

Summary of WRF “Review of Federal, State of Texas, and FCC E-Rate Procurement Laws and Regulations”

On April 24, 2003, Wiley Rein & Fielding LLP (“WRF”) filed a “White Paper” styled *Review of Federal, State of Texas, and FCC E-Rate Procurement Laws and Regulations*, to address SLD’s view that to qualify for SLD funding, school districts must “choose the most cost-effective alternative, with price being the single most heavily weighted factor.” This document summarizes WRF’s White Paper, which explains that SLD’s view of the law departs from FCC precedent and both Texas and Federal procurement law.

- *First*, SLD’s view that price must be the single most important factor conflicts with the FCC’s Universal Services Order, 12 FCC Rcd 8776 para. 481 (1997).
 - The Order states that schools and libraries should enjoy “maximum flexibility” to consider quality and to select the offer that meets its needs “most effectively and efficiently.” While “price should be the primary factor in selecting a bid,” this requirement is met when the “most cost-effective supplier” is selected.
 - The FCC expressly referenced “federal procurement regulations,” which permit consideration of numerous nonprice factors, stating that such factors “form a reasonable basis on which to evaluate whether an offering is cost-effective.” In fact, FAR Part 15, which the FCC cited, expressly contemplated at that time (and still today) that quality factors could be “significantly more important than price.”
- *Second*, SLD’s view conflicts with the FCC’s seminal “Tennessee Order,” 14 FCC Rcd 13734 paras. 8-12 (1999), construing the Universal Services Order.
 - There, the FCC upheld SLD’s funding grant for IT resources, although the underlying RFP gave technical factors greater weight than price.
 - The FCC rejected the contention that “price should be the initial determining factor considered to the exclusion of other factors”: “Interpreting the [FCC’s] competitive bid rules as requiring schools to select the lowest bid with little regard for the quality of the services necessary to achieve technology goals would obviate the ‘maximum flexibility’ the Commission expressly afforded schools.”
 - The FCC construed the Universal Services Order to afford schools “the flexibility to select different levels of service . . . but, when selecting among comparable services, a school should be guided by price in its selection. Even among bids for comparable services, however, this does not mean that the lowest bid must be selected. Price, however, should be carefully considered at this point to ensure that any considerations between price and technical excellence (or other factors) are reasonable.” In short, schools must make reasonable “best value” tradeoffs.
 - The FCC ruled that SLD need not determine whether a school has met the FCC’s requirements because (a) the school’s local procurement rules “will generally consider price to be a ‘primary factor’” and lead to the selection of the most cost-effective bid, or (b) in the absence of such rules, “a school has an incentive to select the most cost-

effective bid . . . because it must pay its pro rata share of the cost of the services requested.” “Absent evidence to the contrary . . . this incentive is generally sufficient to support a conclusion that a school has selected the most cost-effective bid for requested services.” No such evidence exists here.

- *Third*, neither SLD nor the competitors for the underlying contract has even suggested that Ysleta’s award to IBM failed to comply with Texas procurement law.
 - SLD recognizes that Texas law calls for “best value” procurements based on price and nonprice factors and also contemplates the use of a two-step procurement process in which price is not considered until the second step for engineering and technology services. SLD claims only that *even if* these laws were followed, “Ysleta is still required to comply with FCC competitive bidding requirements” because “FCC requirements apply *in addition to* any state and local laws.”
 - This departs from the Tennessee Order and is dubious policy given that the best value and two-step procurement methods are well-recognized competitive processes rooted in the ABA’s Model Procurement Code for State and Local Governments and the Federal Government’s own acquisition rules.
 - Ysleta was a sophisticated purchaser that independently investigated market costs and negotiated risk-shifting mechanisms and millions of dollars in price reductions.
 - Finally, although Texas, like the federal government, expressly authorizes both pre-award and post-award protests challenging the procurement process or award decision, none of the other four Ysleta competitors filed one. If any of these competitors believed that the RFP favored IBM, it would have filed a pre-award protest. If any competitor believed Ysleta’s award decision violated Texas law, it would have filed a post-award protest. The absence of any protest is strong evidence that Ysleta complied with Texas law.
- *Fourth*, Texas’s “best value” and two-phased procurement processes comport with Federal acquisition law.
 - In 1984, Congress repealed the general requirement that Federal contract awards be based on low-cost. It put “best value” procurements on par with “low-cost” acquisitions, especially for procurements of technical services. Now, low-cost acquisitions account for only 10% of federal procurement dollars. But, even in “best value” procurements, cost is still a primary factor because any technical advantages of a given offer must be determined to be worth any additional cost.
 - The two-step process utilized by Ysleta mirrors the method required by the Brooks Act, under which the Federal Government procures “professional services of an architectural and engineering nature.” Cost is still a primary factor insofar as it controls the second step. If the parties cannot agree on a fair and reasonable price, the Government terminates negotiations with the most highly qualified vendor and attempts to negotiate a contract with the next vendor in line. Here, Ysleta even evaluated price during the first step.