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

In the Matter of	)	
	)	
Request for Review of the Decision of the Universal Service Administrator by	)	
	)	
Oklahoma City School District I-89	)	
	)	
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

REQUEST FOR REVIEW OF THE DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR BY OKLAHOMA CITY SCHOOL DISTRICT I-89

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May 7, 2003

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I. Introduction

Oklahoma City School District I-89 ("Oklahoma City Public Schools" or "OCPS" or "District"), pursuant to 47 C.F.R. § 54.719, hereby submits its Request for Review of the Universal Service Administrator's March 10, 2003 Funding Commitment Decision Letter ("FCDL")

II. Summary

Oklahoma City Public Schools respectfully requests that the FCC review a decision of the Universal Service Administrator regarding E-rate funding for Funding Year 2002. The Schools and Libraries Division ("SLD") of the Universal Service Administrative Company issued a Funding Commitment Decision Letter ("FCDL") which denied ten (10) of the District's Form 471 funding requests for the following reasons:

> Vendor selected by RFP, not 470; 470 said no RFP; services for which funding sought not defined when vendor selected; price of services not a factor in vendor selection; price of services set after vendor selection.

The District appeals this denial of its funding requests and submits that it followed all applicable procedures and program guidelines. In particular, the District submitted a Form 470 listing the services it sought from potential service providers. The Form 470 initiated the competitive bidding process required by the FCC. The District also issued a Request for Proposal ("RFP") as suggested by its own policies and as necessitated in order to be a prudent purchaser of services. Nothing in the FCC's rules, guidelines, or prior rulings and nothing in the SLD's rules, guidelines, or prior rulings would indicate that a school or library may not post a Form 470 and also issue an RFP.

The services sought were sufficiently defined both in the District's RFP and in its Form 470. Additionally, price was a primary factor in the District's selection of a service provider. The FCC's rules and prior rulings indicate that price may be considered and evaluated in such a way as to

recognize the most cost-effective service provider. The District considered the hourly rates of those service providers who responded to the RFP in conjunction with the service providers' experience and other factors in selecting the most cost-effective service provider.

The District requests that the SLD's funding commitment decision be reversed and that the funding requests submitted in the Form 471 be awarded to the District for Funding Year 2002.

III. Factual Background

1. On October 16, 2001, Oklahoma City Public Schools ("OCPS" or "District") submitted to SLD an FCC Form 470 for Funding Year 2002 (07/01/2002 - 06/30/2003). The Form 470 requested telecommunications services, Internet access, and internal connections. In Block 2, Items 8, 9, and 10, the District responded to the question of "Do you have a Request for Proposal (RFP) that specifies the services you are seeking?" by answering "No, I do not have an RFP for these services." Having checked "No," the District, then proceeded to list the sorts of services that it was seeking within each category. Exhibit 1.

2. The District received a Form 470 - Receipt Notification Letter dated October 22, 2001 which indicated that the Form 470 was posted on October 17, 2001. Exhibit 2.

3. Sometime after October 15, 2001, the District put out to bid a Request for Proposal for a Strategic Technology Solution Provider ("RFP").[1] The stated purpose of the RFP was

> to select a strategic technology partner with the competencies, expertise and resources necessary to assist the Oklahoma City Public School District (OKCPS) in effectively infusing technology throughout the district. The technology infusion should result in significantly improved student achievement, and improved administrative practices in support of teaching and learning.... The Strategic Technology Partnership agreement will include, but not [be] limited to, E-rate funded

[1] The RFP has a cover page dated October 15, 2001; however, the footer at the bottom of the text pages is dated October 24, 2001, indicating that it was not finalized and released to vendors until sometime after October 15, 2001.

projects. ... The work itself will consist of all aspects of technology implementation for which OKCPS desires to contract with the partner. The current technology program calls for installation of new technology equipment, software, and services on an on-going basis. Exhibit 3, General Scope and Purpose of Procurement (emphasis added)

4. The RFP provides for scoring as follows:

A. Availability and Quality of Resources	30 points
B. Staff Development and Training	20 points
C. Project Management/Systems Integration	50 points
D. Technology Solutions	25 points
E. Commitment to K-12 Education	20 points
F. District funding considerations	100 points
G. Pricing Model and Cost Assurances	25 points
H. Other Vendor Attributes	30 points

Item G states that

[A]s with any project, cost is a consideration. OKCPS understands that a strategic partnership as described in this RFP, does not allow for firm, fixed pricing in all areas, as the specific scope of work necessary for such pricing is impossible to ascertain. Prospective bidders should note that this RFP does 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. However, it is vitally important that OKCPS get value for its dollar in the other areas included in this scope of work and is able to demonstrate this to the OKCPS Board. Consequently, prospective bidders are required to provide a proposed pricing model that will:

* Be able to demonstrate throughout the life of the contract that the costs associated with this partnership are within normal and customary charges for the type of services provided.
* Be simple to administer as specific scopes of work are developed.
* Meet all statutory requirements for record keeping reporting and auditing of public funds.
* Adhere to district's purchasing policy. ...

Bidders were required to submit a proposed schedule of hourly charges and/or other services based pricing in responding to the RFP. The RFP noted that this criteria was essential to the potential success of any bid and were informed of the importance of this criteria. Bidders were notified that,

contingent upon negotiations, a specific price quote might be required upon completion of final negotiated contracts which would be submitted on the District's Form 471 Application.[2] Exhibit 3.

5. The District received eight (8) responses to the RFP. As evidenced by the bid tabulation forms, bids were received from: Mediasoft, Chickasaw Telecom, JDL, Siemens, AVNet, IBM, Compaq, and Southwestern Bell. The District formed a committee to evaluate the responses to the RFP. The evaluation committee consisted of Steve Finch who was the District's Chief Technology Officer, Leroy Walser, Jay Merritt, Jolynn Craig, and Steve Washam. The evaluation committee members reviewed the responses to the RFP and scored the responses according to the points set forth in the RFP. The evaluation committee considered all eight of the responses to the RFP. The District was able to locate the bid tabulation sheets of three (3) of the evaluation committee members. These bid tabulation sheets show that IBM scored the highest for all three (3) evaluators. Exhibits 4, 5 and 6.

6. On December 13, 2001, Mr. Finch recommended to Dr. Weitzel, the District's Chief Executive Officer, that IBM be approved as the District's Strategic Technology Solution Provider ("STSP"). Mr. Finch's recommendation noted that the STSP agreement would include, but not be limited to, E-rate funded projects. Exhibit 7.

7. On December 17, 2001, the Board of Education unanimously approved IBM as the District's STSP. Exhibit 8.

8. During all relevant times from October 2001 to December 2001, the District had in effect a policy entitled Purchasing Authority. This policy, Policy D-12, provides guidelines for purchasing and notes that quality, service, and long-term value are important considerations. The

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[2] The RFP complied with the District's policy requiring bids for expenditures over $7,500.

Board emphasizes that quality conscious vendors and suppliers are to be used and recognizes that it is impossible to make hard and fast rules governing the way all purchases are to be made. The policy provides as a guideline for purchasing goods or contractual yearly services costing more than $7,500.00, that written specifications and formal bids be issued to interested vendors. Exhibit 9.

9. On December 19, 2001, Mr. Finch submitted to SLD an additional Form 470 for Funding Year 2002. This Form 470 differs from the first Form 470 submitted in October in that Steve Finch is listed as the contact person, where Steve Washam had been listed in the first Form 470. With respect to Items 8, 9, and 10 in Block 2, the "No" box was checked as to an RFP and information was provided regarding services sought and quantity and/or capacity. Specifically, the second 470 included some additional services, specifically e-mail services and voice over Internet protocol (VOIP) which were not included on the first 470. Exhibit 10.

10. On December 24, 2001, the SLD issued a Form 470 Receipt Notification Letter for Funding Year 2002 which indicated that the Form 470 had been posted on December 19, 2001 and that the allowable contract date was January 16, 2002. Exhibit 11.

11. On January 17, 2002, the District filed its Form 471 for Funding Year 2002. The Form 471 included the following funding requests with attachments noted:

856873: Internal Connections - IBM Corporation - Attachment TS
856918: Internal Connections - IBM Corporation - Attachment NE
857000: Internal Connections - IBM Corporation - Attachment MCU
857038: Internal Connections - IBM Corporation - Attachment C
857097: Internal Connections - IBM Corporation - Attachment E
857134: Internal Connections - IBM Corporation - Attachment IA
857185: Internal Connections - IBM Corporation - Attachment S
857238: Internal Connections - IBM Corporation - Attachment VoIP
857270: Internal Connections - IBM Corporation - Attachment W
857296: Internal Connections - IBM Corporation - Attachment SU.

Exhibit 12.[3]

12. On February 6, 2002, the SLD advised the District that the Form 471 had been received. Exhibit 13.

13. On December 23, 2002, almost one (1) year from the time that it submitted its Form 471, the District received an E-rate Selective Review Information Request ("Selective Review Request"). The Selective Review Request requested signed and dated copies of any and all agreements related to the Form 471 for Funding Year 2002 and required that the response be received by January 17, 2003. Exhibit 14.

14. On January 17, 2003, the District responded to the Selective Review Request and provided copies of the contracts referenced by the FRN's listed above. Exhibit 15.

15. On March 10, 2003, the SLD issued its Funding Commitment Decision Letter ("FCDL"). That FCDL denied the District's FRN's 856873, 856918, 857000, 857038, 857097, 857134, 857185, 857238, 857270, 857296 for the following reasons:

> Vendor selected by RFP, not 470; 470 said no RFP; services for which funding sought not defined when vendor selected; price of services not a factor in vendor selection; price of services set after vendor selection.

Exhibit 16, 3/10/03 FCDL.

IV. Discussion

A. The District Complied With All Program Requirements and With State and Local Procurement Laws.

[3] The District has omitted the pages of the Form 471 which concern the discount amounts and the attachments for other funding requests which are not being appealed herein.

The FCDL indicates that the District's funding requests related to service provider IBM were denied because the vendor was selected by a request for proposal (RFP) process and not the Form 470 process and because the Form 470 said that there was no RFP.

The Federal Communications Commission (FCC) has adopted regulations regarding E-rate funding. Those regulations provide that an eligible school must seek competitive bids for all services eligible for support. The FCC's competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt state or local requirements. 47 C.F.R. §54.504(a). The first step in the application process is to file an FCC Form 470. 47 C.F.R. §54.504(b). The Form 470 is posted on the SLD's website, and the school district must wait at least four (4) weeks from the date on which the Form 470 is posted before making commitments with selected service providers. *Id.*

The purpose of the Form 470 and its posting on the SLD website is to "provide a minimally burdensome means" for applicants "to get competing providers to approach them, so that schools and libraries could then select the best service packages subject to their state and local rules." *Federal State Joint Board on Universal Service (Order)*, 15 FCC Rcd, 6732, 6733 (1999). The Form 470 is an applicant's opportunity to describe the services sought and to "include information sufficient to enable service providers to identify potential customers. ... any additional information contained in an RFP that is not submitted for posting on the website under FCC Form[] 470 ... can be made available to interested service providers at the election of the [applicant] .... *Federal-State Joint Board on Universal Service (Fourth Order on Reconsideration),* 13 FCC Rcd 5318, 5412 (1997) *("Fourth Reconsideration Order").*

The Instructions for Completing the Schools and Libraries Universal Service Description of Services Requested and Certification Form (FCC Form 470))("Form 470 Instructions") state that

the "purpose of the FCC Form 470 is to open a competitive bidding process for the services desired." Form 470 Instructions, p.2. A school district which requests universal service discounts must seek competitive bids using the Form 470. Form 470 Instructions, p. 3. The Instructions also state that SLD will post the information on the SLD's web site for at least 28 days "to fulfill the competitive bidding requirement" and that the Form 470 is "posted to the SLD web site for competitive bidding." Form 470 Instructions, pp. 3 and 5.

The Instructions provide that, for Block 2, Items 8-10, the items must be completed "to provide potential bidders with particular information about the services" that the applicant is seeking. Form 470 Instructions, p. 10. The specific data requested is sought "to provide potential service providers with information so that they may contact [the applicant] if necessary for detailed information on [the applicant's] specific requirements. *Id.* With respect to Items 8, 9, and 10, the applicant must check the relevant category of service and then must "check either box (a) or (b) under the selected item and complete the item." *Id.*

The Instructions for Item (10)(a) specify that this box is to be checked if the applicant has "a Request for Proposal (RFP) that will provide potential bidders with specific information about the particular internal connections services or functions" it is seeking and "what quantity and/or capacity" is sought. Form 470 Instruction, p. 12. Item (10)(b) is to be checked if the applicant does "NOT have a Request for Proposal (RFP) for the internal connections" which are sought. *Id.* Additionally, the Instructions note that "[A]pplicant's must also comply with any applicable state or local requirements when participating in the competitive bidding process used in the universal service discount mechanism." *Id.*

Lastly as a "Reminder" SLD says that if an applicant has an RFP, the RFP must be available to service providers via a web site or designated contact person "as of the date that this Form 470 is posted on the SLD web site." Form 470 Instructions, p. 18. This makes it clear that an RFP has to be available as of date the Form 470 is posted for an applicant to check the "yes" box.

As set forth in the Instructions for completing the Form 470, the SLD considers the Form 470 to be merely a notice to possible vendors that an applicant is in the market for certain services. The Form 470 is merely a starting point for a competitive process and is not the entire competitive process. It does not provide sufficient detail for vendors to know what is to be provided in many cases. With respect to tariffed/regulated services such as telecommunications, such notice may be sufficient for a vendor to submit a proposal. However, with respect to internal connections, the Form 470 does not contain sufficient detail such as to the number of sites and the specific type of equipment to be used in a particular site to be considered a request for proposal.

Furthermore, the Form 470 Instructions recognize that the Form 470 provides potential service providers with notice of who is seeking particular services so that the service providers may contact the applicant for detailed information. The Form 470 anticipates that there will be further communication between the applicant and potential service providers. It is clear that SLD anticipates that service providers may contact school districts to request detailed information such as would be contained in an RFP and that is why the Form 470 requires an applicant to list a contact person. There is nothing in the SLD's program rules, instructions, or guidance which would indicate that the Form 470 is intended to be the only vehicle through which an applicant may select a service provider. Rather, the SLD obviously expects that there may be documents such as RFP's which set forth the detail about what is sought by the applicant.

The FCDL indicates that one of the reasons for denying OCPS's funding request for the work to be performed by IBM was that the vendor (IBM) was selected by RFP and not the 470. However, as is clearly set forth in the FCC's regulations, the FCC's competitive bidding requirements apply in addition to any state or local competitive bid requirements. Furthermore, the FCC's regulations are not intended to and may not preempt any state or local competitive bidding requirements.

It should be noted that there is no Oklahoma law which requires school districts to obtain bids for any services or goods other than for public construction contracts. Public construction contracts are defined by law as contracts exceeding $25,000.00 for the purpose of making public improvements or constructing public buildings or making repairs to same. Public improvements do not include the purchase of materials, equipment, or supplies. 61 O.S. §102 (Supp. 2003). The District's RFP met the requirements of its own policy in that the RFP contained specifications as to the services being sought, how those services would be evaluated, and a requirement that bids be submitted in response. Responsive bids were required to be sealed and were required to include a proposed schedule of hourly charges or other services based pricing. In order to comply with the FCC's regulations to comply with local competitive bidding requirements, the District had to comply with its local policy to issue written specifications and obtain bids. Therefore, the District was required to issue an RFP with specifications for the Strategic Technology Solution Provider it sought.

OCPS properly and accurately completed its Form 470 in that it indicated it did not have an RFP. At the time the Form 470 was posted in October of 2001, the District's RFP was not complete and could not have been posted on the Web or made available to service providers as of October 17, 2001. Furthermore, the RFP was for more than just internal connections or Internet access as set

forth in the Form 470. The District's RFP was for a Strategic Technology Solution Provider which would provide the District with assistance for E-rate projects but which would also provide other technical assistance that was not eligible for E-rate funding such as staff training and development and assistance with technology implementation generally. Therefore, when the District checked "no" as to whether it had an RFP for internal connections, it answered accurately and in such a way as to encourage further competition.

The fact that the District checked "no" should not be used as a basis for denial of funding since the FCC's interests in insuring that a competitive process occurs were advanced. The Form 470 served as public notice and initiated the competitive bidding process as it is supposed to do according to SLD's Instructions and FCC's prior decisions. The fact that the District received eight (8) potential vendors is evidence that there was competition. The District's RFP further advanced the FCC's interest in insuring a competitive procurement process by complying with the District's local policy guidelines to have written criteria and to require formal responses from bidders. The Form 470 served as the vehicle to provide notice to potential service providers as it is supposed to do.

B. The services for which funding is sought were sufficiently defined when the vendor was selected.

SLD's decision indicates that one of the reasons for denying the listed FRN's was that the "services for which funding sought not defined when vendor selected." Exhibit , 3/10/03 FCDL. From this statement, it is unclear whether SLD is referring to the services listed in the Form 470 or in the District's RFP.

To the extent that the complaint about specificity refers to the Form 470, the District believes that its Form 470 was sufficiently detailed for prospective service providers to know what services

or goods were being sought. As discussed above, the Form 470 is merely a notice to prospective service providers about the services and/or goods being sought. The services are described by category and by quantity of locations. SLD has never indicated in previous communications with the District that the descriptions set forth in the Form 470 were insufficient. Furthermore, the District is not aware of any notices published by SLD which would indicate that such general descriptions in the Form 470 are inadequate. Therefore, the District submits that its Form 470 more than adequately described the services for which it sought service providers.

To the extent that the SLD is complaining about the adequacy of the District RFP, the District submits that the Strategic Technology Solution Provider RFP meets with the District's own policy of requiring written specifications. By providing that applicants for universal services discounts comply with state and local procurement laws, the FCC was acknowledging that it was not establishing a completely separate procurement process. The SLD is not in a position with respect to time, money, and/or staffing to review all applicable state and local laws and policies regarding procurement processes. Such an undertaking would result in even further delays by SLD of the processing of applications and would cause the system to essentially "bog down" in the paperwork required to consider all fifty states procurement laws and all applicants' policies. It appears that the SLD desires to substitute its own judgment as to what constitutes a satisfactory procurement process for the procurement process established by a school district with expenditures of over $200 million. Obviously, the District is capable of and routinely engages in procuring goods and services in a competitive manner. If it did not, there would be no need for the Purchasing Authority policy.

The service providers who responded to the RFP are experienced vendors who were aware that questions could and should be raised in an effort to find out more information regarding the

RFP. Additionally, those service providers were no doubt aware that, if they had a concern regarding the process and/or the selection of IBM, they could have made a complaint to the District's Board of Education. However, no service provider raised any objection to the process or to the selection of IBM. No complaints were submitted to the Board of Education. This fact illustrates that the District engaged in a completely competitive process when hiring a Strategic Technology Solution Provider.

C. Price was a primary factor in the district's decision-making process.

The SLD also listed as a reason for denial of the District's funding requests that the price of services was not a factor in vendor selection and that the prices of services was set after vendor selection.

The FCC's regulations provide that an applicant shall carefully consider all bids submitted and "may consider relevant factors other than the pre-discount prices submitted by providers." 47 C.F.R. §54.511(a). The FCC has explained that schools should have the maximum flexibility to consider service quality in selecting a service provider and to choose an offering that meets a school district's needs most effectively and efficiently. *Federal - State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 9029, para. 481, (1997) (*Universal Service Order*). However, price is to be the "primary factor" in selecting a bid. *Id.* A school should have the flexibility to select different levels of service but when selecting between comparable services, the school should be guided by price in its selection. However, this does not mean that the lowest bid must be selected. *In the Matter of Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator*, 14 FCC Rcd 13734, 13739 (1999) (*Tennessee Decision*).

The selection of a service provider is subject to a presumption that the most cost-effective bid was selected unless there is evidence to the contrary. *Tennessee Decision* at 13737-13738. In the *Tennessee Decision*, the requirement of price as a primary factor was met by a procurement process that evaluated and considered cost but which awarded the contract to the most "cost-effective" service provider. *Id.* at 13740.

In this case, the District's criteria for evaluating responses to the Strategic Technology Solution Provider RFP included cost. The RFP emphasized that pricing was an essential criteria which would be considered. See Exhibit 3, Item G. As required by the RFP, the responses to the RFP included hourly rates for certain services. These hourly rates in conjunction with the service providers' experience which is detailed in the response to the RFP allowed the District to evaluate the cost-effectiveness of the service providers' performance and to select the most cost-effective service provider. Such an approach to the selection of a service provider is clearly anticipated by and approved by the FCC based on the *Tennessee Decision*.

V. Conclusion

As required by FCC and SLD rules, the District properly submitted a Form 470 listing the services it sought from potential service providers. The Form 470 initiated the competitive bidding process required by the FCC and the SLD. The District also issued a Request for Proposal ("RFP") as suggested by its own policies and as necessitated in order to be a prudent purchaser of services. Nothing in the FCC's rules, guidelines, or prior rulings and nothing in the SLD's rules, guidelines, or prior rulings would indicate that a school or library may not post a Form 470 and also issue an RFP. The District's RFP and its Form 470 adequately described and sufficiently defined the services sought.

Additionally, price was a primary factor in the District's selection of a service provider. The FCC's rules and prior rulings indicate that price may be considered and evaluated in such a way as to recognize the most cost-effective service provider. The District considered the hourly rates of those service providers who responded to the RFP in conjunction with the service providers' experience and other factors in selecting the most cost-effective service provider.

The District requests that the SLD's funding commitment decision be reversed and that the funding requests submitted in the Form 471 be awarded to the District for Funding Year 2002.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I, Laura L. Holmes hereby certify that true and correct copies of the preceding Request for Review of Oklahoma City School District I-89 was served this May 7, 2003 via first class mail, postage pre-paid upon the following parties:

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