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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Request for Review of the Decision of the Universal Service Administrator by	)	
	)	
Consorcio de Escuelas y Bibliotecas de Puerto Rico San Juan, Puerto Rico	)	
	)	
Academia Adventista del Oeste Mayagüez, Puerto Rico	)	File No. SLD-228216
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Changes to the Board of Directors of the National Exchange Carrier Association, Inc.	)	CC Docket No. 97-21

ORDER

Adopted: July 12, 2002 **Released: July 15, 2002**

By the Wireline Competition Bureau:

1. Before the Wireline Competition Bureau is a Request for Review filed by Consorcio de Escuelas y Bibliotecas de Puerto Rico (Consorcio), San Juan, Puerto Rico, and Academia Adventista del Oeste, Mayaguez, Puerto Rico (Academia) (collectively, Appellants).[1] Appellants seek review of a decision issued by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator), denying Academia's Funding Year 2001 application for discounts under the schools and libraries universal service support mechanism.[2] For the reasons set forth below, we deny the Request for Review and affirm SLD's decision.

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[1] *Request for Review of the Decision of the Universal Service Administrator by Consorcio de Escuelas y Bibliotecas de Puerto Rico and Academia Adventista del Oeste*, CC Docket Nos. 96-45 and 97-21, Request for Review, filed November 29, 2001 (Request for Review).

[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). Previously, this funding period was referred to as Funding Year 4. Funding periods are now described by the year in which the funding period starts. Thus the funding period which begins on July 1, 2001 and ends on June 30, 2001, previously known as Funding Year 4, is now called Funding Year 2001.

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] The Commission's rules provide that an eligible school, library, or consortium applying for funding must, in most cases, seek competitive bids for the products and services to be funded.[4] To comply with this competitive bidding requirement, the Commission's rules require that an applicant submit to the Administrator a completed FCC Form 470 (Form 470), in which the applicant lists the services for which it seeks discounts.[5] The Administrator then posts the Form 470 on its website for all potential competing service providers to review.[6]

3. 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.[7] Applicants are required, in Item 6, to name a person whom prospective service providers may contact for additional information (contact person).[8] The contact person should be able to answer questions about the application.[9] In addition, in Item 11, applicants may, at their option, name another contact person (Item 11 contact) "who can provide additional technical details and other information about [the applicant's] services to vendors seeking to bid."[10] This need not be the same person listed as the contact person for the entire application in Item 6.[11]

4. In *Mastermind Internet Services, Inc.*, the Commission held 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.[12] Such a surrender occurs when an applicant names a representative of a participating service provider as contact

[3] 47 C.F.R. §§ 54.502, 54.503.

[4] 47 C.F.R. § 54.504(a).

[5] 47 C.F.R. §§ 504(b)(1), (b)(2); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 470 or Form 470).

[6] 47 C.F.R. § 54.504(b).

[7] 47 C.F.R. § 54.504(b).

[8] Form 470, Item 6; Instructions for Completing the Schools and Libraries Universal Service Description of Services Requested and Certification Form (FCC Form 470), OMB 3060-0806 (September 1999) (Form 470 Instructions), at 7.

[9] Form 470 Instructions at 7.

[10] Form 470, Item 11; Form 470 Instructions at 10.

[11] Form 470 Instructions at 10.

[12] *Request for Review by Mastermind Internet Services, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SPIN-143006149, CC Docket No. 96-45, 16 FCC Rcd 4028, 4033, para. 10 (2000) (*Mastermind*).

person on the Form 470.[13] Thus, the Commission concluded 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."[14] In such a case, the Form 470 is invalid and any funding request based on that Form 470 must be denied.[15]

5. In its Funding Year 2001 FCC Form 471, Academia made six funding requests, all supported by Form 470 App. No. 640750000310896.[16] Five of the requests sought discounts on services to be provided by the Hispanic Information and Telecommunications Network, Inc. (HITN).[17] In Item 6, Academia listed two contact persons, who were employees of Consorcio.[18] In addition, Academia named Gloria Bermudez (Bermudez), an employee of HITN, as a contact person in Item 11.[19] On October 31, 2001, SLD denied all five funding requests on the grounds that the "[a]ssociated Form 470 contains service provider contact information."[20] Appellants then filed the pending Request for Review.

6. In their Request for Review, Appellants concede that Bermudez was an employee of HITN, the service provider chosen to provide four of the five services for which Academia seeks funding.[21] However, they argue that using Bermudez as an Item 11 contact for technical details and other information about the services should not constitute a violation of the competitive bidding rules because, they assert, she had no responsibility over Consorcio's contracting policies and did not exert control over the competitive bidding process.[22]

7. In *Mastermind*, the Commission, as discussed above, held that a competitive bidding violation is established when a representative of a service provider participating in the bidding process is named as contact person on the Form 470.[23] The Commission emphasized

[13] *Mastermind*, 16 FCC Rcd at 4033-34, para. 10.

[14] *Mastermind*, 16 FCC Rcd at 4033, para. 10.

[15] *Mastermind*, 16 FCC Rcd at 4032, para. 9.

[16] FCC Form 471, Academia Adventista del Oeste, filed January 18, 2001 (Academia Form 471); FCC Form 470, Puerto Rico Consortium of Schools, Libraries, and Health Care Providers, filed November 17, 2000 (Year 2001 Form 470).

[17] Academia Form 471. These requests are identified by Funding Request Numbers (FRNs) 660253, 660276, 660294, 660315, and 660325.

[18] *Id.*, Item 6.

[19] *Id.*, Item 11.

[20] Letter from Schools and Libraries Division, Universal Service Administrative Company, to Ines O'Neill, Academia Adventista del Oeste, dated October 31, 2001 (Funding Commitment Decision Letter).

[21] Request for Review at 3-4.

[22] Request for Review at 4.

[23] *See supra*, note 14.

that this circumstance compromises the fairness of the bidding process because the contact person can exert influence over the process by discriminating in the dissemination of information regarding the services requested.[24]

8. We find that this reasoning applies to contact persons named in Item 11 as well as to contact persons named in Item 6. As noted above, Item 11 contacts are named to provide technical and other information regarding the services requested, and are thus in a position to exert precisely the kind of influence over the process that concerned the Commission in *Mastermind*.[25] Appellants state that, unlike the Item 6 contact person, the Item 11 contact is optional.[26] However, the fact that naming the Item 11 contact is optional is irrelevant. Once the option is exercised, the fairness concerns exist to the same degree as if the naming of the contact had been mandatory. We conclude that a contact person named in Item 11 of the Form 470 that is a representative of a participating service provider establishes a *Mastermind* violation.

9. Appellants also argue that, because HITN had previously provided the services that Academia was seeking to renew in Funding Year 2001, HITN was an appropriate and logical party to name as a source of technical information regarding the services in question.[27] Regardless of whether Applicants believe that HITN was otherwise a logical choice for Item 11 contact, however, it was not a permissible choice under *Mastermind*.

10. Appellants note that the Form 470 Instructions provide that an Item 11 contact may be a member of "your staff or project," and argue that the use of the term "project" permits applicants to rely on a service provider who is a member of the service "project," *e.g.*, the incumbent provider.[28] We find that there is no inconsistency between the Form 470 Instructions on Item 11 and the competitive bidding requirements under *Mastermind*. While the instructions indicate that applicants have flexibility in choosing an Item 11 contact person, they do not provide that an applicant may choose one that violates competitive bidding rules. The mere use of a term in the Form 470 Instructions cannot overrule Commission regulations or precedents.

11. Appellants further argue that referring to a service provider representative as an Item 11 contact is permitted by SLD's service provider manual.[29] They refer to "The SLD Guide to Service Provider Participation in the E-Rate," attached to their Request for Review.[30] This attached document provides, *inter alia*, that service providers may offer technical assistance to an applicant in the development of the applicant's "technology plan."[31] Appellants argue that

[24] *Mastermind*, 16 FCC Rcd at 4034, para. 19.

[25] *See supra*, para. 3.

[26] Request for Review at 3-5.

[27] Request for Review at 5-6.

[28] Request for Review at 4-5; *see also* Form 470 Instructions at 10.

[29] Request for Review at 6-7.

[30] Request for Review, Exh. 4.

[31] *Id.*, Section 5.

providers who participate in the development of the technology plan are part of the applicant's "project" and may therefore be Item 11 contacts under the Form 470 Instructions. As discussed above, we have rejected the assertion that the reference in the Form 470 Instructions supports this conclusion. However, we also note that the very SLD guide on which Appellants rely further states that "the presence of a representative or employee of a Service Provider as the contact on the Form 470, *or any contact information associated with a service provider on the Form 470*, renders that Form 470 invalid."[32] No exception is provided for those service providers that participated in the development of the technical plan. Thus, the SLD guideline only confirms that Appellants' use of a participating service provider as an Item 11 contact position will invalidate the Form 470.

12. Appellants argue that SLD erred because it did not provide them with an opportunity to rebut the determination that Academia violated the competitive bidding services.[33] The Appellants are mistaken in asserting that a *Mastermind* violation is rebuttable. Rather, *Mastermind* holds that if a representative of a participating service provider is named as a contact person, a violation is definitively established.[34]

13. In further support of their argument that the finding of a *Mastermind* violation is rebuttable, Appellants refer again to "The SLD Guide to Service Provider Participation in the E-Rate" as attached to their Request for Review.[35] This document states that "there is a rebuttable presumption that the Service Provider is participating in the competitive bidding process if the Form 470 seeks the type of services furnished by the Service Provider."[36] However, this only addresses the question of a whether a service provider has, in fact, participated in the bidding process, not whether a participating service provider named as contact person establishes a bidding violation. Here, Appellants have not disputed that HITN participated in the bidding process, nor could they reasonably do so given that HITN was awarded five of the six service contracts at issue. Thus, the guideline on which Appellants rely offers no basis for relief.

14. We conclude that SLD correctly determined, based on the information in Item 11 of the Form 470, that a competitive bidding violation had occurred, and that the Academia Form 470 was therefore invalid under *Mastermind*. Because all six of the funding requests in the Academia Form 471 relied on this invalid Form 470, SLD correctly denied funding for the entire application.

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[32] *Id.*

[33] Request for Review at 8.

[34] *Mastermind*, 12 FCC Rcd at 4033, para. 10.

[35] Request for Review, Exh. 4.

[36] Request for Review, Exh. 4.

15. 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 Request for Review filed by Consorcio de Escuelas y Bibliotecas de Puerto Rico, San Juan, Puerto Rico, and Academia Adventista del Oeste, Mayaguez, Puerto Rico, on November 29, 2001 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Mattey

Carol E. Mattey
Deputy Chief, Wireline Competition Bureau