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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Request for Review of the Decision of the Universal Service Administrator by	)	
	)	
International Business Machines Corporation	)	
	)	
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

ATTACHMENTS TO
REQUEST FOR REVIEW OF THE DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY
INTERNATIONAL BUSINESS MACHINES CORPORATION

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January 30,2003

Questions regarding this notice should be directed to the Client Service Bureau.

TABLE OF ATTACHMENTS

Attachment

1 Letter, Further Explanation of Administrator's Funding Decision, Ysleta Independent School District, Form 471 Application No. 321479, Funding Year 2002, Case #SR-2002-142115

2 Technology Plan, Ysleta Independent School District

3 Projects Summary

4 *FCC* Form *470,* Ysleta Independent School District

5 Request *for* Proposal, Ysleta Independent School District

6 Responses, to Ysleta Request for Proposal

7 Solicitation Award Summary, Yselta Independent School District

8 General Contract, Ysleta Independent School District Contract No. 2002-850-142

9 Facsimile, from Richard Duncan (Ysleta), to Michael Deusinger (SLD) (June 3,2002)

10 Tip Sheet, SLD's Tips for completion of Form 470

11 Eligible Services List, Schools and Libraries Support Mechanism (October 18,2002)

12 Letter, from Richard Duncan (Ysleta), to Michael Deusinger (SLD) (June 21,2002)

13 Article, "Buying Smart: State Procurement Reform Saves Millions", Report by National Association of State Purchasing Officials (NASPO) and the National Association of State Information Resource Executives (NASIRE) (September 1996)

14 Article, "Reforming State Procurement to Buy the Best Information Technology Solution", Report by NGA Center for Best Practices (August 1999)

15 Statements *of* Work

16 Project List

- Prior to posting the Form 470 for any services other than basic telephone service, applicants are required to have a technology plan that defines the educational objectives and specifies the products and services sought. These products and services must then be sought by means of the Form 470 and, if available, RFP. If the technology plan is not sufficiently developed before posting of the Form 470, the competitive process is undermined.

- Winning proposals cannot specify a range of ineligible services, including ineligible services such as training, consulting, and program assistance. io be provided and paid for with Schools and Libraries Universal Service Support Mechanism funding. Providing "free" ineligible services is prohibited by program rules.

- The RFPs and the winning proposals cannot be designed merely with the goal of "maximizing" funding. The intent of the Schools and Libraries Universal Service Support Mechanism is to help schools and libraries afford communication services required to meet educational objectives. An emphasis on maximizing SLD funding is incompatible with the FCC's objective of only providing funding for the most cost-effective alternative to meer legitimate educational objectives.

- RFPs or other solicitarion methods must be Tailored io the needs of each applicant. SLD has found nearly identical language in RFPs from a variety of applicants that resulted in awards to the same service provider. Applicanis and service providers undermine the competitive process if they structure RFPs and competitive bidding processes that favor one service provider.

Funding Year 2002 requests for support based on some or all of the practices listed above either have been or will be denied.

- SLD is posting this notice now in order to alert applicants for Funding Year 2003 about rhis applicarion pattern and to urge applicants to avoid application processes that are not consistent with FCC rules.

- Applicants for Funding Year 2003 who signed multi-year contracts in prior years based on the pattern discussed here should expect their Funding Year 2002 applications to be denied and may want io initiate a new process to select service providers for Funding Year 2003.

- Applicants who may have started a process for Funding Year 2003 similar to that described in this notice are advised to consider starting a new selection process for their Funding Year 2003 service providers.

Note that the filing window for Funding Year 2003 has been extended from a closing date of January 16,2003, to a closing date of February 6,2003.

17 Article, “Buying Smart: State Procurement Reform Saves Millions”, Report by National Association of State Purchasing Officials (NASPO) and the National Association of State Information Resource Executives (NASIRE) (May 1998)

WARNING TO FUNDING YEAR 2003 APPLICANTS AND SERVICE PROVIDERS REGARDING APPLICATION PATTERNS THAT VIOLATE FCC RULES

SLD has determined that a sizable number of Funding Year 2002 applications associated with a particular service provider are nor consistent with Federal Communications Commission (FCC) regulations governing the Schools and Libraries Universal Service Suppon Mechanism. SLD has begun denying these applicanons.

Application and comprtitive bidding processes involving some or all of the following patterns and practices arc not consistent with FCC rules:

- Applicants may not post FCC Form(s) 470 indicating that there is no Request for Proposals (RFP) for the services sought in the FCC Form 470 when there is, in fact, an RFP or other solicitation method which provides that the service provider selected through rhe RFP or other solicitation method will appear on the applicant's FCC Form(s) 471 funding request(s).
    - This type of procurement activity misleads potential bidders to the demment of the competitive process mandated by the FCC.
    - FCC rules require applicants to select their service provider through the FCC Form 470 posting process and after complying with competitive bidding requirements.
    - FCC rules do not allow applicants to select service providers through a process other than the process specified in Schools and Libraries Suppon Mechanism regulations.
- Any FCC Form(s) 470 or RFP(s) issued by applicants that will form the basis for an FCC Form 471 application must define the specific services for which funding will be sought and applicanrs must obtain specific cost information, including prices for products and services to be provided.
    - Applicants are required to choose the most cost-effective alternative. with price being the single most heavily weighted factor.
    - Applicants may not receive funding for services rendered by a "technology partner," "program architect," "strategic partner," or other systems integrator, unless the goods and services to bc provided are specified.
    - By not being specific about the services sought and not seeking prices for those services, selecting a service provider through this type of FCC Form 470. RFP or other method violates the requirement to choose the most cost-effective provider.
- Service Providers cannot assist the applicant in developing its technology plan after the FCC Form(s) 470 has been posted.

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.

Universal Service Administrative Company
Schools and Libraries Division

USAC

Universal Service Administrative Company
Schools &Libraries Division

December 3, 2002

John Policastro
IBM Corporation
4800 Falls of Neuse Rd
Raleigh, NC 27609

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

U: separate cover, you are being sent a Funding Commitment Decision I concerning *the* FCC Form 471 Application N[illegible] Commitment Decision Letter denies all [illegible] requests on this [illegible]

Please be advised that rhe [illegible] Letter i the official ac[illegible] by th[illegible] Libraries I[illegible] of tbe Universal Service Administrative [illegible] (USAC) Pl[illegible] refer [illegible] that letter for [illegible] to [illegible] the [illegible] decision, i you wish to do so.

The purpose of this letter [illegible] to provide you with additional information concerning the reasons for denial of these [illegible] requests.

I. [illegible] Background

Ysleta Independent School District's (Ysleta or [illegible]nt) CC Form 470 # 666710000370147 was posted to the USAC website on Octobe[illegible] 12.2001. App[illegible] Form 470 specifically indicated that there was no [illegible] For [illegible]roposals (RFP) for the specific services for which [illegible] uld be [illegible]ing funding th[illegible] [illegible]s and Libra[illegible] [illegible]al Service [illegible]por[illegible] [illegible] At approximately the same time that t[illegible] F[illegible] 470 was [illegible] Ysle[illegible] a separate RFP (*Ysl[illegible] RFP*) for [illegible] "Technology Implementation and Systems Integration Partner" [illegible] RFP [illegible] was not ci[illegible] [illegible]ppli[illegible] FCC F[illegible] is undated, but indicated that proposals would be accepted [illegible] November 5, 2001. [illegible] at I). The RFP i[illegible] that "[t] selecte[illegible] will [illegible] as the [illegible] for [illegible] funded th[illegible] E-rate, and all E-rate applications will be submitted [illegible] the successful bidder's single SPIN number (Service Provider Information Number). (at 3.6). The RFP d[illegible] not defi[illegible] [illegible] services that the [illegible]er would p[illegible]

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 rhe IBM-Ysleta relationship is to "maximize rhe SLD funding," nor 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 rhe 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, iris 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 comperirive 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 rhe bid. *Or,* an applicant may not reveal information to the service provider assisting in the preparation of the bid that rhe 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 smking 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 thar school dismcts 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.

III. Conclusion

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. a13.7.7).

Pursuant to the Yselta 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 Yslera, 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, rhe IBM Customer Agreement (Z125-4575)(ICA), the General Contracr dared 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 arc 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 nor 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 case of reference.

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 nor 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, PCC rules also require applicants to choose the most cost-effecrive 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 thar 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 Io "enhance the quality and viability of any Dismct submittal" seeking Schools and Libraries Support

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 (rcl. 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." *Id.* ¶ 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@) 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 Form470 and Instructions were revised in April 2002. The language cited here was nor changed when the instructions were revised.

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 thar 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 Io 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 vasr array of ineligible services, including teacher and administrative personnel training, project management services, consulting services, and assistance in filling out program forms, among othen. 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 ai 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 Sratements 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

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 stare and local procurement rules, other relevant facron 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 rhat 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. However, in rhe 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, Yslera acknowledged rhat 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 rhe 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 RIP 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 pan of this analysis whether the description of the services sought on Ysleta's FCC Form 470 complies with program rules.

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. Thw, 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 lo* 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 dismct's non-discount portion. Because rhe 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.org/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

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 informadon 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 Io 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 Starements of Work developed at the direction of [Ysleta]." (IBM Proposal at 30). The RFP indicated that after the Technology Partner was selected, Yslera and the Technology Partner would negotiate the Statements of Work for each funding request. (*Yslera 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 Yslera 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 rime 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 posred. 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). JBM 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 dismct. *See* Texas Educ. § 44.031(a)(1). Those methods include competitive bidding. *See id.* In determining to whom to award a contract, dismcts 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.