

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Request for Review)	
of Decisions of the)	
Universal Service Administrator by)	
)	
MasterMind Internet Services, Inc.)	SPIN-143006149
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	

ORDER

Adopted: May 11, 2000

Released: May 23, 2000

By the Commission:

I. INTRODUCTION

1. The Commission has before it three requests for review filed by MasterMind Internet Services, Inc. (MasterMind),¹ requesting review of decisions issued by the Schools and Libraries Division (SLD) of the Universal Service Administrator (the Administrator or USAC).² The SLD denied funding to certain schools and libraries (Applicants) that requested support for services to be provided by MasterMind, finding that the Applicants and MasterMind violated the Commission's competitive bidding requirements.³ In this Order, the Commission denies in part, and grants in part, MasterMind's requests for review. In upholding, in part, SLD's decision, the Commission protects the integrity of the competitive bidding requirements, thereby ensuring that schools and libraries receive the most cost-effective services.

¹ *Request for Review of the Decision of the Universal Service Administrator by MasterMind Internet Services, Inc.*, CC Docket No. 96-45, CC Docket No. 97-21, Request for Review (filed November 24, 1999) (November 24 Request for Review); *Request for Review of the Decision of the Universal Service Administrator by MasterMind Internet Services, Inc.*, CC Docket No. 96-45, CC Docket No. 97-21, Request for Review (filed December 16, 1999); *Request for Review of the Decision of the Universal Service Administrator by MasterMind Internet Services, Inc.*, CC Docket No. 96-45, CC Docket No. 97-21, Request for Review (filed January 13, 2000). Each appeal raises the same arguments, and we do not distinguish between the three appeals in this Order.

² Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

³ Appendix A contains a list of the schools and libraries and associated applications that are at issue here.

II. BACKGROUND

A. The Commission's Competitive Bidding Requirements

2. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts for eligible telecommunications services, Internet access, and internal connections.⁴ Section 254(h)(1)(B) of the Communications Act limits such discounts to services provided in response to a bona fide request for services by an eligible entity.⁵ The Commission concluded in the *Universal Service Order* that Congress intended, by providing support only for those schools and libraries making bona fide requests for service, to require accountability on the part of the schools and libraries.⁶ To ensure such accountability, the Commission concluded that eligible schools and libraries should submit a description of the services they seek so that such description may be posted to the Administrator's website to be evaluated by competing service providers.⁷ In addition to the need to comply with the requirement that schools and libraries make bona fide requests for services, the Commission concluded that fiscal responsibility required that schools and libraries award contracts for eligible services pursuant to competitive bidding.⁸ Accordingly, the Commission adopted competitive bidding requirements, noting that "[c]ompetitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed about all of the choices available to them."⁹ The Commission found that without competitive bidding, the applicant may not receive the most cost-effective services available, with the result that demand for support would be greater than necessary and less support would be available to support other participants in the program.¹⁰ To promote a fair and open competitive bidding process, the Commission adopted several requirements aimed at ensuring that all prospective bidders could identify the services that schools and libraries seek to receive and that all such bidders would have sufficient time to prepare and submit bids.¹¹

3. The Commission's rules require that the applicant make a bona fide request for services by filing with the Administrator an FCC Form 470,¹² which is posted to the Administrator's website for

⁴ 47 U.S.C. § 254(h); 47 C.F.R. §§ 54.502, 54.503.

⁵ 47 U.S.C. § 254(h)(1)(B); *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9076, para. 570 (1997), as corrected by *Federal-State Joint Board on Universal Service*, Errata, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *affirmed in part, reversed in part and remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (*Universal Service Order*).

⁶ *Universal Service Order*, 12 FCC Rcd at 9076, para. 570 (citing 47 U.S.C. § 254(h)(1)(B)).

⁷ *Universal Service Order*, 12 FCC Rcd at 9076, para. 570.

⁸ *Universal Service Order*, 12 FCC Rcd at 9029, para. 480.

⁹ *Universal Service Order*, 12 FCC Rcd at 9029, para. 480.

¹⁰ *Universal Service Order*, 12 FCC Rcd at 9029, para. 480.

¹¹ 47 C.F.R. §§ 54.504, 54.511; *Universal Service Order*, 12 FCC Rcd at 9078-80, paras. 575-79. These requirements are in addition to applicable state and local procurement rules. 47 C.F.R. § 54.504(a); *Universal Service Order*, 12 FCC Rcd at 9078-79, para. 575.

¹² Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (Form 470).

all potential competing service providers to review.¹³ After the Form 470 is posted, the applicant must wait at least 28 days before entering an agreement for services and submitting an FCC Form 471, which requests support for eligible services.¹⁴ Prior to entering into an agreement with a service provider, the Commission's rules require that the applicant carefully consider all bids submitted for provision of the requested services.¹⁵ The Commission concluded that price should be the primary factor in selecting a bid, but noted several additional factors that also should be considered by the applicant in determining which service provider meets their needs "most effectively and efficiently."¹⁶

4. The Form 470 describes the applicant's planned service requirements, as well as other information regarding the applicant and its competitive bidding process that may be relevant to the preparation of bids.¹⁷ The Form 470 must be completed by the entity that will negotiate with prospective service providers and signed by the person authorized to order the requested services on behalf of the applicant.¹⁸ The signatory must make several certifications, under oath, relating to the eligibility of the applicant and the applicant's ability to make use of the services requested.¹⁹ The Form 470 also requires that the applicant name a person whom prospective service providers may contact for additional information (contact person).²⁰ The contact person should be able to answer questions regarding the information included on the Form 470 and the services requested by the applicant, including how to obtain a copy of the applicant's request for proposal (RFP), if the applicant has prepared one.²¹

5. In the funding requests at issue here, SLD issued funding commitment letters denying

¹³ 47 C.F.R. § 54.504(b); *Universal Service Order*, 12 FCC Rcd at 9078, para. 575.

¹⁴ 47 C.F.R. § 54.504(b), (c); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (Form 471).

¹⁵ 47 C.F.R. § 54.511(a).

¹⁶ *Universal Service Order*, at 9029, para. 481. Additional factors that an applicant should consider—when permitted by state and local procurement rules—include "prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives." *Id.*; see also *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734, 13739, para. 10 (1999).

¹⁷ 47 C.F.R. § 54.504(b). In addition to a description of the services that the applicant plans to receive, the Form 470 requests that the applicant provide information about the number of students that attend the schools that will receive support, the number of buildings for which the applicant seeks services eligible for support, and other information relevant to a service provider's determination of services appropriate to include in its bid proposal. See *Instructions for Completing the Schools and Libraries Universal Service Description of Services Requested and Certification Form (FCC Form 470) (December 1998) (FCC Form 470 Instructions)*.

¹⁸ FCC Form 470 Instructions at 2.

¹⁹ 47 C.F.R. § 54.504(b)(2).

²⁰ FCC Form 470 Instructions at 5.

²¹ FCC Form 470 Instructions at 5.

*support to the Applicants with respect to all funding requests for which MasterMind was the named service provider and (1) an employee of MasterMind had been named as the contact person on the associated Form 470; (2) an employee of MasterMind had signed the Form 470; or (3) an employee of MasterMind had signed a Form 471 associated with the funding request.*²² In a few instances, SLD also denied certain funding requests where a MasterMind employee was not listed as the contact person, or a MasterMind employee had not signed the Form 470 or Form 471.²³ The reason provided by SLD in each case was that "[t]he circumstances surrounding the filing of the Form 470 associated with [the] funding request violated the intent of the bidding process."²⁴ MasterMind filed the three requests for review at issue here seeking review of SLD's denials of such funding requests. MasterMind, however, does not request review of those applications where a MasterMind employee signed the underlying Form 470 or Form 471.

6. In its requests for review, MasterMind admits that it was involved in the preparation of Forms 470 and that a MasterMind employee was listed as the contact person on the Forms 470 related to the denials at issue in the current requests for review.²⁵ MasterMind does not dispute that it was awarded the contracts for each funding request currently under review.²⁶ MasterMind argues, however, that because the Applicants did not violate any Commission rule, there is no basis for denying the

²² Letter from D. Scott Barash, Universal Service Administrative Company, to Magalie Roman Salas, Federal Communications Commission, filed March 17, 2000 (SLD Letter). In addition to the conduct noted in the text, SLD's investigation indicated that MasterMind had prepared and distributed requests for proposals (RFPs) on behalf of certain schools; that those RFPs were vague with respect to the services requested, failed to identify the school requesting services, and did not contain bid-close or reply-by dates; and that MasterMind instructed certain service providers to supply MasterMind, rather than the Applicants, information regarding their services offered. SLD Letter at 3-4.

²³ See Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Kildare School District 50 (SLD-147159), issued October 26, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Lowrey School District No. 10 (SLD-147173), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Grant Elementary School (SLD-147200), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, McCloud Public Schools (SLD-147207), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to CJ Vires, Konawa Independent School District No. 4 (SLD-147209), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Indianola Independent School District No. 25 (SLD-147340), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Henryetta Public Schools (SLD-147343), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Velma Alma Independent School District No. 15 (SLD-148035), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Life Christian School (SLD-148154), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Lowrey School District (SLD-152314), issued October 26, 1999.

²⁴ See, e.g., Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Agra Independent School District 134, issued October 26, 1999.

²⁵ November 24 Request for Review, at 6; Affidavit of Chris Webber, November 24 Request for Review Exhibit A, paras. 3, 10 (Webber Affidavit). MasterMind apparently fails to consider the ten applications under review here that did not name a MasterMind employee as contact person.

²⁶ November 24 Request for Review at 7; Webber Affidavit, para. 9.

applications.²⁷ That is, MasterMind argues that there is no rule specifically prohibiting a service provider's involvement in the competitive bidding process.²⁸ MasterMind argues that, in any event, fair and open competitive bidding processes occurred, noting that it was not awarded the contract to provide service in every instance in which its employee was the contact person.²⁹

7. MasterMind further argues that SLD was aware of MasterMind's involvement in the competitive bidding processes before any of the disputed Forms 470 were filed and that it was unreasonable for SLD subsequently to deny the applications based on MasterMind's involvement.³⁰ According to MasterMind, it communicated with SLD throughout the application process, but SLD never indicated that MasterMind's actions would result in the denial of requests for support.³¹ MasterMind contends that it was "trapped by a policy that was being considered and developed as MasterMind assisted in the filing of the Form 470 and was applied retroactively to MasterMind."³²

8. Finally, MasterMind requests that, if the Commission determines that MasterMind violated any rule by its activities, the Commission grant a waiver of the rule with respect to the funding requests at issue to avoid needlessly penalizing schools that have been denied funding.³³

III. DISCUSSION

9. For the reasons set forth below, we conclude that, to the extent a MasterMind employee was listed as the contact person on the FCC Form 470 that initiated a competitive bidding process in which MasterMind participated, such Forms 470 were defective and violated our competitive bidding requirements. In the absence of valid Forms 470, the requests for support were properly denied. In those instances, however, where SLD denied requests for support that did not name a service provider as the contact person on the Form 470, we grant MasterMind's requests for review, and remand those applications to SLD for further processing. We also conclude that MasterMind has not demonstrated special circumstances warranting a waiver of our competitive bidding requirements.

A. MasterMind Violated the Commission's Competitive Bidding Requirements

10. We find that an applicant violates the Commission's competitive bidding requirements when it surrenders control of the bidding process to a service provider that participates in that bidding process. In this regard, we reject MasterMind's claim that, even if it engaged in conduct that arguably could have undermined the Applicants' competitive bidding processes, the applications at issue cannot be denied in the absence of a rule explicitly prohibiting such conduct. In the *Universal Service Order*, the Commission concluded that schools and libraries should engage in competitive bidding for all services

²⁷ November 24 Request for Review at 8.

²⁸ November 24 Request for Review at 8.

²⁹ MasterMind Letter at 2-3.

³⁰ MasterMind Letter at 6.

³¹ MasterMind Letter at 6-7.

³² MasterMind Letter at 5.

³³ MasterMind Letter at 5.

for which they seek support, finding that competitive bidding would be the most efficient means for ensuring awareness by schools and libraries of the array of choices available to them and enabling the schools and libraries to choose the best and most efficient provider of the requested services.³⁴ Here, the Applicants named a MasterMind employee as the contact person on their Forms 470 and, in at least some instances, the Applicants permitted MasterMind to prepare and distribute RFPs to potential bidders. In so doing, the Applicants surrendered control of the bidding process to an employee of MasterMind, a service provider that not only participated in the bidding process, but also was awarded the service contracts. The contact person exerts great influence over an applicant's competitive bidding process by controlling the dissemination of information regarding the services requested. We believe that, when an applicant delegates that power to an entity that also will participate in the bidding process as a prospective service provider, the applicant irreparably impairs its ability to hold a fair and open competitive bidding process. For example, other bidders may not receive from the contact person information of the same type and quality that the contact person retains for its own use as a bidder. If a bidder cannot, because it lacks critical information, determine how to best serve the applicant's requirements, the bidder cannot prepare a cost-effective proposal, thereby failing to achieve the intended goals of the competitive bidding process. For these reasons, we conclude that a violation of the Commission's competitive bidding requirements has occurred where a service provider that is listed as the contact person on the Form 470 also participates in the competitive bidding process as a bidder. Accordingly, to the extent the Applicants committed such violations, we find that SLD properly denied their applications.

11. We do not find persuasive MasterMind's claims that, notwithstanding its participation, the bidding processes were open and fair. In support of this claim, MasterMind points to several instances in which its bids were not accepted, despite having its employee listed as the contact person on the associated Form 470. We do not believe that denial of an application is proper only if the service provider in control of the bidding process also was awarded the service contract. We believe that the participation of the contact person in the bidding process may significantly affect the submission of bids by other prospective bidders, thereby undermining the ability of the applicant to obtain the most cost-effective bid.³⁵ For example, a prospective bidder may choose not to participate in a competitive bidding process if it believes that the bidding will not be conducted in an open and fair manner, given that another bidder is serving as the contact person.³⁶ Under such circumstances, we find that a fair and open competitive bidding process has not occurred and the requirement that an applicant make a bona fide request for services has been violated. We conclude, therefore, that denial is appropriate in any instance

³⁴ *Universal Service Order*, 12 FCC Rcd at 9029, para. 480.

³⁵ We disagree with MasterMind that the relationship an applicant might have with a service provider it lists as the contact person on the Form 470 is analogous to the relationship that exists between an applicant and its current service provider. November 24 Request for Review at 10. Even if an incumbent service provider might have a competitive advantage in a bidding process, it does not exert control over the bidding process to the disadvantage of other potential bidders.

³⁶ We also do not agree with MasterMind's argument that the instructions for the Form 470 make clear to prospective bidders that the person signing the form would be the person to consider the bids and negotiate with service providers. MasterMind Letter at 5. There is no reason to assume that service providers would be aware of the instructions for a form that they normally would not complete. Moreover, even if the prospective bidder were aware of the distinction suggested by MasterMind, the appearance of a pre-existing relationship between the competitor/contact person and the applicant would have the same potentially deterrent consequences.

in which the service provider is listed as the contact person and participates in the bidding process.³⁷

12. We also reject MasterMind's argument that "at the time the Form 470s were submitted, the bidding process had been complied with" because each applicant had received a receipt acknowledgement letter stating that SLD had "received [a] properly completed FCC Form 470".³⁸ SLD's notifications indicated only that the Applicants had met the minimum processing requirements and did not constitute any decision on the merits of the form.³⁹ Moreover, the Forms 470 did not indicate that the contact person was an employee of a service provider that intended to bid on the requested services. Not until the Forms 471 were filed could SLD know that the contact person was an employee of a service provider that was participating in the competitive bidding process. We find, therefore, that, notwithstanding the issuance of receipt acknowledgement letters, SLD properly denied the applications

13. Finally, we reject MasterMind's argument that we are precluded from finding a violation of our rules because SLD failed, despite having reviewed and advised MasterMind about its marketing materials and other documents indicating MasterMind's intended course of action, to warn MasterMind that its involvement in the Applicant's competitive bidding processes would result in the denial of the funding requests.⁴⁰ Even if SLD had been aware that the Applicants were engaged in such activities, its failure to notify the Applicants or MasterMind of possible violations at that time would not preclude SLD or the Commission from later determining that a violation has occurred. We note that, even where a party has received erroneous advice from a government employee, the government is not estopped from enforcing its rules in a manner that is inconsistent with the advice provided by the employee.⁴¹

14. To the extent that the applications at issue here were denied by SLD in instances that the Applicant did not name a MasterMind employee as the contact person and a MasterMind employee did not sign the associated Forms 470 or 471,⁴² we do not believe that there has been a violation of the

³⁷ In reaching this conclusion, we do not intend to require SLD to modify its current practices in reviewing applications. Rather, we find here that, to the extent that SLD becomes aware of such circumstances, it may properly deny the associated applications.

³⁸ November 24 Request for Review at 10.

³⁹ See, e.g., Letter from Schools and Libraries Division to Chris Webber, Agra Independent School District, dated January 25, 1999 ("We are pleased to inform you that the Schools and Libraries Corporation (SLC) has received your properly completed FCC Form 470, Description of Services Requested. . . . Your application is subject to review by the SLC for a determination of funding eligibility before funds are committed.").

⁴⁰ MasterMind Letter at 5-7.

⁴¹ *In re Mary Ann Salvatoriello*, Memorandum Opinion and Order, 6 FCC Rcd 4705, 4707-08, para. 22 (1991) (citing *Office of Personnel Management v. Richmond*, 497 U.S. 1046 (1990)).

⁴² See Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Kildare School District 50 (SLD-147159), issued October 26, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Lowrey School District No. 10 (SLD-147173), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Grant Elementary School (SLD-147200), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, McCloud Public Schools (SLD-147207), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to CJ Vires, Konawa Independent School District No. 4 (SLD-147209), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Indianola Independent School District No. 25 (SLD- (continued....))

competitive bidding process. Granting these requests for review, therefore, is not inconsistent with the Commission's rules. Accordingly, we grant the requests for review and remand those applications to SLD for further processing.

B. Circumstances Do Not Warrant a Waiver of Our Competitive Bidding requirements.

15. We conclude that MasterMind has not demonstrated a basis for waiving the Commission's rules.⁴³ The Commission may waive any provision of its rules on its own motion and for good cause shown.⁴⁴ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid, and "an applicant for waiver faces a high hurdle even at the starting gate."⁴⁵ A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.⁴⁶ In addition, we may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁴⁷ Waiver is, therefore, appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.⁴⁸ MasterMind fails to show that a waiver would serve the public interest in this instance. MasterMind merely argues that waiver is appropriate in this case to prevent needlessly penalizing the Applicants that have been denied funding.⁴⁹ To the extent we deny MasterMind's requests for review, we do not believe that we are needlessly penalizing the Applicants. Rather, the violations of the Commission's competitive bidding requirements that we find here were the result of the Applicants' failure to comply with their responsibilities. While enforcement of these requirements has a harsh consequence for these particular Applicants, the underlying policy of ensuring that schools and libraries receive the most cost-effective services eligible for universal service support under the schools and libraries mechanism is critical to the integrity of the program. We, therefore, find no basis for waiving our competitive bidding requirements.

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147340), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Henryetta Public Schools (SLD-147343), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Velma Alma Independent School District No. 15 (SLD-148035), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Life Christian School (SLD-148154), issued November 16, 1999; Funding Commitment Letter from Universal Service Administrative Company, to Chris Webber, Lowrey School District (SLD-152314), issued October 26, 1999).

⁴³ MasterMind Letter at 5.

⁴⁴ 47 C.F.R. §1.3.

⁴⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*).

⁴⁶ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

⁴⁷ *WAIT Radio*, 897 F.2d at 1157.

⁴⁸ *Northeast Cellular*, 897 F.2d at 1166.

⁴⁹ MasterMind letter at 5.

IV. ORDERING CLAUSE

16. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1-4, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 54.504, 54.511, 54.719 and 54.722 of the Commission's rules, 47 C.F.R. §§ 54.504, 54.511, 54.719 and 54.722, that the November 24, 1999, December 16, 1999, and January 13, 2000, Letters of Appeal filed by MasterMind Internet Services, Inc., ARE DENIED IN PART and REMANDED IN PART FOR FURTHER PROCESSING TO THE EXTENT PROVIDED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary