

Before the
Federal Communications Commission

Schools and Libraries Universal Service Mechanism	:	CC Docket No. 02-6
	:	
	:	SLD Decisions 1185824, 1185996,
	:	1185946, 1185717, 1185789 and
	:	1185745
In the Matter of Request for Review by RelComm, Inc. of the Decision of the Universal Service Administrator	:	Billed Entity No. 123420
	:	Atlantic City Board of Education

**MOTION OF ATLANTIC CITY BOARD OF EDUCATION
ALEMAR CONSULTING AND MARTIN FRIEDMAN
TO DISMISS RELCOMM INC.'S REQUEST FOR REVIEW
OF UNIVERSAL SERVICE ADMINISTRATOR'S DECISION**

I. INTRODUCTION

RelComm, Inc. (RelComm) has filed a request for review of various decisions of the Universal Service Administrator to approve E-rate discounts for FY 2004, and claims that notwithstanding its failure to submit any bids or proposals to the Atlantic City Board of Education (ACBOE), it is an aggrieved party of the decisions of the Universal Service Administrator. The ACBOE moves to dismiss RelComm's request for review because RelComm lacks standing to file this Request.

II. RULES GOVERNING REQUESTS FOR REVIEW OF UNIVERSAL SERVICE ADMINISTRATOR DECISIONS

According to the FCC's rules governing universal service support mechanisms administered under Part 54, any person aggrieved by action taken by the Administrator may seek review from the FCC, pursuant to 47 C.F.R. §54.722. *See also* 47 C.F.R. § 54.719 (describing

procedures for persons aggrieved by an action taken by the universal service administrator to seek review). In defining the filing deadline for submitting a request for review, the FCC rules characterize the appealing party as an “affected party.” The “affected party” term of art has its origins in the FCC’s July 15, 1998 Public Notice at DA98-1336, but was not defined in more detail.¹ Whether a party is aggrieved or affected by a decision of the administrator, therefore, is a threshold issue that must be addressed before considering the merits of any request for review.

It is particularly important to assure that requests for reviews are filed by qualified parties in light of the fact that the mere act of filing a request for review has the consequence of precluding the administrator from making any disbursements related to the services that are the subject of the appeal. 47 C.F.R. §54.725(a). In the present case, the procedural status is such that by simply filing the request for review – even though RelComm itself did not submit a bid or proposal to provide any of the services that are the target of its request for review – RelComm’s actions prevent the District or its approved service providers from obtaining access to any of the E-rate discounts that the administrator has already approved. Because of this drastic impact that a third party can effectuate by the simple act of filing a request for review, the ACBOE requests the FCC to promptly address ACBOE’s challenge to RelComm’s standing to file a request for review.

III. RELCOMM LACKS STANDING TO FILE THIS REQUEST FOR REVIEW.

RelComm does not rise to an affected or aggrieved party sufficient to establish a plausible interest to justify its filing of this request for review. RelComm voluntarily chose not to submit a bid in response to ACBOE’s posting of Form 470 applications for FY 2004.

¹ The July 15, 1998 Public Notice in turn referred to USAC’s July 1, 1998 Report and Proposed Plan of Reorganization.

RelComm cannot and should not now be permitted to appeal the administrator's decision to approve E-rate discounts associated with these procurements.

As the federal appellate courts have recognized, standing to file a protest to a bid award by a federal government entity is afforded to an interested party. 28 U.S.C. §1491(b)(1). The "interested party" standard is analogous to the "aggrieved party" standard set forth in 47 C.F.R. §54.722 for filing requests for review of the USF administrator's decisions, particularly with respect to an appeal which challenges the manner in which a competitive procurement was conducted. An "interested party" for purposes of objecting to a federal contract award, post-award, is limited to actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract. *American Federation of Government Employees v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001). Unless the protestor filed an actual bid, the only way in which the protestor can establish standing is to demonstrate that it is a prospective bidder. In order to demonstrate prospective bidder status, the protestor must show that it expects to submit a bid within the established deadline, and this opportunity ends when the proposal period ends. *McRae Industries, Inc. v. United States*, In the United States Court of Federal Claims, No. 01-460 C (Filed August 14, 2002).

In other words, RelComm cannot now claim that it is entitled to challenge the procurement after the fact when it chose not to participate in the procurement. Indeed, there is no way of knowing whether the District may have awarded the procurements to RelComm, thereby rendering moot any accusations of impropriety.

Notwithstanding its failure to submit a bid, RelComm claims that because it raised "irregularities and problems with the bid specifications" provided by the Atlantic City School

District (“ACSD”), RelComm filed a formal challenge to the FY 2004 “request for bids” to the ACBOE Purchasing Agent. RelComm claims that it assumed that the bid had been suspended pending its receipt of a reply to its challenge, but provides absolutely no basis for explaining this assumption.

RelComm’s pleading directly contradicts the sworn testimony of Suzanne Zammit, an employee of RelComm who was deposed on March 4, 2005 in the civil action brought by RelComm against ACBOE and other parties claiming that the District breached its contract with RelComm.² Ms. Zammit testified in her deposition as follows:

Q. RelComm decided not to bid that year seven?

A. I believe so, yeah.

Q. Tell me who you had the discussions with about not bidding in year seven.

A. There were too many – Michael Shea felt there were too many inconsistencies, so *he decided not to bid and contested instead.*

Q. And what?

A. Contested instead.

Q. Tell me what Mr. Shea told you about their decision not to bid in year seven.

A. He just said there were too many inconsistencies and they were contested.

Q. What were the inconsistencies that he was discussing?

A. He didn’t get specific. He just said they weren’t going to bid. That was as far as the discussion about that went.

...

Q. *Is it your recollection that a decision not to bid was made before the deadline for submitting bids?*

² RelComm, Inc. v. Atlantic City Board of Education, *et al.*, In the Superior Court of New Jersey, Law Division-Atlantic County, Docket No. ATL-L-477-04.

A. *Oh, yes, I'm pretty sure that's true.*³
(emphasis added).

Ms. Zammit's sworn testimony directly conflicts with RelComm's claim that it did not know that ACSD decided to proceed with its competitive procurements. Moreover, RelComm failed to explain that it was reasonable to assume that the procurement was suspended – or to imply that the procurement should have been suspended – until it received a reply to its concerns.

RelComm also incorrectly claims that because ACBOE proceeded with the procurement without first responding to RelComm's challenge, "RelComm was prevented from submitting its bid." RelComm Request for Review at 3. Contrary to RelComm's claims, RelComm was not entitled to obtain a response to its submission prior to the deadline for submitting bids. In fact, the very case that RelComm cited in its Request for Review makes clear that ACBOE was not obliged to address the bid challenge prior to the deadline for the submission of bids, and therefore,, any purported assumption that RelComm made about the procurement being suspended is completely lacking in merit or reasonableness. Nor did that case even address the statute that RelComm cited as the basis for its alleged right to submit a challenge to the bid specifications.

In *Entech Corporation v. City of Newark*, 351 N.J. Super. 440, 462, 798 A.2d 681, 694 (2002), the New Jersey Superior Court addressed the provisions of the Local Public Contracts Law, not the bidding provisions of Title 18A of New Jersey statutes governing procurements by school districts. In describing the requirements of the Local Public Contracts Law, the court stated, "As long as public contracting agencies provide a fair opportunity for challengers to bid

³ Deposition of Suzanne Zammit, March 4, 2005 at Tr. 97-99 (pages are attached as Exhibit "A".)

specifications to be heard, *either before or after the bid awards*, the statutory provision is satisfied. The nature of the ‘hearing’ may depend to a large extent on the nature and complexity of the challenge, and the circumstances surrounding the contract, including public necessity.

Indeed, it is possible that a challenge processed completely on the papers could suffice.”

(emphasis added). Clearly, it was within ACBOE’s purview to address RelComm’s concerns either before or after the deadline for proposals passed. Simply filing a challenge is not grounds for RelComm to stand by idly, not submit a proposal and then later protest the SLD’s approval of discounts based on the underlying procurement.

Further, contrary to RelComm’s claim that it has not yet received a reply to its challenge, ACBOE in fact did respond to RelComm’s communication on a timely basis *prior* to the bid submission deadline. RelComm submitted its concerns on January 7, 2004. On January 9, 2004, which was well before the bid submission deadline, ACBOE emailed its response to RelComm and all other bidders – to assure that all bidders had access to the same information and to preserve the fair and open nature of the competitive procurement as required under E-rate rules. See <http://www.sl.universalservice.org/whatsnew/reminders-F470.asp#F470R1>, in which the SLD states that "Open" means there are no secrets in the process - such as information shared with one bidder but not with others - and that all bidders know what is required of them.” The bottom line here is that ACBOE conducted its procurements in a fair and open manner, responded to RelComm’s issues on a timely basis, and RelComm is now complaining that it did not receive a bid award for which *RelComm did not even bother submitting a proposal*. RelComm received a response that it did not accept; and as Suzanne Zammit explained, voluntarily refrained from submitting a proposal and figured it would disrupt the District’s E-rate funding by filing this Request for Review.

Even the state statute that RelComm cited as the basis for formulating its challenge, N.J.S.A. 18A:18A-15 does not apply E-rate procurements. N.J.S.A. 18A:18A-5 specifically exempts E-rate procurements from state bid procurements requirements such as advertising. Given that Section 18A-15 is devoted to prescribing the manner in which procurements must be advertised, this section clearly has been rendered inapplicable by virtue of Section 18A-5. Certainly, however, ACBOE complied with the E-rate competitive bid regulation set forth at 47 C.F.R. §54.504(a), notwithstanding the inapplication of the state procurement requirements.

Moreover, assuming *arguendo* that Section 18A-15 applies – which ACBOE submits it does not – there is nothing in the statute that would have required ACBOE from addressing RelComm’s challenge before proceeding with the procurement. Indeed, given the prescribed deadlines and time frames for applying for E-rate discounts, such delays could irreparably harm and prejudice ACBOE by precluding its timely preparation and submission of Form 471 applications. There is absolutely no reason to think that had ACBOE scrapped its first Form 470 and proceeded to re-post its Form 470 that RelComm would not have launched another *ad hominem* attack on the District’s procurement.

RelComm should not be permitted to disrupt the District’s receipt of E-rate discounts for FY 2004 simply by filing a request for review after the SLD has already conducted its extensive and comprehensive review of the District’s FY 2004 applications – including the District’s compliance with the competitive bid requirements.

III. CONCLUSION

The Atlantic City Board of Education respectfully requests that the Commission to dismiss the Request for Review filed by RelComm, Inc. concerning the District’s FY 2004 E-rate approved FRNs. In the event that the Commission declines to dismiss this Request for Review,

ACBOE will respond to the substantive claims raised by RelComm, and demonstrate that each lacks merit and should be dismissed.

Respectfully submitted,

ROVILLARD & BLEE, L.L.C.

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