

Exhibit A

Administrator's Decision on Appeal

Caldwell Parish School District



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal - Funding Year 2002-2003

June 24, 2004

Kenneth F. Sills
Hammonds and Sills
P.O. Box 65236
Baton Rouge, LA 70896

Re: Caldwell Parish School District

Re: Billed Entity Number: 139345
471 Application Number: 289493
Funding Request Number(s): 798393, 798460
Your Correspondence Dated: March 22, 2004

After thorough review and investigation of all relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision in regard to your appeal of SLD's Funding Year 2002 Commitment Adjustment Letter for the Application Number indicated above. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission ("FCC"). If your letter of appeal included more than one Application Number, please note that for each application for which an appeal is submitted, a separate letter is sent.

Funding Request Number: 798393, 798460
Decision on Appeal: **Denied in full**
Explanation:

- You have stated in your letter that this appeal will provide clarifying information that corrects an assumption the SLD made during the initial review process because there was insufficient documentation at that time. The exhibits that you profess to provide clarifying information are statements by the Attorney General for Louisiana that discuss various Louisiana Revised Statutes as they apply, or do not apply, to various entities other than Caldwell Parish School Board (Caldwell). Your opinion is that the statute does not apply in this case because the Caldwell Parish School Board is a political subdivision of the State of Louisiana and the statute only applies to those professional services to be performed by an architect, engineer, or landscape architect. In sum, you declare that the Louisiana Procurement laws do not apply to Caldwell regarding requirements to advertise for bids for Internet access and Internal Connections or to allow a political subdivision to purchase through a local vendor items at the state bid price. Specifically, you explain that the

school board as a political subdivision is not required by Louisiana State law to use the competitive bidding process for contracting with SEND Technologies, LLC. Essentially, you make the assertion that Caldwell is exempt from state procurement law. You request that the SLD nullify the issued Funding Commitment Decision Letter of January 22, 2004.

- After a thorough review of the appeal, it was determined that during the course of an Item 25 review, and through your own admission, Caldwell did not comply with the Louisiana Revised Statutes pertaining to public contracts, specifically for the procurement of Internet access and Internal Connections. The vendor, SEND Technologies, referred to its entire Internet access and Internal Connections contracts as professional service contracts. You note that Internet access and Internal Connections are not considered professional services under Louisiana law. Review of the applicable provisions of Louisiana law do not support your contention that Louisiana law does not require competitive bids for equipment, supplies, and services related to the provision of Internet access and Internal Connections. Consequently, the appeal is denied. For a discussion of the applicable provisions of Louisiana law upon which the decision is based, please see the attached document titled "Further Explanation of the Administrator's Decision on Appeal."
- The FCC's rules for the Schools and Libraries Universal Service Support Mechanism undisputedly require competitive bidding. The FCC's rules state, "[A] n eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under Sec. 54.502 and 54.503. 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**" (47 C.F.R § 54.504(a), emphasis added). Your appeal did not indicate that the FCC's competitive bidding requirements were met and is therefore denied.

If you believe there is a basis for further examination of your application, you may file an appeal with the Federal Communications Commission (FCC). You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the above date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options. We thank you for your continued support, patience, and cooperation during the appeal process.

We thank you for your continued support, patience, and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

Cc: Mark Stevenson
SEND Technologies, LLC
2904 Evangeline Street
Monroe, LA 71201

Cindy Mohler
Caldwell Parish School District
219 Main Street Courthouse Square
Columbia, LA 71418



Universal Service Administrative Company
Schools & Libraries Division

Further Explanation of the Administrator's Decision on Appeal

June 24, 2004

Appeal Decision
Caldwell Parish School District
Form 471 Application Number: 289493
Funding Year 2002

FRNs: 798393, 798460

I. Background

SEND Technologies, LLC (SEND) is the service provider for certain Funding Year 2002 funding requests for Internet access and Internal Connections for applicants located in Louisiana. All applicants associated with SEND in Funding Year 2002 underwent Item 25/competitive bidding reviews. In response to SLD's questions regarding the competitive bidding process, all but one applicant associated with SEND responded that Louisiana law does not require competitive bidding for the provided equipment and services.

II. Summary of Decision on Appeal

Notwithstanding SLD program rules which undisputedly require competitive bidding, review of the applicable provisions of Louisiana law do not support the applicants' contentions that Louisiana law does not require competitive bids for equipment, supplies, and services related to the provision of Internet access and Internal Connections.

III. Applicable Law

**A. Schools and Libraries Universal Service Support Mechanism
Competitive Bidding Requirements**

In preparing request(s) for funding, applicants seeking discounted services through the Schools and Libraries Universal Service Support Mechanism must follow certain competitive bidding requirements. *See* 47 C.F.R. § 54.504. Section 54.504(a) provides in relevant part (emphasis added):

[A] n eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under Sec. Sec. 54.502 and

54.503. 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.

An applicant initiates the competitive bidding process when an applicant submits an FCC Form 470 to USAC for posting on the SLD portion of the USAC website. *See* 47 C.F.R. § 54.504(b); *Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470*, OMB 3060-0806 (April 2002) (FCC Form 470). This posting enables prospective service providers to bid on the equipment and services for which the applicant will request universal service support. After the Form 470 has been posted, the applicant must wait at least 28 days before entering into agreements with service providers, must comply with all applicable state and local procurement laws, and must comply with the other competitive bidding requirements established by the Federal Communications Commission (FCC). *See* 47 C.F.R. §§ 54.504, 54.511; *In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, ¶ 575 (rel. May 8, 1997) (*Universal Service Order*).

FCC rules require applicants to “submit a complete description of the services they seek so that it may be posted for competing service providers to evaluate.” *Universal Service Order*, ¶ 570. The FCC requires “the application to describe the services that the schools and libraries seek to purchase in sufficient detail to enable potential providers to formulate bids.” *Id.* ¶ 575. A description of the Internet access and Internal Connections services being sought must be provided in Items 9 and 10 of the FCC Form 470. The instructions for FCC Form 470 state that these items “must be completed to provide potential bidders with particular information about the services you are seeking.” *See FCC Form 470 Instructions*, April 2002 at 10.¹ The instructions for Item 9(b) state that this box should be checked if the applicant does not have an RFP, and that, if this box is checked, the applicant “must fill in details in the space provided about the specific Internet access services or functions and quantity and/or capacity of service” that is being sought. *Id.* at 12. The Form 470 instructions for Item 10(b) state that this box should be checked if the applicant does not have an RFP, and that, if this box is checked, the applicant “*must* fill in details in the space provided about the specific internal connections services or functions and quantity and/or capacity of service.” *Id.* (emphasis added).

FCC regulations further require that the entity selecting a service provider “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). In regard to these competitive bidding requirements, the FCC nevertheless mandates that “price should be the primary factor in selecting a bid.” *Universal Service Order*, ¶ 481. When permitted pursuant to state and local procurement rules, other relevant factors an applicant may consider include “prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives.” *Id.*

¹ The FCC Form 470 and Instructions were revised in April 2002. The language cited here was not changed when the instructions were revised.

B. Louisiana State Law

Louisiana Revised Statutes (LARS) Title 38 – Public Contracts, Works and Improvements (2004) sets out, among other things, the competitive bidding requirements for public contracts awarded by public entities, and covers contracts for “materials and supplies,” “public works,” and “telecommunications equipment and services.” Section 38:2211(11) defines “public entity” to include a public school board.

1. Materials and Supplies

Section 38:2212.1 provides that all purchases of materials or supplies in excess of \$20,000 must be advertised and awarded to the “lowest responsible bidder”; for purchases of between \$10,000 and \$19,999, the purchaser must obtain at least three telephone or facsimile quotations, must provide written confirmation of the accepted offer, and must record the reasons for rejecting any quotes lower than the accepted quote. *See id.* This provision has been interpreted as applying to, for example, the purchase of vending machines on parish property. *LA Attorney General Opinion* No. 00-322 (2000).² Although the Louisiana Supreme Court has held that a contract for telecommunications services was not for materials and thus not subject to the bidding requirements of Section 38:2212.1, the contract at issue involved leasing rather than purchasing telecommunications equipment from a regulated public utility. *See Stevens v. LaFourche Parish Hospital*, 323 So.2d 794, 796 (1975).

2. Public Works

Section 2211(12) defines “public work” as “the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity.” Public works contracts over \$100,000 must be advertised and awarded in accordance with requirements set forth in Section 2212A.³ The *Stevens* decision, however, raises some question whether a contract to provide telecommunications equipment and services would necessarily be considered a “public work.” For example, the Louisiana Attorney General (AG) has opined, based upon the *Stevens* case, that “public work” “does not include telecommunications services that may be provided in a building or in connection with its use.” *LA Attorney General Opinion* No. 84-729 (1984) citing *Stevens*, 323 So.2d at 796 (1975). On the other hand, as noted, the holding in *Stevens* dates from a time when telecommunications equipment and services were almost exclusively provided by regulated public utilities and where the

²Although the Attorney General (AG) explained that there were no competitive bidding requirements for contracts below the lower statutory threshold (at that time \$7500), the AG, in this opinion, nonetheless recommended obtaining at least three quotations.

³ 2212A(1)(a) provides:

All public work exceeding the contract limit as defined in this Section, including labor and materials, to be done by a public entity shall be advertised and let by contract to the lowest responsible bidder who had bid according to the contract, plans, and specifications as advertised, and no such public work shall be done except as provided in this Part.

Court in that case considered the contract at issue as being exclusively for services. *See Stevens*, 323 So.2d at 796-97. Thus, *Stevens* arguably would not apply today to large contracts that involve the purchase and installation of telecommunications equipment that also involve the ongoing provision of related services.

3. Services

Contracts for services, including “Professional Services,” do not require the public bidding otherwise required by Section 2212. *See Browning-Ferris Inc. v. City of Monroe*, 465 So.2d 882, 884 (La.App. 2d Cir. 1985); *see also LA Attorney General Opinion No. 02-0418* (2002). Moreover, and as noted above, the Louisiana Supreme Court has expressly held that a contract for “telephone services” awarded to a public utility did not require competitive bidding. *See Stevens*, 323 So.2d at 796.

Nevertheless, where a public entity purchases equipment and subsequently contracts for services associated with the use of that equipment, the Louisiana AG has opined that the public bid requirement applies to the provision of the related services:

[A] bid as to a maintenance contract (if one is reasonably foreseen as needed) should be sought at the same time [as the purchase of the equipment to be maintained]; otherwise the public policy behind the public bid could be intentionally or inadvertently flaunted by separately and non-competitively entering into a substantial second contract.

See LA Attorney General Opinion No. 81-465 (1981).

4. Telecommunications Equipment and Related Services

Louisiana law explicitly addresses the advertisement and award of contracts for telecommunications and data processing equipment and related services. *See LARS* §§ 38:2236 (defining telecommunication equipment), 38:2237.⁴ Section 38:2237 provides:

A political subdivision may lease, rent, or purchase telecommunications or data processing systems, including equipment, and related services, through a request for proposals [(RFP)] which shall conform to following requirements . . .

* * * *

Political subdivisions may, at their option, procure telecommunications and data processing equipment, systems, or related services in accordance with the provisions of any other applicable law which governs such acquisitions or purchases by political subdivisions of the state, including but not limited to [LARS] 38:2211 et seq., with respect to awarding of public contracts. However, in the event an invitation for bids is used in lieu of a [RFP], written notice of that fact shall be given to all bidders and such notice shall also state that the [RFP] procedure will not be applicable.

⁴ Added in 1988, this law further calls into question whether the holding in *Stevens* is good law.

Notably, although Section 38:2237 does not require public entities to procure telecommunications equipment and services pursuant to an RFP, they can do so only "in accordance with the provisions of any other applicable law which governs such acquisitions or purchases." Because it would be absurd to construe the phrase "other applicable law governing such acquisitions and purchases" as meaning no applicable law whatsoever, it is clear that Section 38:2237 contemplates either an RFP or a bid process.

C. Local Law

Local law for each applicant was not reviewed as part of this analysis. There may be local requirements that apply in addition to the state requirements discussed here.

IV. Discussion

Contracts for Internet access and/or Internal Connections may fall within the definition of "public work" to the extent that these contracts include "the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity." Nevertheless, such contracts clearly fall within the RFP requirements for the purchase of "telecommunications or data processing systems, including equipment, and related services" set forth in Section 38:2237. Insofar as such contracts are also contracts for "materials or supplies," Section 38:2237 alternatively provides for the application of the competitive bidding requirements set forth in Section 38:2212.1.

Section 38:2212.1 provides, among other things, that all purchases of materials or supplies in excess of \$20,000 must be advertised and awarded to the "lowest responsible bidder" and that purchases of between \$10,000 and \$19,999 must be made by obtaining at least three telephone or facsimile quotations. Nevertheless, because Section 38:2237 contemplates that either RFP or competitive bidding shall apply, in the event a contract fails to meet the \$10,000 threshold for materials and supplies set forth in Section 38:2212.1, the RFP requirement of Section 38:2237 applies.⁵

Finally, insofar as a contract for Internet access includes the provision of services associated with the purchase of related equipment, Louisiana law provides that such services be included or treated as part of the same contract. *See LA Attorney General Opinion No. 81-465* (1981). However, even where a contract is truly and solely for services without the provision of related equipment, because Section 38:2237 explicitly applies to the provision of "telecommunications . . . systems . . . and related services", the RFP requirement of Section 38:2237 applies.

⁵ Where multiple contracts for one applicant each fall under a Section 38:2212.1 dollar threshold, but where the sum of the contracts exceeds the threshold, if necessary, SLD will make a determination regarding whether the contracts should be construed as a single contract.

V. Conclusion

Louisiana state law requires either an RFP or other competitive bidding process in the procurement of telecommunications and data processing equipment, systems, or related services. Although other competitive bidding procedures may be used as an alternative to an RFP, the decision not to use an RFP process must be provided in writing to potential bidders. For contracts solely for services, but where those services are provided in connection with related non-leased equipment, an RFP or other competitive bidding procedure is clearly required for both the services and equipment together. For contracts solely for services, an RFP is required pursuant to Louisiana law expressly governing the purchase of telecommunications services.

Accordingly, statements by applicants associated with SEND that Louisiana law does not require competitive bidding for the contracts at issue is not supported by Louisiana law.

**Universal Service Administrative Company
Schools and Libraries Division**

Exhibit B

Administrator's Decision on Appeal

Catahoula Parish School District



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal - Funding Year 2002-2003

June 24, 2004

Kenneth F. Sills
Hammonds and Sills
P.O. Box 65236
Baton Rouge, LA 70896

Re: Catahoula Parish School District

Re: Billed Entity Number: 139337
471 Application Number: 306666
Funding Request Number(s): 793742, 798900, 798954, 799160, 799180
Your Correspondence Dated: March 22, 2004

After thorough review and investigation of all relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision in regard to your appeal of SLD's Funding Year 2002 Commitment Adjustment Letter for the Application Number indicated above. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission ("FCC"). If your letter of appeal included more than one Application Number, please note that for each application for which an appeal is submitted, a separate letter is sent.

Funding Request Number: 793742, 798900, 798954, 799160, 799180
Decision on Appeal: **Denied in full**
Explanation:

- You have stated in your letter that this appeal will provide clarifying information that corrects an assumption the SLD made during the initial review process because there was insufficient documentation at that time. The exhibits that you profess to provide clarifying information are statements by the Attorney General for Louisiana that discuss various Louisiana Revised Statutes as they apply, or do not apply, to various entities other than Catahoula Parish School Board (Catahoula). Your opinion is that the statute does not apply in this case because the Catahoula Parish School Board is a political subdivision of the State of Louisiana and the statute only applies to those professional services to be performed by an architect, engineer, or landscape architect. In sum, you declare that the Louisiana Procurement laws do not apply to Catahoula regarding requirements to advertise for bids for Internet access and Internal Connections or to allow a political subdivision to purchase through a local vendor items at the state bid price. Specifically, you explain that the

school board as a political subdivision is not required by Louisiana State law to use the competitive bidding process for contracting with SEND Technologies, LLC. Essentially, you make the assertion that Catahoula is exempt from state procurement law. You request that the SLD nullify the issued Funding Commitment Decision Letter of January 22, 2004.

- After a thorough review of the appeal, it was determined that during the course of an Item 25 review, and through your own admission, Catahoula did not comply with the Louisiana Revised Statutes pertaining to public contracts, specifically for the procurement of Internet access and Internal Connections. The vendor, SEND Technologies, referred to its entire Internet access and Internal Connections contracts as professional service contracts. You note that Internet access and Internal Connections are not considered professional services under Louisiana law. Review of the applicable provisions of Louisiana law do not support your contention that Louisiana law does not require competitive bids for equipment, supplies, and services related to the provision of Internet access and Internal Connections. Consequently, the appeal is denied. For a discussion of the applicable provisions of Louisiana law upon which the decision is based, please see the attached document titled "Further Explanation of the Administrator's Decision on Appeal."
- The FCC's rules for the Schools and Libraries Universal Service Support Mechanism undisputedly require competitive bidding. The FCC's rules state, "[A]n eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under Sec. 54.502 and 54.503. 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**" (47 C.F.R § 54.504(a), emphasis added). Your appeal did not indicate that the FCC's competitive bidding requirements were met and is therefore denied.

If you believe there is a basis for further examination of your application, you may file an appeal with the Federal Communications Commission (FCC). You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the above date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options. We thank you for your continued support, patience, and cooperation during the appeal process.

We thank you for your continued support, patience, and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

Cc: Mark Stevenson
SEND Technologies, LLC
2904 Evangeline Street
Monroe, LA 71201

Ronnie Lofton
Catahoula Parish School District
P.O. Box 290
Harrisonburg, LA 71340



Universal Service Administrative Company
Schools & Libraries Division

Further Explanation of the Administrator's Decision on Appeal

June 24, 2004

Appeal Decision
Catahoula Parish School District
Form 471 Application Number: 306666
Funding Year 2002

FRNs: 793742, 798900, 798954, 799160, 799180

I. Background

SEND Technologies, LLC (SEND) is the service provider for certain Funding Year 2002 funding requests for Internet access and Internal Connections for applicants located in Louisiana. All applicants associated with SEND in Funding Year 2002 underwent Item 25/competitive bidding reviews. In response to SLD's questions regarding the competitive bidding process, all but one applicant associated with SEND responded that Louisiana law does not require competitive bidding for the provided equipment and services.

II. Summary of Decision on Appeal

Notwithstanding SLD program rules which undisputedly require competitive bidding, review of the applicable provisions of Louisiana law do not support the applicants' contentions that Louisiana law does not require competitive bids for equipment, supplies, and services related to the provision of Internet access and Internal Connections.

III. Applicable Law

**A. Schools and Libraries Universal Service Support Mechanism
Competitive Bidding Requirements**

In preparing request(s) for funding, applicants seeking discounted services through the Schools and Libraries Universal Service Support Mechanism must follow certain competitive bidding requirements. *See* 47 C.F.R. § 54.504. Section 54.504(a) provides in relevant part (emphasis added):

[A] n eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under Sec. Sec. 54.502 and

54.503. 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.

An applicant initiates the competitive bidding process when an applicant submits an FCC Form 470 to USAC for posting on the SLD portion of the USAC website. See 47 C.F.R. § 54.504(b); *Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470*, OMB 3060-0806 (April 2002) (FCC Form 470). This posting enables prospective service providers to bid on the equipment and services for which the applicant will request universal service support. After the Form 470 has been posted, the applicant must wait at least 28 days before entering into agreements with service providers, must comply with all applicable state and local procurement laws, and must comply with the other competitive bidding requirements established by the Federal Communications Commission (FCC). See 47 C.F.R. §§ 54.504, 54.511; *In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, ¶ 575 (rel. May 8, 1997) (*Universal Service Order*).

FCC rules require applicants to “submit a complete description of the services they seek so that it may be posted for competing service providers to evaluate.” *Universal Service Order*, ¶ 570. The FCC requires “the application to describe the services that the schools and libraries seek to purchase in sufficient detail to enable potential providers to formulate bids.” *Id.* ¶ 575. A description of the Internet access and Internal Connections services being sought must be provided in Items 9 and 10 of the FCC Form 470. The instructions for FCC Form 470 state that these items “must be completed to provide potential bidders with particular information about the services you are seeking.” See *FCC Form 470 Instructions*, April 2002 at 10.¹ The instructions for Item 9(b) state that this box should be checked if the applicant does not have an RFP, and that, if this box is checked, the applicant “must fill in details in the space provided about the specific Internet access services or functions and quantity and/or capacity of service” that is being sought. *Id.* at 12. The Form 470 instructions for Item 10(b) state that this box should be checked if the applicant does not have an RFP, and that, if this box is checked, the applicant “*must* fill in details in the space provided about the specific internal connections services or functions and quantity and/or capacity of service.” *Id.* (emphasis added).

FCC regulations further require that the entity selecting a service provider “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). In regard to these competitive bidding requirements, the FCC nevertheless mandates that “price should be the primary factor in selecting a bid.” *Universal Service Order*, ¶ 481. When permitted pursuant to state and local procurement rules, other relevant factors an applicant may consider include “prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives.” *Id.*

¹ The FCC Form 470 and Instructions were revised in April 2002. The language cited here was not changed when the instructions were revised.

B. Louisiana State Law

Louisiana Revised Statutes (LARS) Title 38 – Public Contracts, Works and Improvements (2004) sets out, among other things, the competitive bidding requirements for public contracts awarded by public entities, and covers contracts for “materials and supplies,” “public works,” and “telecommunications equipment and services.” Section 38:2211(11) defines “public entity” to include a public school board.

1. Materials and Supplies

Section 38:2212.1 provides that all purchases of materials or supplies in excess of \$20,000 must be advertised and awarded to the “lowest responsible bidder”; for purchases of between \$10,000 and \$19,999, the purchaser must obtain at least three telephone or facsimile quotations, must provide written confirmation of the accepted offer, and must record the reasons for rejecting any quotes lower than the accepted quote. *See id.* This provision has been interpreted as applying to, for example, the purchase of vending machines on parish property. *LA Attorney General Opinion No. 00-322 (2000).*² Although the Louisiana Supreme Court has held that a contract for telecommunications services was not for materials and thus not subject to the bidding requirements of Section 38:2212.1, the contract at issue involved leasing rather than purchasing telecommunications equipment from a regulated public utility. *See Stevens v. LaFourche Parish Hospital*, 323 So.2d 794, 796 (1975).

2. Public Works

Section 2211(12) defines “public work” as “the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity.” Public works contracts over \$100,000 must be advertised and awarded in accordance with requirements set forth in Section 2212A.³ The *Stevens* decision, however, raises some question whether a contract to provide telecommunications equipment and services would necessarily be considered a “public work.” For example, the Louisiana Attorney General (AG) has opined, based upon the *Stevens* case, that “public work” “does not include telecommunications services that may be provided in a building or in connection with its use.” *LA Attorney General Opinion No. 84-729 (1984)* citing *Stevens*, 323 So.2d at 796 (1975). On the other hand, as noted, the holding in *Stevens* dates from a time when telecommunications equipment and services were almost exclusively provided by regulated public utilities and where the

²Although the Attorney General (AG) explained that there were no competitive bidding requirements for contracts below the lower statutory threshold (at that time \$7500), the AG, in this opinion, nonetheless recommended obtaining at least three quotations.

³ 2212A(1)(a) provides:

All public work exceeding the contract limit as defined in this Section, including labor and materials, to be done by a public entity shall be advertised and let by contract to the lowest responsible bidder who had bid according to the contract, plans, and specifications as advertised, and no such public work shall be done except as provided in this Part.

Court in that case considered the contract at issue as being exclusively for services. See *Stevens*, 323 So.2d at 796-97. Thus, *Stevens* arguably would not apply today to large contracts that involve the purchase and installation of telecommunications equipment that also involve the ongoing provision of related services.

3. Services

Contracts for services, including “Professional Services,” do not require the public bidding otherwise required by Section 2212. See *Browning-Ferris Inc. v. City of Monroe*, 465 So.2d 882, 884 (La.App. 2d Cir. 1985); see also *LA Attorney General Opinion No. 02-0418* (2002). Moreover, and as noted above, the Louisiana Supreme Court has expressly held that a contract for “telephone services” awarded to a public utility did not require competitive bidding. See *Stevens*, 323 So.2d at 796.

Nevertheless, where a public entity purchases equipment and subsequently contracts for services associated with the use of that equipment, the Louisiana AG has opined that the public bid requirement applies to the provision of the related services:

[A] bid as to a maintenance contract (if one is reasonably foreseen as needed) should be sought at the same time [as the purchase of the equipment to be maintained]; otherwise the public policy behind the public bid could be intentionally or inadvertently flaunted by separately and non-competitively entering into a substantial second contract.

See *LA Attorney General Opinion No. 81-465* (1981).

4. Telecommunications Equipment and Related Services

Louisiana law explicitly addresses the advertisement and award of contracts for telecommunications and data processing equipment and related services. See LARS §§ 38:2236 (defining telecommunication equipment), 38:2237.⁴ Section 38:2237 provides:

A political subdivision may lease, rent, or purchase telecommunications or data processing systems, including equipment, and related services, through a request for proposals [(RFP)] which shall conform to following requirements . . .

* * * *

Political subdivisions may, at their option, procure telecommunications and data processing equipment, systems, or related services in accordance with the provisions of any other applicable law which governs such acquisitions or purchases by political subdivisions of the state, including but not limited to [LARS] 38:2211 et seq., with respect to awarding of public contracts. However, in the event an invitation for bids is used in lieu of a [RFP], written notice of that fact shall be given to all bidders and such notice shall also state that the [RFP] procedure will not be applicable.

⁴ Added in 1988, this law further calls into question whether the holding in *Stevens* is good law.

Notably, although Section 38:2237 does not require public entities to procure telecommunications equipment and services pursuant to an RFP, they can do so only “in accordance with the provisions of any other applicable law which governs such acquisitions or purchases.” Because it would be absurd to construe the phrase “other applicable law governing such acquisitions and purchases” as meaning no applicable law whatsoever, it is clear that Section 38:2237 contemplates either an RFP or a bid process.

C. Local Law

Local law for each applicant was not reviewed as part of this analysis. There may be local requirements that apply in addition to the state requirements discussed here.

IV. Discussion

Contracts for Internet access and/or Internal Connections may fall within the definition of “public work” to the extent that these contracts include “the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity.” Nevertheless, such contracts clearly fall within the RFP requirements for the purchase of “telecommunications or data processing systems, including equipment, and related services” set forth in Section 38:2237. Insofar as such contracts are also contracts for “materials or supplies,” Section 38:2237 alternatively provides for the application of the competitive bidding requirements set forth in Section 38:2212.1.

Section 38:2212.1 provides, among other things, that all purchases of materials or supplies in excess of \$20,000 must be advertised and awarded to the “lowest responsible bidder” and that purchases of between \$10,000 and \$19,999 must be made by obtaining at least three telephone or facsimile quotations. Nevertheless, because Section 38:2237 contemplates that either RFP or competitive bidding shall apply, in the event a contract fails to meet the \$10,000 threshold for materials and supplies set forth in Section 38:2212.1, the RFP requirement of Section 38:2237 applies.⁵

Finally, insofar as a contract for Internet access includes the provision of services associated with the purchase of related equipment, Louisiana law provides that such services be included or treated as part of the same contract. *See LA Attorney General Opinion No. 81-465* (1981). However, even where a contract is truly and solely for services without the provision of related equipment, because Section 38:2237 explicitly applies to the provision of “telecommunications . . . systems . . . and related services”, the RFP requirement of Section 38:2237 applies.

⁵ Where multiple contracts for one applicant each fall under a Section 38:2212.1 dollar threshold, but where the sum of the contracts exceeds the threshold, if necessary, SLD will make a determination regarding whether the contracts should be construed as a single contract.

V. Conclusion

Louisiana state law requires either an RFP or other competitive bidding process in the procurement of telecommunications and data processing equipment, systems, or related services. Although other competitive bidding procedures may be used as an alternative to an RFP, the decision not to use an RFP process must be provided in writing to potential bidders. For contracts solely for services, but where those services are provided in connection with related non-leased equipment, an RFP or other competitive bidding procedure is clearly required for both the services and equipment together. For contracts solely for services, an RFP is required pursuant to Louisiana law expressly governing the purchase of telecommunications services.

Accordingly, statements by applicants associated with SEND that Louisiana law does not require competitive bidding for the contracts at issue is not supported by Louisiana law.

**Universal Service Administrative Company
Schools and Libraries Division**

Exhibit C

Administrator's Decision on Appeal

Claiborne Parish School District



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal - Funding Year 2002-2003

June 24, 2004

Kenneth F. Sills
Hammonds and Sills
P.O. Box 65236
Baton Rouge, LA 70896

Re: Claiborne Parish School District

Re: Billed Entity Number: 139298
471 Application Number: 304992
Funding Request Number(s): 808092, 808493, 808768, 809039
Your Correspondence Dated: March 22, 2004

After thorough review and investigation of all relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision in regard to your appeal of SLD's Funding Year 2002 Commitment Adjustment Letter for the Application Number indicated above. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission ("FCC"). If your letter of appeal included more than one Application Number, please note that for each application for which an appeal is submitted, a separate letter is sent.

Funding Request Number: 808092, 808493, 808768, 809039
Decision on Appeal: **Denied in full**
Explanation:

- You have stated in your letter that this appeal will provide clarifying information that corrects an assumption the SLD made during the initial review process because there was insufficient documentation at that time. The exhibits that you profess to provide clarifying information are statements by the Attorney General for Louisiana that discuss various Louisiana Revised Statutes as they apply, or do not apply, to various entities other than Claiborne Parish School Board (Claiborne). Your opinion is that the statute does not apply in this case because the Claiborne Parish School Board is a political subdivision of the State of Louisiana and the statute only applies to those professional services to be performed by an architect, engineer, or landscape architect. In sum, you declare that the Louisiana Procurement laws do not apply to Claiborne regarding requirements to advertise for bids for Internet access and Internal Connections or to allow a political subdivision to purchase through a local vendor items at the state bid price. Specifically, you explain that the

school board as a political subdivision is not required by Louisiana State law to use the competitive bidding process for contracting with SEND Technologies, LLC. Essentially, you make the assertion that Claiborne is exempt from state procurement law. You request that the SLD nullify the issued Funding Commitment Decision Letter of January 22, 2004.

- After a thorough review of the appeal, it was determined that during the course of an Item 25 review, and through your own admission, Claiborne did not comply with the Louisiana Revised Statutes pertaining to public contracts, specifically for the procurement of Internet access and Internal Connections. The vendor, SEND Technologies, referred to its entire Internet access and Internal Connections contracts as professional service contracts. You note that Internet access and Internal Connections are not considered professional services under Louisiana law. Review of the applicable provisions of Louisiana law do not support your contention that Louisiana law does not require competitive bids for equipment, supplies, and services related to the provision of Internet access and Internal Connections. Consequently, the appeal is denied. For a discussion of the applicable provisions of Louisiana law upon which the decision is based, please see the attached document titled "Further Explanation of the Administrator's Decision on Appeal."
- The FCC's rules for the Schools and Libraries Universal Service Support Mechanism undisputedly require competitive bidding. The FCC's rules state, "[A] n eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under Sec. 54.502 and 54.503. 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**" (47 C.F.R § 54.504(a), emphasis added). Your appeal did not indicate that the FCC's competitive bidding requirements were met and is therefore denied.

If you believe there is a basis for further examination of your application, you may file an appeal with the Federal Communications Commission (FCC). You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the above date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options. We thank you for your continued support, patience, and cooperation during the appeal process.

We thank you for your continued support, patience, and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

Cc: Mark Stevenson
SEND Technologies, LLC
2904 Evangeline Street
Monroe, LA 71201

Janet Holland
Claiborne Parish School District
415 East Main Street
Homer, LA 71040



Universal Service Administrative Company
Schools & Libraries Division

Further Explanation of the Administrator's Decision on Appeal

June 24, 2004

Appeal Decision
Claiborne Parish School District
Form 471 Application Number: 304992
Funding Year 2002

FRNs: 808092, 808493, 808768, 809039

I. Background

SEND Technologies, LLC (SEND) is the service provider for certain Funding Year 2002 funding requests for Internet access and Internal Connections for applicants located in Louisiana. All applicants associated with SEND in Funding Year 2002 underwent Item 25/competitive bidding reviews. In response to SLD's questions regarding the competitive bidding process, all but one applicant associated with SEND responded that Louisiana law does not require competitive bidding for the provided equipment and services.

II. Summary of Decision on Appeal

Notwithstanding SLD program rules which undisputedly require competitive bidding, review of the applicable provisions of Louisiana law do not support the applicants' contentions that Louisiana law does not require competitive bids for equipment, supplies, and services related to the provision of Internet access and Internal Connections.

III. Applicable Law

**A. Schools and Libraries Universal Service Support Mechanism
Competitive Bidding Requirements**

In preparing request(s) for funding, applicants seeking discounted services through the Schools and Libraries Universal Service Support Mechanism must follow certain competitive bidding requirements. *See* 47 C.F.R. § 54.504. Section 54.504(a) provides in relevant part (emphasis added):

[A] n eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under Sec. Sec. 54.502 and

54.503. 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.

An applicant initiates the competitive bidding process when an applicant submits an FCC Form 470 to USAC for posting on the SLD portion of the USAC website. See 47 C.F.R. § 54.504(b); *Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470*, OMB 3060-0806 (April 2002) (FCC Form 470). This posting enables prospective service providers to bid on the equipment and services for which the applicant will request universal service support. After the Form 470 has been posted, the applicant must wait at least 28 days before entering into agreements with service providers, must comply with all applicable state and local procurement laws, and must comply with the other competitive bidding requirements established by the Federal Communications Commission (FCC). See 47 C.F.R. §§ 54.504, 54.511; *In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, ¶ 575 (rel. May 8, 1997) (*Universal Service Order*).

FCC rules require applicants to “submit a complete description of the services they seek so that it may be posted for competing service providers to evaluate.” *Universal Service Order*, ¶ 570. The FCC requires “the application to describe the services that the schools and libraries seek to purchase in sufficient detail to enable potential providers to formulate bids.” *Id.* ¶ 575. A description of the Internet access and Internal Connections services being sought must be provided in Items 9 and 10 of the FCC Form 470. The instructions for FCC Form 470 state that these items “must be completed to provide potential bidders with particular information about the services you are seeking.” See *FCC Form 470 Instructions*, April 2002 at 10.¹ The instructions for Item 9(b) state that this box should be checked if the applicant does not have an RFP, and that, if this box is checked, the applicant “must fill in details in the space provided about the specific Internet access services or functions and quantity and/or capacity of service” that is being sought. *Id.* at 12. The Form 470 instructions for Item 10(b) state that this box should be checked if the applicant does not have an RFP, and that, if this box is checked, the applicant “must fill in details in the space provided about the specific internal connections services or functions and quantity and/or capacity of service.” *Id.* (emphasis added).

FCC regulations further require that the entity selecting a service provider “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). In regard to these competitive bidding requirements, the FCC nevertheless mandates that “price should be the primary factor in selecting a bid.” *Universal Service Order*, ¶ 481. When permitted pursuant to state and local procurement rules, other relevant factors an applicant may consider include “prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives.” *Id.*

¹ The FCC Form 470 and Instructions were revised in April 2002. The language cited here was not changed when the instructions were revised.

B. Louisiana State Law

Louisiana Revised Statutes (LARS) Title 38 – Public Contracts, Works and Improvements (2004) sets out, among other things, the competitive bidding requirements for public contracts awarded by public entities, and covers contracts for “materials and supplies,” “public works,” and “telecommunications equipment and services.” Section 38:2211(11) defines “public entity” to include a public school board.

1. Materials and Supplies

Section 38:2212.1 provides that all purchases of materials or supplies in excess of \$20,000 must be advertised and awarded to the “lowest responsible bidder”; for purchases of between \$10,000 and \$19,999, the purchaser must obtain at least three telephone or facsimile quotations, must provide written confirmation of the accepted offer, and must record the reasons for rejecting any quotes lower than the accepted quote. *See id.* This provision has been interpreted as applying to, for example, the purchase of vending machines on parish property. *LA Attorney General Opinion No. 00-322 (2000).*² Although the Louisiana Supreme Court has held that a contract for telecommunications services was not for materials and thus not subject to the bidding requirements of Section 38:2212.1, the contract at issue involved leasing rather than purchasing telecommunications equipment from a regulated public utility. *See Stevens v. LaFourche Parish Hospital*, 323 So.2d 794, 796 (1975).

2. Public Works

Section 2211(12) defines “public work” as “the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity.” Public works contracts over \$100,000 must be advertised and awarded in accordance with requirements set forth in Section 2212A.³ The *Stevens* decision, however, raises some question whether a contract to provide telecommunications equipment and services would necessarily be considered a “public work.” For example, the Louisiana Attorney General (AG) has opined, based upon the *Stevens* case, that “public work” “does not include telecommunications services that may be provided in a building or in connection with its use.” *LA Attorney General Opinion No. 84-729 (1984)* citing *Stevens*, 323 So.2d at 796 (1975). On the other hand, as noted, the holding in *Stevens* dates from a time when telecommunications equipment and services were almost exclusively provided by regulated public utilities and where the

²Although the Attorney General (AG) explained that there were no competitive bidding requirements for contracts below the lower statutory threshold (at that time \$7500), the AG, in this opinion, nonetheless recommended obtaining at least three quotations.

³ 2212A(1)(a) provides:

All public work exceeding the contract limit as defined in this Section, including labor and materials, to be done by a public entity shall be advertised and let by contract to the lowest responsible bidder who had bid according to the contract, plans, and specifications as advertised, and no such public work shall be done except as provided in this Part.

Court in that case considered the contract at issue as being exclusively for services. *See Stevens*, 323 So.2d at 796-97. Thus, *Stevens* arguably would not apply today to large contracts that involve the purchase and installation of telecommunications equipment that also involve the ongoing provision of related services.

3. Services

Contracts for services, including "Professional Services," do not require the public bidding otherwise required by Section 2212. *See Browning-Ferris Inc. v. City of Monroe*, 465 So.2d 882, 884 (La.App. 2d Cir. 1985); *see also LA Attorney General Opinion No. 02-0418* (2002). Moreover, and as noted above, the Louisiana Supreme Court has expressly held that a contract for "telephone services" awarded to a public utility did not require competitive bidding. *See Stevens*, 323 So.2d at 796.

Nevertheless, where a public entity purchases equipment and subsequently contracts for services associated with the use of that equipment, the Louisiana AG has opined that the public bid requirement applies to the provision of the related services:

[A] bid as to a maintenance contract (if one is reasonably foreseen as needed) should be sought at the same time [as the purchase of the equipment to be maintained]; otherwise the public policy behind the public bid could be intentionally or inadvertently flaunted by separately and non-competitively entering into a substantial second contract.

See LA Attorney General Opinion No. 81-465 (1981).

4. Telecommunications Equipment and Related Services

Louisiana law explicitly addresses the advertisement and award of contracts for telecommunications and data processing equipment and related services. *See LARS* §§ 38:2236 (defining telecommunication equipment), 38:2237.⁴ Section 38:2237 provides:

A political subdivision may lease, rent, or purchase telecommunications or data processing systems, including equipment, and related services, through a request for proposals [(RFP)] which shall conform to following requirements . . .

* * * *

Political subdivisions may, at their option, procure telecommunications and data processing equipment, systems, or related services in accordance with the provisions of any other applicable law which governs such acquisitions or purchases by political subdivisions of the state, including but not limited to [LARS] 38:2211 et seq., with respect to awarding of public contracts. However, in the event an invitation for bids is used in lieu of a [RFP], written notice of that fact shall be given to all bidders and such notice shall also state that the [RFP] procedure will not be applicable.

⁴ Added in 1988, this law further calls into question whether the holding in *Stevens* is good law.

Notably, although Section 38:2237 does not require public entities to procure telecommunications equipment and services pursuant to an RFP, they can do so only “in accordance with the provisions of any other applicable law which governs such acquisitions or purchases.” Because it would be absurd to construe the phrase “other applicable law governing such acquisitions and purchases” as meaning no applicable law whatsoever, it is clear that Section 38:2237 contemplates either an RFP or a bid process.

C. Local Law

Local law for each applicant was not reviewed as part of this analysis. There may be local requirements that apply in addition to the state requirements discussed here.

IV. Discussion

Contracts for Internet access and/or Internal Connections may fall within the definition of “public work” to the extent that these contracts include “the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity.” Nevertheless, such contracts clearly fall within the RFP requirements for the purchase of “telecommunications or data processing systems, including equipment, and related services” set forth in Section 38:2237. Insofar as such contracts are also contracts for “materials or supplies,” Section 38:2237 alternatively provides for the application of the competitive bidding requirements set forth in Section 38:2212.1.

Section 38:2212.1 provides, among other things, that all purchases of materials or supplies in excess of \$20,000 must be advertised and awarded to the “lowest responsible bidder” and that purchases of between \$10,000 and \$19,999 must be made by obtaining at least three telephone or facsimile quotations. Nevertheless, because Section 38:2237 contemplates that either RFP or competitive bidding shall apply, in the event a contract fails to meet the \$10,000 threshold for materials and supplies set forth in Section 38:2212.1, the RFP requirement of Section 38:2237 applies.⁵

Finally, insofar as a contract for Internet access includes the provision of services associated with the purchase of related equipment, Louisiana law provides that such services be included or treated as part of the same contract. *See LA Attorney General Opinion No. 81-465* (1981). However, even where a contract is truly and solely for services without the provision of related equipment, because Section 38:2237 explicitly applies to the provision of “telecommunications . . . systems . . . and related services”, the RFP requirement of Section 38:2237 applies.

⁵ Where multiple contracts for one applicant each fall under a Section 38:2212.1 dollar threshold, but where the sum of the contracts exceeds the threshold, if necessary, SLD will make a determination regarding whether the contracts should be construed as a single contract.

V. Conclusion

Louisiana state law requires either an RFP or other competitive bidding process in the procurement of telecommunications and data processing equipment, systems, or related services. Although other competitive bidding procedures may be used as an alternative to an RFP, the decision not to use an RFP process must be provided in writing to potential bidders. For contracts solely for services, but where those services are provided in connection with related non-leased equipment, an RFP or other competitive bidding procedure is clearly required for both the services and equipment together. For contracts solely for services, an RFP is required pursuant to Louisiana law expressly governing the purchase of telecommunications services.

Accordingly, statements by applicants associated with SEND that Louisiana law does not require competitive bidding for the contracts at issue is not supported by Louisiana law.

**Universal Service Administrative Company
Schools and Libraries Division**

Exhibit D

Administrator's Decision on Appeal

Concordia Parish School District



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal - Funding Year 2002-2003

June 24, 2004

Kenneth F. Sills
Hammonds and Sills
P.O. Box 65236
Baton Rouge, LA 70896

Re: Concordia Parish School District

Re: Billed Entity Number: 139342
471 Application Number: 287856
Funding Request Number(s): 794599, 800567, 800576, 800584, 800588,
800592, 800608, 800640
Your Correspondence Dated: March 22, 2004

After thorough review and investigation of all relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision in regard to your appeal of SLD's Funding Year 2002 Commitment Adjustment Letter for the Application Number indicated above. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission ("FCC"). If your letter of appeal included more than one Application Number, please note that for each application for which an appeal is submitted, a separate letter is sent.

Funding Request Number: 794599, 800567, 800576, 800584, 800588, 800592,
800608, 800640

Decision on Appeal: **Denied in full**

Explanation:

- You have stated in your letter that this appeal will provide clarifying information that corrects an assumption the SLD made during the initial review process because there was insufficient documentation at that time. The exhibits that you profess to provide clarifying information are statements by the Attorney General for Louisiana that discuss various Louisiana Revised Statutes as they apply, or do not apply, to various entities other than Concordia Parish School Board (Concordia). Your opinion is that the statute does not apply in this case because the Concordia Parish School Board is a political subdivision of the State of Louisiana and the statute only applies to those professional services to be performed by an architect, engineer, or landscape architect. In sum, you declare that the Louisiana Procurement laws do not apply to Concordia regarding requirements to advertise for bids for Internet

Access and Internal Connections or to allow a political subdivision to purchase through a local vendor items at the state bid price. Specifically, you explain that the school board as a political subdivision is not required by Louisiana State law to use the competitive bidding process for contracting with SEND Technologies, LLC. Essentially, you make the assertion that Concordia is exempt from state procurement law. You request that the SLD nullify the issued Funding Commitment Decision Letter of January 22, 2004.

- After a thorough review of the appeal, it was determined that during the course of an Item 25 review, and through your own admission, Concordia did not comply with the Louisiana Revised Statutes pertaining to public contracts, specifically for the procurement of Internet Access and Internal Connections. The vendor, SEND Technologies, referred to its entire Internet Access and Internal Connections contracts as professional service contracts. You note that Internet Access and Internal Connections are not considered professional services under Louisiana law. Review of the applicable provisions of Louisiana law do not support your contention that Louisiana law does not require competitive bids for equipment, supplies, and services related to the provision of Internet Access and Internal Connections. Consequently, the appeal is denied. For a discussion of the applicable provisions of Louisiana law upon which the decision is based, please see the attached document titled "Further Explanation of the Administrator's Decision on Appeal."
- The FCC's rules for the Schools and Libraries Universal Service Support Mechanism undisputedly require competitive bidding. The FCC's rules state, "[A]n eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under Sec. 54.502 and 54.503. 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**" (47 C.F.R § 54.504(a), emphasis added). Your appeal did not indicate that the FCC's competitive bidding requirements were met and is therefore denied.

If you believe there is a basis for further examination of your application, you may file an appeal with the Federal Communications Commission (FCC). You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the above date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options. We thank you for your continued support, patience, and cooperation during the appeal process.

We thank you for your continued support, patience, and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

Cc: Mark Stevenson
SEND Technologies, LLC
2904 Evangeline Street
Monroe, LA 71201

Sam Matson
Concordia Parish School District
508 John Dale Drive
Vidalia, LA 71373



Universal Service Administrative Company
Schools & Libraries Division

Further Explanation of the Administrator's Decision on Appeal

June 24, 2004

Appeal Decision
Concordia Parish School District
Form 471 Application Number: 287856
Funding Year 2002

FRNs: 794599, 800567, 800576, 800584, 800588, 800592, 800608, 800640

I. Background

SEND Technology, LLC (SEND) is the service provider for certain Funding Year 2002 funding requests for Internet Access and Internal Connections for applicants located in Louisiana. All applicants associated with SEND in Funding Year 2002 underwent Item 25/competitive bidding reviews. In response to SLD's questions regarding the competitive bidding process, all but one applicant associated with SEND responded that Louisiana law does not require competitive bidding for the provided equipment and services.

II. Summary of Decision on Appeal

Notwithstanding SLD program rules which undisputedly require competitive bidding, review of the applicable provisions of Louisiana law do not support the applicants' contentions that Louisiana law does not require competitive bids for equipment, supplies, and services related to the provision of Internet Access and Internal Connections.

III. Applicable Law

A. Schools and Libraries Universal Service Support Mechanism Competitive Bidding Requirements

In preparing request(s) for funding, applicants seeking discounted services through the Schools and Libraries Universal Service Support Mechanism must follow certain competitive bidding requirements. See 47 C.F.R. § 54.504. Section 54.504(a) provides in relevant part (emphasis added):

[A] n eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under Sec. Sec. 54.502 and

54.503. 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.

An applicant initiates the competitive bidding process when an applicant submits an FCC Form 470 to USAC for posting on the SLD portion of the USAC website. See 47 C.F.R. § 54.504(b); *Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470*, OMB 3060-0806 (April 2002) (FCC Form 470). This posting enables prospective service providers to bid on the equipment and services for which the applicant will request universal service support. After the Form 470 has been posted, the applicant must wait at least 28 days before entering into agreements with service providers, must comply with all applicable state and local procurement laws, and must comply with the other competitive bidding requirements established by the Federal Communications Commission (FCC). See 47 C.F.R. §§ 54.504, 54.511; *In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, ¶ 575 (rel. May 8, 1997) (*Universal Service Order*).

FCC rules require applicants to “submit a complete description of the services they seek so that it may be posted for competing service providers to evaluate.” *Universal Service Order*, ¶ 570. The FCC requires “the application to describe the services that the schools and libraries seek to purchase in sufficient detail to enable potential providers to formulate bids.” *Id.* ¶ 575. A description of the Internet Access and Internal Connections services being sought must be provided in Items 9 and 10 of the FCC Form 470. The instructions for FCC Form 470 state that these items “must be completed to provide potential bidders with particular information about the services you are seeking.” See *FCC Form 470 Instructions*, April 2002 at 10.¹ The instructions for Item 9(b) state that this box should be checked if the applicant does not have an RFP, and that, if this box is checked, the applicant “must fill in details in the space provided about the specific Internet access services or functions and quantity and/or capacity of service” that is being sought. *Id.* at 12. The Form 470 instructions for Item 10(b) state that this box should be checked if the applicant does not have an RFP, and that, if this box is checked, the applicant “*must* fill in details in the space provided about the specific internal connections services or functions and quantity and/or capacity of service.” *Id.* (emphasis added).

FCC regulations further require that the entity selecting a service provider “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). In regard to these competitive bidding requirements, the FCC nevertheless mandates that “price should be the primary factor in selecting a bid.” *Universal Service Order*, ¶ 481. When permitted pursuant to state and local procurement rules, other relevant factors an applicant may consider include “prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives.” *Id.*

¹ The FCC Form 470 and Instructions were revised in April 2002. The language cited here was not changed when the instructions were revised.

B. Louisiana State Law

Louisiana Revised Statutes (LARS) Title 38 – Public Contracts, Works and Improvements (2004) sets out, among other things, the competitive bidding requirements for public contracts awarded by public entities, and covers contracts for “materials and supplies,” “public works,” and “telecommunications equipment and services.” Section 38:2211(11) defines “public entity” to include a public school board.

1. Materials and Supplies

Section 38:2212.1 provides that all purchases of materials or supplies in excess of \$20,000 must be advertised and awarded to the “lowest responsible bidder”; for purchases of between \$10,000 and \$19,999, the purchaser must obtain at least three telephone or facsimile quotations, must provide written confirmation of the accepted offer, and must record the reasons for rejecting any quotes lower than the accepted quote. *See id.* This provision has been interpreted as applying to, for example, the purchase of vending machines on parish property. *LA Attorney General Opinion No. 00-322 (2000)*.² Although the Louisiana Supreme Court has held that a contract for telecommunications services was not for materials and thus not subject to the bidding requirements of Section 38:2212.1, the contract at issue involved leasing rather than purchasing telecommunications equipment from a regulated public utility. *See Stevens v. LaFourche Parish Hospital*, 323 So.2d 794, 796 (1975).

2. Public Works

Section 2211(12) defines “public work” as “the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity.” Public works contracts over \$100,000 must be advertised and awarded in accordance with requirements set forth in Section 2212A.³ The *Stevens* decision, however, raises some question whether a contract to provide telecommunications equipment and services would necessarily be considered a “public work.” For example, the Louisiana Attorney General (AG) has opined, based upon the *Stevens* case, that “public work” “does not include telecommunications services that may be provided in a building or in connection with its use.” *LA Attorney General Opinion No. 84-729 (1984)* citing *Stevens*, 323 So.2d at 796 (1975). On the other hand, as noted, the holding in *Stevens* dates from a time when telecommunications equipment and services were almost exclusively provided by regulated public utilities and where the

²Although the Attorney General (AG) explained that there were no competitive bidding requirements for contracts below the lower statutory threshold (at that time \$7500), the AG, in this opinion, nonetheless recommended obtaining at least three quotations.

³ 2212A(1)(a) provides:

All public work exceeding the contract limit as defined in this Section, including labor and materials, to be done by a public entity shall be advertised and let by contract to the lowest responsible bidder who had bid according to the contract, plans, and specifications as advertised, and no such public work shall be done except as provided in this Part.

Court in that case considered the contract at issue as being exclusively for services. *See Stevens*, 323 So.2d at 796-97. Thus, *Stevens* arguably would not apply today to large contracts that involve the purchase and installation of telecommunications equipment that also involve the ongoing provision of related services.

3. Services

Contracts for services, including "Professional Services," do not require the public bidding otherwise required by Section 2212. *See Browning-Ferris Inc. v. City of Monroe*, 465 So.2d 882, 884 (La.App. 2d Cir. 1985); *see also LA Attorney General Opinion No. 02-0418* (2002). Moreover, and as noted above, the Louisiana Supreme Court has expressly held that a contract for "telephone services" awarded to a public utility did not require competitive bidding. *See Stevens*, 323 So.2d at 796.

Nevertheless, where a public entity purchases equipment and subsequently contracts for services associated with the use of that equipment, the Louisiana AG has opined that the public bid requirement applies to the provision of the related services:

[A] bid as to a maintenance contract (if one is reasonably foreseen as needed) should be sought at the same time [as the purchase of the equipment to be maintained]; otherwise the public policy behind the public bid could be intentionally or inadvertently flaunted by separately and non-competitively entering into a substantial second contract.

See LA Attorney General Opinion No. 81-465 (1981).

4. Telecommunications Equipment and Related Services

Louisiana law explicitly addresses the advertisement and award of contracts for telecommunications and data processing equipment and related services. *See LARS* §§ 38:2236 (defining telecommunication equipment), 38:2237.⁴ Section 38:2237 provides:

A political subdivision may lease, rent, or purchase telecommunications or data processing systems, including equipment, and related services, through a request for proposals [(RFP)] which shall conform to following requirements . . .

* * * *

Political subdivisions may, at their option, procure telecommunications and data processing equipment, systems, or related services in accordance with the provisions of any other applicable law which governs such acquisitions or purchases by political subdivisions of the state, including but not limited to [LARS] 38:2211 et seq., with respect to awarding of public contracts. However, in the event an invitation for bids is used in lieu of a [RFP], written notice of that fact shall be given to all bidders and such notice shall also state that the [RFP] procedure will not be applicable.

⁴ Added in 1988, this law further calls into question whether the holding in *Stevens* is good law.

Notably, although Section 38:2237 does not require public entities to procure telecommunications equipment and services pursuant to an RFP, they can do so only "in accordance with the provisions of any other applicable law which governs such acquisitions or purchases." Because it would be absurd to construe the phrase "other applicable law governing such acquisitions and purchases" as meaning no applicable law whatsoever, it is clear that Section 38:2237 contemplates either an RFP or a bid process.

C. Local Law

Local law for each applicant was not reviewed as part of this analysis. There may be local requirements that apply in addition to the state requirements discussed here.

IV. Discussion

Contracts for Internet Access and/or Internal Connections may fall within the definition of "public work" to the extent that these contracts include "the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity." Nevertheless, such contracts clearly fall within the RFP requirements for the purchase of "telecommunications or data processing systems, including equipment, and related services" set forth in Section 38:2237. Insofar as such contracts are also contracts for "materials or supplies," Section 38:2237 alternatively provides for the application of the competitive bidding requirements set forth in Section 38:2212.1.

Section 38:2212.1 provides, among other things, that all purchases of materials or supplies in excess of \$20,000 must be advertised and awarded to the "lowest responsible bidder" and that purchases of between \$10,000 and \$19,999 must be made by obtaining at least three telephone or facsimile quotations. Nevertheless, because Section 38:2237 contemplates that either RFP or competitive bidding shall apply, in the event a contract fails to meet the \$10,000 threshold for materials and supplies set forth in Section 38:2212.1, the RFP requirement of Section 38:2237 applies.⁵

Finally, insofar as a contract for Internet access includes the provision of services associated with the purchase of related equipment, Louisiana law provides that such services be included or treated as part of the same contract. *See LA Attorney General Opinion No. 81-465* (1981). However, even where a contract is truly and solely for services without the provision of related equipment, because Section 38:2237 explicitly applies to the provision of "telecommunications . . . systems . . . and related services", the RFP requirement of Section 38:2237 applies.

⁵ Where multiple contracts for one applicant each fall under a Section 38:2212.1 dollar threshold, but where the sum of the contracts exceeds the threshold, if necessary, SLD will make a determination regarding whether the contracts should be construed as a single contract.

V. Conclusion

Louisiana state law requires either an RFP or other competitive bidding process in the procurement of telecommunications and data processing equipment, systems, or related services. Although other competitive bidding procedures may be used as an alternative to an RFP, the decision not to use an RFP process must be provided in writing to potential bidders. For contracts solely for services, but where those services are provided in connection with related non-leased equipment, an RFP or other competitive bidding procedure is clearly required for both the services and equipment together. For contracts solely for services, an RFP is required pursuant to Louisiana law expressly governing the purchase of telecommunications services.

Accordingly, statements by applicants associated with SEND that Louisiana law does not require competitive bidding for the contracts at issue is not supported by Louisiana law.

**Universal Service Administrative Company
Schools and Libraries Division**

Exhibit E

Administrator's Decision on Appeal

Franklin Parish School District



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal - Funding Year 2002-2003

June 24, 2004

Kenneth F. Sills
Hammonds and Sills
P.O. Box 65236
Baton Rouge, LA 70896

Re: Franklin Parish School District

Re: Billed Entity Number: 139329
471 Application Number: 288635
Funding Request Number(s): 737823, 794905, 799714, 799731, 799765,
799780, 799789
Your Correspondence Dated: March 22, 2004

After thorough review and investigation of all relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision in regard to your appeal of SLD's Funding Year 2002 Commitment Adjustment Letter for the Application Number indicated above. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission ("FCC"). If your letter of appeal included more than one Application Number, please note that for each application for which an appeal is submitted, a separate letter is sent.

Funding Request Number: 737823, 794905, 799714, 799731, 799765, 799780,
799789

Decision on Appeal: **Denied in full**

Explanation:

- You have stated in your letter that this appeal will provide clarifying information that corrects an assumption the SLD made during the initial review process because there was insufficient documentation at that time. The exhibits that you profess to provide clarifying information are statements by the Attorney General for Louisiana that discuss various Louisiana Revised Statutes as they apply, or do not apply, to various entities other than Franklin Parish School Board (Franklin). Your opinion is that the statute does not apply in this case because the Franklin Parish School Board is a political subdivision of the State of Louisiana and the statute only applies to those professional services to be performed by an architect, engineer, or landscape architect. In sum, you declare that the Louisiana Procurement laws do not apply to Franklin regarding requirements to advertise for bids for Internet

access and Internal Connections or to allow a political subdivision to purchase through a local vendor items at the state bid price. Specifically, you explain that the school board as a political subdivision is not required by Louisiana State law to use the competitive bidding process for contracting with SEND Technologies, LLC. Essentially, you make the assertion that Franklin is exempt from state procurement law. You request that the SLD nullify the issued Funding Commitment Decision Letter of January 22, 2004.

- After a thorough review of the appeal, it was determined that during the course of an Item 25 review, and through your own admission, Franklin did not comply with the Louisiana Revised Statutes pertaining to public contracts, specifically for the procurement of Internet access and Internal Connections. The vendor, SEND Technologies, referred to its entire Internet access and Internal Connections contracts as professional service contracts. You note that Internet access and Internal Connections are not considered professional services under Louisiana law. Review of the applicable provisions of Louisiana law do not support your contention that Louisiana law does not require competitive bids for equipment, supplies, and services related to the provision of Internet access and Internal Connections. Consequently, the appeal is denied. For a discussion of the applicable provisions of Louisiana law upon which the decision is based, please see the attached document titled "Further Explanation of the Administrator's Decision on Appeal."
- The FCC's rules for the Schools and Libraries Universal Service Support Mechanism undisputedly require competitive bidding. The FCC's rules state, "[A]n eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under Sec. 54.502 and 54.503. 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**" (47 C.F.R § 54.504(a), emphasis added). Your appeal did not indicate that the FCC's competitive bidding requirements were met and is therefore denied.

If you believe there is a basis for further examination of your application, you may file an appeal with the Federal Communications Commission (FCC). You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the above date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options. We thank you for your continued support, patience, and cooperation during the appeal process.

We thank you for your continued support, patience, and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

Cc: Mark Stevenson
SEND Technologies, LLC
2904 Evangeline Street
Monroe, LA 71201

Mike Gandy
Franklin Parish School District
7293 Prairie Road
Winnsboro, LA 71295



Universal Service Administrative Company
Schools & Libraries Division

Further Explanation of the Administrator's Decision on Appeal

June 24, 2004

Appeal Decision
Franklin Parish School District
Form 471 Application Number: 288635
Funding Year 2002

FRNs: 737823, 794905, 799714, 799731, 799765, 799780, 799789

I. Background

SEND Technologies, LLC (SEND) is the service provider for certain Funding Year 2002 funding requests for Internet access and Internal Connections for applicants located in Louisiana. All applicants associated with SEND in Funding Year 2002 underwent Item 25/competitive bidding reviews. In response to SLD's questions regarding the competitive bidding process, all but one applicant associated with SEND responded that Louisiana law does not require competitive bidding for the provided equipment and services.

II. Summary of Decision on Appeal

Notwithstanding SLD program rules which undisputedly require competitive bidding, review of the applicable provisions of Louisiana law do not support the applicants' contentions that Louisiana law does not require competitive bids for equipment, supplies, and services related to the provision of Internet access and Internal Connections.

III. Applicable Law

**A. Schools and Libraries Universal Service Support Mechanism
Competitive Bidding Requirements**

In preparing request(s) for funding, applicants seeking discounted services through the Schools and Libraries Universal Service Support Mechanism must follow certain competitive bidding requirements. *See* 47 C.F.R. § 54.504. Section 54.504(a) provides in relevant part (emphasis added):

[A] n eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under Sec. Sec. 54.502 and

54.503. 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.

An applicant initiates the competitive bidding process when an applicant submits an FCC Form 470 to USAC for posting on the SLD portion of the USAC website. See 47 C.F.R. § 54.504(b); *Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470*, OMB 3060-0806 (April 2002) (FCC Form 470). This posting enables prospective service providers to bid on the equipment and services for which the applicant will request universal service support. After the Form 470 has been posted, the applicant must wait at least 28 days before entering into agreements with service providers, must comply with all applicable state and local procurement laws, and must comply with the other competitive bidding requirements established by the Federal Communications Commission (FCC). See 47 C.F.R. §§ 54.504, 54.511; *In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, ¶ 575 (rel. May 8, 1997) (*Universal Service Order*).

FCC rules require applicants to “submit a complete description of the services they seek so that it may be posted for competing service providers to evaluate.” *Universal Service Order*, ¶ 570. The FCC requires “the application to describe the services that the schools and libraries seek to purchase in sufficient detail to enable potential providers to formulate bids.” *Id.* ¶ 575. A description of the Internet access and Internal Connections services being sought must be provided in Items 9 and 10 of the FCC Form 470. The instructions for FCC Form 470 state that these items “must be completed to provide potential bidders with particular information about the services you are seeking.” See *FCC Form 470 Instructions*, April 2002 at 10.¹ The instructions for Item 9(b) state that this box should be checked if the applicant does not have an RFP, and that, if this box is checked, the applicant “must fill in details in the space provided about the specific Internet access services or functions and quantity and/or capacity of service” that is being sought. *Id.* at 12. The Form 470 instructions for Item 10(b) state that this box should be checked if the applicant does not have an RFP, and that, if this box is checked, the applicant “*must* fill in details in the space provided about the specific internal connections services or functions and quantity and/or capacity of service.” *Id.* (emphasis added).

FCC regulations further require that the entity selecting a service provider “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). In regard to these competitive bidding requirements, the FCC nevertheless mandates that “price should be the primary factor in selecting a bid.” *Universal Service Order*, ¶ 481. When permitted pursuant to state and local procurement rules, other relevant factors an applicant may consider include “prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives.” *Id.*

¹ The FCC Form 470 and Instructions were revised in April 2002. The language cited here was not changed when the instructions were revised.

B. Louisiana State Law

Louisiana Revised Statutes (LARS) Title 38 – Public Contracts, Works and Improvements (2004) sets out, among other things, the competitive bidding requirements for public contracts awarded by public entities, and covers contracts for “materials and supplies,” “public works,” and “telecommunications equipment and services.” Section 38:2211(11) defines “public entity” to include a public school board.

1. Materials and Supplies

Section 38:2212.1 provides that all purchases of materials or supplies in excess of \$20,000 must be advertised and awarded to the “lowest responsible bidder”; for purchases of between \$10,000 and \$19,999, the purchaser must obtain at least three telephone or facsimile quotations, must provide written confirmation of the accepted offer, and must record the reasons for rejecting any quotes lower than the accepted quote. *See id.* This provision has been interpreted as applying to, for example, the purchase of vending machines on parish property. *LA Attorney General Opinion No. 00-322 (2000).*² Although the Louisiana Supreme Court has held that a contract for telecommunications services was not for materials and thus not subject to the bidding requirements of Section 38:2212.1, the contract at issue involved leasing rather than purchasing telecommunications equipment from a regulated public utility. *See Stevens v. LaFourche Parish Hospital*, 323 So.2d 794, 796 (1975).

2. Public Works

Section 2211(12) defines “public work” as “the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity.” Public works contracts over \$100,000 must be advertised and awarded in accordance with requirements set forth in Section 2212A.³ The *Stevens* decision, however, raises some question whether a contract to provide telecommunications equipment and services would necessarily be considered a “public work.” For example, the Louisiana Attorney General (AG) has opined, based upon the *Stevens* case, that “public work” “does not include telecommunications services that may be provided in a building or in connection with its use.” *LA Attorney General Opinion No. 84-729 (1984)* citing *Stevens*, 323 So.2d at 796 (1975). On the other hand, as noted, the holding in *Stevens* dates from a time when telecommunications equipment and services were almost exclusively provided by regulated public utilities and where the

²Although the Attorney General (AG) explained that there were no competitive bidding requirements for contracts below the lower statutory threshold (at that time \$7500), the AG, in this opinion, nonetheless recommended obtaining at least three quotations.

³ 2212A(1)(a) provides:

All public work exceeding the contract limit as defined in this Section, including labor and materials, to be done by a public entity shall be advertised and let by contract to the lowest responsible bidder who had bid according to the contract, plans, and specifications as advertised, and no such public work shall be done except as provided in this Part.

Court in that case considered the contract at issue as being exclusively for services. *See Stevens*, 323 So.2d at 796-97. Thus, *Stevens* arguably would not apply today to large contracts that involve the purchase and installation of telecommunications equipment that also involve the ongoing provision of related services.

3. Services

Contracts for services, including "Professional Services," do not require the public bidding otherwise required by Section 2212. *See Browning-Ferris Inc. v. City of Monroe*, 465 So.2d 882, 884 (La.App. 2d Cir. 1985); *see also LA Attorney General Opinion No. 02-0418* (2002). Moreover, and as noted above, the Louisiana Supreme Court has expressly held that a contract for "telephone services" awarded to a public utility did not require competitive bidding. *See Stevens*, 323 So.2d at 796.

Nevertheless, where a public entity purchases equipment and subsequently contracts for services associated with the use of that equipment, the Louisiana AG has opined that the public bid requirement applies to the provision of the related services:

[A] bid as to a maintenance contract (if one is reasonably foreseen as needed) should be sought at the same time [as the purchase of the equipment to be maintained]; otherwise the public policy behind the public bid could be intentionally or inadvertently flaunted by separately and non-competitively entering into a substantial second contract.

See LA Attorney General Opinion No. 81-465 (1981).

4. Telecommunications Equipment and Related Services

Louisiana law explicitly addresses the advertisement and award of contracts for telecommunications and data processing equipment and related services. *See LARS* §§ 38:2236 (defining telecommunication equipment), 38:2237.⁴ Section 38:2237 provides:

A political subdivision may lease, rent, or purchase telecommunications or data processing systems, including equipment, and related services, through a request for proposals [(RFP)] which shall conform to following requirements . . .

* * * *

Political subdivisions may, at their option, procure telecommunications and data processing equipment, systems, or related services in accordance with the provisions of any other applicable law which governs such acquisitions or purchases by political subdivisions of the state, including but not limited to [LARS] 38:2211 et seq., with respect to awarding of public contracts. However, in the event an invitation for bids is used in lieu of a [RFP], written notice of that fact shall be given to all bidders and such notice shall also state that the [RFP] procedure will not be applicable.

⁴ Added in 1988, this law further calls into question whether the holding in *Stevens* is good law.

Notably, although Section 38:2237 does not require public entities to procure telecommunications equipment and services pursuant to an RFP, they can do so only “in accordance with the provisions of any other applicable law which governs such acquisitions or purchases.” Because it would be absurd to construe the phrase “other applicable law governing such acquisitions and purchases” as meaning no applicable law whatsoever, it is clear that Section 38:2237 contemplates either an RFP or a bid process.

C. Local Law

Local law for each applicant was not reviewed as part of this analysis. There may be local requirements that apply in addition to the state requirements discussed here.

IV. Discussion

Contracts for Internet access and/or Internal Connections may fall within the definition of “public work” to the extent that these contracts include “the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity.” Nevertheless, such contracts clearly fall within the RFP requirements for the purchase of “telecommunications or data processing systems, including equipment, and related services” set forth in Section 38:2237. Insofar as such contracts are also contracts for “materials or supplies,” Section 38:2237 alternatively provides for the application of the competitive bidding requirements set forth in Section 38:2212.1.

Section 38:2212.1 provides, among other things, that all purchases of materials or supplies in excess of \$20,000 must be advertised and awarded to the “lowest responsible bidder” and that purchases of between \$10,000 and \$19,999 must be made by obtaining at least three telephone or facsimile quotations. Nevertheless, because Section 38:2237 contemplates that either RFP or competitive bidding shall apply, in the event a contract fails to meet the \$10,000 threshold for materials and supplies set forth in Section 38:2212.1, the RFP requirement of Section 38:2237 applies.⁵

Finally, insofar as a contract for Internet access includes the provision of services associated with the purchase of related equipment, Louisiana law provides that such services be included or treated as part of the same contract. *See LA Attorney General Opinion No. 81-465* (1981). However, even where a contract is truly and solely for services without the provision of related equipment, because Section 38:2237 explicitly applies to the provision of “telecommunications . . . systems . . . and related services”, the RFP requirement of Section 38:2237 applies.

⁵ Where multiple contracts for one applicant each fall under a Section 38:2212.1 dollar threshold, but where the sum of the contracts exceeds the threshold, if necessary, SLD will make a determination regarding whether the contracts should be construed as a single contract.

V. Conclusion

Louisiana state law requires either an RFP or other competitive bidding process in the procurement of telecommunications and data processing equipment, systems, or related services. Although other competitive bidding procedures may be used as an alternative to an RFP, the decision not to use an RFP process must be provided in writing to potential bidders. For contracts solely for services, but where those services are provided in connection with related non-leased equipment, an RFP or other competitive bidding procedure is clearly required for both the services and equipment together. For contracts solely for services, an RFP is required pursuant to Louisiana law expressly governing the purchase of telecommunications services.

Accordingly, statements by applicants associated with SEND that Louisiana law does not require competitive bidding for the contracts at issue is not supported by Louisiana law.

**Universal Service Administrative Company
Schools and Libraries Division**

Exhibit F

Administrator's Decision on Appeal

Lincoln Parish School District



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal - Funding Year 2002-2003

June 24, 2004

Kenneth F. Sills
Hammonds and Sills
P.O. Box 65236
Baton Rouge, LA 70896

Re: Lincoln Parish School District

Re: Billed Entity Number: 139324
 471 Application Number: 302051
 Funding Request Number(s): 776890
 Your Correspondence Dated: March 22, 2004

After thorough review and investigation of all relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision in regard to your appeal of SLD's Funding Year 2002 Commitment Adjustment Letter for the Application Number indicated above. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission ("FCC"). If your letter of appeal included more than one Application Number, please note that for each application for which an appeal is submitted, a separate letter is sent.

Funding Request Number: 776890
Decision on Appeal: **Denied in full**
Explanation:

- You have stated in your letter that this appeal will provide clarifying information that corrects an assumption the SLD made during the initial review process because there was insufficient documentation at that time. The exhibits that you profess to provide clarifying information are statements by the Attorney General for Louisiana that discuss various Louisiana Revised Statutes as they apply, or do not apply, to various entities other than Lincoln Parish School Board (Lincoln). Your opinion is that the statute does not apply in this case because the Lincoln Parish School Board is a political subdivision of the State of Louisiana and the statute only applies to those professional services to be performed by an architect, engineer, or landscape architect. In sum, you declare that the Louisiana Procurement laws do not apply to Lincoln regarding requirements to advertise for bids for Internet access and Internal Connections or to allow a political subdivision to purchase through a local vendor items at the state bid price. Specifically, you explain that the school board as a

political subdivision is not required by Louisiana State law to use the competitive bidding process for contracting with SEND Technologies, LLC. Essentially, you make the assertion that Lincoln is exempt from state procurement law. You request that the SLD nullify the issued Funding Commitment Decision Letter of January 22, 2004.

- After a thorough review of the appeal, it was determined that during the course of an Item 25 review, and through your own admission, Lincoln did not comply with the Louisiana Revised Statutes pertaining to public contracts, specifically for the procurement of Internet access and Internal Connections. The vendor, SEND Technologies, referred to its entire Internet access and Internal Connections contracts as professional service contracts. You note that Internet access and Internal Connections are not considered professional services under Louisiana law. Review of the applicable provisions of Louisiana law do not support your contention that Louisiana law does not require competitive bids for equipment, supplies, and services related to the provision of Internet access and Internal Connections. Consequently, the appeal is denied. For a discussion of the applicable provisions of Louisiana law upon which the decision is based, please see the attached document titled "Further Explanation of the Administrator's Decision on Appeal."
- The FCC's rules for the Schools and Libraries Universal Service Support Mechanism undisputedly require competitive bidding. The FCC's rules state, "[A]n eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under Sec. 54.502 and 54.503. 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**" (47 C.F.R § 54.504(a), emphasis added). Your appeal did not indicate that the FCC's competitive bidding requirements were met and is therefore denied.

If you believe there is a basis for further examination of your application, you may file an appeal with the Federal Communications Commission (FCC). You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the above date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options. We thank you for your continued support, patience, and cooperation during the appeal process.

We thank you for your continued support, patience, and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

Cc: Mark Stevenson
SEND Technologies, LLC
2904 Evangeline Street
Monroe, LA 71201

Debbie Sandidge
Lincoln Parish School District
410 South Farmerville Street
Ruston, LA 71270



Universal Service Administrative Company
Schools & Libraries Division

Further Explanation of the Administrator's Decision on Appeal

June 24, 2004

Appeal Decision
Lincoln Parish School District
Form 471 Application Number: 302051
Funding Year 2002

FRNs: 776890

I. Background

SEND Technologies, LLC (SEND) is the service provider for certain Funding Year 2002 funding requests for Internet access and Internal Connections for applicants located in Louisiana. All applicants associated with SEND in Funding Year 2002 underwent Item 25/competitive bidding reviews. In response to SLD's questions regarding the competitive bidding process, all but one applicant associated with SEND responded that Louisiana law does not require competitive bidding for the provided equipment and services.

II. Summary of Decision on Appeal

Notwithstanding SLD program rules which undisputedly require competitive bidding, review of the applicable provisions of Louisiana law do not support the applicants' contentions that Louisiana law does not require competitive bids for equipment, supplies, and services related to the provision of Internet access and Internal Connections.

III. Applicable Law

**A. Schools and Libraries Universal Service Support Mechanism
Competitive Bidding Requirements**

In preparing request(s) for funding, applicants seeking discounted services through the Schools and Libraries Universal Service Support Mechanism must follow certain competitive bidding requirements. *See* 47 C.F.R. § 54.504. Section 54.504(a) provides in relevant part (emphasis added):

[A]n eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under Sec. Sec. 54.502 and

54.503. 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.

An applicant initiates the competitive bidding process when an applicant submits an FCC Form 470 to USAC for posting on the SLD portion of the USAC website. See 47 C.F.R. § 54.504(b); *Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470*, OMB 3060-0806 (April 2002) (FCC Form 470). This posting enables prospective service providers to bid on the equipment and services for which the applicant will request universal service support. After the Form 470 has been posted, the applicant must wait at least 28 days before entering into agreements with service providers, must comply with all applicable state and local procurement laws, and must comply with the other competitive bidding requirements established by the Federal Communications Commission (FCC). See 47 C.F.R. §§ 54.504, 54.511; *In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, ¶ 575 (rel. May 8, 1997) (*Universal Service Order*).

FCC rules require applicants to “submit a complete description of the services they seek so that it may be posted for competing service providers to evaluate.” *Universal Service Order*, ¶ 570. The FCC requires “the application to describe the services that the schools and libraries seek to purchase in sufficient detail to enable potential providers to formulate bids.” *Id.* ¶ 575. A description of the Internet access and Internal Connections services being sought must be provided in Items 9 and 10 of the FCC Form 470. The instructions for FCC Form 470 state that these items “must be completed to provide potential bidders with particular information about the services you are seeking.” See *FCC Form 470 Instructions*, April 2002 at 10.¹ The instructions for Item 9(b) state that this box should be checked if the applicant does not have an RFP, and that, if this box is checked, the applicant “must fill in details in the space provided about the specific Internet access services or functions and quantity and/or capacity of service” that is being sought. *Id.* at 12. The Form 470 instructions for Item 10(b) state that this box should be checked if the applicant does not have an RFP, and that, if this box is checked, the applicant “*must* fill in details in the space provided about the specific internal connections services or functions and quantity and/or capacity of service.” *Id.* (emphasis added).

FCC regulations further require that the entity selecting a service provider “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). In regard to these competitive bidding requirements, the FCC nevertheless mandates that “price should be the primary factor in selecting a bid.” *Universal Service Order*, ¶ 481. When permitted pursuant to state and local procurement rules, other relevant factors an applicant may consider include “prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives.” *Id.*

¹ The FCC Form 470 and Instructions were revised in April 2002. The language cited here was not changed when the instructions were revised.

B. Louisiana State Law

Louisiana Revised Statutes (LARS) Title 38 – Public Contracts, Works and Improvements (2004) sets out, among other things, the competitive bidding requirements for public contracts awarded by public entities, and covers contracts for “materials and supplies,” “public works,” and “telecommunications equipment and services.” Section 38:2211(11) defines “public entity” to include a public school board.

1. Materials and Supplies

Section 38:2212.1 provides that all purchases of materials or supplies in excess of \$20,000 must be advertised and awarded to the “lowest responsible bidder”; for purchases of between \$10,000 and \$19,999, the purchaser must obtain at least three telephone or facsimile quotations, must provide written confirmation of the accepted offer, and must record the reasons for rejecting any quotes lower than the accepted quote. *See id.* This provision has been interpreted as applying to, for example, the purchase of vending machines on parish property. *LA Attorney General Opinion No. 00-322 (2000).*² Although the Louisiana Supreme Court has held that a contract for telecommunications services was not for materials and thus not subject to the bidding requirements of Section 38:2212.1, the contract at issue involved leasing rather than purchasing telecommunications equipment from a regulated public utility. *See Stevens v. LaFourche Parish Hospital*, 323 So.2d 794, 796 (1975).

2. Public Works

Section 2211(12) defines “public work” as “the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity.” Public works contracts over \$100,000 must be advertised and awarded in accordance with requirements set forth in Section 2212A.³ The *Stevens* decision, however, raises some question whether a contract to provide telecommunications equipment and services would necessarily be considered a “public work.” For example, the Louisiana Attorney General (AG) has opined, based upon the *Stevens* case, that “public work” “does not include telecommunications services that may be provided in a building or in connection with its use.” *LA Attorney General Opinion No. 84-729 (1984)* citing *Stevens*, 323 So.2d at 796 (1975). On the other hand, as noted, the holding in *Stevens* dates from a time when telecommunications equipment and services were almost exclusively provided by regulated public utilities and where the

²Although the Attorney General (AG) explained that there were no competitive bidding requirements for contracts below the lower statutory threshold (at that time \$7500), the AG, in this opinion, nonetheless recommended obtaining at least three quotations.

³2212A(1)(a) provides:

All public work exceeding the contract limit as defined in this Section, including labor and materials, to be done by a public entity shall be advertised and let by contract to the lowest responsible bidder who had bid according to the contract, plans, and specifications as advertised, and no such public work shall be done except as provided in this Part.

Court in that case considered the contract at issue as being exclusively for services. *See Stevens*, 323 So.2d at 796-97. Thus, *Stevens* arguably would not apply today to large contracts that involve the purchase and installation of telecommunications equipment that also involve the ongoing provision of related services.

3. Services

Contracts for services, including "Professional Services," do not require the public bidding otherwise required by Section 2212. *See Browning-Ferris Inc. v. City of Monroe*, 465 So.2d 882, 884 (La.App. 2d Cir. 1985); *see also LA Attorney General Opinion No. 02-0418* (2002). Moreover, and as noted above, the Louisiana Supreme Court has expressly held that a contract for "telephone services" awarded to a public utility did not require competitive bidding. *See Stevens*, 323 So.2d at 796.

Nevertheless, where a public entity purchases equipment and subsequently contracts for services associated with the use of that equipment, the Louisiana AG has opined that the public bid requirement applies to the provision of the related services:

[A] bid as to a maintenance contract (if one is reasonably foreseen as needed) should be sought at the same time [as the purchase of the equipment to be maintained]; otherwise the public policy behind the public bid could be intentionally or inadvertently flaunted by separately and non-competitively entering into a substantial second contract.

See LA Attorney General Opinion No. 81-465 (1981).

4. Telecommunications Equipment and Related Services

Louisiana law explicitly addresses the advertisement and award of contracts for telecommunications and data processing equipment and related services. *See* LARS §§ 38:2236 (defining telecommunication equipment), 38:2237.⁴ Section 38:2237 provides:

A political subdivision may lease, rent, or purchase telecommunications or data processing systems, including equipment, and related services, through a request for proposals [(RFP)] which shall conform to following requirements . . .

* * * *

Political subdivisions may, at their option, procure telecommunications and data processing equipment, systems, or related services in accordance with the provisions of any other applicable law which governs such acquisitions or purchases by political subdivisions of the state, including but not limited to [LARS] 38:2211 et seq., with respect to awarding of public contracts. However, in the event an invitation for bids is used in lieu of a [RFP], written notice of that fact shall be given to all bidders and such notice shall also state that the [RFP] procedure will not be applicable.

⁴ Added in 1988, this law further calls into question whether the holding in *Stevens* is good law.

Notably, although Section 38:2237 does not require public entities to procure telecommunications equipment and services pursuant to an RFP, they can do so only “in accordance with the provisions of any other applicable law which governs such acquisitions or purchases.” Because it would be absurd to construe the phrase “other applicable law governing such acquisitions and purchases” as meaning no applicable law whatsoever, it is clear that Section 38:2237 contemplates either an RFP or a bid process.

C. Local Law

Local law for each applicant was not reviewed as part of this analysis. There may be local requirements that apply in addition to the state requirements discussed here.

IV. Discussion

Contracts for Internet access and/or Internal Connections may fall within the definition of “public work” to the extent that these contracts include “the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity.” Nevertheless, such contracts clearly fall within the RFP requirements for the purchase of “telecommunications or data processing systems, including equipment, and related services” set forth in Section 38:2237. Insofar as such contracts are also contracts for “materials or supplies,” Section 38:2237 alternatively provides for the application of the competitive bidding requirements set forth in Section 38:2212.1.

Section 38:2212.1 provides, among other things, that all purchases of materials or supplies in excess of \$20,000 must be advertised and awarded to the “lowest responsible bidder” and that purchases of between \$10,000 and \$19,999 must be made by obtaining at least three telephone or facsimile quotations. Nevertheless, because Section 38:2237 contemplates that either RFP or competitive bidding shall apply, in the event a contract fails to meet the \$10,000 threshold for materials and supplies set forth in Section 38:2212.1, the RFP requirement of Section 38:2237 applies.⁵

Finally, insofar as a contract for Internet access includes the provision of services associated with the purchase of related equipment, Louisiana law provides that such services be included or treated as part of the same contract. *See LA Attorney General Opinion No. 81-465* (1981). However, even where a contract is truly and solely for services without the provision of related equipment, because Section 38:2237 explicitly applies to the provision of “telecommunications . . . systems . . . and related services”, the RFP requirement of Section 38:2237 applies.

⁵ Where multiple contracts for one applicant each fall under a Section 38:2212.1 dollar threshold, but where the sum of the contracts exceeds the threshold, if necessary, SLD will make a determination regarding whether the contracts should be construed as a single contract.

V. Conclusion

Louisiana state law requires either an RFP or other competitive bidding process in the procurement of telecommunications and data processing equipment, systems, or related services. Although other competitive bidding procedures may be used as an alternative to an RFP, the decision not to use an RFP process must be provided in writing to potential bidders. For contracts solely for services, but where those services are provided in connection with related non-leased equipment, an RFP or other competitive bidding procedure is clearly required for both the services and equipment together. For contracts solely for services, an RFP is required pursuant to Louisiana law expressly governing the purchase of telecommunications services.

Accordingly, statements by applicants associated with SEND that Louisiana law does not require competitive bidding for the contracts at issue is not supported by Louisiana law.

**Universal Service Administrative Company
Schools and Libraries Division**