



FUNDING COMMITMENT DECISION LETTER

(Funding Year 2002: 07/01/2002 - 06/30/2003)

December 3, 2002

YSLETA INDEP SCHOOL DISTRICT
Richard L. Duncan
9600 SIMS DR
EL PASO, TX 79925-7200

Re: Form 471 Application Number: 321479
Funding Year 2002: 07/01/2002 - 06/30/2003
Billed Entity Number: 147115
Applicant's Form Identifier: Yr5-Int Partner

Thank you for your Funding Year 2002 E-rate application and for any assistance you provided throughout our review. We have completed review of your Form 471. This letter is to advise you of our decision(s).

FUNDING COMMITMENT REPORT

On the pages following this letter, we have provided a Funding commitment Report for the Form 471 application cited above. We have reviewed each Discount Funding Request on your Form 471 application and have assigned a Funding Request Number (ERN) to each Block 5. The enclosed report includes a list of the ERNs from your application. The SLD is also sending this information to your service provider(s) so preparations can be made to begin implementing your E-rate discount(s) upon the filing of your Form 486. Immediately preceding the Funding Commitment Report, you will find a guide that defines each line of the Report.

NEXT STEPS

FILE FORM 486. Once you have reviewed this letter and have determined that some or all of your requests have been funded, your next step to facilitate receipt of discounts as featured in this letter will be to file an FCC Form 486 with the SLD. The Form 486 notifies the SLD to begin payment to your service provider and provides certified indication that your technology plan(s) has been approved by an SLD certified Technology Plan Approver. The Form 486 and instructions and the list of SLD certified Technology Plan Approvers can be found on the SLD web site at <www.sl.universalservice.org> or you can call the SLD Client Service Bureau at 1-888-203-8100 and ask that the form be sent to you. The Form 486 dated July, 2001 in the lower right corner MUST be used for Funding Year 2002 and for any previous funding years. Submissions of earlier versions of the Form 486 will be returned to you and will not be able to be processed. As you complete Form 486, you should also contact your service provider to verify they have received notice from the SLD of your funding commitments. After the SLD processes your Form 486, we can process invoices for services that have been provided to you.

DEADLINE FOR FORM 486. Form 486 must be postmarked within 120 days of the Service Start Date featured on the Form 486 or within 120 days of the date of the Funding Commitment Decision Letter, whichever is later. If the Form 486 is postmarked after the later of those two dates, the date 120 days before the Form 486 postmark date will become the start date for discounted services. If the service start date is moved, your funding commitment may be reduced. You are advised to keep proof of the date of mailing of your form(s).

REVIEW CIPA REQUIREMENTS. On December 21, 2000, the Children's Internet Protection Act (CIPA) was signed into law. That law requires schools and libraries that receive Universal Service discounts for certain services to adopt an Internet safety policy incorporating the use of filtering or blocking technology on computers with Internet access as a condition of receiving those discounts. Funding Year 2002 may be the Second Funding Year for purposes of CIPA for one or more schools and/or libraries represented on your Form 486. (Funding Year 2002 is the Second Funding Year for purposes of CIPA for a school or library if a Form 486 for internet access or internal connections was successfully data entered for Funding Year 2001. See the section of the Form 486 Instructions entitled "Impact of CIPA Requirements on Form 486" for more information on First, Second and Third Funding Years.) If Funding Year 2002 is the Second Funding Year for purposes of CIPA for one or more schools and/or libraries represented on your Form 486, those school(s) and/or library(ies) must certify that they are in compliance with CIPA unless state or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required. A school or library so prevented may request a waiver for Funding Year 2002. Certification(s) for purposes of CIPA and CIPA waiver request(s) must be made on the Form 486 or the Form 479, whichever is appropriate. See the Form 486 Instructions and the Form 479 Instructions for more information. You may also refer to the SLD web site at <www.sl.universalservice.org> or call the Client Service Bureau at 1-888-203-8100 for more information about Form 486, Form 479, and the requirements of CIPA.

FILE FORM 472 (APPLICANT) or FORM 474 (SERVICE PROVIDER). After a Form 486 has been properly filed the SLD must receive an invoice from either the applicant or the service provider in order to make payments for approved discounts on eligible services. Form 472, Billed Entity Applicant Reimbursement (BEAR) Form, is filed by the applicant; Form 474, Service Provider Invoice Form, is filed by the service provider.

NEW DEADLINES FOR INVOICES. Invoices must be Postmarked within 90 days of the last date to receive service or within 90 days of the date of the Form 486 Notification Letter, whichever is later. If an invoice is postmarked after the later of those two dates, payment will be denied.

TO APPEAL THESE FUNDING COMMITMENT DECISIONS

If you wish to appeal the Funding Commitment Decision s (FCD indicated in this letter, your appeal must be RECEIVED BY THE SCHOOLS AND LIBRA(S)S DIVISION (SLD) WITHIN 60 DAYS OF THE ABOVE DATE ON THIS LETTER. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and e-mail address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify which F W Letter you are appealing. Indicate the relevant funding year and the date of the Funding Commitment Decision Letter. Your letter of appeal must also include the applicant name, the Form 471 Application Number, and the Billed Entity Number from the top of your F W Letter.
3. Identify the particular Funding Request Number (FRN) that is the subject of your appeal. When explaining your appeal, include the precise language or text from the Fundin Commitment Decision Letter that is at the heart of your appeal. By pointing us to the exact words that give rise to Your appeal, the SLD will be able o more readily understand and respond appropriately to your appeal. Please keep your letter to the point, and provide documentation to support your appeal. Be sure to keep copies of your correspondence and documentation.
4. Provide an authorized signature on your letter of appeal.

If you are submitting your appeal on paper, please send your appeal to: Letter of Appeal, Schools and Libraries Division, Box 125 - Correspondence Unit, 80 South Jefferson Road, Whippany, NJ 07981. Additional options for filing an appeal can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by calling the Client Service Bureau.

While we encourage you to resolve your appeal with the SLD first, you have the option of filing an appeal directly with the Federal Communications Commission (FCC). You should refer to CC Docket Nos. 96-45 and 97-21 on the first page of your appeal to the FCC. Your a peal must be RECEIVED BY THE FCC WITHIN 60 DAYS OF THE ABOVE DATE ON THIS LETTER. Faifure to meet this requirement will result in automatic dismissal of your appeal. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by calling the Client Service Bureau. We strongly recommend that you use either the e-mall or fax filing options because of continued substantial delays in mail delivery

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to the FCC. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554.

NOTICE ON RULES AND FUNDS AVAILABILITY

Applicants' receipt of funding commitments is contingent on their compliance with all statutory, regulatory, and procedural requirements of the universal service mechanisms for schools and libraries. FCC Form 471 Applicants who have received funding commitments continue to be subject to audits and other reviews that SLD or the Federal Communications Commission may undertake periodically to assure that funds have been committed and are being used in accordance with all such requirements. If the SLD subsequently determines that its commitment was erroneously issued due to action or inaction, including but not limited to that by SLD, the Applicant, or Service Provider, and that the action or inaction was not in accordance with such requirements, SLD may be required to cancel these funding commitments and seek repayment of any funds disbursed not in accordance with such requirements. The SLD, and other appropriate authorities (including but not limited to USAC and the FCC), may pursue enforcement actions and other means of recourse to collect erroneously disbursed funds. The timing of payment of invoices may also be affected by the availability of funds based on the amount of funds collected from contributing telecommunications companies.

We look forward to continuing our work with you on connecting our schools and libraries through advanced telecommunications services.

Sincerely,

Schools and Libraries Division
Universal Service nistra Company

Enclosures

A GUIDE TO THE FUNDING COMMITMENT REPORT

Attached to this letter will be a report for each E-rate funding request from your application. We are providing the following definitions.

FUNDING REQUEST NUMBER (FRN): A Funding Request Number is assigned by the SLD to each Block 5 of your Form 471 once an application has been processed. This number is used to report to Applicants and Service Providers the status of individual discount funding requests submitted on a Form 471.

FUNDING STATUS: Each FRN will have one of three definitions: "Funded," "Not Funded," or "As Yet Unfunded."

1. An FRN that is "Funded" will be approved at the level that SLD determined is appropriate for that item. The funding level will generally be the level requested unless the SLD determines during the application review process that some adjustment is appropriate.
2. An FRN that is "Not Funded" is one for which no funds will be committed. The reason for the decision will be briefly explained in the "Funding Commitment Decision," and amplification of that explanation may be offered in the section, "Funding Commitment Decision Explanation." An FRN may be "Not Funded" because the request does not comply with program rules, or because the total amount of funding available for this Funding Year was insufficient to fund all requests.
3. An FRN that is "As Yet Unfunded" reflects a temporary status that is assigned to an FRN when the SLD is uncertain at the time the letter is generated whether there will be sufficient funds to make commitments for requests for internal connections at a particular discount level. For example, if your application included requests for discounts on both telecommunications services and internal connections, you might receive a letter with our funding commitment for your telecommunications funding requests and a message that your internal connections requests are "As Yet Unfunded." You would receive a subsequent letter(s) regarding the funding decision on your internal connections requests.

SERVICES ORDERED: The type of service ordered from the service provider, as shown on Form 471.

SPIN (Service Provider Identification Number): A unique number assigned by the Universal Service Administrative Company to service providers seeking payment from the Universal Service Fund for participation in the universal service support mechanisms. A SPIN is also used to verify delivery of services and to arrange for payment.

SERVICE PROVIDER NAME: The legal name of the service provider.

CONTRACT NUMBER: The number of the contract between the eligible party and the service provider. This will be present only if a contract number was provided on Form 471.

BILLING ACCOUNT NUMBER: The account number that your service provider has established with you for billing purposes. This will be present only if a Billing Account Number was provided on Form 471.

EARLIEST POSSIBLE EFFECTIVE DATE OF DISCOUNT: The earliest possible date of which the SLD will reimburse service provider for discounts.

CONTRACT EXPIRATION DATE: The date the contract expires. This will be present only if a contract expiration date was provided on Form 471.

SITE IDENTIFIER: The Entity Number listed in Form 471, Block 5, Item 22a will be listed. This will appear only for "site specific" FRNs.

ANNUAL PRE-DISCOUNT AMOUNT FOR ELIGIBLE RECURRING CHARGES: Eligible monthly pre-discount amount approved for recurring charges multiplied by number of months of recurring service provided in the funding year.

ANNUAL PRE-DISCOUNT AMOUNT FOR ELIGIBLE NON-RECURRING CHARGES: Annual eligible non-recurring charges approved for the funding year.

PRE-DISCOUNT AMOUNT: Amount in Form 471, Block 5, Item 23, Column I, as determined through the application review process.

DISCOUNT PERCENTAGE APPROVED BY THE SLD: This is the discount rate that the SLD has approved for this service.

FUNDING COMMITMENT DECISION: This represents the total amount of funding that the SLD has reserved to reimburse service providers for the approved discounts for this service for this funding. It is important that you and the service provider both recognize that the SLD should be invoiced and the SLD may direct disbursement of discounts only for eligible, approved services actually rendered.

FUNDING COMMITMENT DECISION EXPLANATION: This entry may amplify the comments in the "Funding Commitment Decision" area.

FUNDING COMMITMENT REPORT

Form 471 Application Number: 321479
Funding Request Number: 855891 Funding Status: Not Funded
Services Ordered: Internal Connections
SPIN: 143005607 Service Provider Name: IBM Corporation
Contract Number: 2002-850-142
Billing Account Number: 2002-850-142
Earliest Possible Effective Date of Discount: 07/01/2002
Contract Expiration Date: 06/30/2003
Annual Pre-discount Amount for Eligible Recurring Charges: \$.00
Annual Pre-discount Amount for Eligible Non-recurring Charges: \$12,409,811.00
Pre-Discount Amount: \$12,409,811.00
Discount Percentage Approved by the SLD: N/A
Funding Commitment Decision: \$0.00 - Program Rule Violations
Funding Commitment Decision Explanation: This funding request is denied as a result of the program rule violations explained in the Further Explanation of Administrator's Funding Decision letter sent this date under separate cover.

Funding Request Number: 855923 Funding Status: Not Funded
Services Ordered: Internal Connections
SPIN: 143005607 Service Provider Name: IBM Corporation
Contract Number: 2002-850-142
Billing Account Number: 2002-850-142
Earliest Possible Effective Date of Discount: 07/01/2002
Contract Expiration Date: 06/30/2003
Annual Pre-discount Amount for Eligible Recurring Charges: \$.00
Annual Pre-discount Amount for Eligible Non-recurring Charges: \$965,500.00
Pre-Discount Amount: \$965,500.00
Discount Percentage Approved by the SLD: N/A
Funding Commitment Decision: \$0.00 - Program Rule Violations
Funding Commitment Decision Explanation: This funding request is denied as a result of the program rule violations explained in the Further Explanation of Administrator's Funding Decision letter sent this date under separate cover.

Funding Request Number: 855944 Funding Status: Not Funded
Services Ordered: Internal Connections
SPIN: 143005607 Service Provider Name: IBM Corporation
Contract Number: 2002-850-142
Billing Account Number: 2002-850-142
Earliest Possible Effective Date of Discount: 07/01/2002
Contract Expiration Date: 06/30/2003
Annual Pre-discount Amount for Eligible Recurring Charges: \$.00
Annual Pre-discount Amount for Eligible Non-recurring Charges: \$2,090,400.00
Pre-Discount Amount: \$2,090,400.00
Discount Percentage Approved by the SLD: N/A
Funding Commitment Decision: \$0.00 - Program Rule Violations
Funding Commitment Decision Explanation: This funding request is denied as a result of the program rule violations explained in the Further Explanation of Administrator's Funding Decision letter sent this date under separate cover

Funding Request Number: 855967 Funding Status: Not Funded
Services Ordered: Internet Access
SPIN: 143005607 Service Provider Name: IBM Corporation
Contract Number: 2002-850-142
Billing Account Number: 2002-850-142
Earliest Possible Effective Date of Discount: 07/01/2002
Contract Expiration Date: 06/30/2003
Annual Pre-discount Amount for Eligible Recurring Charges: \$968,600.04
Annual Pre-discount Amount for Eligible Non-recurring Charges: \$.00
Pre-Discount Amount: \$968,600.04
Discount Percentage Approved by the SLD: N/A
Funding Commitment Decision: \$0.00 - Program Rule Violations
Funding Commitment Decision Explanation: This funding request is denied as a result of the program rule violations explained in the Further Explanation of Administrator's Funding Decision letter sent this date under separate cover

FUNDING COMMITMENT REPORT

Form 471 Application Number: 321479
Funding Request Number: 856008 Funding Status: Not Funded
Services Ordered: Internal Connections
SPIN: 143005607 Service Provider Name: IBM Corporation
Contract Number: 2002-850-142
Billing Account Number: 2002-850-142
Earliest Possible Effective Date of Discount: 07/01/2002
Contract Expiration Date: 06/30/2003
Annual Pre-discount Amount for Eligible Recurring Charges: \$.00
Annual Pre-discount Amount for Eligible Non-recurring Charges: \$3,945,320.00
Pre-Discount Amount: \$3,945,320.00
Discount Percentage Approve6 by the SLD: N/A
Funding Commitment Decision: \$0.00 - Program Rule Violations
Funding Commitment Decision Explanation: This funding request is denied as a result of the program rule violations explained in the further Explanation of Administrator's Funding Decision letter sent this date under separate cover.



Universal Service Administrative Company
Schools & Libraries Division

December 3, 2002

Richard L. Duncan
Ysleta Indep School District
9600 Sims Dr.
El Paso, TX 79925 7200

Further Explanation of Administrator's Funding Decision
Form 471 Application Number: 321479
Funding Year 2002
Case # SR-2002-142115

Under separate cover, you are being sent a Funding Commitment Decision Letter concerning the FCC Form 471 Application Number cited above. This Funding Commitment Decision Letter denies all funding requests on this application.

Please be advised that the Funding Commitment Decision Letter is the official action on this application by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC). Please refer to that letter for instructions regarding how to appeal the Administrator's decision, if you wish to do so.

The purpose of this letter is to provide you with additional information concerning the reasons for denial of these funding requests.

I. Factual Background

Ysleta Independent School District's (Ysleta or Applicant) FCC Form 470 # 666710000370147 was posted to the USAC website on October 12, 2001. Applicant's Form 470 specifically indicated that there was no Request For Proposals (RFP) for the specific services *for* which Applicant would be seeking funding through the Schools and Libraries Universal Service Support Mechanism. At approximately the same time that the FCC Form 470 was posted, Ysleta issued a separate RFP (*Ysleta RFP*) for a "Technology Implementation and Systems Integration Partner" (Technology Partner). Ysleta's RFP—which was not cited in Applicant's FCC Form 470—is undated, but indicated that proposals would be accepted until November 15, 2001. (*Id.* at 1). The RFP indicated that "[t]he selected vendor will serve as the prime contractor for any projects funded through E-rate, and all E-rate applications will be submitted using the successful bidder's single SPIN number (Service Provider Information Number)." (*Id.* at 3.6). The RFP did not define the particular services that the partner would provide and

for which funding would be sought, (*id.* at 3.7.4); nor did the RFP require “a firm, fixed price, a cost plus proposal, or any other specific cost information with the exceptions of: a cost schedule for services and costs for Specialized Services for funding assistance.” (*Id.* at 3.7.7).

Pursuant to the Ysleta RFP, Ysleta selected IBM Corporation (IBM) to be its Technology Partner. (Ysleta Independent School District, Competitive Solicitations for Board Approval, December 12, 2001, at B-5 (Ysleta *Board of Trustees* Meeting)). The General Contract (contract) between Ysleta and IBM was signed by the parties on January 17, 2002 and January 18, 2002. (General Contract at 1).¹ The contract provided that the cost of the entire contract would be the amount of Schools and Libraries Universal Service Support Mechanism funding committed to Ysleta, plus Ysleta's non-discount obligation, and that the “Funding Source” was “E-rate.” (General Contract at 1). The contract further indicates that the entire agreement between Ysleta and IBM “consists of RFP #22-1115-016RFP and the Contractor's Appendix to RFP#22-1115-016RFP, the IBM Customer Agreement (Z125-4575)(ICA), the General Contract dated January 17, 2002, and the individual IBM Statements of Work listed below.” (General Contract at 2).

Applicant's FCC Form 471 # 321479 was submitted to USAC on January 17, 2002. This **Form** 471 contains five Funding Request Numbers (FRNs) and the service provider for each FRN is IBM. One **FRN** is for Internet access service and the remaining four are for internal connections goods and services. Each **FRN** on this **Form** 471 is associated with FCC **Form** 470 # 666710000370147. Applicant submitted the Statements of Work with IBM, referenced above, as the underlying contract for each **FRN**.

In response to SLD's request for copies of all bids that Applicant received in response to the FCC **Form** 470 posting, Applicant responded:

All of our service/hardware requirements were listed in the FCC Form 470 and posted as required. This was the competitive bidding process in which we engaged.

Although we do not have an E-Rate Funding Request for our Systems Integration Partner contract, it is extremely important to our successful use of technology, so we have included the RFP, and all of the bid responses.

(Ysleta Facsimile to SLD, June 3, 2002, at 1 (emphasis in original))(Ysleta Fax).

Applicant further indicated that “[o]ther than the contracts, no bid responses were received for any of the e-Rate Funding Requests.” (Ysleta Fax at 2). In response to SLD's request for documentation regarding the bid selection process, Applicant responded, “Since there were no other bids, the selection process was very

¹ The pages of the General Contract are not numbered. These page numbers have been supplied by SLD for ease of reference.

straightforward. We evaluated the one and only bid for each of the requested services.”
(*Id.*)

II. Discussion

A. Schools and Libraries Universal Service Support Mechanism Competitive Bidding Requirements

In preparing request(s) for funding, applicants seeking discounted services through the Schools and Libraries Universal Service Support Mechanism must follow certain competitive bidding requirements. **An** applicant initiates the competitive bidding process when an applicant submits an FCC Form 470 to USAC for posting on the SLD portion of the USAC website. *See* 47 C.F.R. § 54.504(b); Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470, OMB 3060-0806 (April 2002) (FCC Form 470). **This** posting enables prospective service providers to bid on the equipment and services for which the applicant will request universal service support. After the Form 470 has been posted, the applicant must wait at least 28 days before entering into agreements with service providers, must comply with all applicable state and local procurement laws, and must comply with the other competitive bidding requirements established by the Federal Communications Commission (FCC). *See* 47 C.F.R. §§ 54.504, 54.511; In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, **Report and Order**, FCC 97-157, ¶ 575 (rel. May 8, 1997) (*Universal Service Order*).

FCC rules require applicants to “submit a complete description of the services they seek so that it may be posted for competing service providers to evaluate.” *Universal Service Order*, ¶ 570. The FCC requires “the application to describe the services that the schools and libraries seek to purchase in sufficient detail to enable potential providers to formulate bids.” *Zd.* ¶ 575. A description of the Internet access and internal connections services being sought are required to be provided in Items 9 and 10 of the FCC Form 470. The instructions for FCC Form 470 state that these items “must be completed to provide potential bidders with particular information about the services you are seeking.” *See* FCC Form 470 Instructions, April 2002 at 10.² The instructions for Item 9(b) state that this box should be checked if the applicant does not have an RFP, and that, if this box is checked, the applicant “must fill in details in the space provided about the specific Internet access services or functions and quantity and/or capacity of service” that **is being** sought. *Id.* at 12. The Form 470 instructions for Item 10(b) state that this box should be checked if the applicant does not have an RFP, and that, if this box is checked, the applicant “*must* fill in details in the space provided about the specific internal connections services or functions and quantity and/or capacity of service.” *Id.* (emphasis added).

FCC regulations further require that the entity selecting a service provider “carefully consider all bids submitted and may consider relevant factors other than the pre-discount

² *The* FCC Form 470 and **Instructions** were revised in April 2002. The language cited here was not changed when the instructions were revised.

prices submitted by providers.” 47 C.F.R. § 54.511(a). In regard to these competitive bidding requirements, the FCC mandated that “price should be the primary factor in selecting a bid.” *Universal Service Order*, ¶ 481. When allowed under state and local procurement rules, other relevant factors an applicant may consider include “prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives.” *Id.*

B. The Solicitation Process Conducted by Applicant Did Not Comply With Schools and Libraries Universal Service Support Mechanism Requirements

1. Applicant Selected a Service Provider By a Process Other Than the FCC Form 470 Posting Process and Without Specifying the Services Being Sought

The Form 470 posting process mandated by FCC rules requires applicants to choose service providers that will provide specific, defined services. The FCC regulatory framework governing the Schools and Libraries Support Mechanism does not allow applicants to select service providers through a process other than the FCC Form 470 posting. If an applicant chooses a service provider through any process other than the FCC-mandated process, then the services being procured cannot be eligible for Schools and Libraries Support Mechanism funding. *See, e.g.*, 47 C.F.R. § 54.504(b); FCC Form 470.

The facts above demonstrate that Ysleta selected IBM to be its Technology Partner as a result of the RFP—which **was** not cited or otherwise referred to in Applicant’s FCC Form 470. Applicant did post an FCC Form 470 for the services for which it now seeks funding.³ However, in the RFP, Ysleta explicitly stated its intention to select its service provider through the RFP process rather than through the 470 posting process. The RFP stated that: “all E-rate applications will be submitted using the successful bidder’s single SPIN number (Service Provider Information Number).” (*Ysleta RFP* at 3.6). In addition, Ysleta acknowledged that it selected IBM as a result of the RFP rather than through the FCC Form 470 posting process when, in response to SLD’s inquiry, it stated, “[a]lthough we do not have an E-Rate Funding Request for our Systems Integration Partner contract, it is extremely important to our successful use of technology, so we have included the RFP, and all of the bid responses.” (*Ysleta Fax* at 1).

The RFP issued by Ysleta did not describe the specific services that were described on the FCC Form 470. Rather, the RFP described Ysleta’s request for a Technology Implementation and Systems Integration Partner and the criteria Ysleta would use to choose that partner. Ysleta’s RFP did not require bidders to submit proposals for specific

³ SLD does not evaluate as part of this analysis whether the description of the services sought on Ysleta’s FCC Form 470 complies with program rules.

services with a definite price. Rather, Ysleta only required bidders responding to its RFP to “describe their approach, qualification, and industry experience in the design and implementation of these network requirements in large school districts.” (*Ysleta RFP* at 3.7.4.) Furthermore, the RFP did not require “a firm, fixed price, a cost plus proposal, or any other specific cost information with the exceptions of: a cost schedule for services and costs for Specialized Services for funding assistance.” (*Ysleta RFP* at 3.7.7). In regard to the specific services for which funding would later be requested, IBM provided only a “general description of IBM’s networking capabilities.” (IBM Proposal at 30). IBM’s proposal stated that while it is capable of performing all the tasks, it “will only be performing those tasks specifically identified in the Statements of Work developed at the direction of [Ysleta].” (IBM Proposal at 30). The RFP indicated that after the Technology Partner was selected, Ysleta and the Technology Partner would negotiate the Statements of Work for each funding request. (*Ysleta RFP* at 3.7.7).

Applicant stated that it did not receive any other bids in response to its FCC Form 470 posting other than the “contracts.” (*Ysleta Fax* at 2). These “contracts” are the Statements of Work that are described in the RFP and in IBM’s proposal to Ysleta that Ysleta and IBM negotiated after Ysleta selected IBM to be its Technology Partner.

Viewed in totality, these facts indicate that IBM was selected as the service provider as a result of Ysleta’s RFP and IBM’s Proposal, *not* as a result of the FCC Form 470 posting process required by Schools and Libraries Support Mechanism regulations. In selecting its service provider through a separate RFP process, while at the **same** time stating in its FCC Form 470 that no RFP existed, Applicant in effect misled those service providers that may have relied on its FCC Form 470 as posted. These facts further demonstrate that when IBM was selected to be Ysleta’s Technology Partner, the actual services for which funding would be requested had not been defined. The Statements of Work were negotiated after Ysleta selected IBM. Because Applicant failed to comply with the requirement that it select its service provider to provide specific services through the FCC Form 470 posting process, its funding request has been denied as being in violation of Schools and Libraries Support Mechanism competitive bidding requirements.

2. Applicant Selected a Service Provider in Violation of the Requirement that it Choose the Most Cost-Effective Provider of Service with Cost Being the Primary Factor

Schools and Libraries Support Mechanism rules require a competitive bidding process pursuant to which an applicant chooses a service provider only after defining the specific services sought and after the FCC Form 470 has been posted. The primary factor in making the selection must be low cost. See 47 C.F.R. § 54.511(a); *Universal Service Order*, ¶ 481.

The RFP issued by Ysleta did not require “a firm, fixed price, a cost plus proposal, or any other specific cost information with the exceptions of: a cost schedule for services and costs for Specialized Services for funding assistance.” (*Ysleta RFP* at 3.7.7). The

selection criteria indicate that this factor is among the least heavily weighted, at 25 points. (*Ysleta RFP* at 3.7.1 – 3.7.8). IBM responded to Ysleta's RFP with a description of its pricing model, a reminder that IBM must return a profit, and a schedule of IBM hourly rate charges. (IBM Proposal at 77-80). In addition, as set out above, Ysleta selected IBM before defining the actual work to be done for which funding would be requested.

These facts demonstrate that Ysleta could not have selected the most cost effective provider of service, with low cost being the primary factor. This is the case because IBM did not specify the cost of the contract, because Ysleta selected IBM before the actual work for which funding would be requested was defined and quantified, and because the RFP's selection criteria do not include these factors. Furthermore, Applicant's stated reasons for selecting IBM do not indicate that Applicant selected IBM based on whether IBM was the most cost-effective provider of service with low cost being the primary factor. (*Ysleta Board of Trustees Meeting* at B-5). Because it is beyond dispute that Applicant did not select IBM based on whether IBM's bid was the most cost-effective, with price being the primary factor, Applicant's funding request has been denied as being in violation of Schools and Libraries Support Mechanism competitive bidding requirements.

3. Applicant Must Comply with FCC Form 470 Posting Requirements in Addition to Applicable State and Local Procurement Laws

FCC regulations governing the Schools and Libraries Support Mechanism require applicants to comply with all applicable state and local procurement laws. *See, e.g.*, 47 C.F.R. §§ 47 C.F.R. §§ 54.504, 54.511; *Universal Service Order*, ¶ 575. This requirement does not, however, eliminate the FCC's competitive bidding requirements pursuant to which the service provider must be selected with reference to the particular services sought, after the FCC Form 470 has been posted, and the primary factor in making the selection must be low cost.

Under Texas law, school district contracts, with certain exceptions not relevant here, are required to be made according to whichever of a list of methods provides the "best value" for the district. *See* Texas Educ. § 44.031(a)(1). Those methods include competitive bidding. *See id.* In determining to **whom** to award a contract, districts may consider a variety of factors, one of which is the purchase price. *See id.* at § 44.031(b)(1). These requirements do not, however, necessarily apply to contracts for services rendered by a technology consultant:

A school district may, at its option, contract for professional services rendered by a financial consultant or a technology consultant in the manner provided in Section 2254.003, Government Code, in lieu of the methods provided by this section.

Id. at 44.031(f). Section 2254.003 of the **Texas** Government Code prohibits government entities from selecting professional service providers “on the basis of competitive bids submitted for the contract or services,” but rather, requires the selection to be made:

- (1) on the basis of demonstrated competence and qualifications to perform the services; and
- (2) for a fair and reasonable price.

Texas Government Code § 2254.003.

Ysleta’s RFP may have been issued under the provision of Texas procurement law which allows, but does not require, technology consultants to be selected on the basis of the factors indicated in the RFP. SLD does not reach the issue of whether the services for which Ysleta seeks funding on its FCC Form 471 may properly be considered professional services under Texas law, but notes that Ysleta seeks Schools and Libraries Support Mechanism funding for particular goods and services. Thus, even if the RFP was issued, and IBM selected as Ysleta’s technology consultant, pursuant to this local law, Ysleta is still required to comply with FCC competitive bidding requirements in seeking Schools and Libraries Support Mechanism funding. As explained above, the FCC requirements apply *in addition to* any applicable state and local laws. Furthermore, the contract between Ysleta and IBM indicates that the cost of the General Contract is USAC’s funding commitment to the school district plus the school district’s non-discount portion. Because the contract between Ysleta and IBM specifically provides that 90% of IBM’s compensation will be **through** the Schools and Libraries Support Mechanism, Ysleta and IBM are required to comply with FCC competitive bidding requirements.

4. The Winning Proposal Included Many Ineligible Services

Schools and Libraries Support Mechanism rules authorize USAC to provide universal service support to telecommunications carriers and non-telecommunications carriers for providing supported services to eligible entities. **See** 47 C.F.R §§ 54.501(a), 54.517. These rules prohibit applicants and service providers from using discounts to subsidize the procurement of ineligible or *unrequested* products and services. **See, e.g.,** Free Services Advisory, <http://www.sl.universalservice.orrr/reference/freeservices.asp>. Consequently, “[t]he value of all price reductions, promotional offers, and ‘free’ products or services must be deducted from the pre-discount cost of services indicated in Funding Requests.” *Id.*

FCC rules further require applicants to certify that they “have secured access to all of the resources, including computers, training, software, maintenance, and electrical connections necessary **to** make effective use of the services purchased as well as to pay the discounted charges for eligible services.” **See** Schools and Libraries Universal Service, Services Ordered and Certification Form 471, OBM 3060-0806, Item 25 (October 2000)(FCC Form 471). Although applicants certify that they have secured access to these resources, these resources are generally not eligible for discounts. In

particular, the Eligible Services List indicates that training is conditionally eligible under the following parameters:

Training is eligible if it is basic instruction on the use of eligible equipment, coincident with and directly associated with the installation of such equipment. Training of teachers and staff in the use of covered services in their programs of instruction or for professional development is not eligible for discount.

See http://www.sl.universalservice.org/data/pdf/EligibleServicesList_101701.pdf at 34. The list further indicates that Internet training is ineligible. See *id.* at 14. The list also provides that “Consulting Services—Costs of expertise in areas such as initial planning, consulting, development of technology plans, application assistance, and program advice are not eligible.” *Id.* at 34.

Ysleta's RFP identified a range of services that Ysleta sought under each selection criteria. These included development of a Staff Development Plan, Project Management, project planning, specialized program assistance, and other services including funding assistance. In response to each selection criteria identified by Ysleta, IBM described in detail a wide range of services that it would provide to Ysleta as Ysleta's “Technology Partner.” (IBM Proposal at 17-80). These services included a vast array of ineligible services, including teacher and administrative personnel training, project management services, consulting services, and assistance in filling out program forms, among others. In responding to the selection criteria, IBM indicated that it “will only be performing those tasks specifically identified in the Statements of Work.” (IBM Proposal at 30). IBM stated that the cost to Ysleta for all of these services will be the percentage of the costs based on Ysleta's discount percentage and that USAC would pay the remainder of the cost as support. (IBM Proposal at 69). The General Contract between Ysleta and IBM specifies that IBM would be paid for the services specified in the RFP, IBM's Proposal, and the Statements of Work by the Universal Service Fund (90%) and the Applicant (10%). (General Contract at 1, 2).

Under FCC rules, the only services that are potentially eligible for funding are the services sought on the FCC Form 471 and identified in the Statements of Work. However, the agreement between Ysleta and IBM indicates that IBM will be providing Ysleta with a wide range of other services in addition to the services specified in the Statements of Work. These types of training and consulting services are not eligible for funding. Consequently, their cost cannot be included in Ysleta's funding request. However, the General Contract provides that IBM would be paid for these services by Schools and Libraries Support Mechanism funding earmarked for eligible services only.

If the cost of these services are included in Ysleta's funding requests, then those funding requests contain ineligible items. If IBM considers its services to be “free,” then the Free Services Advisory requires that the value of those services be deducted from the pre-discount cost of services indicated in the funding requests. It appears highly unlikely that IBM intends to provide these services free of charge since IBM clearly stated in its

proposal that “[s]ince the IBM Corporation must return a profit to its investment owners, the first consideration in pricing is earning that expected margin over our costs.” (IBM Proposal at 77). Because it can reasonably be inferred that IBM, with its stated profit-making mandate, is not covering the cost of providing these services itself, these costs must be built into Ysleta’s request for Schools and Libraries Support Mechanism funding.

SLD is not denying these funding requests at this time on the grounds that they include a prohibited proportion of ineligible services. However, SLD notes that the documentation provided by the Applicant demonstrates that these funding requests include many ineligible services. Because these services are not eligible for funding, their cost should have been deducted from the pre-discount cost of services included in the Funding Request Numbers at issue here.

C. The Proposal Selected by Applicant Emphasized Development of a Technology Plan and Structuring Technology to Maximize Schools and Libraries Support Mechanism Funding

FCC regulations governing the Schools and Libraries Support Mechanism require applicants to conduct a technology inventory/assessment, develop a technology plan that identifies educational objectives and then identify the technology resources necessary to achieve those objectives. *See Universal Service Order*, ¶¶ 572-573. The FCC has stipulated that funding requests must be based on a technology plan that complies with program requirements. *See id.* ¶ 573. As explained above, FCC rules also require applicants to choose the most cost-effective alternative to achieve objectives. Unless applicants will seek discounts only for basic local and long distance service, they must certify on the Form 470 that “all of the individual schools, libraries, and library consortia receiving services under this application are covered by” either individual technology plans or higher-level plans. *See FCC Form 470, Item 20.* A basic premise of the program is that, applicants determine the educational objectives to be served by technology, the technology needs, and the resources that will be required for those technology needs *before* initiating the procurement process and before filing the **Form 470**. If technology plans are not in place or are vague at the time of the Form 470 filing, applicants cannot present to would-be vendors a clear idea of the products and services they seek.

In its proposal, IBM indicated that it could help Ysleta develop its technology plan and that it would structure Ysleta’s funding requests to maximize funding requests to SLD. IBM’s approach is to structure the technological aspects to ensure that the services are eligible for funding (IBM Proposal at 66-67) and to “structur[e] the application for funding and supporting documentation to maximize the SLD funding. It is anticipated that all funding requests will be funded at the 90% level.” (IBM Proposal at 67). Applicant, in explaining its basis for selecting IBM, stated that it considered IBM’s success in “obtaining awards for E-Rate projects” and IBM’s ability to “enhance the quality and viability of any District submittal” seeking Schools and Libraries Support

Mechanism funding to be critically important in its decision to select IBM. (*Ysleta Board of Trustees Meeting at B-5*).

Thus, the record reflects that the overriding goal of the IBM-Ysleta relationship is to "maximize the SLD funding," not necessarily to promote educational goals that have been clearly defined in a technology plan. The emphasis on maximizing Schools and Libraries Support Mechanism funding is inconsistent with the design of the program to first develop a technology plan that identifies educational objectives and then the technology resources necessary to achieve those objectives. Nor is the approach here consistent with the requirement to choose the most cost-effective alternative to achieve objectives. Furthermore, if IBM and the district are rewriting the technology plan after selection of IBM as the service provider, it is difficult to see how the district can ensure it is choosing the most cost-effective alternative to meet its educational objectives.

D. Similar Language in Other RFPs Raised Significant Questions as to Whether the Service Provider Chosen by Applicant was Improperly Involved in the Selection Process

SLD's Service Provider Manual provides the following guidance in regard to service provider involvement in preparation of an RFP or other solicitation materials to be used in the competitive bidding process:

The FCC understands that applicants sometimes need to seek assistance from service providers in developing RFPs. Such assistance is permissible even if the service provider plans to submit a bid in response to that RFP as long as the service provider's assistance is neutral. For example, RFPs may not be written in such a way that only the service provider who rendered the assistance could win the bid. Or, an applicant may not reveal information to the service provider assisting in the preparation of the bid that the applicant does not share with all prospective bidders. These are just two examples of assistance that would not be considered neutral.

See www.sl.universalservice.org/vendor/manual/chapter5.doc.

SLD has also reviewed numerous RFPs issued by applicants seeking the same type of consultant as sought by Applicant in this situation. These RFPs bear striking similarities, sometimes including virtually identical language. This creates an inference that the service provider in question, IBM, is involved before the RFP is issued or that school districts have shared the RFPs that have worked for them with others. Absent a contrary explanation, if IBM is contacting applicants before the selection process and encouraging them to use a standard RFP or other solicitation materials, SLD reasonably could infer that IBM has unduly influenced the selection process in IBM's favor.

111. Conclusion

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Based on the totality of the circumstances and a careful review of all documentation submitted by Applicant in connection with the FCC Form 471 Application Number cited above, all funding requests on that application are denied. As discussed above, under separate cover, you are being sent a Funding Commitment Decision Letter concerning the Form 471 application cited on the first page of this document.

Please be advised that the Funding Commitment Decision Letter is the official action on this application by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC). Please refer to that letter for instructions regarding how to appeal the Administrator's decision, if you wish to do so.

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