

APPENDIX A

Requests Denied (amount in dollars)			
Entity Name	Telecommunications Services	Internet Access	Internal Connections
Ysleta Independent School District		871,740.04	17,469,927.90
Donna Independent School District			28,641,208.95
Galena Park Independent School District		9,006.00	23,893,555.50
Oklahoma City School District I-89	561,480.39	3,216,360.00	40,770,145.80
El Paso Independent School District	46,800.00	3,088,074.03	41,639,602.13
Navajo Education Technology Consortium			41,305,747.50
Memphis City School District	5,891,241.25	25,377.96	19,902,043.07
Albuquerque School District			37,355,476.23
TOTALS	6,499,521.64	7,210,558.03	250,977,707.08

APPENDIX B

1 Although the specific circumstances of each of the following applicants vary, the record reflects that the following applicants engaged in competitive bidding practices substantially similar to those practiced by Ysleta in Funding Year 2002. We describe below the factual circumstances of each applicant, and incorporate by reference our discussion in this Order regarding Ysleta's practices. As with Ysleta, the procurement process of each of the following applicants violates our competitive bidding rules and undermines the goals of the program. For the reasons discussed in the Order, however, we find that good cause exists to waive our rules governing the filing window for Funding Year 2002, and permit these applicants to re-bid for services for Funding Year 2002 in accordance with our rules.

Donna Independent School District (DISD)

2 On October 1, 2001, DISD's Funding Year 2002 FCC Form 470 was posted on SLD's website.¹⁹⁰ DISD indicated on its FCC Form 470 that it was seeking services for virtually every product and service eligible for discounts under the support mechanism.¹⁹¹ Moreover, in Blocks 8, 9, and 10 of FCC Form 470, DISD checked the box for, respectively, telecommunications services, Internet access, and internal connections. In each instance, DISD checked the box stating, "No, I do not have an RFP [Request for Proposal] for these services."¹⁹²

3 Twenty-five days after the posting of the FCC Form 470, DISD released a Request for Information (RFI) on October 21, 2001 which generally sought a strategic technology partner to assist it with the E-rate program.¹⁹³ DISD's RFI did not specify projects for which it sought funding, and did not seek pricing information from bidders concerning products and services for which discounts under the support mechanism would be sought.¹⁹⁴

4 DISD subsequently received bids.¹⁹⁵ In its bid submitted to DISD, IBM did not list any prices except for a listing of hourly rates for its employees.¹⁹⁶ After negotiations were conducted, on January 15, 2002, DISD signed an agreement with IBM to provide its requested

¹⁹⁰ See Donna Independent School District (DISD) FCC Form 470

¹⁹¹ See DISD Form 470, *supra* para. 10

¹⁹² See DISD FCC Form 470. Although DISD checked the box indicating no RFP had been released, it did state in Box 15(f) of its FCC Form 470 "Request RFP for Internal Connections." See DISD FCC Form 470, *supra* para. 10

¹⁹³ See DISD RFI at 1

¹⁹⁴ See DISD RFI at § 4(g), *supra* para. 12

¹⁹⁵ DISD Request for Review filed by IBM at 8-9. Although IBM indicates DISD received multiple bids, IBM does not specify the actual number of bids that DISD received, or the identity of the other bidders. See *id*

¹⁹⁶ See IBM Response to Donna Independent School District Request for Information at Section 4G, *supra* para. 13

services.¹⁹⁷ On January 16, 2002, DISD filed its FCC Form 471 application.¹⁹⁸ On March 10, 2003, SLD issued a decision denying DISD's discounts.¹⁹⁹ Similar to SLD's denial for Ysleta, SLD denied discounts finding: (1) the price of services was not a factor in vendor selection, (2) the price of services was set after vendor selection, (3) the vendor was selected by RFP instead of an FCC Form 470, (4) the FCC Form 470 did not reference an RFP; and (5) the services for which funding was sought were not defined when the vendor was selected.²⁰⁰

5 As with Ysleta's appeal, we conclude that DISD's two-step procurement process violated program rules. First, DISD's competitive bidding for a Systems Integrator without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission's rules requiring that "an eligible school or library shall seek competitive bids . . . for all services eligible for support."²⁰¹ Further, as with the bidding process employed by Ysleta, DISD failed to seek actual pricing information from bidders, and selected IBM without consideration of specific pricing information relating to the actual E-rate eligible services to be provided.²⁰² We therefore find that DISD did not consider price as the primary factor in selecting IBM. DISD neither sought to ascertain the proposed prices for the eligible services for each bidder, nor compared different providers' prices for actual services eligible for support.²⁰³ As a final matter, we also find that because DISD violated our competitive bidding rules and failed to demonstrate that it selected IBM with price as the primary factor, DISD violated section 254's mandate that applicants submit a *bona fide* request for services.²⁰⁴

¹⁹⁷ DISD Request for Review filed by IBM at 4, DISD Request for Review at 4 IBM submitted a bid response on November 8th See generally IBM Response to Donna Independent School District Request for Information

¹⁹⁸ DISD FCC Form 471

¹⁹⁹ SLD Funding Commitment Decision Letter for Donna Independent School District at 6

²⁰⁰ See *id*

²⁰¹ 47 C F R § 54 504(a), *supra* paras 22-26

²⁰² *Supra* para 24

²⁰³ See 47 C F R § 54 511(a), *Universal Service Order*, 12 FCC Rcd at 9029-30, para. 481, *supra* paras 24 47, 48, 53

²⁰⁴ *Supra* paras 54-55

Galena Park Independent School District (Galena Park)

6. Galena Park's initial Funding Year 2002 FCC Form 470 was posted on September 10, 2001.²⁰⁵ In its FCC Form 470, Galena Park indicated it did not have an RFP for the services for which it was seeking discounts.²⁰⁶ On October 4, 2001, Galena Park released an RFP.²⁰⁷ Galena Park's RFP did not seek bids for specific services eligible for support.²⁰⁸ Its RFP stated that Galena Park was seeking an "E-rate Program Architect" to serve as a Systems Integrator.²⁰⁹ Galena Park's RFP did not seek pricing information from bidders concerning products and services for which discounts under the support mechanism would be sought.²¹⁰

7. IBM submitted a bid response on October 19, 2001.²¹¹ IBM did not list any prices except for a listing of hourly rates for its employees.²¹² On November 9, 2001, Galena Park filed another FCC Form 470 which added E-mail to services for which it sought discounts.²¹³ In its second FCC Form 470, Galena Park indicated that it was seeking services for virtually every product and service eligible for discounts under the support mechanism.²¹⁴ Despite the fact that Galena Park had released its RFP a month earlier, in Blocks 8, 9, and 10 of FCC Form 470, Galena Park 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."²¹⁵

8. Galena Park did not receive any bid other than IBM's.²¹⁶ After conducting negotiations with IBM, on January 16, 2002 Galena Park signed a contract with IBM and filed an FCC Form 471.²¹⁷ On March 10, 2003, SLD issued a decision denying DISD's discounts.²¹⁸

²⁰⁵ See Galena Park Request for Review filed by IBM at 2

²⁰⁶ See *id.*

²⁰⁷ See generally Galena Park RFP

²⁰⁸ See *id.*, *supra* para 12

²⁰⁹ See Galena Park RFP at § 1(a). Specifically, the RFP sought a consultant that could "advise and assist the district in all aspects of the e-rate program." *Id.*

²¹⁰ See Galena Park RFP at § 5(e)

²¹¹ See IBM Response to Galena Park Independent School District Request for Proposal

²¹² See IBM Response to Request for Proposal at 32-33, *supra* para. 13

²¹³ See Galena Park FCC Form 470, Galena Park Request for Review filed by IBM at 3

²¹⁴ See Galena Park FCC Form 470, *supra* para 10

²¹⁵ See Galena Park FCC Form 470

²¹⁶ See IBM Request for Review (Galena Park) at 9

²¹⁷ See Galena Park Request for Review filed by IBM at 3, 8-9, Galena Park FCC Form 471

SLD denied discounts finding: (1) the price of services was not a factor in vendor selection; (2) the price of services was set after vendor selection; (3) the vendor was selected by RFP instead of an FCC Form 470, (4) the FCC Form 470 did not reference an RFP; and (5) the services for which funding was sought were not defined when the vendor was selected.²¹⁹

9 We conclude, similar to our findings concerning Ysleta's appeal, that Galena Park's two-step procurement process violated program rules. By checking the box on its second FCC Form 470 to indicate that it did not have an RFP, even though it had previously released an RFP, Galena Park provided incorrect and misleading information on its FCC Form 470. Further, Galena Park's competitive bidding for a systems integrator without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that "an eligible school or library shall seek competitive bids . . . for all services eligible for support," and violated section 254's mandate that applicants submit a *bona fide* request for services.²²⁰

Oklahoma City Public Schools (OCPS)

10 OCPS's Funding Year 2002 FCC Form 470 was posted on SLD's website on October 16, 2001.²²¹ In its FCC Form 470, OCPS indicated that it was seeking services for virtually every product and service eligible for discounts under the support mechanism.²²² Moreover, in Blocks 8, 9, and 10 of the form, OCPS 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."²²³

11 Some time in mid to late October, 2001, OCPS released an RFP.²²⁴ The RFP stated that OCPS was seeking a "Strategic Technology Solution Provider" for a four-year term to, among other things, "assist the District with all aspects of the E-rate process."²²⁵ The Solution

²¹⁸ SLD Funding Commitment Decision Letter for Galena Park Independent School District at 6-7.

²¹⁹ See *id.* at 6-7.

²²⁰ 47 C.F.R. § 54.504(a), *supra* paras 22-26, paras 54-55.

²²¹ See OCPS Form 470.

²²² See OCPS Form 470; *supra* para 10.

²²³ See OCPS Form 470.

²²⁴ See OCPS RFP. The RFP has a cover page dated October 15, 2001. However, the text of the RFP is date-stamped October 24, 2001, indicating that the RFP was released after October 15, 2001. See also OCPS Request for Review at n 1.

²²⁵ Oklahoma City Public School District, Request for Proposal, Quotation # 8839, dated October 15, 2001 (RFP) at 1.

Provider would “assist [OCPS] in effectively infusing technology throughout the District.”²²⁶ The specified technology requirements were not identified in the RFP.

12 OCPS’s RFP did not seek pricing information from bidders concerning products and services for which discounts under the support mechanism would be sought.²²⁷ The RFP stated, “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.”²²⁸

13 Eight vendors submitted bids in response to the OCPS proposal.²²⁹ On December 17, 2001, the Oklahoma City Board of Education unanimously approved IBM as the District’s Solution Provider.²³⁰ Only after OCPS chose IBM as the awardee, and prior to submitting its FCC Form 471, did OCPS begin specifically identifying the scope of work and cost of the actual products and services for Funding Year 2002 that would be eligible for discounts under the support mechanism.²³¹ On January 17, 2002, the final day of the filing window for Funding Year 2002 applications for discounts, OCPS filed its FCC Form 471 application.²³²

14 On March 10, 2003, SLD issued a decision denying OCPS’s discounts.²³³ SLD denied discounts finding: (1) the price of services was not a factor in vendor selection; (2) the price of services was set after vendor selection; (3) the vendor was selected by RFP instead of an FCC Form 470; (4) the FCC Form 470 did not reference an RFP; and (5) the services for which funding was sought were not defined when the vendor was selected.²³⁴

15 We conclude, consistent with our findings concerning Ysleta’s appeal, that OCPS’s two-step procurement process violated program rules. First, OCPS’ competitive bidding for a Systems Integrator without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that “an eligible school or library shall seek competitive bids . . . for all services eligible for support.”²³⁵ As with the bidding process employed by Ysleta, OCPS failed to seek actual

²²⁶ *Id*

²²⁷ See generally OCPS RFP, *supra* para. 12

²²⁸ *Id*

²²⁹ *Id*

²³⁰ OCPS Request for Review at 4

²³¹ See IBM Request for Review at 7

²³² See OCPS Form 471

²³³ SLD Funding Commitment Decision Letter for Oklahoma City School District I-89 at 6-9

²³⁴ *Id*

²³⁵ 47 C F R § 54.504(a), *supra* paras 22-26

pricing information from bidders, and selected IBM over other bidders without consideration of specific pricing information relating to the actual E-rate eligible services to be provided.²³⁶ We therefore find that OCPS did not consider price as the primary factor in selecting IBM. OCPS neither sought to ascertain the proposed prices for the eligible services for each bidder, nor compared different providers' prices for actual services eligible for support.²³⁷ As a final matter, we also find that because OCPS violated our competitive bidding rules and failed to demonstrate that it selected IBM with price as the primary factor, it violated section 254's mandate that applicants submit a *bona fide* request for services.²³⁸

El Paso Independent School District (EPISD)

16. EPISD's Funding Year 2002 FCC Form 470 was posted on SLD's website on November 26, 2001.²³⁹ In its FCC Form 470, EPISD indicated that it was seeking services for virtually every product and service eligible for discounts under the support mechanism.²⁴⁰ Like Ysleta, in Blocks 8, 9, and 10 of the form, EPISD 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."²⁴¹

17. In the previous Funding Year (Funding Year 2001), IBM had been selected by EPISD as its service provider pursuant to a contract entered into by IBM and EPISD on January 18, 2001.²⁴² This contract was based upon an RFP dated December 1, 2000.²⁴³ El Paso selected IBM over seven other bidders, in a two-step process similar to Ysleta's that did not compare proposed prices for specified E-rate eligible services during the bidding process.²⁴⁴ Prices and service terms were negotiated with IBM post-selection in the second step of this two-step process.²⁴⁵ The 2000 RFP and the subsequent contract, similar to Ysleta's Funding Year 2002 arrangements, formed a "Strategic Technology Solution Provider" relationship between IBM and EPISD for a four-year term to, among other things, "assist the District with all aspects of the E-rate process." Similar to Ysleta, the exact technology requirements were not identified in

²³⁶ *Supra* para 24

²³⁷ See 47 C F R § 54.511(a), *Universal Service Order*, 12 FCC Rcd at 9029-30 para. 481, *supra* paras 47, 48, 53, 24

²³⁸ *Supra* paras 54-55

²³⁹ See EPISD FY 2002 Form 470

²⁴⁰ See EPISD FY 2002 Form 470, *supra* para 10

²⁴¹ EPISD FY 2002 Form 470 at Blocks 8, 9, 10

²⁴² EPISD Request for Review at Exhibit 8 (2001 Contract).

²⁴³ EPISD Request for Review at Exhibit 6 (2001 Request for Proposal)

²⁴⁴ EPISD Request for Review at 10

²⁴⁵ *Id*

the December 2000 RFP.²⁴⁶ The RFP also did not seek pricing information from bidders concerning products and services for which discounts under the support mechanism would be sought²⁴⁷

18 EPISD states that it “did not issue a[n RFP] for Funding Year 2002 . . .” but instead “renewed its pre-existing contract with IBM as a service provider.”²⁴⁸ EPISD states that even though it was not required to post a Form 470 in Funding Year 2002, it did so because it wanted to “inquire as to interest from other possible vendors, in an effort to determine whether or not renewal was cost-effective and should take place.”²⁴⁹ EPISD states that no inquiries were received from vendors other than IBM in response to the Funding Year 2002 Form 470 “sufficient to convince EPISD not to renew its existing contract with IBM.”²⁵⁰

19 On March 10, 2003, SLD issued a decision denying EPISD’s discounts for internal connections and Internet access from IBM.²⁵¹ Similar to SLD’s denial for Ysleta, SLD denied discounts finding (1) the price of services was not a factor in vendor selection; (2) the price of services was set after vendor selection; (3) the vendor was selected by RFP instead of an FCC Form 470; (4) the FCC Form 470 did not reference an RFP; and (5) the services for which funding was sought were not defined when the vendor was selected.²⁵²

20 We find that EPISD’s Funding Year 2001 procurement process for internal connections and Internet access, which was the foundation for its renewal of its contract with IBM, contains significant similarities to Ysleta’s procurement process and violates program rules. EPISD argues that its decision to select IBM for Funding Year 2002 was based not on its Funding Year 2002 FCC Form 470, but rather on its Funding Year 2001 RFP.²⁵³ EPISD maintains that the Commission may not address the propriety of EPISD’s Funding Year 2001 RFP, because doing so “is an improper collateral attack.”²⁵⁴ That position is without merit, as nothing precludes the Commission from examining the circumstances of a previous funding decision.²⁵⁵ EPISD’s competitive bidding in Funding Year 2001 for a Systems Integrator

²⁴⁶ *Id*

²⁴⁷ *Id*

²⁴⁸ EPISD Request for Review at 15

²⁴⁹ EPISD Request for Review at 12

²⁵⁰ *Id*

²⁵¹ Funding Commitment Decision Letter for El Paso Independent School District at ---.

²⁵² *Id*

²⁵³ *See* EPISD Request for Review at 15-19

²⁵⁴ EPISD Request for Review at 16

²⁵⁵ *See, e.g., Request for Review by School for Language and Communication Development*, Order, 17 FCC Rcd 15166 (Wireline Comp. Bur. rel. August 6, 2002) (citing precedent and noting that failure to detect violations in

without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that "an eligible school or library shall seek competitive bids . . . for all services eligible for support."²⁵⁶

21 As with the bidding process employed by Ysleta, EPISD did not seek actual pricing information from bidders for its Internet access and internal connections services, and selected IBM over other bidders without consideration of specific pricing information relating to the actual E-rate eligible services to be provided.²⁵⁷ We therefore find that EPISD did not consider price as the primary factor in selecting IBM. EPISD neither sought to ascertain the proposed prices for the eligible services for each bidder, nor compared different providers' prices for actual services eligible for support.²⁵⁸ As a final matter, we also find that because EPISD violated our competitive bidding rules and failed to demonstrate that it selected IBM with price as the primary factor, it violated section 254's mandate that applicants submit a *bona fide* request for services.²⁵⁹

22 We note that SLD also denied a Funding Year 2002 funding request from EPISD for telecommunications services, to be provided by AT&T.²⁶⁰ This funding request was denied for the same reasons that the funding requests for Internet access and internal connections from IBM were denied.²⁶¹ Although EPISD also challenges SLD's denial of funding for this funding request in its Request for Review, we do not make a decision on that funding request in this Order. Rather, since this funding request was part of a separate Form 471 and Funding Commitment Decision Letter and thus requires a separate factual assessment, we will defer a ruling on this portion of EPISD's Request for Review to a later decision.

Navajo Education Technology Consortium (NETC)

23 NETC's Funding Year 2002 FCC Form 470 was posted on SLD's website on October 31, 2001.²⁶² NETC indicated in its FCC Form 470 that it was seeking services for virtually every product and service eligible for discounts under the support mechanism.²⁶³

prior funding years does not preclude SLD or the Commission from requiring compliance with the Commission's rules in subsequent years)

²⁵⁶ 47 C F R § 54.504(a), *supra* paras 22-26

²⁵⁷ *Supra* para 24

²⁵⁸ See 47 C F R § 54.511(a), *Universal Service Order*, 12 FCC Rcd at 9029-30 para 481; *supra* paras 47, 48, 53, 24

²⁵⁹ *Supra* paras 54-55

²⁶⁰ Letter from SLD to Jack Johnston, El Paso Independent School District dated March 10, 2003 at 6, FRN No 832243

²⁶¹ *Id*

²⁶² See NETC Form 470

²⁶³ *Id*, *supra* para 10

Moreover, like Ysleta, in Blocks 8, 9, and 10 of FCC Form 470, NETC 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.”²⁶⁴ Unlike in Ysleta, however, in its FCC Form 470, NETC did not indicate that it was seeking a technology implementation and Systems Integration partner.²⁶⁵

24 Unlike Ysleta, NETC did not release a subsequent RFP. Rather, NETC states that it determined the size of its project through an “E-Rate 5 Planning” process in which the scope of funding and services needed by NETC was developed and the schools and buildings for which funding was required were identified.²⁶⁶ NETC also states that it relied on a state-approved Educational Technology Plan as a model to determine the parameters of its project.²⁶⁷ NETC subsequently received 12 bids, and states that it contacted each vendor by phone and explained the scope and size of the proposed project.²⁶⁸ NETC points to certain “quotes” by vendors as evidence that price was considered prior to the selection of IBM.²⁶⁹ These “quotes,” however, do not by any means match the scope of the services outlined in NETC’s FCC Form 470, nor do they compare in any way to the IBM “Statement of Work” dated January 11, 2002, which apparently formed the basis for the approximately \$41 million in services from IBM that NETC sought in its FCC Form 471.²⁷⁰

25 On January 17, 2002, NETC filed its FCC Form 471 application.²⁷¹ On March 10, 2003, SLD issued a decision denying NETC’s discounts.²⁷² Similar to SLD’s denial for Ysleta, SLD denied discounts finding: (1) the price of services was not a factor in vendor selection; (2) the price of services was set after vendor selection; and (3) the services for which funding was sought were not defined when the vendor was selected.²⁷³

²⁶⁴ *Id.* at Blocks 8, 9, 10

²⁶⁵ *Id.*

²⁶⁶ NETC Request for Review at 4

²⁶⁷ *Id.*

²⁶⁸ NETC Request for Review at Attachment 13

²⁶⁹ NETC Request for Review at Attachment 17

²⁷⁰ NETC Request for Review at Attachment 17. For example, NETC provides a copy of a quote from Tamsco Communications for “satellite internet services” at \$14,579 per site and monthly service costs between \$1,107 and \$2,769 per month. Tamsco also quoted \$149,291 for LAN maintenance services. None of these quotes compare to the “E-rate eligible” prices quoted by IBM for NETC (\$5.7 million for Network Electronics, \$25.9 million for Video Equipment, and \$14.9 million for Technical Support Services Solution charges).

²⁷¹ *See* NETC Form 471

²⁷² Funding Commitment Decision Letter for Navajo Educational Technology Consortium.

²⁷³ *See id.*

26 We find that NETC's Funding Year 2002 procurement process contains significant similarities to Ysleta's procurement process and violates program rules. Its competitive bidding without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that "an eligible school or library shall seek competitive bids . . . for all services eligible for support."²⁷⁴ As with the bidding process employed by Ysleta, NETC failed to seek actual pricing information from bidders for comparable service packages, and selected IBM over other bidders without consideration of specific pricing information relating to the actual E-rate eligible services to be provided.²⁷⁵ Furthermore, according to the record, the price of IBM's services was far in excess of any other quote received by NETC. We therefore find that NETC did not consider price as the primary factor in selecting IBM. NETC neither sought to ascertain the proposed prices for the eligible services for each bidder nor compared different providers' prices for actual services eligible for support.²⁷⁶ As a final matter, we also find that because NETC violated our competitive bidding rules and failed to demonstrate that it selected IBM with price as the primary factor, it violated section 254's mandate that applicants submit a *best bid* request for services.²⁷⁷

Memphis City School District

27 The FCC Form 470 for Memphis City Schools (Memphis) was posted on August 10, 2001.²⁷⁸ Unlike the other entities discussed in this Order, Memphis indicated in Blocks 8, 9, and 10 on its FCC Form 470 that it had a Request for Qualifications (RFQ) for, respectively, telecommunications services, Internet access, and internal connections, and that the RFQ was available on its website.²⁷⁹ Because it indicated that it had an RFQ,²⁸⁰ Memphis was not required under SLD's procedures to list the eligible services it sought on the FCC Form 470.²⁸¹ On the same day as the posting of Memphis's FCC Form 470, Memphis released the related RFQ. In its RFQ, Memphis indicated it was seeking a "Technology Business Partnership" with a "Qualified Provider" with whom to enter into a multi-year master contract for "a comprehensive program."²⁸² This program included management services, telecommunications services, Internet access, hardware/software, infrastructure services, other technology-related

²⁷⁴ 47 C.F.R. § 54.504(a), *supra* paras 22-26

²⁷⁵ *Supra* para 24

²⁷⁶ See 47 C.F.R. § 54.511(a), *Universal Service Order*, 12 FCC Rod at 9029-30 para 481, *supra* paras 47, 48, 53, 24

²⁷⁷ *Supra* paras 54-55

²⁷⁸ See FCC Form 470, Memphis City Schools, filed August 10, 2001

²⁷⁹ *Id*

²⁸⁰ The term "Request for Qualifications" as used by Memphis appears to be synonymous with the term "RFP" as used elsewhere in this Order and in the *Ysleta* Order

²⁸¹ See FCC Form 470 Instructions

²⁸² See Memphis RFQ

services, application and systems support services, and customer support services²⁸³ Bids were due one month later on September 10, 2001.²⁸⁴

28 Memphis's RFQ outlined a two-step procurement process. In the first step, bidders would submit bids that would be evaluated on the basis of (1) experience and background; (2) total capabilities; (3) project implementation; (4) minority/women business enterprise participation; (5) legal agreement; and (6) on-going support program.²⁸⁵ After selecting the most qualified bidder based on these criteria, Memphis would then engage in contract negotiations.²⁸⁶ The chosen firm would have fifteen days to submit a proposed contract, and if, within thirty days of the date of selection, Memphis and the provider had not concluded successful negotiations (including the price of services), the next highest-ranked bidder would be contacted.²⁸⁷

29 Memphis received only one bid, however, from IBM.²⁸⁸ Consequently, it immediately entered into contract negotiations with IBM.²⁸⁹ Memphis and IBM signed a contract on December 19, 2002. As with Ysleta, the contract included language that offered Memphis certain price protections.²⁹⁰ On March 24, 2003, SLD denied Memphis's request for discounts, stating, "Services for which funding [were] sought [were] not defined when vendors selected; price of services [was] not a factor in vendor selection; [and] price of services [was] set after vendor selection."²⁹¹

30 We conclude, consistent with our findings concerning Ysleta's appeal, that Memphis' use of a two-step procurement process violated program rules. In particular, Memphis' competitive bidding for a Systems Integrator without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission's rules requiring that "an eligible school or library shall seek competitive bids for all services eligible for support."²⁹² As with the bidding process employed by Ysleta, Memphis failed to seek actual pricing information from bidders for E-rate eligible services. Moreover, we find that because Memphis violated our competitive bidding rules through the use

²⁸³ *Id*

²⁸⁴ *Id*

²⁸⁵ *Id*

²⁸⁶ *Id*

²⁸⁷ *Id*

²⁸⁸ Memphis Request for Review at 2

²⁸⁹ Memphis Request for Review at 2-3

²⁹⁰ See Memphis Request for Review at 3

²⁹¹ Memphis Funding Commitment Decision Letter

²⁹² 47 C F R § 54.504(a), *supra* para 22-26

of a two-step procurement process, it also violated section 254's mandate that applicants submit a bona fide request for services.²⁹³

31 That only one bidder responded to the RFQ does not alter our conclusion that Memphis' two-step procurement process failed to comply with program rules. Indeed, this case illustrates how an imperfect competitive bidding process may well stifle competition among service providers. We find it unusual that only one entity would bid on the opportunity to provide services and products eligible for discounts under the schools and libraries support mechanism, given the size of the Memphis School District and the scope of its proposed project. In a major city like Memphis, we would expect to see more robust competition.

Albuquerque School District (Albuquerque)

32 Unlike Ysleta, Albuquerque states that it relied on a purchasing alliance as equivalent to an RFP when it selected IBM.²⁹⁴ In 1999, the Western States Contracting Alliance (WCSA) set out an RFP to select computer vendors for several Western states. After a competitive bidding process, the WCSA selected five computer companies with whom to enter into price agreements, effective from September 3, 1999 through September 2, 2004: Compaq, CompUSA, Dell, Gateway, and IBM.²⁹⁵ Price was factored into the selection of the five companies in a limited manner, as each vendor submitted bids with prices for three computer configurations: a server, a desktop computer, and a laptop computer.²⁹⁶ The resulting price agreements included various pricing protections for Albuquerque and the other members of WCSA, such as predetermined discount percentages that would apply to purchases after certain volume "trigger points" were reached.²⁹⁷

33. Albuquerque's FCC Form 470 was posted on December 10, 2001.²⁹⁸ Similar to Ysleta's FCC Form 470, Albuquerque indicated in its FCC Form 470 that it was seeking services for virtually every product and service eligible for discounts under the support mechanism.²⁹⁹ Subsequently, Albuquerque began negotiating Statements of Work (SOWs) with IBM. IBM proposed five SOWs: maintenance, servers, network electronics, video systems, and web-based community interaction.³⁰⁰ Albuquerque contracted with IBM to provide

²⁹³ *Supra paras* 54-55

²⁹⁴ See Albuquerque Request for Review at 7-10

²⁹⁵ *Id* at 8-9

²⁹⁶ See Western States Contracting Alliance, RFP dated June 16, 1999 at 56-59

²⁹⁷ Albuquerque Request for Review at 9

²⁹⁸ See FCC Form 470, Albuquerque School District, posted December 10, 2001

²⁹⁹ *Id*

³⁰⁰ Affidavit of Maureen Davidson, Albuquerque School District, dated May 21, 2003 at 3

services based on three SOWs—maintenance, servers, and network electronics (without cabling)³⁰¹

34. On March 24, 2003, SLD denied Albuquerque's request on the grounds that Albuquerque "did not identify the specific services sought—either clearly on the 470 or in the RFP—to encourage full competition on major initiatives."³⁰² Albuquerque maintains that it competitively bid for eligible services, because the 1999 WSCA RFP served as the RFP for its Funding Year 2002 selection of IBM.³⁰³ Albuquerque also suggests that its agreement with IBM that stemmed from the WSCA RFP constituted a master contract, which is permissible under our rules³⁰⁴

35 Although Albuquerque maintains that it relied on a master contract, and therefore did not need to submit an FCC Form 470, the WSCA contract with IBM does not meet our requirements for a master contract, negotiated by third parties, that has been competitively bid.³⁰⁵ Master contracts subject to competitive bidding must bear a reasonable connection to the products or services for which discounts are sought.³⁰⁶ We conclude that in this instance, the WSCA contract did not have such a connection. The record does not reflect that IBM's bid on the cost of a server, a laptop, and a desktop in its 1999 bid was reasonably related to the extensive costs for maintenance and network electronics for which Albuquerque sought discounts in Funding Year 2002.³⁰⁷ Although Albuquerque argues that the 1999 master contract includes "maintenance and support services," we are not persuaded that the type of maintenance and support services sought in 2002 in the 1999 RFP are sufficiently similar to the extensive maintenance and support services to relieve Albuquerque of its obligation to

³⁰¹ *Id*

³⁰² See Letter from Schools and Libraries Division, Universal Service Administrative Company to Maureen Davidson, Albuquerque School District, dated March 24, 2003 (Albuquerque Funding Commitment Decision Letter) We note also that Albuquerque argues that it is confused by SLD's language citing "major new initiatives," and that SLD representatives told Albuquerque that this term was based on the Commission's *Brooklyn Order*. See Albuquerque Request for Review at 4-6, *Request for Review by Brooklyn Public Library, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-149423, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 17931 (2000). Other applicants stated this as well. See, e.g., Winston-Salem Request for Review at 7-8. The reasoning of the Commission's *Brooklyn Order* does not appear to pertain to the facts at issue in these cases. We do not base our conclusions on the reasoning contained in that Order or on the question of whether these services comprised "major new initiatives."

³⁰³ See Albuquerque Request for Review at 6-11

³⁰⁴ *Id.* at 9, *Fourth Order on Reconsideration*, 13 FCC Rcd at 5452 para. 232

³⁰⁵ See *Fourth Order on Reconsideration*, 13 FCC Rcd at 5452 paras. 233-34

³⁰⁶ *Id.* For example, a master contract to purchase photocopy machines and other office equipment could not be used as a substitute for competitive bidding for internal connections under the E-rate program

³⁰⁷ Indeed, laptops and desktop computers themselves are only eligible for discounts under the program if used solely as servers. See Funding Year 2002 Eligible Services List

competitively bid those services in Funding Year 2002.³⁰⁸ We therefore conclude that Albuquerque's reliance on the WSCA contract in lieu of an FCC Form 470 was misplaced

36. Albuquerque's competitive bidding without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that "an eligible school or library shall seek competitive bids . . . for all services eligible for support."³⁰⁹ We also find that because Albuquerque violated our competitive bidding rules, it violated section 254's mandate that applicants submit a *bona fide* request for services.³¹⁰

³⁰⁸ *Ex parte* letter from Arthur D. Melendres, Counsel, Albuquerque Public School District, to Marlene H. Dortch, Secretary, FCC, dated August 15, 2003.

³⁰⁹ 47 C.F.R. § 54.504(a), *supra* paras. 22-26

³¹⁰ *Supra* paras. 54-55