Cost Formula. It clearly showed using examples, the advantage of proposing additional funding to provide additional services. The FCC articulated that schools could obtain as many services for which they could afford to pay their share (33% in Tennessee's case) and use effectively with a plan, trained teachers and sufficient computers. Tennessee has all of the necessary elements.

Tennessee stated in the RFP that it was willing to put any sources that proposers would offer, as well as any savings into network services. All services are to be invoiced in two parts, one part to the State and one part to the FCC. Because the State is eligible for a 66% discount, this means that the State could submit a contract to the FCC for as much as three times the amount of its available funds and meet the financial commitments to the FCC. One third would be paid by the State and two-thirds paid by the FCC. The amount of available funds from State and Local Sources was defined in the RFP with a maximum of approximately \$5.1 million in any fiscal year, plus any other sources that a proposer could offer from the sale or equipment or salvage. Therefore in any year, the State could receive the benefit of services for significantly more than its available dollars.

Today

Approval of the contract negotiated following the Notice of Intent to Award is necessary for Tennessee to finalize its application and be eligible for the discounts. Without a contract, we cannot file the application to the FCC. We, the Department of Education seek your agreement with our findings and conclusions that this contract should be awarded to Education Networks of America

Now, let me turn to the specific responses to ISIS' letter of protest.

Item #2. The ENA Cost Proposal Misrepresents the E-rate rules and funding

The E-Rate funding is a significant component of this RFP. Again, reading from the Statement of Purpose (section 1.1), the RFP states:

"Creativity is particularly important in living within the classroom constraints, providing a migration plan from the existing capability and the existing financial resources to the possibility of the State's eligibility and acceptance by the FCC to receive E-Rate discounts. Creativity is also required to respond to the situation if Tennessee's E-Rate application in 1998 or future years is not funded. "

In the written report in response to the Letter of Protest which is already in the record, we responded specifically to each item.

Item 2A "The current network... is not eligible for E-rate funding as a capital expenditure..."

Item 2B regarding ISDN tariffs

Item 2C regarding web content

Item 2D regarding staff hours

We identified specific sources for clarifying the E-rate funding rules with reasons why we fully expect that these items are eligible. There are some 3500 pages of FCC orders, guidelines, comments and clarifications and having read them all, there is room for interpretation among these pages. The State has been diligent and sought the advice of an attorney in Washington who regularly handles FCC matters. He has worked with us for over 200 hours in understanding our situation and informing us of how these rulings affect our situation. I have been advised by that counsel, with whom I spoke on Friday and again on yesterday. He has read the pleading and has stated to me that he does not believe it has merit. Clearly they present one side of the story, and **if** this is actually filed with the FCC, we will respond. Clearly, if it is filed, we are jeopardized from participating for funds in the 75 day window, and our application is likely to be delayed at least one year. It is also clear that their request for "Expedited Declaratory Ruling" is not valid because they would have to show immediate material harm and there is certainly no harm to them before the application due date of April 15, 1998. There will be no ruling by April 15, 1998.

We can spend a great deal of time examining these issues. I submit to the committee, that (1) the State has diligently familiarized itself with the E-Rate program over the last 1.5 years; (2) developed its RFP in light of the E-Rate program; and (3) evaluated the responses in light of the needs of Tennessee schools and the E-Rate program. The FCC and the SLC are the only people who can fully answer these items 2A, 2B, 2C, and 2D raised in this protest objection.

Item #2E, "The State apparently intends to award a \$74 million contract to ENA..., when ISIS2000 proposed comparable service to the State, for 23 million less."

While this is also an E-Rate issue, because there is always concern if such a statement were true, I will specifically respond to this in terms of the comparability of service. In fact, the proposal from ISIS is not comparable to the proposal from ENA.

In the Cost Proposal, section 5.3, the RFP states:

"The proposer must clearly show the capability that will be provided through State and Local recurring funds and the amount the State and Local agencies must pay for these services. RFP services should also be identified which will be provided as a result of eligibility and funding from the FCC E-Rate Fund. For example, one level of functionality might be proposed using State and Local funds solely, and a higher level of functionality might be proposed when the FCC E-Rate funds included. The proposer must clearly identify the capability that will be provided for every period throughout the life of the contract, if the E-Rate funding is not available in any period. "

The RFP described that any other available funding from the proposer that would be paid to the State would also be used to increase the service levels for Tennessee schools. Examples of how this would work were provided in Section 6.2.7. It showed a comparison of one year of funding where one proposal offered services of \$12.5 million and the second offered \$13.125 million with the latter receiving more points in the awarding of points.

This formula and examples were in the RFP from the beginning. All were approved by the Comptroller's Office and the Department of Finance and Administration before the RFP was issued. It was also reviewed with our FCC attorney. This was reviewed with the proposers with opportunity for questions in three pre-bidder's conferences. There were written questions by proposers and clarifications issued. All proposers agreed to the formula and waived any rights to oppose it. (Required Review and Waiver of Objections by Proposers, section 3.4 in the standard template language of the State).

Despite the requirements of the RFP to provide information about the delivery of services both with and without E-Rate, ISIS did not provide this information in any of its cost information. ENA clearly described their services and costs with and without E-Rate funding in each of the 7 six-month periods. ISIS provided only cost information with E-Rate funding. And in identifying its services, even after a request for clarification, it further confused the level of services that would be offered without E-Rate.

In responding to the statement that ISIS proposed comparable services, we offer the following differences.

What are the differences that reflect \$23 million difference in price?

Capacity and reliability are critical to provide services to schools where our number of computers has already grown from 7,000 to 50,000 computers. And this network is expected to grow to 90,000 computers. Let's get to the bottom line: delivering information to the student's computer screen that is important, appropriate, reliable and presently quickly enough to be a learning experience for every student. Before we look