

Before the
Federal Communications Commission
Washington, DC 20554

DEC 10 2003

In the Matter of)	
)	
Request for Review of the)	
Decision of the)	
Universal Service Administrator by)	
)	
Winston-Salem/Forsyth County School District)	SLD No. 302305
Winston-Salem, North Carolina)	
)	
International Business Machines, Inc. on behalf of)	SLD No. 302305
Winston-Salem/Forsyth County School District)	
Winston-Salem, North Carolina)	
)	
Federal-State Joint Board on)	CC Docket No. <u>96-45</u>
Universal Service)	
)	
Changes to the Board of Directors of the)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.)	

ORDER

Adopted: December 4, 2003

Released: December 8, 2003

By the Commission:

I. INTRODUCTION

1 Before the Commission are Requests for Review by Winston-Salem/Forsyth County School District, Winston-Salem, North Carolina (Winston-Salem), and International Business Machines, Inc. (IBM).¹ This school and IBM seek review of decisions of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator) that denied Winston-Salem \$16.7 million in discounts for internal connections from the universal

¹ Request for Review of the Decision of the Universal Service Administrator by Winston-Salem / Forsyth County School District, CC Docket Nos 96-45 and 97-21, Request for Review, filed June 20, 2003 (Winston-Salem Request for Review), Request for Review of the Decision of the Universal Service Administrator by International Business Machines, Inc on behalf of Winston-Salem / Forsyth County School District, CC Docket Nos 96-45 and 97-21, SLD No 302305, Request for Review, filed June 20, 2003 (IBM Request for Review).

service support mechanisms for schools and libraries for Funding Year 2002.² For the reasons set forth below, we grant these Requests for Review, and remand to SLD for consideration in accordance with this Order.

2. Today the Commission also releases the *Ysleta* Order, which addresses requests for review by other applicants that also selected IBM as their service provider.³ In the *Ysleta Order*, the Commission finds that a number of schools in Funding Year 2002 engaged in various practices that violated one or more of our rules regarding competitive bidding, the weighting of price in selecting among bidders, and the submission of bona fide requests for services under this support mechanism.⁴ The Commission also concluded, however, that the circumstances of those applicants justified a waiver of our rules governing the Funding Year 2002 filing window, and allowed those applicants to re-bid for their requested services.⁵ As set forth below, we conclude that the facts presented in this case, unlike the cases that the Commission addresses in the *Ysleta Order*, do not support a denial of Winston-Salem's request for discounts under the program.

II. BACKGROUND

A. Governing Rules

3 Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts for eligible telecommunications services, Internet access, and internal connections.⁶ Section 254(h)(1)(B) of the Act provides, "All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to [schools and libraries] for educational purposes at rates less than the amounts charged for similar services to other parties"⁷ The Commission elaborated on the meaning of "bona fide" in the *Universal Service Order*, where it stated that Congress "intended to require accountability on the part of schools and libraries," which should therefore be required to "(1) conduct internal assessments of the components necessary to use effectively the discounted services they order; (2) submit a complete description

² See Winston-Salem Request for Review. Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c)

³ See *in the Matter of Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, et al.*, CC Docket Nos. 96-45 and 97-21, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315364, 309005, 317363, 314879, 305340, 315578, 318522, 315768, 306050, 320461, FCC 03-313 (December 8, 2003) (*Ysleta Order*)

⁴ *Ysleta Order* at paras. 20-63

⁵ *Ysleta Order* at paras. 64-78

⁶ 47 C.F.R. §§ 54.502, 54.503

⁷ 47 U.S.C. § 254(h)(1)(B) (emphasis added)

of services they seek so that it may be posted for competing providers to evaluate; and (3) certify to certain criteria under perjury.”⁸

4 In the *Universal Service Order*, the Commission designed the program application structure to encourage competitive bidding on specific eligible products and services. Our rules provide explicit requirements for applicants to develop technology plans based on the reasonable needs and resources of the applicant, setting forth in detail how the applicant will use certain technologies in the near term and into the future, and how they plan to integrate the use of the technologies into their curriculum.⁹ At the time of the FCC Form 470 filing, applicants must certify whether their technology plans have been approved, and that they recognize that support is conditional upon securing access “to all of the resources, including computers, training, software, maintenance, and electrical connections necessary to use the services purchased effectively.”¹⁰ This requirement limits waste in the program by ensuring that products and services for which discounts are sought have been carefully selected to complement an applicant’s educational and information goals, consistent with available resources. The Commission specifically required that technology plans be independently approved, to ensure that the plans are based on the “reasonable needs . . . of the applicants and are consistent with the goals of the program”¹¹

5 The Commission’s rules state that “an eligible school or library shall seek competitive bids . . . for all services eligible for support . . .”¹² Under our rules, the competitive bidding process involves the use of an FCC Form 470 describing services being sought. An eligible school, library, or consortium seeking to receive discounts for eligible services must submit to the Administrator a complete FCC Form 470, which must include certain information such as information about the computer equipment, software, and internal connections available or budgeted for purchase, and staff experience.¹³ As explained in the *Universal Service Order*, the Form 470 must “describe the services that the schools and libraries seek to purchase in sufficient detail to enable potential providers to formulate bids. . . .”¹⁴ Each applicant must certify in its

⁸ *Universal Service Order*, 12 FCC Rcd at 9076, para 570

⁹ See *Universal Service Order*, at 9077, para 572-74

¹⁰ *Id* In a recent Further Notice of Proposed Rulemaking, the Commission sought comment on whether to change our rules so that applicants may certify that their technology plans will be approved by the time that E-rate supported services begin. See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Rulemaking, FCC 03-101 at paras 99-100 (*rel April 30, 2003*) (*Second Order and FNPRM*)

¹¹ *Universal Service Order*, 12 FCC Rcd at 9077, paras 573-74.

¹² 47 C F R § 54.504(a)

¹³ 47 C F R § 54.504(b)

¹⁴ *Universal Service Order*, 12 FCC Rcd at 9078, para 575 (emphasis added)

FCC Form 470 that it has developed a technology plan that has been approved by an authorized entity.¹⁵

6. The Administrator must post each applicant's Form 470 on SLD's website, allowing review by all potential competing service providers¹⁶ After waiting at least four weeks so that competing providers may consider submitting competitive bids for services, the eligible school, library, or consortium seeking discounts may then enter into a contract with the chosen service provider. The applicant then submits a completed FCC Form 471 application to the Administrator, indicating the selected service provider and services for which discounts are sought.¹⁷ SLD reviews the FCC Forms 471 that it receives and issues funding commitment decisions in accordance with the Commission's rules Applications that are received outside of this filing window are subject to separate funding priorities under the Commission's rules, and typically do not receive funding.¹⁸

7 Under our rules, applicants must select the most cost-effective bids.¹⁹ The Commission's rules state, "These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements"²⁰

B. Winston-Salem's Application

8 Winston-Salem's Funding Year 2002 FCC Form 470 was posted on SLD's website on November 15, 2001.²¹ Winston-Salem indicated in its FCC Form 470 that it was seeking

¹⁵ 47 U.S.C. § 54 504(b)(2)(vii). An applicant must certify that its technology plan has been "certified by its state, the Administrator, or an independent entity approved by the Commission." *Id.* Technology plans must establish the connections between the information technology and the professional development strategies, curriculum initiatives, and objectives that will lead to improved education or library services They must (1) establish clear goals and a realistic strategy for using telecommunications and information technology to improve education or library services, (2) include a professional development strategy to ensure adequate use of the technology, (3) include an assessment of the telecommunications services, hardware, software, or other services needed; (4) provide for a sufficient budget, and (5) include an evaluation process to monitor progress and make mid-course corrections. See *Universal Service Order*, 12 FCC Rcd at 9077-78, paras 572-74, SLD web site, Frequently Asked Questions About Technology Planning, <<http://www.sl.universalservice.org/reference/TechnologyPlanningFAQ.asp>>

¹⁶ 47 C.F.R. § 54 504(b), *Universal Service Order*, 12 FCC Rcd at 9078, para 575

¹⁷ 47 C.F.R. § 54 504(b), (c), Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (FCC Form 471) The FCC Form 471 notifies SLD of the services that have been ordered and indicates the amount of discounts sought *Id.*

¹⁸ 47 C.F.R. § 54 507(g)

¹⁹ *Universal Service Order*, 12 FCC Rcd at 9029-30, para 481

²⁰ 47 C.F.R. § 54 504(a)

²¹ See Winston-Salem FCC Form 470

services for virtually every product and service eligible for discounts under the support mechanism.²² In Blocks 8, 9, and 10 of FCC Form 470, Winston-Salem checked the box for, respectively, telecommunications services, Internet access, and internal connections, indicating in each instance “No, I do not have an RFP [Request for Proposal] for these services.”²³ Winston-Salem also states that it received a number of telephone inquiries in response to the FCC Form 470, and that those companies that inquired were given “information necessary to complete a proposal.”²⁴ Winston-Salem also states that BellSouth was interested in selling Cisco equipment to Winston-Salem, but that once BellSouth understood the broad nature of Winston-Salem’s request for internal connections, BellSouth decided not to submit a proposal.²⁵ Unlike in Ysleta’s case, only one vendor, IBM, submitted a proposal in response to Winston-Salem’s FCC Form 470.²⁶

9 In its proposals, IBM sought to provide a variety of services, at one total price, for system design and installation of these technologies for Winston-Salem. Winston-Salem stated in correspondence with SLD, “[S]ince there were not other bids, the selection process was very straightforward. We evaluated the one and only bid for each of the requested services.”²⁷ IBM negotiated various SOWs, and submitted the completed SOWs on January 17, 2002, the last day of the filing window.²⁸ Winston-Salem selected IBM as its service provider and filed its FCC Form 471 on January 17, 2003.²⁹

10 More than five months after filing its FCC Form 471, on June 25, 2002, Winston-Salem released an RFP seeking an additional System Integrator (a “Strategic Technology Integration Partner”) to implement its technology plan.³⁰ In contrast to Ysleta, Winston-Salem’s RFP excluded work related to E-rate services since IBM was already selected to perform such

²² See Winston-Salem FCC Form 470

²³ See Winston-Salem FCC Form 470

²⁴ Winston-Salem Request for Review at 12

²⁵ *Id.*

²⁶ See Winston-Salem Request for Review at 12

²⁷ See Winston-Salem Response to SLD Item 25 Selective Review

²⁸ See generally Winston-Salem FCC Form 471 and attachments; IBM Global Services Proposal for Winston-Salem/Forsyth County Schools to Provide Cable and Networking Electronics, dated January 17, 2002, IBM Global Services Proposal for Winston-Salem/Forsyth County Schools to Provide Wireless LAN, dated January 17, 2002, IBM Global Services Proposal for Winston-Salem/Forsyth County Schools to Provide Voice Over IP, dated January 17, 2002. The record reflects negotiations between IBM and Winston-Salem that resulted in the completed SOWs. See Winston-Salem Response to SLD Item 25 Review (appointment calendar showing numerous conference calls and meetings with IBM)

²⁹ See Winston-Salem FCC Form 471, Winston-Salem Request for Review at 11-12.

³⁰ See Winston-Salem Request for Proposal. Winston-Salem’s RFP was revised on December 5, 2002. See *id.*

work.³¹ After receiving seven proposals in response to its RFP, Winston-Salem selected Eperitus, LLC to be its System Integrator.³²

11 On April 21, 2003, SLD denied discounts for Winston-Salem finding the “[a]pplicant did not identify the specific services sought - either clearly on the 470 or in an RFP - to encourage full competition on major new initiatives.”³³

III. DISCUSSION

12 We conclude, based on the record before us, that SLD erred in denying the discounts requested by Winston-Salem. The grounds upon which we found rule violations in the *Ysleta* case are not present here

13 First, we cannot conclude that Winston-Salem violated our competitive bidding rules. Unlike the *Ysleta Order*, Winston-Salem did not issue any sort of RFP for a systems integrator prior to filing its FCC Form 471. It merely posted a request for bids for eligible services on FCC Form 470. While we are troubled that it utilized an overly broad FCC Form 470, that is not, in itself, a basis for denying its requests for discounts. In the *Ysleta Order*, we clarified that the requirement for a bona fide request for services means that applicants must submit a list of specified services for which they anticipate they are likely to seek discounts, consistent with their technology plans; they may not list every service and product eligible for discounts under the schools and libraries support mechanism. At the same time, we recognized that past practices arguably could be construed as permitting broad FCC Form 470, and therefore clarified this requirement prospectively.

14. Second, we cannot conclude that Winston-Salem failed to properly consider price when selecting its service provider because only one party responded to its posted FCC Form 470. Its decision to enter into a contract with the one bidder is no different than the thousands of other applicants who receive either no bids, or only one bid, in response to a FCC Form 470 posting. Our rules require applicants to seek competitive bids; they do not require an applicant to have competing bidders where none appear. While we find it unusual, given the size of Winston-Salem’s proposed project, that no other entity submitted a bid, this alone, without more, cannot be the basis for denying Winston-Salem’s request for review. We note, however, that this case demonstrates how an overly broad FCC Form 470 posting may well stifle competition among service providers. In the *Ysleta Order*, we clarify that prospectively such a broad FCC Form 470 is not consistent with our rules.³⁴

15 Finally, we note that in its Request for Review, Winston-Salem describes in detail the process it employed to select a Systems Integrator, to demonstrate that Winston-Salem is

³¹ See Winston-Salem Request for Proposal at §§ 2.6, 2.7

³² See Winston-Salem Request for Review at 5-6

³³ See SLD Funding Commitment Decision Letter for Winston-Salem at 7-10

³⁴ See *Ysleta Order* at paras 36-37

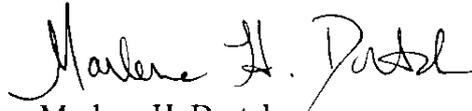
committed to utilizing a fully competitive selection process for the award of its contracts.³⁵ We find that Winston-Salem's procedures for selecting Eperitus as a Systems Integrator are not relevant to our decision here, because it did not seek discounts on any services provided by Eperitus, and the services provided by Eperitus were outside the scope of the E-rate program.³⁶

16. For the reasons cited above, therefore, we grant the above-captioned Requests for Review and remand the Winston-Salem application to SLD. In doing so, we emphasize that we make no determination as to whether the applicant is ultimately entitled to any funding, as SLD must scrutinize all applications for ineligible services and compliance with all program rules, including all prospective clarifications enunciated in the *Ysleta Order*.

IV. ORDERING CLAUSE

17 ACCORDINGLY, IT IS ORDERED, pursuant to section 54 722(a) of the Commission's rules, 47 C.F.R. § 54.722(a), that the above-captioned Requests for Review ARE GRANTED to the extent provided herein and REMANDED to SLD for further processing in accordance with this Order

FEDERAL COMMUNICATIONS COMMISSION


Marlene H. Dortch
Secretary

³⁵ See Winston-Salem Request for Review at 4-6

³⁶ We note, however, that Winston-Salem's 76-page RFP for Systems Integration sought bids based on specific pricing information related to management, design, construction costs, and quantity discounts. See Winston-Salem RFP. Winston-Salem's RFP, in contrast to Ysleta's, provides an example of how price can be taken into account in the competitive bidding process, rather than relying on mere negotiation to secure the most cost-effective services.