

MEMORANDUM IN SUPPORT OF REVIEW

Comes now, ASOCIACIÓN DE EDUCACIÓN PRIVADA DE PUERTO RICO, INC. ("AEP") on its own behalf, and on behalf of the above -referenced AEP members ("Applicants") and herein support their Request for Review, seeking reversal of the denial by the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("Administrator") of the requests for funding filed by Applicants. As explained below, the SLD's denial of funding was in error as a matter of fact and law in that it is inconsistent with FCC rules and precedent and SLD guidelines.

I.

INTRODUCTORY REMARKS

SCOPE OF THE HEREIN INTERVENTION OF ASOCIACIÓN DE EDUCACIÓN PRIVADA DE PUERTO RICO, INC.

The appearing, ASOCIACIÓN DE EDUCACIÓN PRIVADA DE PUERTO RICO, INC.(AEP), is a non profit private association that represents the interest of private, primary, secondary and post secondary members schools in the Commonwealth of Puerto Rico; and although the entity as such is no recipient of any federal funds, is herein acting exclusively as a coordinator entity for the enhancement of the participation of eligible private schools and its student population in the herein pertaining federal program.

II.

BACKGROUND

On October 17, 2002, AEP filed a Form 470 application describing the technological needs of list members, including Applicants, for Funding Year 2003 (7/1/2003 to 6/30/2004). Form 470 is attached as Exhibit A. AEP filed the Form 470 because it was the entity that would negotiate with prospective service providers on behalf of its members. Form 470 was posted on the SLD's website on December 2, 2002, establishing an allowable contract date of December

30, 2002. In response to the Form 470, AEP received bids from three potential service providers (Centennial Broadband, Netwave Equipment Corp. and Nevesem, Inc.) for the provision of Internet access and internal connections.

AEP's Board of Directors created an Ad Hoc Committee and an External Committee to evaluate proposals and select a service provider for Funding Year 2003. The Ad-Hoc Committee was composed of AEP -affiliated members, while the External Committee was composed of professionals from various educational institutions in Puerto Rico none of whom were employed by or affiliated with AEP or its members. The purpose of having the External Committee was to guarantee an independent and objective review of all proposals.

On January 2, 2003, these two committees held a meeting to: (i) discuss and identify the criteria that would be used to evaluate the proposals; (ii) evaluate the proposals, and (iii) select a service provider. At that meeting, the committee members jointly agreed upon the criteria to consider and the number of points to be assigned to each criteria. The first criteria to consider was price, which was assigned a total of 15 points.² The undersigned, as Chair of the Ad Hoc Committee, then instructed each committee to meet in separate rooms and evaluate the proposals using the agreed-upon criteria. I specifically instructed each committee to consider price as the primary factor in the evaluation process. After careful consideration of each factor, the Ad Hoc Committee assigned a total of 90 points to Nevesem, 70 points to Centennial and 35 points to Netwave (Exhibit B). The External Committee, in a separate meeting, assigned 90 points to Nevesem, 60 to Centennial and 10 to Netwave (Exhibit C). The two committee then resumed their joint meeting to discuss the evaluations of the proposals. Since I had instructed the committee members to consider price as the primary factor, and since Nevesem received the

² Other factors included the bidders' ability to meet the general and specific needs of member schools (15 points), compliance with AEP's bidding procedures (10 points), expertise (10 points), experience with educational institutions (5 points), and service reputation (5 points), among others.

highest number of points from both committees, Nevesem was selected as service provider for Internet access and internal connections.

After selection of the service provider, each Applicant submitted a Form 471 indicating the selected service provider and the services for which they were requesting discounts (Exhibit D). On [Insert Date], Program Integrity Assurance ("PIA") reviewers at the SLD requested that AEP provide additional information regarding the competitive bidding process and vendor selection process (Exhibit E). On June 2, 2003, AEP submitted its response to the PIA reviewers (Exhibit F). On June 16 and June 29, 2004, eighteen months after Applicants submitted their Forms 471, the SLD issued Funding Commitment Decision Letters (FCDL) denying Applicants' funding requests on the following grounds: "Bidding violation. Documentation provided demonstrates that price was not the primary factor in selecting this service provider's proposal" (Exhibit G). In response to the SLD's denials, AEP and Applicants file this Request for Review with the Commission urging that it overturn the denials and grant the funding requests.

III.

THE SLD ERRONEOUSLY CONCLUDED THAT PRICE WAS NOT THE PRIMARY FACTOR IN SELECTING THE SERVICE PROVIDER

Due to the SLD's terse denial of the alleged bidding violation, it is unclear how it arrived at the conclusion that price was not the primary factor in AEP's selection of its service provider.³ This is particularly true if one takes into consideration the fact that I, as Chair of the Ad Hoc Committee, specifically instructed the Ad Hoc and External Committee members to consider price as the primary factor in their evaluations.

³ The SLD may have incorrectly determined that AEP did not consider price as the primary factor because the committee reports or tables do not make reference to "price" or "cost", but instead uses the term "costo-efectivo". While a literal translation of "costo-efectivo" from Spanish into English is "cost-effective", "costo-efectivo" in Spanish can be used - and was in fact used in this case - to refer to the actual cost or price. See DICCIONARIO DE LA LENGUA ESPAÑOLA (Madrid, Editorial España -Calpe, 22nd ed. 2002) (defining "costo-efectivo" as "actual cost"). Given these language differences, it would not be surprising that the SLD thought the committee were using the school administrators in Puerto Rico and USAC Program Integrity Assurance ("PIA") reviewers caused by language differences has led to incorrect denials in the past and underscores the need for additional bilingual PIA reviewers.

The Commission's rules require schools to seek competitive bids for the service for which they seek a discount.⁴ In selecting a service provider, an applicant must carefully consider all bids submitted and must select the most cost-effective service offering.⁵ While the Commission's rules do not establish a bright line test for what is a cost-effective service,⁶ factors such as "personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives" form a reasonable basis on which to evaluate whether an offering is cost-effective.⁷ Under established FCC precedent, schools and libraries enjoy "maximum flexibility" to take service quality into account to choose the offering that meets their needs most effectively and efficiently.⁸ As a result, the Commission's rules and decisions establish that while price should be the primary factor considered, schools and libraries are not required to select the lowest bids offered.⁹ The SLD's guidelines, posted on its website, are consistent with these FCC rules.¹⁰

In this case, AEP solicited competitive bids through the submission of a Form 470. AEP carefully considered all bids through the creation of two separate committees tasked with the evaluation of each proposal. I, as Chair of the Ad Hoc Committee, instructed both committees to consider price as the primary factor, which is why price is the first criteria listed on the tables used by the evaluator. At the end of the evaluation process, both committees concurred that

⁴ 47 C.F.R. § 54.504(a).

⁵ 47 C.F.R. § 54.511(a).

⁶ See Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Third Report and Order and Second Further of Proposed Rulemaking, 28 FCC Rcd 26912 ¶ 87 (rel. Dec. 23, 2003)(seeking comment on whether it would be beneficial and administratively feasible to develop a bright line test for what is "cost-effective" service).

⁷ Federal State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029-30, ¶ 481 (1997) (Universal Service Order), as corrected by Federal-State Joint Board on Universal Service, CC Docket No. 94-45, Errata, FCC 97-157 (1997).

⁸ Universal Service Order, 12 FCC Rcd 8776, 9029-30

⁹ 47 C.F.R. § 54.511(a); Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, 13 FCC Rcd 5318, 5429 § 192 (1997).

¹⁰ SLD Guidelines, found at <http://www.sl.universalservice.org/reference/pir470Yr4.asp#2>, last visited on August 2, 2004.

Nevesem had submitted the most cost-effective proposal.¹¹ This evaluation process is consistent with FCC rules and decisions and SLD guidelines that allow applicants "maximum flexibility" to take service quality into account to choose a service provider that meets the needs of each school most effectively and efficiently.

IV.

AT THE TIME AEP SELECTED ITS SERVICE PROVIDER, IT WAS NOT REQUIRED TO ASSIGN THE HIGHEST NUMBER OF POINTS TO "PRICE"

If the SLD reached the conclusion that price was not the primary factor because the committee reports or tables suggest that the committees assigned an equal number of points to price and to another category, the SLD's action was incorrect as a matter of law. AS explained below, at the time the committees selected the service provider, no FCC rule or policy required an applicant to assign more points to the price category than to any other category in order to comply with the FCC's competitive bidding rules. Therefore, AEP acted in accordance with FCC policy as it existed at the time it evaluated the proposals.

In its 1999 *Tennessee Order*, the Commission interpreted its rules and endorsed a school's selection process where - contrary to this case- price received less weight than technical qualifications.¹² The Commission found that quality must be considered along with price; otherwise, schools would not have the "maximum flexibility" necessary to choose the most "cost-effective" bidder. The Commission also noted that schools have a strong incentive to select the most "cost-effective" bidder because they are responsible for a percentage of the overall contract, as well as the ineligible portions of the contract (e.g.; computers and training). Given these incentives, the Commission found that, absent evidence to the contrary, an applicant's

¹¹ Nevesem received the maximum number of points for the price criteria because it was the only bidder to supply a price figure based on the specific technology needs of each member school.

¹² *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator*, Order, 14 FCC Rcd 13734, § 13.

procurement process would be presumed to be valid and result in an award to the most "cost-effective" bidder.¹³

Almost a year after AEP evaluated the bids submitted in response to Form 470, the Commission, in *Ysleta*,¹⁴ first addressed the issue of the number of points assigned to price vis-à-vis the number of points assigned to non price factors. In *Ysleta*, the Commission stated that in selecting the winning bid, price must be given more weight than any other single factor. The Commission then stated in footnote 138, "For example, if in selecting bids an applicant assigns 10 points for reputation, 10 points to past experience, and 10 points to timing considerations, it must assign at least 11 points to price."¹⁵ This is the first time that the Commission stated that an applicant is required to assign the greatest number of points to price in order to demonstrate that an applicant gave price more weight than any other factor. In fact, the Commission expressly recognized in *Ysleta* that it was departing "from past Commission decisions to the contrary" to strengthen the consideration of price as "the primary factor" in the competitive bid process.¹⁶

It could be that, in concluding that the Applicants' funding requests should be denied, the SLD was holding AEP to the standard articulated in *Ysleta*. If so, this is an error because *Ysleta* was decided almost a year after AEP evaluated the bids involved in this Request for Review. Therefore, AEP cannot be held to the standard articulated in *Ysleta* that an applicant cannot assign an equal number of points to both the price factor and a non-price factor. Indeed, as demonstrated above, the committees evaluated the bids submitted in response to the Form 470 in complete compliance with the then existing FCC precedent, which precedent *Ysleta*

¹³ *Tennessee Order*, 14 FCC Rcd 13734, § 13.

¹⁴ Request for Review of the Decision of the Universal Service Administrator by *Ysleta Independent School District*, El Paso, Texas, Order, 18 FCC Rcd 26406 (2003) (*Ysleta*).

¹⁵ *Ysleta*, 18 FCC Rcd 26406, § 50 n. 138.

¹⁶ *Ysleta*, 18 FCC Rcd 26406, § 50. On December 9, 2003, the SLD posted portions of the *Ysleta* decision on its website noting that, "[I]n this order, the FCC clarified important concepts for applications and service providers." FCC Issues *Ysleta Order* on "System Integrator" Approach, found at <http://www.sl.universal service.org/whatsnew/2003/122003.asp#120903>, last visited on August 2, 2004.

specifically states it is departing from. As the Commission is well aware, such retroactive application of precedent is not permitted in the American system of jurisprudence and is considered reversible error by all courts.¹⁷

V.

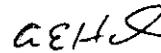
CONCLUSION

AEP carefully considered all bids submitted, considered price as the primary factor in selecting a bid, and selected the most cost-effective service available in accordance with FCC Rules and decisions and SLD guidelines existing at the time AEP evaluated the bids. For these reasons, the SLD's funding denials should be reversed and the rejected applications remanded to the SLD for further processing.

In San Juan, Puerto Rico, this January 26, 2005.

Respectfully submitted,

***Asociación de Educación Privada
de Puerto Rico, Inc.***



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CERTIFICATE OF SERVICE

¹⁷ See Landgraf v. USI Film Prods., 511 U.S. 244 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted"... the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.")

I. Augusto Hernández, hereby certify that true and correct copies of the foregoing "Memorandum in Support of Review" was served, this day, January 26, 2005, via the Commission's Electronic Comment Filing Service (***) or via electronic mail (*), upon the following parties:

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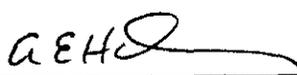

Augusto E. Hernández

EXHIBIT A
FCC Form 470

EXHIBIT B
Ad Hoc Committee Evaluation Report

EXHIBIT C

External Committee Evaluation Report

EXHIBIT D
FCC Form 471

EXHIBIT E
Inquiry from PIA Selective Reviewer to AEP dated [insert date]

EXHIBIT F
AEP Response to PIA Selective Reviewers dated June, 2, 2003

EXHIBIT F
Funding Commitment Decision Letters

DECLARATION

Augusto Hernández declares as follows:

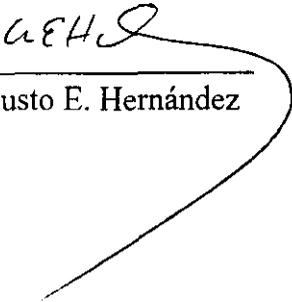
1. I am the President of the Asociación de Educación Privada de Puerto Rico, Inc. ("AEP") in San Juan, Puerto Rico and have held that position since February 2004. Previously, I served as Vice President of AEP for two years.

2. I have read the foregoing "Request for Review." As to all factual statement in that document other those materials as to which the FCC may take official notice, I state that those factual statements are true and correct to the best of my personal knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 26, 2005.

**ASOCIACIÓN DE EDUCACIÓN PRIVADA
DE PUERTO RICO, INC.**

By:


Augusto E. Hernández