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May 23, 2016

**SUBMITTED ELECTRONICALLY VIA ECFS**

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

Re: **MEETING SUMMARY PER SECTION 1.1208 OF THE FCC'S RULES**

Request for Review or Waiver of a Decision of the Universal Service Administrator by  
Sweetwater City Schools et al., Docket No. 02-6

Dear Ms. Dortch:

On May 18, 2016, representatives of Education Networks of America, Inc. and ENA Services, LLC (ENA) and the Sweetwater City Schools Consortium (Sweetwater) met with staff of the Wireline Competition Bureau (WCB) regarding the above-referenced E-rate appeal. Present at the meeting for ENA/Sweetwater were Dr. Melanie Miller, director of schools for the Athens (TN) school district; Joan Gray, executive director of the Tennessee Educational Technology Association; Charles Cagle, attorney for the school districts; and Bob Patterson and Gina Spade, attorneys for ENA. Present from WCB were Lisa Hone, associate bureau chief, WCB; Ryan Palmer, chief, Telecommunications Access Policy Division (TAPD); Aaron Garza, deputy division chief, TAPD; Bryan Boyle, attorney-advisor, TAPD; and Sibö McNally, attorney-advisor, TAPD.

The representatives of ENA and Sweetwater reiterated their request for the Commission to grant their appeals of the decisions of USAC to deny funding to 45 school districts in Tennessee, which serve about one-third of the public school students in Tennessee, for funding years 2013, 2014 and 2015.<sup>1</sup> USAC has claimed a violation of the rules requiring a "signed contract" and the selection of cost-effective services.

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<sup>1</sup> See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Request for Review and/or Waiver by Education Networks of America of Funding Decisions of the Universal Service Administrative Company, filed May 13, 2016 (ENA Appeal), and *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Consolidated Request for Review and/or Waiver by Sweetwater City Schools et al. of Funding Decisions by the Universal Service Administrative Company, filed May 10, 2016 (Sweetwater Appeal).

As evaluators of the two bids received by the Sweetwater Consortium in 2013, Dr. Miller and Ms. Gray explained that they used a bid evaluation process as outlined in Sweetwater’s Request for Proposal (RFP) to objectively determine that ENA provided the most cost-effective services, as based on the bid responses.

In response to a question from WCB staff, Dr. Miller and Ms. Gray noted that the RFP and allocation of points for categories evaluated were based on an RFP previously used successfully to receive E-rate funding. Further, the Commission has noted that using “price as the primary factor” in the evaluation process means that price, as a category, must be worth one more point than any other individual category.<sup>2</sup> In establishing this standard, the Commission gave the example of 11 points for price and 10 points for each of the other categories.<sup>3</sup> As the Consortium gave 25 points for price as a category, it more than met this standard. There is no other Commission precedent that would indicate that price as a category should be worth more points.

Dr. Miller and Ms. Gray described the process by which they reviewed the bids submitted in response to the RFP. The parties provided a summary of some of the evaluation criteria, submitted with this letter, that demonstrated why ENA received more points than AT&T for those evaluation criteria. For example, the evaluators explained, in response to a question seeking information about financial restitution for service outages, ENA responded that it had not made any payments due to service outages while AT&T refused to answer the question, citing “customer confidentiality.” ENA earned four points for its response, and AT&T earned zero.

During the meeting, Dr. Miller and Ms. Gray noted – echoing the information in their affidavits and as AT&T itself indicated in its bid response – that installation charges were not included in AT&T’s pricing. Further, they explained that AT&T’s bid response said its lowest pricing was limited to the prices contained in the state master contract, NetTN, not those included in the bid itself. AT&T did not provide a copy of the NetTN contract with its response. As such, the evaluators knew that the pricing was incomplete, but they stressed that they were trying to evaluate the bids using the information they had in front of them during the bid process. Dr. Miller and Ms. Gray stated that, in hindsight, they possibly should have declared AT&T’s bid non-responsive as AT&T did not provide its actual pricing with its bid, with the result that ENA still would have been selected as the winning bidder.

WCB staff also asked the evaluators whether they should have abandoned the scoring process outlined in the RFP to select the non-winning bidder due to the “dramatic difference” in pricing. Dr. Miller and Ms. Gray indicated that they knew the difference was not as great as it appeared

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<sup>2</sup> *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District El Paso, Texas, et al.*, Order, FCC 03-313, 18 FCC Rcd 26407 (2003) (*Ysleta Order*).

<sup>3</sup> *Ysleta Order* at 26407, n. 138. USAC’s own sample evaluation chart gives only 30 percent to the E-rate eligible price. <http://www.usac.org/sl/applicants/step02/evaluation.aspx>. As noted in the Consortium’s brief, more than 40 percent would have had to be allocated to price to make a difference in the outcome of the process. Sweetwater Appeal at 40.

because AT&T did not include installation in its offer. In addition, they did not know what AT&T's actual bid was because AT&T's NetTN contract pricing was not included with its bid. Furthermore, if the price AT&T quoted in its RFP *had* actually been the total price members of the Sweetwater Consortium would expect to pay if it had selected AT&T, ENA's bid would have been only 50 percent higher than AT&T's. The limited guidance the Commission has given on cost-effectiveness does not suggest this price differential would be sufficient grounds for overturning a decision reached following the requirements of state law and a scoring rubric detailed in an RFP.<sup>4</sup>

In addition to detailing how the competitive bidding process resulted in the selection of cost-effective services, the Consortium and ENA also explained how the contract between the parties was formed by offer and acceptance. ENA offered its terms and pricing in its bid, and included a signed contract as part of that bid response.<sup>5</sup> The Consortium responded with a signed award letter, thereby forming the contract.<sup>6</sup> The parties chose to use the form of the Metro Nashville contract to memorialize the contract, as described in the parties' briefs, simply because that was administratively easier and did not require the schools to send another letter indicating they were adopting a different form contract.<sup>7</sup>

Although this reason was not cited by USAC in its denial, WCB staff seemed to indicate that the issue with the contract was that both parties did not agree to the contract terms with a signature on the same piece of paper. However, the Commission has not required two signatures to complete the formation of a contract, much less two signatures on the same piece of paper.<sup>8</sup> In *Adams County*, the Commission noted that "to the extent state contract law does not require two signatures and two dates for a valid contract, Commission precedent does not impose such a requirement."<sup>9</sup> Tennessee law does not require two signatures and two dates for

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<sup>4</sup> *Ysleta Order* at ¶ 54.

<sup>5</sup> The Consortium believed the signed Sweetwater contract was included as an attachment to the ENA bid response submitted as an exhibit to the Sweetwater Consortium (Dayton County/Scott City) filed with the Commission on May 10, 2016. However, it appears the exhibits were not included in the filing. As such, we have submitted the contract with this letter.

<sup>6</sup> See ENA Appeal at pgs. 16-19.

<sup>7</sup> *Id.*

<sup>8</sup> See *Schools and Libraries Universal Service Support Mechanism, Requests for Waiver of the Decision of the Universal Service Administrator by Adams County School District 14*, CC Docket No. 02-6, Order, FCC 07-35, at ¶ 11 n. 29 (2007); see also *Schools and Libraries Universal Service Support Mechanism, Request for Waiver of the Decision of the Universal Service Administrator by Barberton City School District*, CC Docket No. 02-6, Order, DA 08-2382 at ¶ 10 (WCB 2008) (*Barberton*) (granting appeals "on the merits" for several applicants that had contracts only signed by one party). In the latter order, the Commission waived the rule where the district had not *awarded* the contract until after the FCC Form 471 was filed. *Barberton* at ¶ 6.

<sup>9</sup> In USAC had apparently misinterpreted a Commission order detailing document retention requirements in denying applications on this basis. "We note that in detailing document

a valid contract.<sup>10</sup> As such, the contract between Sweetwater and ENA was valid.

Regardless, the Commission has waived the rule in cases in which the contract had not even been awarded when the FCC Form 471 was filed.<sup>11</sup> As counsel for ENA indicated, if the Commission staff believes some error in process occurred here, a waiver of the Commission's rules would be consistent with numerous past Commission and WCB orders and in the public interest. There was no waste, fraud or abuse as the services were delivered and used for their intended purposes, satisfying program goals. Further, the schools in the Consortium received the lowest prices offered, as AT&T's bid based on its state master contract pricing was nearly \$2 million more than ENA's bid.

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retention requirements, the Commission required both beneficiaries and service providers to retain executed contracts that are 'signed and dated by both parties.' *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order, 19 FCC Rcd 15808, 15825, ¶ 48 (2004). We clarify that this language was not intended to establish a new rule regarding the validity of a contractual agreement." *Adams County School District* at ¶ 11 n. 29.

<sup>10</sup> Because ENA had signed the Sweetwater Contract and the Consortium had issued a separate written and signed award letter, WCB staff suggested that a written contract is not formed unless both parties sign the same document. This is a misstatement of the law. "It is a general principle of the law of contracts that, while an assent to an offer is a requisite to the formation of an agreement, yet such assent is a condition of the mind, and may be either express or evidenced by circumstances from which the assent may be inferred." *Buddy Lee Attractions, Inc. v. William Morris Agency, Inc.*, 13 S.W.3d 343, 349 (Tenn. Ct. App. 1999). "When a contract between two parties is contemplated to be signed by both is reduced to writing and signed by only one of them, but accepted by the other, it becomes in the contemplation of the law, a written binding contract on both of them." *Id.* at 350. In public procurement law, an "award" is an award of a contract, which is the government's acceptance of the offer made by a bidder with a bid response to a request for proposal. *See, e.g.*, Federal Acquisition Regulations, "Part 14, Sealed Bidding," Subpart 14.4- Opening of Bids and Award of Contract," §14.408-1 General, which states, "The contracting officer shall make a contract award (1) by written or electronic notice, (2) within the time for acceptance specified in the bid or an extension." Here, ENA made an offer in writing when it signed the contract appended to its Sweetwater bid response, and Sweetwater in a separate document signed by the authorized representative of the Consortium issued an award accepting that offer. This process is routinely employed in thousands of public procurements nationwide as the two signed documents manifest consent to the parties' written agreement that is formed as of the date of the award.

<sup>11</sup> *Barberton* at ¶ 6.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed for inclusion in the above-referenced dockets and sent to WCB attendees. Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

*/s/ Gina Spade*

Gina Spade  
Counsel for ENA

cc: Lisa Hone  
Ryan Palmer  
Aaron Garza  
Bryan Boyle  
Sibo McNally

**Comparison of ENA and AT&T Scores in Sweetwater Procurement**

Question in Sweetwater RFP	ENA's Score	AT&T's Score
Describe in detail all instances in which you have had to make financial restitution to your customers in the last year as it pertains to service level agreements.	<b>4 points.</b> ENA stated it did not have financial restitution in the past year.	<b>0 points.</b> AT&T refused to answer the question. As financial restitution is an objective marker of a provider's failure to render service, AT&T was awarded zero points.
Did vendor sign contract; are proposed changes acceptable?	<b>10 points.</b> ENA signed the contract in the RFP without modifying it, and also gave the Consortium the option of using ENA's contract with MNPS instead.	<b>5 points.</b> (Could have been zero, as AT&T itself notes) AT&T modified the form contract in the RFP and stated that it was bound by the NetTN contract; Sweetwater was thus unsure of the complete scope of AT&T's proposed changes. If Sweetwater had wanted to sign onto the NetTN contract, they would not have engaged in their own RFP process.
Provide a listing of previous customers that purchased your services/products that were of similar size and scope.	<b>10 points.</b> ENA responded to the question with the maximum number of references, with six Tennessee districts, six small/medium districts similar to many in the Consortium, four larger districts and one statewide consortium.	<b>6 points.</b> AT&T listed the LA (CA) Unified School District and the University of South Florida. Even in Tennessee, AT&T listed Rutherford and Williamson County schools, which are large urban and suburban districts with existing fiber infrastructure. Only one rural district was listed.
Describe in detail all network failures affecting customers in the last year.	<b>2 points.</b> ENA provided a response with detail of two network outages in the past year.	<b>1 point.</b> (Could have been zero.) AT&T did not respond to the question. As above, the timely and continuous delivery of services is critical to both the teaching and learning experience.
Describe in detail the timeline for installation.	<b>3 points.</b> As the Consortium's current provider, ENA had engineered, installed, and priced the services required by every Consortium member. In addition, however, ENA provided several pages detailing a project plan for new site installation for the services requested.	<b>1.5 points.</b> AT&T failed to promise timely installation of needed circuits, and provided generalized and unhelpful responses full of qualifiers, stating that timelines would vary, that it would "endeavor" to meet deadlines, and that it was not responsible for circumstances out of its control or due to "network delays," even though it controls the network
Demonstrate an understanding of the rules and regulations of the E-rate program.	<b>2 points.</b> ENA provided a detailed description of how the E-rate program works, including what forms need to be filed and how ENA will specifically assist schools with the program requirements.	<b>1 point.</b> AT&T's response consisted of generic promises regarding E-rate compliance, without a <i>demonstration</i> of its understanding of E-rate rules.
Describe your expansion, scalability capability during the term of the contract.	<b>2 points.</b> ENA provided a thorough description of its bandwidth scalability for the schools in Tennessee.	<b>1 point.</b> AT&T provided insufficient assurance that it had the capacity to increase bandwidth to the generally rural areas in which Consortium members required reliable service.

**Attachment E  
Contract Template**

Number: **RFP No. 13-1**

**CONTRACT BETWEEN**  
**Sweetwater City Schools**  
**AND**  
**[*insert complete name of Contractor*]**  
**FOR PURCHASE OF GOODS AND SERVICES**

This contract is entered into on this \_\_\_ day of \_\_\_\_\_, 20\_\_\_, by and between **SWEETWATER CITY SCHOOLS ("SCS")** and [*insert name and address, including zip code, of Contractor*] ("Contractor"). This contract consists of the following documents:

- a) This contract,
- b) Managed Internet Access, Voice-Over-IP and Video Conferencing, RFP 13-1
- c) [*insert titles and numbers of RFP/ITB amendments*],
- d) Contractor's Bid/Proposal dated \_\_\_\_\_, 2013

In the event of conflicting provisions, all documents shall be construed according to the following priorities:

- a) any properly executed amendment or change order to this contract, (most recent with first priority),
- b) this contract,
- c) Contractor's Bid/Proposal dated [*insert date*],
- d) Managed Internet Access, Voice-Over-IP and Video Conferencing, RFP 13-1

**1. Duties and Responsibilities of Contractor.** Contractor agrees to provide and SCS agrees to purchase the following goods and services:

As describe in RFP 13-1 and detailed in vendor's response to RFP 13-1.

***Performance Bond***

SCS shall require a performance bond upon approval of a contract pursuant to this RFP. The amount of the performance bond shall be a sum equal to Ten Million Dollars (\$10,000,000.00), and said amount shall be reduced as detailed in the chart below:

\$10,000,000.00 Year one of contract

\$8,000,000.00 Year two of contract  
\$6,000,000.00 Year three of contract

This bond may be reduced or the requirement waived at anytime during the life of this contract with the agreement of both parties.

The successful Proposer must obtain the required performance bond in form and substance acceptable to SCS and provide it to SCS no later than the start of the contract

The successful Proposer must meet this performance bond requirement by providing the SCS either:

- a. a performance bond that covers the entire Contract period including all options to extend the Contract, or
- b. a performance bond for the first, twelve (12) calendar months of the Contract in the amount detailed above, and, thereafter, a new or re-issued performance bond in the amount detailed above covering each subsequent twelve (12) calendar month period of the Contract. (In which case, the Contractor must provide the new (or re-issued) performance bonds to the SCS no later than thirty (30) days preceding each subsequent period of the Contract to be covered by the new (or re-issued) bond.)

Failure to provide to SCS a performance bond as required by performance bond deadline detailed in the Contract, as applicable in the case of a periodic new (or re-issued) performance bond, no later than thirty (30) days preceding each period of the Contract to be covered by the new or re-issued bond, shall result in contract termination.

The successful Proposer must make all necessary arrangements for the performance bond prior to the Contract start date and prior to any subsequent performance bond deadlines in the case of an annual performance bond. SCS will not assist the Proposer with securing the services of any fidelity or guaranty underwriter.

Failure to adhere to these requirements shall result in termination of the Contract as a material breach of the contract. Further, as applicable, failure to periodically provide to the SCS a new or re-issued performance bond subsequent to the first as required above shall be a material breach of contract and result in SCS taking action to exact payment pursuant to the current performance bond held by SCS as per paragraph 10. Termination-Breach of this contract. .

**2. Delivery and Installation.**

- a) All deliveries shall be made pursuant to a written purchase order issued by Sweetwater City Schools, which assumes no liability for any goods delivered without such purchase order. All deliveries shall be made to \_\_\_\_\_ within ( ) days of the issuance of a purchase order.
- b) Installation is required. Installation shall be completed within \_\_\_\_\_ days of the date of delivery.

**3. Term.** The term of this contract will begin July 1, 2013 and end June 30, 2016.

**4. Compensation.** Contractor shall be paid \$ \_\_\_\_\_ upon receipt of invoice. In no event shall the total compensation for this contract exceed \$ \_\_\_\_\_ for the contract term.

There will be no other charges for the performance of this contract.

SCS will make reasonable efforts to make payments within 30 days of receipt of invoice but in any event shall make payments within 60 days. SCS will make reasonable efforts to make payments to small businesses within 15 days of receipt of invoice but in any event shall make payment within 60 days.

Contractor shall submit a written report with invoice to SCS each month setting forth the services provided in the billing period. Such report shall include, but not limited to, description of type of service, date, time and duration of service, agendas, sign-in sheets, attendance rosters. Payment of invoices may be withheld if documentation is not sufficient. SCS may request additional documentation or explanation regarding services at any time and Contractor shall respond to such requests promptly with such additional information as SCS may require. Failure to provide such additional information or explain why it cannot be provided within thirty days of receipt of the request from SCS may be cause for termination of this contract.

**5. Contractor Performance Evaluation.**

The reports of service rendered under this contract as provided by the contractor and agreed to in substance by SCS will be reviewed at a minimum of quarterly during the term of the contract and reports filed for review and consideration by senior management of SCS.

Reports will cover all SLAs listed in the RFP and responded to by the contractor.

**6. Taxes.** SCS shall not be responsible for any taxes that are imposed on Contractor other than sales/use taxes stated above. Furthermore, Contractor understands that it cannot claim exemption from taxes by virtue of any exemption that is provided to SCS.

**7. Warranty.**

a) Contractor warrants that for a period of one year from the date of delivery, the goods provided, including software, shall be free of any defects that interfere with or prohibit the use of the goods for the purposes for which they were obtained. Such purposes are stated in the RFP.

b) During the warranty period, SCS may, at its option, request that Contractor repair or replace any defective goods, by written notice to Contractor. .

**8. License.** Contractor warrants and represents that it is the owner of or otherwise has the right to and does hereby grant SCS a license to use any software provided for the purposes for which the software was obtained. Such purposes are set forth in SCS' RFP.

**9. Copyright, Trademark, Service Mark, or Patent Infringement.**

a) Contractor shall, at its own expense, be entitled to and shall have the duty to defend any suit which may be brought against SCS to the extent that it is based on a claim that the products or services furnished infringe a copyright, Trademark, Service Mark, or patent. Contractor shall further indemnify and hold harmless

SCS against any award of damages and costs made against SCS by a final judgment of a court of last resort in any such suit. SCS shall provide Contractor immediate notice in writing of the existence of such claim and full right and opportunity to conduct the defense thereof, together with all available information and reasonable cooperation, assistance and authority to enable Contractor to do so. No costs or expenses shall be incurred for the account of Contractor without its written consent. SCS reserves the right to participate in the defense of any such action. Contractor shall have the right to enter into negotiations for and the right to effect settlement or compromise of any such action, but no such settlement or compromise shall be binding upon SCS unless approved by the Sweetwater City Schools.

- b) If the products or services furnished under this contract are likely to, or do become, the subject of such a claim of infringement, then without diminishing Contractor's obligation to satisfy the final award, Contractor may at its option and expense:
  - i) *Procure for SCS the right to continue using the products or services.*
  - ii) *Replace or modify the alleged infringing products or services with other equally suitable products or services that are satisfactory to SCS, so that they become non-infringing.*
  - iii) *Remove the products or discontinue the services and cancel any future charges pertaining thereto.*
  - iv) *Provided, however, that Contractor will not exercise option b.iii. until Contractor and SCS have determined that options b.i. and b.ii. are impractical.*
- c) Contractor shall have no liability to SCS, however, if any such infringement or claim thereof is based upon or arises out of:
  - i) *The use of the products or services in combination with apparatus or devices not supplied or else approved by Contractor.*
  - ii) *The use of the products or services in a manner for which the products or services were neither designated nor contemplated.*
  - iii) *The claimed infringement in which SCS has any direct or indirect interest by license or otherwise, separate from that granted herein.*

**10. Termination--Breach.** Should Contractor fail to fulfill in a timely and proper manner its obligations under this contract or if it should violate any of the terms of this contract, SCS shall have the right upon 7 days written notification to terminate the contract. The performance Bond listed in Section 1) Duties and Responsibilities of Contractor will be forfeited to SCS in the amount listed in the schedule of Section 1) or as may be amended during the term of this contract.

**11. Termination--Funding.** Should funding for this contract be discontinued, SCS shall have the right to terminate the contract immediately upon written notice to Contractor.

Contractor shall be paid in full for all cost incurred to date and forth coming for equipment that is in process or that cannot be terminated without cost.

12. **Termination--Notice.** SCS may terminate this contract at any time upon thirty (30) days written notice to Contractor. Contractor shall be paid in full for all cost incurred to date and forth coming for equipment that is in process or that cannot be terminated without cost.
13. **Compliance with Laws.** Contractor agrees to comply with any applicable federal, state and local laws and regulations.
14. **Federal Economic Stimulus Funding.** If this Contract requires the Contractor to provide products and/or services that are funded in whole or in part under the American Recovery and Reinvestment Act of 2009, Public Law 111-5, (Recovery Act), then Contractor is responsible for ensuring that all applicable requirements, including but not limited to those set forth herein, of the Recovery Act are met and that the Contractor provides information to the State as required. The Contractor (and any subcontractor) shall comply with the following:
  - a) Federal Grant Award Documents, as applicable.
  - b) Executive Office of the President, Office of Management and Budget (OMB) Guidelines as posted at [www.whitehouse.gov/omb/recovery\\_default/](http://www.whitehouse.gov/omb/recovery_default/), as well as OMB Circulars, including but not limited to A-102 and A-133 as posted at: [www.whitehouse.gov/omb/financial\\_offm\\_circulars/](http://www.whitehouse.gov/omb/financial_offm_circulars/).
  - c) Office of Tennessee Recovery Act Management Directives (posted on the Internet at [www.tnrecovery.gov](http://www.tnrecovery.gov)).
  - d) The Recovery Act, including but not limited to the following sections of that Act:
    - i) Section 1604 – Disallowable Use. No funds pursuant to this Contract may be used for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool.
    - ii) Section 1512 – Reporting and Registration Requirements. The Contractor must report on use of Recovery Act funds provided through this Contract. Information from these reports will be made available to the public.
    - iii) Section 1553 – Recovery Act Whistleblower Protections. An employee of any non-Federal employer receiving covered funds under the Recovery Act may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee’s duties, to the Accountability and Transparency Board, an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or other person working for the employer who has the authority to investigate, discover or

terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives, information that the employee believes is evidence of one or more of the following related to the implementation or use of covered funds:

- (1) gross mismanagement,
- (2) gross waste,
- (3) substantial and specific danger to public health or safety,
- (4) abuse of authority, or
- (5) violation of law, rule, or regulation (including those pertaining to the competition for or negotiation of a Contract).

Non-enforceability of Certain Provisions Waiving Rights and Remedies or Requiring Arbitration: Except as provided in a collective bargaining agreement, the rights and remedies provided to aggrieved employees by this section may not be waived by any agreement, policy, form, or condition of employment, including any pre-dispute arbitration agreement. No pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of a dispute arising out of this section.

Requirement to Post Notice of Rights and Remedies: The Contractor and any subcontractor shall post notice of the rights and remedies as required under Section 1553. (Refer to Section 1553 of the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5 located at [www.recovery.gov](http://www.recovery.gov), for specific requirements of this section and prescribed language for the notices.)

- iv) Section 902 – Access Of Government Accountability Office. The Contractor shall provide that the Comptroller General and his representatives are authorized:
  - (1) to examine any records of the Contractor or any of its subcontractors, that directly pertain to, and involve transactions relating to, this Contract or a subcontract; and
  - (2) to interview any officer or employee of the Contractor or any of its subcontractors regarding such transactions.
- v) Section 1514 – Inspector General Reviews. Any inspector general of a federal department or executive agency has the authority to review, as appropriate, any concerns raised by the public about specific investments using such funds made available in the Recovery Act. In addition, the findings of such reviews, along with any audits conducted by any inspector general of funds made available in the Recovery Act, shall be posted on the inspector general’s website and linked to the website established by Recovery Act Section 1526, except that portions of reports may be redacted to the extent the portions would disclose information that is

protected from public disclosure under sections 552 and 552a of title 5, United States Code.

vi) Section 1515 – Access of Offices of Inspector General to Certain Records and Employers. With respect to this Contract, any representative of an appropriate inspector general appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), is authorized:

- (1) to examine any records, of the Contractor or any of its subcontractors, that pertain to and involve transactions relating or pursuant to this Contract; and
- (2) to interview any officer or employee of the Contractor or any subcontractors regarding such transactions.

vii) Section 1606 – Wage Rate Requirements. All laborers and mechanics employed by pursuant to this Contract shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code. All rulings and interpretations of the Davis-Bacon Act and related acts contained in 29 CFR 1, 3, and 5 are herein incorporated by reference.

For purposes of this Contract, laborer or mechanic includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term laborer or mechanic includes apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards.

viii) Section 1605 – Buy American Requirements for Construction Material – Buy American, Use of American Iron, Steel, and Manufactured Goods. None of the funds provided by this Contract may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.

- e) The Contractor agrees to comply with any modifications or additional requirements that may be imposed by law and future guidance and clarifications of Recovery Act requirements.
- f) If the Contractor enters into one or more subcontracts for any of the services performed under this Contract, each subcontract shall contain provisions specifically imposing on the subcontractor all requirements set forth in this Contract Section 14, “Federal Economic Stimulus Funding.”

**15. Notices.**

Notice of assignment of any rights to money due to Contractor under this contract must be mailed or hand delivered to the attention of the Chief Accountant, ACCOUNTING DEPARTMENT, BUSINESS OFFICE, Sweetwater City Schools, 203 Monroe Street, Sweetwater, TN 37874, with a copy to the recipient for SCS notices listed below:

- a) All other notices to SCS shall be mailed or hand delivered to:

Dept: Instruction  
Attn: Larry Stein  
Addr: 203 Monroe Street, Sweetwater, TN 37874

Phone: (423) 337-7051  
Email Addr: Larry.stein@scstn.net

- b) Notices to Contractor shall be sent to:

Contractor: ENA Services, LLC  
Attn: David Pierce  
Addr: 1101 McGavock Street  
Nashville, TN 37203  
Phone: (615) 312-6009  
E-mail Addr: dpierce@ena.com

- c) Contractor designates the following as the Contractor's agent for service of process and will waive any objection to service of process if process is served upon this agent:

Designated Agent: (name) N/A  
(address) N/A  
(phone) N/A  
Email Addr: N/A

**16. Maintenance of Records.** Contractor shall maintain documentation for all charges against SCS. The books, records, and documents of Contractor, insofar as they relate to work performed or money received under the contract, shall be maintained for a period of three (3) full years from the date of final payment and will be subject to audit, at any reasonable time and upon reasonable notice by SCS or its duly appointed representatives. The records shall be maintained in accordance with generally accepted accounting principles.

**17. SCS Property.** Any SCS property, including but not limited to books, records and equipment, that is in Contractor's possession shall be maintained by Contractor in good condition and repair, and shall be returned to SCS by Contractor upon

termination of the contract. All goods, documents, records, and other work product and property produced during the performance of this contract are deemed to be SCS property.

18. **Modification of Contract.** This contract may be modified only by written amendment executed by all parties and their signatories hereto.
19. **Partnership/Joint Venture.** Nothing herein shall in any way be construed or intended to create a partnership or joint venture between the parties or to create the relationship of principal and agent between or among any of the parties. None of the parties hereto shall hold itself out in a manner contrary to the terms of this paragraph. No party shall become liable for any representation, act or omission of any other party contrary to the terms of this paragraph.
20. **Waiver.** No waiver of any provision of this contract shall affect the right of any party thereafter to enforce such provision or to exercise any right or remedy available to it in the event of any other default.
21. **Employment.** Contractor shall not subscribe to any personnel policy which permits or allows for the promotion, demotion, employment, dismissal or laying off of any individual due to race, creed, color, national origin, age, sex, or which is in violation of applicable laws concerning the employment of individuals with disabilities.
22. **Non-Discrimination.** It is the policy of the Sweetwater City Schools not to discriminate on the basis of age, race, sex, color, national origin, or disability in its hiring and employment practices, or in admission to, access to, or operation of its programs, services, and activities. With regard to all aspects of this contract, Contractor certifies and warrants it will comply with this policy. No person shall be excluded from participation in, be denied benefits of, be discriminated against in the admission or access to, or be discriminated against in treatment or employment in SCS's contracted programs or activities, on the grounds of handicap and/or disability, age, race, color, religion, sex, national origin, or any other classification protected by federal or Tennessee State Constitutional or statutory law; nor shall they be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination in the performance of contracts with SCS or in the employment practices of SCS's Contractors. Accordingly, all Proposers entering into contracts with SCS shall, upon request, be required to show proof of such nondiscrimination and to post in conspicuous places that are available to all employees and applicants, notices of nondiscrimination.
23. **Criminal Background Checks.** Contractor shall comply with Public Chapter 587 of 2007, as codified in Tennessee Code Annotated Section 49-5-413, which requires all contractors to facilitate a criminal history records check conducted by the Tennessee Bureau of Investigation and the Federal Bureau of Investigation for each employee prior to permitting the employee to have contact with students or enter school grounds when students are present.
24. **Insurance.** Contractor shall maintain comprehensive general liability and automobile liability insurance, both with limits of not less than one million dollars and, if necessary, commercial umbrella insurance with limits of not less than \$1,000,000 per occurrence.

Contractor shall maintain workers' compensation insurance with statutory limits as required by the State of Tennessee or other applicable laws and employers' liability insurance with limits of not less than \$500,000. A certificate of insurance, on a standard ACCORD form, evidencing said coverage shall be provided to SCS prior to commencement of performance of this Contract. Sweetwater City Schools by and through the Sweetwater City BOARD OF PUBLIC EDUCATION shall be included as an additional insured and this insurance shall apply as primary insurance with respect to any other insurance programs afforded SCS. There shall be no endorsement or modification to make this insurance excess over other available insurance. **Throughout the term of this contract, Contractor shall provide an updated certificate of insurance upon expiration of the current certificate.** Additionally, SCS shall maintain adequate Builders Risk/All Risk Insurance for the project covering products provided by the Contractor naming the Contractor as an additional insured.

- 25. Contingent Fees.** Contractor hereby represents that Contractor has not been retained or retained any persons to solicit or secure a Sweetwater City Schools contract upon an agreement or understanding for a contingent commission, percentage, or brokerage fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business. Breach of the provisions of this paragraph is, in addition to a breach of this contract, a breach of ethical standards which may result in civil or criminal sanction and/or debarment or suspension from being a contractor or subcontractor under Sweetwater City Schools contracts.
- 26. Gratuities and Kickbacks.** It shall be a breach of ethical standards for any person to offer, give or agree to give any employee or former employee, or for any employee or former employee to solicit, demand, accept or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy or other particular matter, pertaining to any program requirement of a contract or subcontract or to any solicitation or proposal therefor. It shall be a breach of ethical standards for any payment, gratuity or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor or a person associated therewith, as an inducement for the award of a subcontract or order. Breach of the provisions of this paragraph is, in addition to a breach of this contract, a breach of ethical standards which may result in civil or criminal sanction and/or debarment or suspension from being a contractor or subcontractor under Sweetwater City Schools contracts.
- 27. Indemnification and Hold Harmless.** Contractor shall indemnify and hold harmless SCS, its officers, agents and employees from:
- a) Any claims, damages, costs and attorney fees for injuries or damages arising, in part or in whole, from the negligent or intentional acts or omissions of Contractor,

its officers, employees and/or agents, including its sub or independent contractors, in connection with the performance of the contract, and, Contractor shall pay SCS any expenses incurred as a result of Contractor's failure to fulfill any obligation in a professional and timely manner under this contract.

- b) Any claims, damages, penalties, costs and attorney fees arising from any failure of Contractor, its officers, employees and/or agents, including its sub or independent contractors, to observe applicable laws, including, but not limited to, labor laws and minimum wage laws.
- 28. Attorney Fees.** Contractor agrees that, in the event either party deems it necessary to take legal action to enforce any provision of the contract, and in the event SCS prevails, Contractor shall pay all expenses of such action including SCS's attorney fees and costs at all stages of the litigation.
- 29. Assignment--Consent Required.** The provisions of this contract shall inure to the benefit of and shall be binding upon the respective successors and assignees of the parties hereto. Except for the rights of money due to Contractor under this contract, neither this contract nor any of the rights and obligations of Contractor hereunder shall be assigned or transferred in whole or in part without the prior written consent of SCS. Any such assignment or transfer shall not release Contractor from its obligations hereunder. NOTICE OF ASSIGNMENT OF ANY RIGHTS TO MONEY DUE TO CONTRACTOR UNDER THIS CONTRACT MUST BE SENT TO THE ATTENTION OF SCS'S CHIEF ACCOUNTANT, 203 Monroe Street, Sweetwater , TENNESSEE 37874.
- 30. Entire Contract.** This contract sets forth the entire agreement between the parties with respect to the subject matter hereof and shall govern the respective duties and obligations of the parties.
- 31. Force Majeure.** No party shall have any liability to the other hereunder by reason of any delay or failure to perform any obligation or covenant if the delay or failure to perform is occasioned by *force majeure*, meaning any act of God, storm, fire, casualty, unanticipated work stoppage, strike, lockout, labor dispute, civil disturbance, riot, war, national emergency, act of Government, act of public enemy, or other cause of similar or dissimilar nature beyond its control.
- 32. Governing Law.** The validity, construction and effect of this contract and any and all extensions and/or modifications thereof shall be governed by the laws of the State of Tennessee. Tennessee law shall govern regardless of any language in any attachment or other document that the Contractor may provide.
- 33. Venue.** Any action between the parties arising from this agreement shall be maintained in the courts of Monroe County, Tennessee.
- 34. Severability.** Should any provision of this contract be declared to be invalid by any court of competent jurisdiction, such provision shall be severed and shall not affect the validity of the remaining provisions of this contract.

- 35. Confidentiality of Records.** All educational records created, disclosed or maintained pursuant to the terms of this contract are confidential and shall be created, disclosed and maintained pursuant to the provisions of Family Educational Rights and Privacy Act, also known as FERPA (20 U.S.C.A. s1232g), its regulations and Board policy.
- 36. Compliance with the Americans with Disabilities Act.** The contractor will be required to provide assurances that it does not discriminate on the basis of disability in admission to, access to, or operations of its program, services, or activities, including *hiring or employment practices*. *The contractor will insure that qualified applicants and participants with disabilities in its services, programs, or activities have communication access that is equally effective as that provided to people without disabilities. Information shall be made available in accessible formats and auxiliary aids and services shall be provided upon the reasonable request of a qualified person with a disability.*

Contract Number: [*insert contract number*]

**37. Effective Date.** This contract shall not be binding upon the parties until it has been signed first by the Contractor and then by the authorized representatives of the Sweetwater City Schools. When it has been so signed and filed, this contract shall be effective as of the date first written above.

Contract Number: [insert contract number]

**Sweetwater City Schools:**

Director of Schools Purchasing, SCS:

\_\_\_\_\_

**RECOMMENDED:**

Department Head

\_\_\_\_\_

Department:

\_\_\_\_\_

**APPROVED AS TO AVAILABILITY OF FUNDS:**

\_\_\_\_\_

ACCOUNT NUMBER:

\_\_\_\_\_

Chief Financial Officer, SCS

\_\_\_\_\_

Chairman of the Board, SCS

\_\_\_\_\_

Date Filed: \_\_\_\_\_

**CONTRACTOR**

EDUCATION NETWORKS OF AMERICA, INC AND ITS SUBSIDIARY ENA SERVICES, LLC

BY: [Signature]

Title: CTO/Sr VP

Sworn to and subscribed to before me, a

Notary Public, this 24<sup>TH</sup>

day of FEBRUARY, 2013,

by BOB COLLIE,

the SVP AND CTO of

Contractor and duly authorized to

execute this instrument on Contractor's

behalf.

[Signature]

Notary Public

My Commission Expires 1-9-14

