

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Consolidated Request for Review of Decisions of the Universal Service Administrator)	CC Docket No. 02-6
)	
Morehouse Parish School District)	FRN Nos. 782233, 819080, 819270, 819319,
)	819485, 819629, 819783, 819884,
and)	820088
)	
Richland Parish School District)	FRN Nos. 817045, 817085, 817658, 817708,
)	817992, 818088
)	

CONSOLIDATED REQUEST FOR REVIEW

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SUMMARY

Morehouse Parish School District (“Morehouse”) and Richland Parish School District (“Richland”) (collectively, the “Schools”) and SEND Technologies, LLC (“SEND”) seek review of two decisions of the Universal Service Administrative Company (“USAC”) that upheld two decisions of the Schools and Libraries Division (“SLD”) that denied the Schools’ requests for funding for Internet access service and internal connections. The SLD and USAC denied each of the Schools’ funding requests for one of two reasons: (1) perceived “similarities” between the Schools’ Form 470 applications and the applications of other E-rate Program applicants “suggest” to USAC improper vendor involvement in the Schools’ competitive bidding process, or (2) failure to comply with the competitive bidding requirements of Title 38 of the Louisiana Revised Statutes (state procurement law), as interpreted by the SLD and USAC.

The factual underpinnings for the “similarities” perceived by USAC and the SLD include similar Form 470 identifiers, similar service descriptions, and minimal mailing assistance from SEND in submitting the Schools’ completed Form 470 certification pages. USAC claims that the mere existence of these similarities on the Form 470s represents a *per se* competitive bidding violation. USAC’s unproved “suggestion” of service provider involvement based upon permissible similarities in their Form 470s, without proof or evidence of actual service provider involvement (after subjecting the Schools to a lengthy selective review process), is not enough to justify denial of the Schools’ funding requests.

The FCC previously acknowledged in the *Ysleta* case that applicants seeking E-rate Program funds may have similar Form 470s without violating FCC or Program competitive bidding requirements. Furthermore, there is a reasonable explanation for each of these similarities, which the Schools did not have the opportunity to discuss before, which demonstrate that SEND was not impermissibly involved in the Schools’ application or competitive bidding

process. All communications between SEND and the Schools were of the type approved under FCC and Program rules, were vendor-neutral, and were only for the purpose of providing general, basic assistance to the Schools. There are no FCC or Program rules, or relevant decisions, that indicate that the alleged similarities upon which USAC and the SLD base their denials represent violations of the competitive bidding rules. Despite the similarities noted by USAC in the Schools' applications, SEND was not improperly involved in the Schools' competitive bidding processes, and the Schools fully complied with all applicable FCC and Program rules.

In addition, Richland did not violate Title 38 of the state procurement laws when it sought to purchase specific internal connections (i.e., maintenance service contracts). The relevant provisions of the Louisiana procurement laws do not apply to the internal connections requested by Richland. Regardless, whether Richland complied with Louisiana's procurement requirements is arguably a matter of state law, within the province of the Louisiana Attorney General ("Louisiana AG"), and not within the province of federal agencies or quasi-federal agencies. Richland has sought the opinion of the Louisiana AG regarding whether it complied with the state's procurement laws. Therefore, the Schools and SEND request that the FCC hold in abeyance its consideration of the Title 38 claims addressed in this Request for Review until the Louisiana AG renders an opinion.

Irrespective of the request to the Louisiana AG, USAC's Title 38 claims raise serious notice and due process concerns. Richland's appeal was denied on different bases than the initial denial of its funding requests. Neither Richland nor SEND had an opportunity to address these new potential, violations and arguments raised by USAC, depriving them due process in this matter.

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Morehouse Parish School District)

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819485, 819629, 819783, 819884,
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and)

Richland Parish School District)

FRN Nos. 817045, 817085, 817658, 817708,
817992, 818088

To: The Commission

CONSOLIDATED REQUEST FOR REVIEW

Morehouse Parish School District (“Morehouse”) and Richland Parish School District (“Richland”) (collectively, the “Schools”), through counsel, and SEND Technologies, LLC (“SEND”), pursuant to Section 54.719(c) of the Commission’s rules,¹ submit this Consolidated Request for Review (“Request for Review”) seeking reversal of two decisions of the Administrator of the Universal Service Administrative Company (“USAC”), issued on June 24, 2004.² Specifically, USAC upheld two decisions of the Schools and Libraries Division (“SLD”) that denied the funding requests of Morehouse and Richland through the Schools and Libraries Universal Service Program (“E-rate Program” or “Program”) for Internet access service and

¹ 47 C.F.R. § 54.719(c).

² Letters from the Universal Service Administrative Company to Kenneth F. Sills, Counsel to the Schools (June 24, 2004) (“*Decisions on Appeal*”), attached hereto as Exhibits A and B. The SLD initially denied the Schools’ funding requests on January 22, 2004. On March 22, 2004, the Schools appealed the SLD’s denials to USAC through their counsel.

internal connections. SEND is the service provider with whom the Schools contracted for Internet access service and internal connections.

I. INTRODUCTION.

The SLD and USAC denied each of the Schools' funding requests for one of two reasons. Richland's requests for internal connections (FRN Nos. 817085, 817658, 817708, 817992, 818088) were denied due to perceived violations of Title 38 of the Louisiana Revised Statutes (state procurement law), as interpreted by the SLD and USAC. Morehouse's requests for Internet access service and internal connections (FRN Nos. 782233, 819080, 819270, 819319, 819485, 819629, 819783, 819884, 820088) were denied due to "similarities" between Morehouse's Form 470 application and the applications of other E-rate Program applicants. Richland's request for Internet access service (FRN No. 817045) also was denied due to alleged "similarities." The SLD and USAC made the presumption, incorrectly, that similarities among the Form 470 applications submitted by Morehouse and Richland (and other schools) "suggest" SEND's involvement in the competitive bidding process in a manner that violates the Commission's and the Program's competitive bidding rules. As explained below, the factual underpinnings of the "similarities" perceived by USAC and the SLD demonstrate that SEND was not impermissibly involved in the Schools' competitive bidding process in violation of FCC or Program rules.

In addition, Richland did not violate Title 38 of the state procurement laws when it sought to purchase the specific internal connections it requested. Regardless, whether Richland complied with Louisiana's procurement requirements is arguably a matter of state law, within the province of the Louisiana Attorney General ("Louisiana AG"), and not within the province of federal agencies or quasi-federal agencies. Both USAC and FCC staff have acknowledged in conversations with SEND's outside counsel in this matter that the Louisiana AG is the proper

arbiter of whether Richland complied with Louisiana procurement law with respect to its E-rate funding requests for internal connections.³ USAC and FCC staff both agreed that Richland should seek the advice of the Louisiana AG in this matter.⁴ A copy of the appeal filed with the Louisiana AG is attached hereto as Exhibit C. The Schools and SEND request that the FCC hold in abeyance its consideration of the Title 38 claims addressed in this Request for Review until the Louisiana AG renders an opinion.⁵

II. DESPITE THE “SUGGESTION” OF COMPETITIVE BIDDING VIOLATIONS DUE TO “SIMILARITIES” IN THE SCHOOLS’ FORM 470 APPLICATIONS, THERE WERE NO ACTUAL COMPETITIVE BIDDING VIOLATIONS.

The SLD initially denied Morehouse’s funding requests for Internet access services and internal connections and Richland’s funding requests for internal connections for the following reason:

Similarities in Form 470s and in the preparation and submission of Forms 470s certification pages amongst applicants using this service provider *suggest* service provider involvement in the competitive bidding process. (*emphasis added*)

³ Jennifer Richter of Morrison & Foerster, LLP, counsel to SEND, has discussed the utility of seeking the Louisiana AG’s advice, and holding the Schools’ appeals in abeyance, with Cynthia Schultz, Director of Service Provider Support at USAC, and Narda Jones, Acting Division Chief of the Telecommunications Access Policy Division, Wireline Competition Bureau.

⁴ *Id.*

⁵ The Title 38 claims that are addressed in this Request for Review are substantially identical to two other requests for review that were filed for DeSoto Parish School Board and Tensas Parish School Board on July 27, 2004 and Bienville Parish School District and Madison Parish School District on August 17, 2004. *See* Consolidated Request for Review of Decisions of the Universal Service Administrator, DeSoto Parish School Board, Tensas Parish School Board, CC Docket No. 02-6 (filed July 27, 2004); Consolidated Request for Review of Decisions of the Universal Service Administrator Regarding the Denials of Bienville Parish School District’s Funding Requests and Madison Parish School District’s Funding Requests, CC Docket No. 02-6 (filed August 17, 2004). The undersigned counsel also represents the DeSoto, Tensas, Bienville, and Madison Parish School Districts.

The SLD's generic explanation provided no explanation of the facts that led to the SLD's conclusion. Nor did the SLD cite to any actual *proof* of impermissible service provider involvement in preparation of the applications or execution of the competitive bidding process, despite the SLD having subjected the Schools to a selective review process during which the Schools provided the SLD with detailed information about their application and competitive bidding process. Given that the SLD provided no information concerning these alleged similarities, the Schools were left only to surmise the basis for the SLD's claims when they appealed the SLD's decision to USAC.⁶ USAC's *Decision on Appeal*, which upheld the funding denials by the SLD, provided slightly more information regarding the alleged similarities:

[Morehouse/ Richland] Parish School Board's Form 470 identifier, Form 470 service descriptions, and Form 470 certification page submission by Mark Stevenson, President of SEND Technologies, LLC, displayed striking similarities to those of other applicants that selected SEND Technologies, LLC as their vendor. The similarities in the Forms 470 were only noted on applications that had SEND Technologies, LLC as a vendor, which indicates that SEND Technologies, LLC was improperly involved in the competitive bidding and vendor selection processes.⁷

⁶ Counsel for SEND asked the SLD to clarify its reasoning for denying the Schools' funding requests so that the Schools could respond appropriately to the SLD's allegations. *See* letter from Jennifer L. Richter, counsel to SEND, to Cynthia Schultz, Director of Service Provider Support, Universal Service Administrative Company (Feb. 10, 2004). Although the FCC has recognized that an applicant's appeal of a denial of a funding request, and consideration of that appeal, is impeded when the record developed by the SLD "does not reveal the facts and reasoning on which [the] SLD's determination is based with clarity," the SLD did not provide any clarifying information. *See* email from Cynthia Schultz to Jennifer Kostyu, counsel to SEND (Mar. 4, 2004). The correspondence between counsel and Ms. Schultz is attached hereto as Exhibit D.

⁷ *Decisions on Appeal* at 2. USAC's allegation that similarities exist only on applications that list SEND as a vendor is inaccurate. At least one other E-rate applicant, West Carroll Parish School District, used a similar Form 470 to that of the Schools, but did not choose SEND as its vendor.

These similarities, which SEND and the Schools' have not had an opportunity to explain before now, are not indicative of a *per se* violation of the FCC's and the Program's competitive bidding rules. Any communications between the Schools and SEND were of the type approved by Program rules, were vendor-neutral, and were only for the purpose of providing general, basic assistance to the Schools. There are no FCC or Program rules, or relevant decisions, that indicate that the alleged similarities upon which USAC and the SLD base their denials reflect violations of the competitive bidding rules. Despite the similarities noted among the applications, SEND was not improperly involved in the Schools' competitive bidding and vendor selection processes, and the Schools fully complied with all applicable competitive bidding rules.

A. SEND's Actions Did Not Contravene Applicable Guidelines for Permissible Service Provider Involvement.

The SLD describes on its website what role a service provider can take without violating the FCC's and the SLD's competitive bidding rules.⁸ For example, the SLD explains that service providers can communicate with an applicant so long as such communication is neutral and does not taint the competitive bidding process. A service provider can provide basic information regarding the E-rate Program to an applicant, and can assist with an applicant's RFPs so long as the assistance is neutral. A service provider also can provide an applicant with technical assistance on the development of a technology plan, including information regarding products and services that are being furnished to the applicant.

The SLD explains on its website that a service provider *cannot*: (1) sign a Form 470 or 471 for an applicant; (2) be listed as a contact person on a Form 470; (3) act as a technology plan approver for an applicant; (4) prepare RFPs for an applicant; (5) provide or waive funding for an applicant's undiscounted portion of equipment and services obtained through the E-rate

⁸ USAC, "Service Provider Manual, Chapter 5 – Service Provider Role in Assisting Customers," available at www.sl.universalservice.org/vendor/manual/chapter5.asp.

Program; (6) coerce or pressure an applicant to use a specific service provider; and (7) interfere with or obstruct an applicant's competitive bidding process.⁹ USAC and the SLD have not proven that SEND engaged in any of the foregoing prohibited conduct.

Simply because the Form 470s submitted by the Schools may bear some similarity, this does not justify a finding that a service provider was improperly involved in the Schools' competitive bidding process. The FCC has previously acknowledged that applicants seeking E-rate Program funds may have similar technology plans and Form 470s without violating the E-rate Program's competitive bidding requirements.¹⁰ As the SLD's own Program rules reveal, similarity in applications involving the same service provider could be due to *permissible* service provider communications with the Schools (*i.e.*, a service provider can provide basic information regarding the E-rate Program, and can provide an applicant with technical assistance on the development of a technology plan, including information regarding products and services that are being furnished to the applicant).

In the *Ysleta* case the E-rate Program applicants had submitted "carbon copy" Form 470s that listed every service or product eligible for discounts. Although the FCC concluded that such comprehensive lists did not comport with the competitive bidding requirements under the E-rate Program,¹¹ it noted that applicants may validly have the same or similar filings.¹² USAC states

⁹ *Id.*

¹⁰ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas*, CC Docket Nos. 96-45, 97-21, FCC No. 03-313 (Dec. 8, 2003) ("*Ysleta*"). In *Ysleta* the Commission addressed multiple requests to review the decisions of the SLD that were filed by E-rate applicants, but combined the requests as they had almost identical fact patterns.

¹¹ *Id.* at ¶ 26-37.

¹² *Id.* at ¶ 30.

in its *Decisions on Appeal*, however, that *Ysleta* is inapposite to the instant case because *Ysleta* concerned:

“encyclopedia Form 470s” that contain a list of virtually all eligible services. The FCC specifically found that where the Administrator finds carbon copy technology plans and Form 470s across a series of applications, especially where the same service provider is involved, it is appropriate for the Administrator to review these applications with more scrutiny to ensure that there has been no improper service provider involvement in the competitive bidding process. The SLD has not exceeded its authority in this instance. Like the *Ysleta* Order, the *Winston-Salem* Order expressed concern related to the use of overly broad Form 470s. However, nowhere in either order did the FCC determine that “similarities” in Form 470 applications did not provide a basis for denial due to improper vendor involvement.¹³

Despite USAC’s contention, the Schools and SEND do not object to USAC’s authority to scrutinize certain applications or deny applications if there is improper vendor involvement.

Rather the Schools and SEND disagree with USAC’s apparent perception that the mere existence of similarities across Form 470 applications *per se* equates to improper service provider involvement and a competitive bidding violation. There was no improper service provider involvement in the present case. Both SEND and the Schools complied with all known rules and guidance regarding competitive bidding for the services they sought.

USAC does not acknowledge why *Ysleta* is significant in the instant case. The FCC in *Ysleta* explicitly recognized that there are valid reasons why similarities may exist across Form 470 applications. By assuming the opposite, USAC creates a new policy -- i.e., that perceived similarities across Form 470s, even without actual proof of impermissible service provider involvement, indicate *per se* violations of the competitive bidding rules and justify denial of E-rate funding requests. USAC is not empowered to make this policy, interpret any unclear rule

¹³ *Decisions on Appeal* at 2.

promulgated by the Commission, or create the equivalent of new Program guidelines.¹⁴ In addition, such a policy leads to absurd and unintended results when funding requests are denied based upon nothing more than similarities among applications. Such similarities are not tantamount to impermissible service provider involvement or violations of the competitive bidding rules. USAC and the SLD subjected the Schools in this case to a selective review process and received information from the Schools about how they completed their applications and undertook competitive bidding for the services they sought. USAC and the SLD did not learn, nor have they alleged, any specific facts that indicate that there was, *in fact*, impermissible service provider involvement. They have only alleged an unproved inference or “suggestion” of such involvement based upon perceived similarities among applications. An inference or a “suggestion” of service provider involvement is not enough justification to deny applications for needed federal funds for Morehouse and Richland.

B. The Perceived “Similarities” Across The Schools’ Form 470 Applications Do Not Signify That SEND Was Improperly Involved In The Schools’ Competitive Bidding Process.

As noted above, the application “similarities” cited by USAC in its *Decisions on Appeal* include the following: “[Morehouse/ Richland] Parish School Board’s Form 470 identifier, Form 470 service descriptions, and Form 470 certification page submission by Mark Stevenson, President of SEND Technologies, LLC. . . .”¹⁵ Each of these alleged similarities can be easily explained, and the factual underpinnings do not indicate that there was impermissible service provider involvement that tainted the competitive bidding process.

¹⁴ See 47 C.F.R. § 54.702(c); *Changes to the Board of Directors of the Nat’l Exchange Carrier Ass’n, Inc.*, 13 FCC Rcd 25058, 25066-67 (1998).

¹⁵ *Decisions on Appeal* at 2.

Form 470 Identifiers. The Schools' use of certain Form 470 identifiers (i.e., the school district number assigned to the Schools by the state) is a decision the Schools made, and is not connected to SEND. The Form 470 identifier is a label placed on the Form 470 that is chosen solely by the applicant to help the applicant identify the Form 470 at some later date. The Schools (and other school districts in Louisiana) have used their school district number as their Form 470 identifier for multiple years. For example, Morehouse's school district number and Form 470 identifier are "034" and Richland's are "042." Several years ago, the State conducted seminars (and still does so from time to time) regarding the benefits of participating in the E-rate Program and how to apply for funding under Program rules, including completing Form 470s.¹⁶ Some of the school districts in Louisiana eventually established a pattern for common elements in the Form 470, including the Form 470 identifier. To maintain continuity in their applications from year to year, the Schools continue to use the same identifier. The school district numbers / application identifiers assigned to the Schools by the state have no connection to SEND, and could not be interpreted as representing impermissible service provider involvement.

Service Descriptions. Any perceived similarities in service descriptions on the Schools' Form 470s also fail to demonstrate that SEND was impermissibly involved in their competitive bidding processes. SLD Program rules state that service providers can communicate with applicants and provide basic information regarding the E-rate Program, including information

¹⁶ USAC also holds training sessions and workshops for Program participants. In the early years of the E-rate Program, vendors (including BellSouth, CenturyTel and SEND) sometimes conducted training sessions in a neutral, advisory role, to provide basic information about the E-rate Program and the application process to Program participants. Such general, basic assistance is explicitly allowed under Commission and Program rules. See USAC, "Service Provider Manual, Chapter 5 - Service Provider Role in Assisting Customers, available at <http://www.sl.universalservice.org/vendor/manual/chapter5.asp>.

regarding products and services.¹⁷ Morehouse, Richland and other Louisiana schools participated in training sessions and workshops held by USAC and various vendors, including SEND, which resulted in the development of a template for service descriptions. Accordingly, some of the service descriptions submitted by the Schools are “similar,” but such similarities are allowed and acknowledged by the FCC. It is critical to note that while the service descriptions might be similar, each School requested different services pursuant to their Form 470 applications in order to respond to their unique needs.¹⁸ For the foregoing reasons, the service descriptions contained on the Form 470s are similar, but such similarity is specifically allowed and acknowledged by the FCC and by the Program rules.

The FCC stated in *Ysleta* that “while we do expect some variation among individual applicants, we stress that we are not prohibiting a state or school district from seeking uniformity in technological development, *i.e.*, through the use of statewide technology plans or requiring applicants to seek the same level or types of services.”¹⁹ As explained above, any similarities

¹⁷ USAC, “Service Provider Manual, Chapter 5 – Service Provider Role in Assisting Customers,” available at www.sl.universalservice.org/vendor/manual/chapter5.asp.

¹⁸ Copies of the Schools’ Form 470 applications for the 2002-2003 funding year are attached as Exhibit E. USAC fails to provide any explanation as to how the service descriptions are similar, but, as shown in the Schools’ Form 470s, each Form 470 was specifically tailored to the particular needs of each School. First, the amount of services ordered from SEND clearly varies by School. Second, the Schools also were paying different amounts for the ordered services. Third, the description of services and the quantity requested differed in each Form 470 depending on the individual needs of each School. (For example, Morehouse sought funding for Internet access and internal connections for 17 separate school sites while Richland sought funding for 14 sites. The Schools were seeking different types and amounts of switches, servers and equipment. The value of the services and products the Schools were receiving from SEND also differed -- Morehouse was purchasing Internet access service for \$104,400 and internal connections for \$6000, while Richland was purchasing Internet access service for \$72,180 and internal connections for \$6025.) USAC also failed to specifically identify what other E-rate applicants (other than Morehouse and Richland) may have “similar” Form 470s, and this lack of important information makes it difficult for the Schools and SEND to provide the Commission with additional facts that may be relevant to the Commission’s consideration of this case.

¹⁹ *Id.* at ¶ 30, n.90.

among the Schools' Form 470s and the preparation thereof were due to decisions made by the Schools, or permissible discussions and collaborations *between the Schools*, and permissible discussions between the Schools and SEND. Such communications did not violate any SLD Program rules or the rules and regulations of the FCC. Each School prepared its own applications and determined its own need for services. To save time and limited resources, they created example filings that each School could use to ensure that they complied with the E-Rate Program's application and competitive bidding rules. Any communications between the Schools and SEND were vendor-neutral, as required by FCC and Program rules.

FCC and E-rate Program rules do not prohibit applicants from corresponding with each other for the purpose of obtaining Program support. In fact, such a prohibition is counter to the policies of the E-rate Program. Such collaboration allows applicants to save time and limited resources and obtain services more quickly and efficiently to the benefit of students and faculty. Since applicants do not submit bids, there would be no reason why their collaboration or sharing of information would violate the rules or the spirit of the E-rate Program. In addition, the SLD regularly holds workshops and meetings for applicants, providing them with information and hand-out materials about the application process. A certain amount of collaboration and coordination among applicants is expected and encouraged.

Any communications between SEND and the Schools regarding the funding requests that are the subject of this Request for Review was to provide general, basic assistance to the Schools regarding the E-rate Program and technical information the Schools needed to develop their technology plans. Such communications are clearly allowed under FCC and SLD rules. SEND was very conscientious of any communications that could be misinterpreted as impermissible. At the time the Schools were developing their technology plans and seeking competitive bids for internal connections and access services, SEND was undergoing an audit by the State of

Louisiana Legislative Auditor. SEND and the Schools did not violate program rules and would not have violated program rules in any event, but the presence of the Legislative Auditor meant that special precautions were taken to ensure there would not be even the appearance of impropriety in communications between SEND and the Schools.

Mailing. The final similarity among the applications noted by USAC is: “Form 470 certification page submission by Mark Stevenson.”²⁰ Mark Stevenson is the president of SEND. USAC’s characterization is somewhat misleading. Mark Stevenson did not “submit” Form 470 certification pages for the Schools. The Schools prepared their own applications online, and signed and submitted their own certification pages for the SLD’s consideration. Because timely delivery of regular mail is not guaranteed, and loss of a Form 470 certification would preclude receiving any E-rate support, overnight delivery is preferred so that mailings can be tracked in the event something goes awry. In order to use an overnight delivery service, the Schools were required to submit and receive approval for a purchase order, even though the cost of an overnight package is *de minimis*. Given SEND’s close proximity to a FedEx location, its relative ease in using the service, and the *de minimis* cost of overnight delivery (\$16.00), SEND offered to overnight the Form 470s certifications that were completed by the Schools to the SLD. Neither the Schools nor SEND believe that the simple act of mailing the certifications could be construed as inappropriate involvement by a service provider and a competitive bidding violation, especially in light of the fact of the minimal cost of overnight delivery and the fact that neither the FCC nor the SLD stated that doing so could be considered improper involvement by a vendor. SEND’s act of sending overnight the completed Form 470 certification pages, did not impact the competitive bidding processes of Morehouse, Richland or other schools. Each of the Schools sought competitive bids by posting their Form 470s on the SLD website as required by

²⁰ *Decisions on Appeal* at 2.

FCC and Program rules, and based upon the bids various vendors submitted, some schools chose SEND, some chose SEND and other providers for different services, and some chose providers other than SEND.²¹ Providing minimal mailing assistance clearly did not, in practical effect, taint the competitive bidding process or the independence of the schools in choosing service providers, nor did it violate any of the FCC's or the Program's competitive bidding rules.

III. RICHLAND WAS NOT REQUIRED TO COMPLY WITH TITLE 38 OF THE LOUISIANA PROCUREMENT LAWS BUT, IN ANY EVENT, THE LOUISIANA ATTORNEY GENERAL IS THE PROPER ARBITER OF THIS ISSUE.

The SLD initially denied Richland's funding requests for internal connections stating that, in the SLD's view, Richland had not complied with Sections 2212 and 2212.1 of Title 38 of the Louisiana Revised Statutes when it sought bids for internal connections.²² Richland appealed the SLD's denials to USAC through the undersigned counsel, who is also counsel to the Louisiana School Board Association and is familiar with Louisiana state procurement laws. Richland explained in its appeal that Sections 2212 and 2212.1 did not apply to the internal connections that it sought through the E-rate Program. Nevertheless, USAC denied Richland's appeal and upheld the funding denial, but in doing so raised new charges that were not alleged in the SLD's initial denial of the funding requests (*i.e.*, perceived violation of Sections 2212 or

²¹ For example, even though Morehouse's Form 470 application may have contained "similar" service descriptions and Form 470 identifiers, and the certification page for the completed application was mailed by SEND, it did not impact Morehouse's competitive bidding process. Morehouse conducted a comprehensive RFP process for the services and products it was seeking through the E-rate Program, and decided to contract with SEND for Internet access service and internal connections only after it compared SEND's RFP response to that of another vendor. *See* Morehouse's evaluation criteria and RFP analysis, attached hereto as Exhibit F. In addition, Morehouse, Claiborne Parish School District, Lincoln Parish School District, Bienville School District, and other schools that may have used a similar "template" Form 470s and/or for which SEND overnighted their certification pages rejected SEND for various services and products through their competitive bidding process. Thus, it is evident that SEND was not impermissibly involved in the Schools' competitive bidding process.

²² LA RS §§ 38:2212 and 38:2212.1.

2212.1). Rather, when USAC denied Richland’s appeal, it admitted that the SLD’s interpretation of Sections 2212 and 2212.1 may have been wrong and that such statutes only “may” have required competitive bidding with respect to Richland’s funding requests. Instead, USAC claimed for the first time in the appeal denials that Richland’s E-rate funding requests should have been denied because it may have violated Section 2237 of Title 38 of the Louisiana Revised Statutes.²³ According to the appeal denial, USAC interpreted Louisiana law to mean that any E-rate funding request that fails to meet the dollar thresholds established for Sections 2212 and 2212.1 is nevertheless “clearly” subject to the bidding requirements of Section 2237.²⁴ Richland disagrees with this interpretation, but never had an opportunity to respond to the allegation that it had violated Section 2237.

It is counsel’s understanding, based upon Louisiana state law and interpretations thereof, that Sections 2212 (public works), 2212.1 (materials and supplies) and 2237 (telephone and data processing equipment) do not apply to the specific internal connections Richland sought through the E-rate Program. Specifically, Richland sought funding for wire-plan maintenance for several sites and onsite technical support, the cost of which was \$6000 for each site. Neither Section 2212 nor Section 2212.1 applies to maintenance services because these statutes apply to public works or the purchase of materials or supplies. Maintenance services are service contracts and do not fall under either category. The maintenance services are also not subject to the requirements of Section 2237 of the Louisiana Revised Statutes which relates to the purchase of “telecommunications” or “data processing” systems, equipment or services.

²³ *Id.* § 38:2237.

²⁴ *See Further Explanation of the Administrator’s Decision on Appeal at pp.5-6, attached to Richland’s Decision on Appeal.*

As stated earlier, whether Richland complied with Louisiana state procurement requirements with respect to its E-rate funding requests is a matter of state law to be decided by the Louisiana AG. The Schools and SEND therefore request that the FCC refrain from processing the Title 38 claims that are raised in this Request for Review until it receives the Louisiana AG's decision in this matter.

USAC's Title 38 decision in the Richland case also raises serious notice and due process concerns, irrespective of the Louisiana AG opinion the school is seeking. First, as discussed above, Richland's appeal was denied on a different basis than the initial denial of its funding requests. Neither Richland nor SEND had an opportunity to address the potential, alleged violation of Section 2237. Violation of this statute was raised for the first time in USAC's denials of Richland's appeal, thus depriving it and SEND due process in this matter.

Similarly, the SLD's initial denials did not challenge the validity of Richland's funding requests on the basis of failing to meet the Commission's competitive bidding requirements. Rather, the initial denials were based solely on perceived violations of Louisiana procurement law as discussed above. Richland's appeal addressed the specific state laws the SLD alleged were violated. Richland's appeal to USAC understandably did not address (nor was it required to do so under Program or Commission rules) whether it complied with the Commission's competitive bidding requirements because there was no known issue. Yet USAC, in denying Richland's appeal, stated "[y]our appeal did not indicate that the FCC's competitive bidding requirements were met and is therefore denied."²⁵ Again, USAC raised new charges against Richland without providing it with an opportunity to respond to USAC's allegations. Furthermore, USAC's denials are devoid of any explanation as to how Richland might have violated the Commission's competitive bidding rules.

²⁵ See Richland *Decision on Appeal* at 3.

Contrary to USAC's claims, Richland fully complied with Program and Commission competitive bidding requirements. Specifically, it submitted a Form 470 application to the SLD and sought competitive bids for eligible products and services listed in its application. The Form 470 was posted to the SLD's website for a minimum of 28 days for the purpose of seeking competitive bids. After the 28-day period, Richland entered into contracts with eligible service providers who responded to the Form 470 application with competitive bids.

IV. CONCLUSION.

In view of the foregoing, the Schools and SEND request that the FCC overrule USAC's decisions that denied the Schools' funding requests. The Schools and SEND also request that the Commission hold in abeyance the processing of the Title 38 claims presented in this Request for Review pending receipt of the Louisiana AG's decision. The record in this case will be supplemented regarding the Title 38 and due process issues noted above once the Louisiana AG has rendered an opinion in this case.

Respectfully submitted,

/s/ Mark Stevenson
Mark Stevenson
SEND Technologies, LLC
2904 Evangeline Street
Monroe, LA 71201
(318) 651-8282

/s/ Kenneth F. Sills
Kenneth F. Sills
Hammonds & Sills
Quad One, Suite C
1111 South Foster Drive
Baton Rouge, LA 70806
(225) 923-3462

Counsel to the Morehouse and Richland Parish
School Districts

August 23, 2004

CERTIFICATE OF SERVICE

I, Theresa Rollins, certify on this 17th day of August, 2004, a copy of the foregoing Request for Review has been served via electronic mail (*) or first class mail, postage pre-paid, to the following:

Narda Jones*
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Narda.Jones@fcc.gov

Cynthia Schultz*
Director - Service Provider Support
Universal Service Administrative Company
2000 L Street, N.W.
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Washington, DC 20036
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Universal Service Administrative Company
Letter of Appeal
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80 S. Jefferson Road
Whippany, NJ 07981

Jennifer Richter*
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Jrichter@mofocom

Counsel to Send Technologies, LLC

/s/ Theresa Rollins

Exhibit A

Administrator's Decision on Appeal

Morehouse 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
Hammond & Sills
1111 South Foster Drive
Baton Rouge, LA 70896

Re: Morehouse Parish School District

Re: Billed Entity Number: 139312
471 Application Number: 301743
Funding Request Number(s): 782233, 819080, 819270, 819319, 819485,
819629, 819783, 819884, 820088
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 Year 2002 Funding Commitment Decision 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: 782233, 819080, 819270, 819319, 819485, 819629,
819783, 819884, 820088

Decision on Appeal: Denied in full

Explanation:

- On Appeal, you assert that SLD erred and exceeded its authority by denying Morehouse Parish School District's (MPSD) funding requests due to similarities in Form 470s. You state that SLD's denial explanation was generic and did not provide any actual proof of a competitive bidding violation. You contend that SEND Technologies, LLC did not engage in any prohibited actions with respect to the applications; in support of your assertion you have included a sworn declaration from Mark Stevenson. You cite the FCC's Ysleta Order and claim that this ruling determined that similar Form 470s are not improper; you also reference the SLD web site on the service provider role in assisting applicants. You affirm that "simply because the Form 470s submitted by a number of Schools in Louisiana bear some

similarities, this does not justify a finding that a service provider was involved in the Schools' competitive bidding process." You request that the Administrator reverse the denial and approve the Funding Year 2002 requests.

- In your Appeal Letter, you note that the Ysleta Order (footnote 1) stated that although the FCC concluded that "carbon copy" Form 470s did not comport with the competitive bidding requirements under the E-rate Program, it noted that applicants may validly have the same or similar filings. Although this statement is true, it is taken out of context. In the Ysleta Order¹, the Commission was concerned with various bidding practices, such as "encyclopedia Form 470s" that contain a list of virtually all eligible services. The FCC specifically found that where the Administrator finds carbon copy Technology plans and Form 470s across a series of applications, especially when the same service provider is involved, it is appropriate for the Administrator to review these applications with more scrutiny to ensure that there has been no improper service provider involvement in the competitive bidding process.² Thus, SLD has not exceeded its authority in this instance. Like the Ysleta Order, the Winston-Salem Order expressed concern related to the use of overly broad Form 470s.³ However, nowhere in either order did the FCC determine that "similarities" in Form 470 applications did not provide a basis for denial due to improper vendor involvement, as you state in your appeal letter.
- Upon a thorough review of the appeal, it was determined that this request for discounts was properly denied. Morehouse Parish School Board's Form 470 identifier, Form 470 service descriptions, and Form 470 certification page submission by Mark Stevenson, President of SEND Technologies, L.L.C., displayed striking similarities to those of other applicants that selected SEND Technologies, L.L.C. as their vendor. The similarities in the Forms 470 were only noted on applications that had SEND Technologies, L.L.C. as a vendor, which indicates that SEND Technologies, L.L.C. was improperly involved in the competitive bidding and vendor selection processes. In your appeal, you have not shown that SLD's determination was incorrect or that any such involvement was vendor neutral. Consequently, SLD denies your appeal.
- FCC rules require applicants to submit an FCC Form 470 to USAC for posting on its website. 47 C.F.R. § 54.504(b). The FCC requires applicants to "submit a complete description of the services they seek so that it may be posted for competing service providers to evaluate." Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, FCC 97-157, ¶ 570 (rel. May 8, 1997) (*Universal*

¹ *Request for Review by Ysleta Independent School District, et. al., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket Nos. 96-45 and 97-21, Order*, FCC 03-313, 18 FCC Rcd. 26,407 (rel. Dec. 8, 2003).

² *Id.* at ¶30.

³ *Request for Review by Winston-Salem/Forsyth County School District and International Business Machines, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket Nos. 96-45 and 97-21, Order*, FCC 03-314, 18 FCC Rcd. 26,457, ¶¶ 13-14 (rel. Dec. 8, 2003).

Service Order). 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. SLD’s Service Provider Manual indicates that service providers may provide neutral assistance to applicants as they determine what goods and services to seek. Service Provider Manual, Chapter 5, <http://www.sl.universal-service.org/vendor/manual/chapter5.asp>. Once the applicant enters into an agreement(s) with the service provider(s), the applicant submits an FCC Form 471 to USAC. 47 C.F.R. § 54.504(c). The FCC has stated that applicants cannot abdicate control over the application process to a service provider that is associated with the FCC Form 471 for that applicant. *Request for Review by Bethlehem Temple Christian School, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 97-21, DA 01-852 ¶ 6 (rel. Apr. 6, 2001).

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 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.

Schools and Libraries Division
Universal Service Administrative Company

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

cc: Morehouse Parish School District
714 South Washington Street
Bastrop, LA 71220

Exhibit B

Administrator's Decision on Appeal

Richland 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: Richland Parish School District

Re: Billed Entity Number: 139321
471 Application Number: 291953
Funding Request Number(s): 817045, 817085, 817658, 817708, 817992,
818088
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: 817045
Decision on Appeal: **Denied in full**
Explanation:

- On Appeal, you assert that SLD erred and exceeded its authority by denying your funding requests due to similarities in Form 470s. You state that SLD's denial explanation was generic and did not provide any actual proof of a competitive bidding violation. You contend that SEND Technologies, LLC did not engage in any prohibited actions with respect to the applications; in support of your assertion you have included a sworn declaration from Mark Stevenson and affidavits from the various schools. You cite the FCC's Ysleta Order and claim that this ruling determined that similar Form 470s are not improper; you also reference the SLD web site on the service provider role in assisting applicants. You affirm that "simply because the Form 470s submitted by a number of Schools in Louisiana bear some similarities, this does not justify a finding that a service provider was involved in the Schools' competitive bidding process." You request that the Administrator reverse the denial and approve the Funding Year 2002 requests.

- In your Appeal Letter, you note that the Ysleta Order (footnote 1) stated that although the FCC concluded that “carbon copy” Form 470s did not comport with the competitive bidding requirements under the E-rate Program, it noted that applicants may validly have the same or similar filings. Although this statement is true, it is taken out of context. In the Ysleta Order¹, the Commission was concerned with various bidding practices, such as “encyclopedia Form 470s” that contain a list of virtually all eligible services. The FCC specifically found that where the Administrator finds carbon copy Technology plans and Form 470s across a series of applications, especially when the same service provider is involved, it is appropriate for the Administrator to review these applications with more scrutiny to ensure that there has been no improper service provider involvement in the competitive bidding process.² Thus, SLD has not exceeded its authority in this instance. Like the Ysleta Order, the Winston-Salem Order expressed concern related to the use of overly broad Form 470s.³ However, nowhere in either order did the FCC determine that “similarities” in Form 470 applications did not provide a basis for denial due to improper vendor involvement, as you state in your appeal letter.
- Upon a thorough review of the appeal, it was determined that this request for discounts was properly denied. Richland Parish School Board’s Form 470 identifier, Form 470 service descriptions, and Form 470 certification page submission by Mark Stevenson, President of SEND Technologies, L.L.C., displayed striking similarities to those of other applicants that selected SEND Technologies, L.L.C. as their vendor. The similarities in the Forms 470 were only noted on applications that had SEND Technologies, L.L.C. as a vendor, which indicates that SEND Technologies, L.L.C. was improperly involved in the competitive bidding and vendor selection processes. In your appeal, you have not shown that SLD’s determination was incorrect or that any such involvement was vendor neutral. Consequently, SLD denies your appeal.

Funding Request Number: 817085, 817658, 817708, 817992, 818088
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

¹ *Request for Review by Ysleta Independent School District, et. al., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket Nos. 96-45 and 97-21, Order, FCC 03-313, 18 FCC Rcd. 26,407 (rel. Dec. 8, 2003).*

² *Id.* at ¶30.

³ *Request for Review by Winston-Salem/Forsyth County School District and International Business Machines, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket Nos. 96-45 and 97-21, Order, FCC 03-314, 18 FCC Rcd. 26,457, ¶¶ 13-14 (rel. Dec. 8, 2003).*

various entities other than Richland Parish School Board (Richland). Your opinion is that the statute does not apply in this case because Richland 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 Richland 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 Richland 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, Richland 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

Regena Green
Richland Parish School District
411 Foster Street
Rayville, LA 71269



Universal Service Administrative Company
Schools & Libraries Division

Further Explanation of the Administrator's Decision on Appeal

June 24, 2004

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

FRNs: 817085, 817658, 817708, 817992, 818088

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 10.⁴ 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.*

⁴ 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).*⁵ 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.⁶ 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

⁵ Although 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.

⁶ 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), 38:2237.⁷ 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.

⁷ 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.⁸

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.

⁸ 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**