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MAY 23 2003

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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	)	
	)	
Memphis City School District	)	
	)	
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 MEMPHIS CITY SCHOOL DISTRICT

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May 22, 2003

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SUMMARY

Memphis City Schools (Memphis) requests Commission review of a March 24, 2002, Funding Commitment Decision Letter issued by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company.

The SLD denied funding under the Schools and Libraries Funding Mechanism (the "E-Rate program") to the Memphis City School District, Memphis, Tennessee.

Memphis is the largest school system in Tennessee and the 21st largest metropolitan school system nationally. It serves approximately 118,000 students. The poverty level of the district yields an average 83% discount level under the E-Rate program.

The SLD erroneously interpreted the "Multi-step sealed bidding" mechanism used by Memphis as defined in laws of the State of Tennessee. The prime issue centers around when the services were defined, when pricing was set and the timing of vendor selection. The issue was further complicated by having only a single respondent to the RFP.

The SLD did not ask any questions or seek clarification during the E-Rate Selective Review it conducted nor did they answer the districts questions about the rejection reasons. Therefore Memphis after careful study, can only assume that the SLD (1) did not clearly understand that the master contract signed by the district did not select the vendor for the various projects included in the districts application; or (2) did not understand the legal requirement in Tennessee to evaluate all technical offers

SUMMARY
Continued

before dealing with price. The following documentation will clearly outline the steps used by Memphis in vendor selection and show that Memphis was in fact compliant will all program rules.

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REQUEST FOR REVIEW OF THE DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY
MEMPHIS CITY SCHOOL DISTRICT

Memphis City School District, pursuant to Section 54.719 of the Commission's rules,[1] hereby submits its Request for Review of the Universal Service Administrator's Year 2002 Funding Decision regarding the Memphis City School District.[2]

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1 47 C.F.R. § 54.719.

2 Universal Service Administrative Company, Schools and Libraries Division's "Funding Commitment Decision Letter (Funding Year 2002: 07/01/2002 – 06/30/2003) " Re: Form 471 Application Number: 331487 dated March 24, 2003.

I. FACTUAL BACKGROUND

Memphis City Schools ("Memphis") is the largest school system in Tennessee and the 21st largest metropolitan school system nationally. Memphis serves a student population of approximately 118,000 students composed of 87% African-American, 9% Caucasian and 4% other. The poverty level of the district is extremely high as indicated by the current district average discount of 83%.

Memphis is truly committed to improving student achievement through its use of technology. The ultimate goal of the Memphis City Schools' investment in technology is to ensure that students can access, assimilate, apply and adapt to existing and emerging technologies as life-long learners in a global community. When this occurs, the District will produce graduates who are able to understand and use technology to reach their full potential in life.

The E-Rate program has been very instrumental in moving Memphis toward its goal and the children of Memphis City Schools have been significantly influenced. Because of the progress being made and the negative impact of the loss of E-Rate funds on these children, it is imperative that the FCC review this appeal with an open mind as Memphis City Schools feels quite strongly that your administrator, the Schools and Libraries Division has made an egregious error in rejecting this Year 2002 application. While the intentions of the SLD may have been honorable, it appears to this beneficiary that the SLD may have been caught up in the pressure of enforcing program rules and did not follow due diligence in the review of Memphis

City Schools' application; particularly as it relates to the unique bidding laws of the State of Tennessee. Memphis is asking the FCC to rectify this error and reverse this decision.

Selective Review and Rejection:

On December 20, 2002, Memphis City Schools was notified that all of it's Year 2002 applications were selected for an E-RATE SELECTIVE REVIEW to ensure compliance with program rules regarding competitive bidding and vendor selection processes. Memphis eagerly complied with this and submitted all materials requested prior to the deadline of January 17, 2003.

While expecting the customary questions, answers and clarification dialogue consistent with the normal program integrity process, Memphis received no communications what so ever from the SLD until receipt of the afore mentioned Funding Commitment Letter of March 24, 2003. In fact when Memphis contacted the SLD for clarification, the response was: "This funding decision was based on the information that you have provided to Program Integrity Assurance when they were reviewing your application. For more of an explanation you will need to request the reason why when you appeal this decision."[3] Therefore this appeal is based our interpretation of the messages printed on the funding commitment letter Memphis reserves the right to amend this appeal if our interpretation is incorrect.

---

[3] Email response by SLD to Memphis request for further explanation of rejection reasons (Attachment 1).

In the letter, all FRN's in the application were rejected. Rejection reasons were as follows:

1. Services for which funding sought not defined when vendor selected
2. Price of services not a factor in vendor selection.
3. Price of services set after vendor selection.
4. 30% or more of this FRN includes a request for a duplex circuit which is an ineligible product based on program rules.

Bidding Methodology:

The bidding mechanism used by Memphis to acquire product and services for its Year 2002 E-Rate application is what is legally known in the State of Tennessee as "Multi-step sealed bidding". This is defined by law as:

"...a two-phase process consisting of a technical phase composed of one (1) or more steps in which bidders submit unpriced technical offers to be evaluated by the state, and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their price bids considered. It is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder, and at the same time obtain the benefits of the competitive sealed proposals procedure through the solicitation of technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers;..."[4]

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4 Tennessee Code / TITLE 12 PUBLIC PROPERTY, PRINTING AND CONTRACTS / CHAPTER 3 PUBLIC PURCHASES / PART 2 BIDDING, CONTRACTS AND PURCHASES GENERALLY / 12-3-201(5). Definitions.

Memphis chose this multi-step mechanism with the first step being the evaluation of technical offers only. This segregation of review is required by Tennessee law as indicated below:

"...That proposers be given a reasonable time to consider evaluation factors set forth in the solicitation document before submitting proposals and, further, that no cost proposals may be opened until the evaluation of the non-cost sections of the proposal has been completed; and ..."[5]

The FCC has already ruled in the affirmative on this segregation of review in what is commonly referred to as the "Tennessee Order"[6]. Here is a specific quote from that FCC order:

"n22 We note, moreover, that requiring schools to evaluate price first may lead to a conflict with state and/or local government procurement laws, rules, or practices. Indeed, Tennessee procurement laws and rules require cost proposals to be opened only after evaluation of the non-cost sections of the proposals have been completed. See Tenn. Code Ann. section 12-4-109(a)(1)(A)(iii)... As section 54.504 states, "[the Commission's] competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements." 47 C.F.R. § 54.504. [**11] "

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5 Tennessee Code / TITLE 12 PUBLIC PROPERTY, PRINTING AND CONTRACTS / CHAPTER 4 PUBLIC CONTRACTS / PART 1 GENERAL PROVISIONS / 12-4109(a)(1)(A)(iii).Contracts for state services.

6 Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator (Order), 14 FCC Rcd 13734 (1999) ("Tennessee Order")

The second step of this process was to supply qualified vendors with more detailed lists including specific quantities of products and services to be supplied for pricing and contract negotiations. Since this bidding cycle generated only one respondent, it would not be prudent to ask the single vendor to just supply prices and accept them. Therefore, Memphis negotiated a master contract that established the rules of enagement, gave Memphis certain price protections, and established that this master contract was nonexclusive and would allow Memphis to seek other competitive pricing at any time during the contract period. This master contract included a certain baseline of services that was the only guaranteed work to be done under the contract. All other work was negotiated under separate subcontractors (PCR's).

When Memphis does not get satisfactory pricing from negotiations of a specific subcontract (PCR) we have and will continue to reject that project.

Open and Fair Bidding

Memphis understands the value of an open and fair bidding process, and always tries to make proposals as inclusive as possible; while trying to ensure cost-effective, efficient, successful solutions.

In the early 1990's, technology bid proposal documents were normally broken down to their least common denominator. In the old world of stand-alone microcomputers and centralized mainframes, life was simpler as each project was isolated from each other and the need for vendor coordination was minimal. In the summer of 1995, prior to E-Rate, Memphis identified the ever-increasing complexity and

interdependency of technology projects as a deterrent to meeting the needs of the students of the district. Projects were behind schedule, not done to standards, when problems occurred; it was always the other vendors' fault and inevitably would require additional costs to rectify a problem or would result in wasting money by deploying "problem of the day solutions" that later were throwaways.

This is when Memphis decided to try the construction industry model of a "general contractor" and developed the Technology Business Partnership concept. This concept is more than a systems integrator role, as the district requires the successful bidder to become immersed into our organization, understand our unique challenges and work together with the district to bring together long-term cost effective solutions.

As indicated in our RFQ, we were looking for either a single firm or a consortium to provide such a "general contractor" role. The master contract also encourages the Technology Business Partner to use the subcontractor mechanism to seek participation by local and minority vendors. This method has proven to be efficient, cost effective and inclusive.

Determination of Fair Pricing:

Memphis, like most school districts across the nation, is always facing budget constraints and the "do more with less" edict. The fact that the request for qualifications only received a single respondent raises the red flag, is pricing fair? In

order to answer that question, which needs to be asked even when you have multiple respondents, the person(s) reviewing pricing or negotiating contracts must keep abreast of not only industry pricing but also local variations and must have an accurate understanding of competitive fair pricing. Memphis technology procurement personnel are experienced dedicated professionals who do their homework and understand fair pricing not only at time of the bid but they must be cognitive of what will happen to that pricing at time of deployment. This is extremely important when dealing with the E-Rate program since bids occur sometimes a year or more before deployment begins.

This delay in deployment is due to long procurement cycles of the district and the delays in receipt of commitment letters from the SLD. To protect the district from this situation a number of strategies have been put into place such as:

1. All pricing in contracts are not to exceed prices.
2. All product purchases are repriced at time of deployment and we accept the lower of the two prices. Historically, this has saved the district and the SLD considerable dollars.
3. The Master Contract has this price protection language: "We will provide hardware (same make and models) and software (Same versions) at price points equal to or less than those available under existing Tennessee state contracts. Our (IBM) prices for services being provided to MCS (Memphis City Schools) are the same prices

we would extend to any other IBM customer for the same comparable services."

4. The Master Contract has this language: "This is a non-exclusive contract, therefore, MCS may at any time elect to procure products and services through normal processes outside the contract." In fact periodically we have gone out to bid to validate IBM's pricing.

In total, all of these mechanism ensure that MCS gets a fair reasonable price.

Additionally, Memphis has a vested interest in receiving fair pricing. There is a large misconception surrounding the E-Rate program that this is free money from the FCC and since it is free, cost is not an issue; the district only pays ten cents on a dollar therefore don't worry about the price. In reality, the district pays a lot more than ten percent and the numbers add up. For example, an analysis of the deployment of our infrastructure shows a different story. While Memphis has a considerable number of schools that are eligible for a ninety percent discount (over one-hundred), the district also has a large number of schools ranging from eighty percent to forty percent discounts. For equity reasons, when the district deploys technology, it goes into all schools, not just those that are funded. When you add the non-eligible items such as electrical circuits, the costs are staggering. The initial rollout of our infrastructure cost was $45,217,265. The SLD's share was $23,254,960 and the district cost $21,962,305. This shows that Memphis' share was in fact 48.6 percent. Memphis

certainly does have a vested interest in fair pricing and the district negotiates in earnest as a price reduction strategy.

The impact of cost effective negotiations by Memphis in the Year 2002. Application is illustrated when you look at voice services for the district. The application contains two projects for voice services; one for BellSouth at tariff prices and a negotiated contract with XO Communications. We are in the process of migrating all voice to XO Communications because their negotiated price was approximately one-half the proposed price from BellSouth.

Bidding Chronology:

Memphis contends that it followed all program bidding rules and provides this chronology of events to illustrate its compliance.

8/10/2001

1. A Form 470, application number 912020000362068[7], was posted on the Schools and Libraries Division's web site with a reference to the RFQ posting on Memphis City Schools web site.

2. The RFQ was posted on Memphis City Schools web site.

3. The RFQ[8] was mailed out to vendors registered with our Division of Procurement Services

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7 FCC Form 470, Memphis City School District (Attachment 5)

8 Request For Proposal, Memphis City School District (Attachment 6)

8/13/2001 – 8/17/2001

Legal Notices advertising the RFQ were posted in the following

Local Newspapers:

1. The Daily News
2. The Tri-State Defender
3. The Commercial Appeal
4. The Memphis Business Journal

9/10/2001

There was a public opening of the RFQ responses. Respondents were:

1. International Business Machines Corporation (IBM)
2. Computer Lab of Memphis (No Bid)
3. Dell (No Bid)
4. Gateway (No Bid)
5. Thomas Consultants (No Bid)

9/10/2001 - 9/24/2001

The RFQ evaluation committee reviewed the single RFQ proposal submitted, against the published Proposal Evaluation Criteria and unanimously determined that IBM was the sole qualifier for this bid. They then instructed Procurement Services to request permission form the Board of Education to begin contract negotiations.

11/5/2001

The Memphis City School District's Board of Education approved negotiations of this contract for a period of five years, effective 7/12/2002 through 6/30/2007.

11/6/2001 - 01/16/2002

Memphis provided IBM, the sole respondent and sole qualified provider, with the specific products and services for a number of major projects for pricing and negotiations. Negotiations of the multi-year Master Contract and subcontracts known as Project Change Requests (PCR's) were conducted with vendor selection and agreements being signed as follows:

CONTRACT	VENDOR SELECTION
Master Contract/Initial Baseline	12/19/2001
PCR 01-020 ATM WAN, Centrex, and T-1 Services	01/07/2002
PCR 01-021 Network Mon., On-Site Tech and Maint.	01/15/2002
PCR 01-022 PBX and Key System Maintenance	01/15/2002
PCR 01-023 Centrex Telephone Support	01/16/2002
PCR 01-024 Network Enhancements	01/16/2002
PCR 01-025 New & Ren. Schools Net.Enhancements	01/16/2002
PCR 01-026 Server Upgrades	01/16/2002
PCR 01-027 BellSouth Voice Services	01/14/2002
PCR 01-028 Video Distance Learning Middle and HS	01/15/2002
PCR 01-029 Video Distance Learning Elementary	01/15/2002
PCR 01-030 Network Cabling Maintenance	01/16/2002

II. REASON FOR REJECTING FUNDING 1: "SERVICES FOR WHICH FUNDING SOUGHT NOT DEFINED WHEN VENDOR SELECTED"

Rejection for this reason is in error and shows that, despite not asking any questions or clarifications during the Selective E-rate Selective Review, the SLD did not understand the mechanics of vendor selection used by Memphis. They assumed that once a vendor qualified on technical merits (Step one of the multi-step vendor selection process) or at the signing of the master contract that the district had selected them to provide services and product in the E-Rate application. In fact as indicated previously, vendor selection was done on a project-by-project basis and was not concluded until after detail specifications of product and services had been provided to the "qualified" vendor and negotiations resulted in a signed subcontract (PCR). Perusal of the attached PCR's will show that the services were defined prior to selection.

III. REASON FOR REJECTING FUNDING 2: "PRICE OF SERVICES NOT A FACTOR IN VENDOR SELECTION"

Again, this rejection is in error, due to the SLD's misunderstanding of the Memphis vendor selection process. They assumed that once a vendor qualified on technical merits (Step one of the multi-step vendor selection process) or at the signing of the master contract that the district had selected them to provide services and product in the E-Rate application. In fact as indicated previously, vendor selection was done on a project-by-project basis and was not concluded until after detail specifications of product and services had been provided to the "qualified" vendor and negotiations resulted in not to exceed prices that are incorporated into each signed subcontract

(PCR). Perusal of the attached PCR's will show that the pricing was included at the time of vendor selection.

IV. REASON FOR REJECTING FUNDING 3: "PRICE OF SERVICES SET AFTER VENDOR SELECTION"

Again, this rejection is in error, due to the SLD's misunderstanding of the Memphis vendor selection process. They assumed that once a vendor qualified on technical merits (Step one of the multi-step vendor selection process) or at the signing of the master contract that the district had selected them to provide services and productin the E-Rate application. In fact as indicated previously, vendor selection was done on a project-by-project basis and was not concluded until after detail specifications of product and services had been provided to the "qualified" vendor and negotiations resulted in not to exceed prices that are incorporated into each signed subcontract (PCR). Perusal of the attached PCR's will show that the pricing was set before vendor selection.

V. REASON FOR REJECTING FUNDING 4: "30% OR MORE OF THIS FRN INCLUDES A REQUEST FOR A DUPLEX CIRCUIT WHICH IS AN INELIGIBLE PRODUCT BASED ON PROGRAM RULES"

Memphis is cognizant of what products and services are eligible and ineligible under the E-rate program rules, when in doubt we confer with the SLD for clarification. Electrical work, such as duplex circuits, is quite clearly ineligible. Unfortunately in printing our complex application of over 1200 pages, a mistake was made in the print macro for a single project; PCR 01-024 Network Enhancements. It did not move the

costs of these duplex circuits to Block 5 item 23 column G "How much of the $ amount in (F) is ineligible". Therefore the spreadsheet did not subtract this amount properly from all the FRN's associated with this project. This was a technical problem and not a deliberate attempt to get funding for ineligible services.

The Year 5 471 Application Block 5 Item 21 Attachments and the districts May 7, 2002 response to questions from Mr. David Le, SLD Program Integrity Assurance clearly shows that the total cost of the project included $4,828,523.00 of ineligible charges and that Memphis did not intend to lump these monies into eligible costs[9].

VI. CONCLUSION

For the aforestated reasons, the commission should reverse the SLD's decision to deny funding to Memphis.

Respectfully submitted,

By: _____

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Memphis City Schools
2597 Avery Avenue, Memphis, TN 38112
(901) 416-5475

E-Rate Coordinator Memphis City Schools

May 22, 2003

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9 Response to Program Integrity request of May 7, 2002 (Attachment 19)

CERTIFICATE OF SERVICE

I, **William Hazelton** hereby certify that true and correct copies of the preceding Request for Review of **Memphis City Schools** was served this **May 22, 2003** via first class mail, postage pre-paid the following parties:

William Maher
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