

Federal Communications Commission

DA 02-892

MAY -1 2002
FCC-MAILROOM

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Request for Review of the)
Decision of the)
Universal Service Administrator by)
)
Montgomery Public Schools)
Montgomery, Alabama)
)
Federal-State Joint Board on)
Universal Service)
)
Changes to the Board of Directors of the)
National Exchange Carrier Association, Inc.)

File No. SLD-151546

CC Docket No. 96-45 ✓

CC Docket No. 97-21

ORDER

Adopted: April 17, 2002

Released: April 18, 2002

By the Telecommunications Access Policy Division, Wireline Competition Bureau:

1. The Telecommunications Access Policy Division has under consideration a Request for Review by Montgomery Public Schools (Montgomery), Montgomery, Alabama, seeking review of a decision issued by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator).¹ Montgomery seeks review of the SLD's denial of its requests for discounts for internal connections under Year 2 of the schools and libraries universal service support mechanism.² For the reasons set forth below, we deny Montgomery's appeal.

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.³ In order to receive discounts on eligible services, the Commission's rules require that the applicant

¹ See Letter from Carol A. Doucet, Montgomery Public Schools, to Schools and Libraries Division of the Universal Service Administrative Company, filed July 13, 2000 (Request for Review). Although the Request for Review letter is addressed to the Schools and Libraries Division, the content of the Request for Review indicates that it was intended as an appeal to the Commission. Request for Review at 1.

² See Request for Review. 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 47 C.F.R. §§ 54.502, 54.503.

submit to the Administrator a completed FCC Form 470, in which the applicant sets forth its technological needs and the services for which it seeks discounts.⁴ Once the applicant has complied with the Commission's competitive bidding requirements and entered into agreements for eligible services, it must file an FCC Form 471 application to notify the Administrator of the services that have been ordered, the carriers with whom the applicant has entered into an agreement, and an estimate of funds needed to cover the discounts to be given for eligible services.⁵ The Administrator then issues a funding commitment decision letter based on its review of the FCC Form 471.

3. The Commission's rules provide that eligible schools and libraries with existing contracts are exempt from the competitive bidding requirement only under certain circumstances. Section 54.511(c)(1) provides that contracts signed after July 10, 1997 and before January 30, 1998 would be exempt from the competitive bidding requirement for services provided through December 31, 1998.⁶ To ensure that schools and libraries contracting for services between July 10, 1997 and January 30, 1998 did not negotiate long-term contracts and avoid the competitive bidding requirement altogether, the Commission limited the exemption of the competitive bidding requirement for contracts signed between July 10, 1997 and January 30, 1998 to services provided through December 31, 1998, regardless of the duration of the contract as a whole.⁷ Once an applicant submits an FCC Form 470 and complies with the 28-day posting period, the applicant is permitted to sign a long-term contract at that time and, having complied with the competitive bidding requirement prior to signing the contract, the applicant need not submit any additional FCC Form 470s for the duration of that contract.⁸ Further, where an applicant seeks to

⁴ 47 C.F.R. § 54.504 (b)(1), (b)(3).

⁵ 47 C.F.R. § 54.504(c).

⁶ 47 C.F.R. § 54.511(c)(1); see also *Fourth Reconsideration Order*, 13 FCC Rcd at 5441, para. 217 (1998). In June 1998, the Commission changed the funding year for the schools and libraries universal service support mechanism from a calendar year cycle (January 1 – December 31) to a fiscal year cycle (July 1 – June 30). *Federal-State Joint Board on Universal Service*, Docket No. 96-45, Fifth Order on Reconsideration and Fourth Report and Order in CC Docket No. 96-45, 13 FCC Rcd 14915, 14920, para. 8 (1998) (*Fifth Order on Reconsideration*). The year 1 period was extended to cover the 18-month period from January 1, 1998 to June 30, 1999. *Id.* Although the Commission's rules generally do not exempt voluntary extensions of contracts from the competitive bidding requirement, the *Fifth Order on Reconsideration* provided that existing contracts with termination dates between December 31, 1998 and June 30, 1999 could be voluntarily extended to a date no later than June 30, 1999 in order to account for the change in the funding year cycle, and to avoid the undue hardship that would result from requiring schools and libraries to participate in competitive bidding for the six-month period between January 1, 1999 through June 30, 1999. *Id.* at 14923, para. 14. The Commission subsequently amended this exemption from the competitive bidding requirement to include applicants with existing contracts that expired between the closing dates of the 1998 filing window and June 30, 1999, but only for services received between January 1, 1999 and June 30, 1999. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Tenth Order on Reconsideration, 14 FCC Rcd 5983, 5989-5991, para. 12-15 (1999); 47 C.F.R. § 54.511(d)(1).

⁷ *Fourth Reconsideration Order*, 13 FCC Rcd at 5445, para. 217.

⁸ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, DA 99-1773, 1999 WL 680424 (Com. Car. Bur. 1999), para. 10 ("We conclude that permitting a school or library to commit to a long-term contract after participating in the competitive bidding process does not compromise the benefits derived from competition. As long as all providers have had the opportunity to compete for the same contract, schools or libraries can enter into renewable contracts of any length or form, as permitted by state law.").

renew an existing contract that was not previously posted, the applicant must satisfy the competitive bidding requirement by posting the request on the SLD website and carefully consider all bids submitted before renewing the existing contract after the 28-day posting period has terminated.⁹

4. The Commission has repeatedly emphasized the importance of the competitive bidding requirement, stating that it helps to ensure that schools and libraries will receive the lowest possible pre-discount price.¹⁰ The Commission has concluded that competitive bidding is the most efficient means for ensuring that both eligible schools and libraries are informed about the choices available to them, reducing the contract prices, and minimizing the amount of support needed.¹¹ In adopting this requirement, the Commission was aware that some schools and libraries were bound by existing contracts that could not be breached without such schools or libraries incurring a penalty. The Commission did not want applicants with existing contracts to be precluded from benefiting from universal service support until after their contracts expired, nor did it wish to penalize providers with whom the contracts were signed.¹² At the same time, however, the Commission has an interest in preventing incumbent carriers from using long-term contracts as a means to prevent potential competitors from offering alternative service packages to schools and libraries.¹³

5. At issue here are forty-seven Funding Year 2 funding requests, all of which listed a contract award date (CAD) of February 28, 1998, and cited FCC Form 470 Universal Service Control Number (USCN) 553620000229925 (Montgomery Form 470) as the supporting FCC Form 470.¹⁴ SLD denied these requests on the grounds that “[a] contract for a new service was signed prior to the required 28-day waiting period”¹⁵

⁹ *Id.* at para. 11.

¹⁰ See *Federal-State Joint Board on Universal Service*, CC Docket 96-45, Order on Reconsideration, 12 FCC Rcd 10095, 10098, para. 9 (1997), as corrected by *Federal-State Joint Board on Universal Service*, Erratum, CC Docket No. 96-45, FCC 97-246 (rel. July 15, 1997) (*First Reconsideration Order*).

¹¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029, para. 480 (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).

¹² *Id.* at 9063-9064, para. 547.

¹³ See *First Reconsideration Order*, 12 FCC Rcd at 10098, para. 9; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5442, para. 213 (1998) (*Fourth Reconsideration Order*).

¹⁴ See FCC Form 471, Montgomery County School District, filed April 5, 1999 (Montgomery Form 471); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Dr. Carol A. Doucet, Montgomery County School District, dated October 12, 1999; Letter from Schools and Libraries Division, Universal Service Administrative Company, to Dr. Carol A. Doucet, Montgomery County School District, dated June 14, 2000; Request for Review.

¹⁵ See, e.g., Funding Commitment Decision Letter at 5.

6. In its pending Request for Review, Montgomery argues that the funding requests were made in compliance with the Commission's competitive bidding rules.¹⁶ Montgomery asserts that the CAD stated on the FCC Form 471 is correct and that the funding requests were made pursuant to a pre-existing contract on February 29, 1998.¹⁷

7. A contract awarded on February 28, 1998 does not qualify as a pre-existing contract under the Commission's regulations.¹⁸ Therefore, Montgomery was required to post an FCC Form 470 presenting the contract for competitive bidding. As noted, the FCC Form 470 that Montgomery cited to as support for its requests was not posted because Montgomery indicated that it was not seeking new services.¹⁹ Further, our review of the record reveals no other FCC Form 470 that Montgomery posted in Funding Year 1 that would support a February 28, 1998 contract, nor has Montgomery pointed to any such FCC Form 470. We conclude that the February 28, 1998 contract underlying Montgomery's funding requests was not properly bid under the Commission's regulations.

8. Montgomery next argues that, even if the original contract awarded on February 28, 1998 was not validly bid, Montgomery later rebid at least "some" of the services for which it requests discounts, that the same vendor was again awarded the new contract on October 4, 1998, and that this new contract was therefore validly subjected to competitive bidding.²⁰

9. We must reject this argument because Montgomery's post-filing window assertion that the services were awarded on October 4, 1998 contradicts the February 28, 1998 award date that Montgomery provided in the original FCC Form 471. We do not accept new evidence from an applicant on appeal that is contrary to the information that the applicant provided to SLD during SLD's application review.²¹ Further, nothing in the record that was before SLD during application review indicated that the requested services were awarded in October 1998. Therefore, based on the information in the record that was before SLD during application review, we find that the services requested in the 47 Funding Requests at issue in this appeal were not subjected to competitive bidding in compliance with Commission rules, and were therefore correctly denied.

¹⁶ Request for Review, at 1.

¹⁷ *Id.*

¹⁸ *See supra*, para. 3 (noting that pre-existing contract is limited to those contracts signed between July 10, 1997 and January 30, 1998).

¹⁹ Montgomery Form 470, Item 10.

²⁰ Request for Review, at 1-2.

²¹ *Request for Review by Richland Parish School District, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-127412, CC Dockets No. 96-45 and 97-21, Order, 16 FCC Rcd 15871, para. 7 (Com. Car. Bur. 2001).

10. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the appeal filed by Montgomery County School District, Montgomery, Alabama on July 13, 2000 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Mark Seifert
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Wireline Competition Bureau