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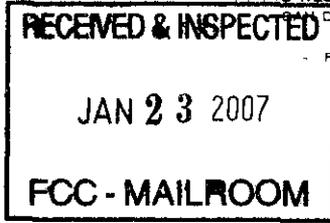
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January 22, 2007

OUR FILE NUMBER:
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FEDERAL EXPRESS

Letter of Appeal/Request for Review
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: Appeal of Notification of Commitment Adjustment Letter/ Request for Review of
USAC Administrator's Decision on Appeal

CC Docket # 02-6

Ladies and Gentlemen:

This letter shall constitute an appeal filed by the Le Grand Union Elementary School District, of the decisions issued on March 24, 2006, relating to Funding Year 2001, for retroactive denial of E-rate funding on the projects cited below:

Form 471 Application Number(s)	259033
Billed Entity Number:	144378
FCC Registration Number:	13964127
SPIN Name(s) and numbers:	Quest Media & Supplies (143005814); Pacific Bell Telephone Company(143002665)
Amount of Funds Denied:	Pacific Bell - \$15,989.08 Quest - \$180,280.34

I. INTRODUCTION/SUMMARY OF ARGUMENT

During the 2001-02 school year, the Le Grand Elementary School District, a small, rural district that serves a predominantly low-income community, applied for E-rate funding to help supply much needed technology equipment. The majority of the funding requests were approved, and the District commenced its technology improvement purchases. Much-needed equipment was brought into classrooms and District offices, which has been of great benefit to students and staff. But in March 2006, nearly five years after the funding had been approved, the District received notice from the Universal Service Administrative Company ("USAC") that all of the funding previously approved was being retroactively denied. The District submitted a

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Federal Communications Commission

CC Docket #02-6

January 22, 2007

Page 2

timely appeal to USAC. On January 3, 2007, USAC denied the appeal. The reasons for the denial were exactly the same as those cited for the original retroactive denial of funding. The decision made no reference to any of the arguments cited in the District's Letter of Appeal, and essentially contained no legal analysis of the issues raised. Therefore, the District is now appealing USAC's decision to the FCC.

The original notice stated that the bidding process had been "tainted," and yet no rule, statute or regulation was claimed to have been violated. Upon further inquiry, the District learned that a principle articulated in a six-year-old FCC order was cited as the reason for the retroactive denial. The District contends that this order, known as the "*MasterMind*" decision, is distinguishable on its facts, and portions of the decision are worded far too broadly. Moreover, the District contends that it and its employees would have had no notice of the wording of portions of the decision (which are arguably dicta) and to penalize the District in this manner constitutes a violation of due process. USAC contends that the competitive bidding process was "tainted" by virtue of the fact that the District's technology coordinator was listed as the "contact person" on one of its forms, and subsequently submitted a bid himself on behalf of his company. The fact of the matter is that this bid was rejected by USAC, and the District properly complied with all rules and regulations related to competitive bidding and did in fact award the projects to the lowest bidders. USAC never conducted any investigation into whether competitive bidding rules were actually violated. Therefore, its decision to retroactively deny all funding was based purely on speculation. There has never been any evidence of "waste, fraud, or abuse," the standards under which funding denial should be upheld.

The District also contends that USAC is estopped from claiming reimbursement of the funds, because USAC knew or should have known of any irregularity at the time funding was approved, and the District reasonably relied on the funding approval notices to purchase the equipment at issue. Lastly, to the extent that any violation of a rule is actually found, the District requests a waiver of such a rule, given the negligible or non-existent impact of the alleged violation, and the devastating impact of forcing the District to repay the nearly \$200,000 at issue.

II. FEDERAL COMMUNICATIONS RULES AND GUIDELINES

On February 8, 1996, the Telecommunications Act of 1996 was signed into law. The "universal service" provisions of existing law were revised to help schools and libraries obtain access to state of the art service and technologies at discounted rates. The Act requires that the FCC and the states base the revision of the universal service system on seven principles, including the principle that elementary and secondary schools, libraries and health care providers should have access to advanced telecommunications services. Section 706 of the Act requires the FCC to conduct regular inquiries to see that advanced telecommunications are in fact becoming accessible. If the FCC finds that they are not, it must accelerate the deployment of advanced services, and must use its regulatory tools to encourage the deployment of advanced telecommunications to all participants, particularly schools.

Federal Communications Commission

CC Docket #02-6

January 22, 2007

Page 3

Under the schools and libraries universal service support mechanism, eligible schools may apply for discounts for eligible telecommunications services, Internet access, and internal connections. (47 C.F.R. §§ 54.502, 54.503.) Section 254(h)(1)(B) of the Act provides:

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to [schools and libraries] for educational purposes at rates less than the amounts charged for similar services to other parties" (47 U.S.C. § 254(h)(1)(B).)

Schools must generally seek competitive bids for all services eligible for support. (47 C.F.R. §§ 54.504, 54.511(c).)

In accordance with the Commission's rules, an applicant must file with the Universal Service Administrative Company an FCC Form 470 requesting services, which USAC posts onto its website. The Form 470 must be completed by the entity that will negotiate with prospective service providers and signed by the person authorized to order the requested services on behalf of the applicant. The Form 470 must include certain information such as information about the computer equipment, software, and internal connections available or budgeted for purchase, and staff experience. (47 C.F.R. § 54.504(b).) The Form 470 also requires that the applicant name a person whom prospective service providers may contact for additional information. The contact person should be able to answer questions regarding the information included on the Form 470 and the services request by the applicant, including how to obtain a copy of the applicant's request for proposal (RFP), if the applicant has prepared one.

The applicant must wait 28 days before entering into an agreement with a service provider for the requested services and submitting an FCC Form 471. (47 C.F.R. § 504(c).) The earliest date an applicant can sign a contract for services after the 28-day waiting period is referred to as the allowable contract date. Prior to entering into an agreement with a service provider, the Commission's rules require that the applicant carefully consider all bids submitted for provision of the requested services. (47 C.F.R. § 54.511(a).) The Commission has concluded that price should be the primary factor in selecting a bid, although several additional factors should also be considered by the applicant in determining which service provider meets their needs "most effectively and efficiently." (Universal Service Order, at 9029, ¶ 481.) Once the school has complied with the Commission's competitive bidding requirements and entered into agreements for eligible services, it must file an FCC Form 471 application to notify USAC of the services that have been ordered, the service providers with whom the applicant has entered into an agreement, and an estimate of the funds needed to cover the discounts to be given for eligible services. USAC reviews the FCC Forms 471 that it receives and issues funding commitment decisions in accordance with the Commission's rules.

Federal Communications Commission
CC Docket #02-6
January 22, 2007
Page 4

III. FACTUAL BACKGROUND

Le Grand Union Elementary School District ("District") is a small, rural district located in the heart of California's Central Valley. It serves approximately 430 students, nearly 90 percent of them considered low-income, and nearly half of them come from non-English speaking households. (**Exhibit A.**) The District applied for funding under the E-Rate program beginning shortly after it was initiated, but applied for the bulk of funding during the 2001-02 school year (Program Year 4), when it initiated its first full-scale upgrade of telecommunications equipment and servicing. With the funding provided under the E-rate program, the District would be able to purchase two servers, which in turn would be used for email, web hosting, and terminal service access for students and employees of the District. The E-rate funding would also allow the District to purchase switching gear to connect all computers and network devices on the campus. These switches would be vital to the delivery and transport of all computer-based services offered by the District. The devices would allow the District to connect over 300 computers and devices together, allowing for numerous programs and applications that could be used as learning and achievement tools for students. The devices also would allow the District to segment traffic that students and teachers use to allow the District to implement an environment to secure all data. Lastly, the E-rate funding would allow the District to purchase an "Uninterruptible Power Supply" (or "UPS") battery backup to the main server room and each "IDF" (Switch Closet Location) on the campus. This was particularly important for the District because it is located in a very rural part of Merced County, and power outages occur on a more regular basis than in more urban locations. The UPS devices would allow the system to run for a sufficient amount of time if the power went out, in order to prevent irreparable harm that could result to the system from rebooting or power cycling of servers.

The District timely submitted its Form 470. The "contact person" listed was Justin Jordan, who was employed by the District as its Technology Coordinator. Mr. Jordan was the person most knowledgeable about the technology needs of the District, and would have been in the best position to answer any specific or technical questions related to technology. On September 27, 2000, USAC sent the District a "Form 470--Receipt Notification Letter," indicating a posting date of September 7, 2000, as applied to Form 470 Application Number 929600000294834. On December 11, 2000, USAC sent the District a Form 470--Receipt Notification Letter for its Form 470 Application Number 150100000321498.

The District complied with all applicable competitive bidding requirements and received three bids for the servers, switches, and UPS. Davis Office Systems submitted a bid for \$212,836.16. Advanced Micronet Solutions submitted a bid for \$210,450.85. Quest submitted a bid for \$208,613.66. Regarding the phone service, only Pacific Bell (since SBC and now AT&T) was able to provide the necessary services to the District, given its rural location. Therefore, it was not surprising that the District received only one bid on that item. Lastly, the District received two bids for the cabling and maintenance portion of the project: Quest

Federal Communications Commission

CC Docket #02-6

January 22, 2007

Page 5

submitted a bid for \$102,903.22 for cabling and \$135,000 for maintenance; Technology Solutions submitted a bid for \$98,367.69 for cabling and \$75,000 for maintenance. **(Exhibit B.)**

All bids were opened and reviewed by Superintendent Scott Lucas. Mr. Jordan was not involved in the opening, review, or selection of the bidders. The District, complying with existing regulations to consider price as the primary factor, selected the companies submitting the lowest bids.

The District then timely submitted its Form 471 Application Number 259033, and received the Form 471 Receipt Acknowledgement Letter dated February 23, 2001. On July 23, 2001, USAC sent the District its "Funding Commitment Decision Letter" for the District's Form 471 Application Number 259033. The attached "Funding Commitment Report" provided that USAC had approved funding for \$16,200 for Pacific Bell, and \$10,800 for Pacific Bell Internet Services. The remainder of the vendors was listed as "as yet unfunded."

On September 4, 2001, USAC sent another "Funding Commitment Decision Letter, noting that all of the Quest Media & Supplies contracts had been "funded." This notice did not indicate the status of the Technology Solutions proposed contracts. (However, those contracts were never funded, and the District ultimately completed the cabling and maintenance needed without E-rate funding assistance.) On December 1, 2001, USAC issued a "Form 486 Notification Letter," indicating the start date for the two Pacific Bell contracts and three Quest contracts. The District, therefore, commenced and completed the projects.

Since completion of the projects, the District was able to provide an admirable array of computers and networking systems, as well as needed security and energy backup protection, all of which has greatly benefited the District and the students it serves. Students and employees are now able to use approximately 300 computers on campus, bringing this rural community into the 21st Century and giving the students the opportunity to benefit and learn from technology that they otherwise would not have had. Teachers are able to use SASI-XP and Ingrade Pro to maintain accurate student records, report grades and record attendance. Eighth grade students are developing writing and keyboarding skills with special, "AlphaSmart 3000" portable keyboards, and teachers now have access to specialized software to help monitor and improve individual student performance. The District has also been able to add a videoconferencing station and a school library database to the network, using the fiber optic and T-1 technology. Every classroom has an overhead 32-inch monitor which is connected to the teacher's classroom computer and the school-wide video network. The computer lab currently houses 36 workstations. **(Exhibit C.)**

It is impossible to accurately describe how tremendously the new technology has helped to improve the quality of education offered to the District's students. However, it is worth noting that from the 2003-04 to the 2004-05 school year alone, students' academic performance, as

Federal Communications Commission

CC Docket #02-6

January 22, 2007

Page 6

measured by percent proficiency, improved substantially in all three target areas, and the District's "Academic Performance Index" (API) went from 620 to 651. **(Exhibit A.)**

On March 24, 2006, almost five years after USAC had approved funding for the District's technology upgrades, USAC issued a "Notification of Commitment Adjustment Letter" rejecting, in its entirety, all of the funding that had previously been approved for equipment and services provided by Pacific Bell and Quest. In total, USAC was rejecting a total of nearly \$200,000. The "Funding Commitment Adjustment Report" provides the following explanation for rejecting the funding retroactively:

After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. During the course of a review it was determined that service provider contact information appeared on the cited Form 470. The contact person on the cite Form 470 # 150100000321498 is Justin Jordan. Justin Jordan is also the registered contact person for Technology Solutions. FCC rules require applicants to submit a Form 470 to initiate the competitive bidding process, and to conduct a fair and open process. If the applicant has posted a Form 470 that contains contact information for a service provider that participates in the competitive bidding process, the applicant has violated this requirement, and FCC rules consider this Form 470 to be tainted. All Funding Requests that relate to this Form 470 are required to be denied because the Form 470 is tainted. Accordingly, the commitment has been rescinded in full and the SLD will seek recovery of any disbursed funds. **(Exhibit D.)**

No legal authority or citations were provided to support this decision. Counsel for the District then contacted USAC to inquire which rule or regulation had been violated. USAC provided no citation to a particular rule or regulation, but referred to "*In the Matter of MasterMind Internet Services, Inc.*" - FCC Decision No. 00-167, a matter that was decided by the FCC in May 2000. **(Exhibit E.)**

The District appealed the Decision in a timely manner. The appeal was denied on January 3, 2007. **(Exhibit F.)**

IV. ARGUMENT

A. The "*MasterMind*" Decision Is Distinguishable On Its Facts

In the *Mastermind* decision, the Schools and Libraries Division of USAC denied funding to several applicants that had requested support for services to be provided by MasterMind,

Federal Communications Commission

CC Docket #02-6

January 22, 2007

Page 7

finding that the applicants and the contractor (MasterMind) had violated the FCC's competitive bidding requirements. MasterMind requested review of this decision. In the FCC decision, it was noted that an employee of MasterMind had been named as the contact person on the applicants' Form 470 and/or signed the Form 471 associated with the funding request. MasterMind had also been awarded contracts for the funding requests under review. MasterMind argued that there was no rule prohibiting a service provider's involvement in the competitive bidding process, and that a fair and open competitive bidding process had occurred. Lastly, MasterMind argued that SLD was aware of MasterMind's involvement in the competitive bidding process, and SLD never provided any indication or warning that this was improper.

The FCC concluded that "an applicant violates the Commission's competitive bidding requirements when it surrenders control of the bidding process to a service provider that participates in that bidding process." The FCC noted that not only was a MasterMind employee listed as the contact person on the Form 470s, but in some instances, the applicants even permitted MasterMind to prepare and distribute RFPs to potential bidders. The FCC noted that by doing so, the applicants essentially surrendered control of the bidding process to MasterMind, who not only participated in the bidding process, but was also awarded the service contracts. The decision points out that the contact person "exerts great influence over an applicant's competitive bidding process by controlling the dissemination of information regarding the services requested, and that prospective bidders might be deterred from participating if they believe that the bidding will not be conducted in an open and fair manner, given that another bidder is serving as the contact person. The FCC, therefore, concluded that a fair and open competitive bidding process did not occur.

The situation in the *MasterMind* case is markedly different than the situation that occurred here. Specifically, the District never "surrendered control" of the bidding process to a service provider. Mr. Jordan was an employee of the District. The MasterMind employee who was listed as a contact person was not employed by the applicants in that decision. And while Mr. Jordan was listed as the "contact person," he had no other involvement in the bidding process. He did not distribute the RFP to potential bidders or attempt to persuade potential bidders from bidding. He did not review the bids, or have any input into who was selected of the bidders. As a "contact person," he was simply identified as somebody who had knowledge about the technology needs of the District at that time. That was part of his job as an employee of the District, with the title of "Technology Coordinator." At no point in time did the District intend to or actually surrender control of the bidding process to him, and, as explained in more detail below, his participation did not negatively impact the bidding process in any way.

In addition, the *MasterMind* case is distinguishable because Mr. Jordan was simply an employee of the District, who happened to have his own company, Technology Solutions, and submitted a bid on his company's behalf. As it so happened, his company was the low bidder on one of the projects. Therefore, the District saw no reason to prohibit Technology Solutions from being awarded the bid for that particular project. Ultimately, funding for this project was denied

Federal Communications Commission
CC Docket #02-6
January 22, 2007
Page 8

under the E-rate program, but in reality, there was nothing the District could have done to prevent Technology Solutions from submitting a bid.¹ This is quite different from the situation in *MasterMind*, where the person listed as a “contact” was not an employee of the applicant(s), and the appearance of that person’s name on the Form 470 actually may have served as a deterrent to other bidders. Here, there is no indication that any bidders were deterred at all. (See below). To punish the District, for permitting open bidding, which included a bid by a company associated with one of its own employees, and where that bid was ultimately rejected by USAC, makes no sense.

B. The *MasterMind* Decision Contains Self-Contradictory Language, And Portions Of The Decision Relied On By USAC Are Mere Dicta

The holding stated in paragraph 9 of the *MasterMind* decision provides in relevant part: “In those instances, however, where SLD denied requests for support that did not name a service provider as the contact person on the Form 470, we grant *MasterMind*’s request for review, and remand those applications to SLD for further processing” This portion of the holding would appear to support the District’s position, because neither Technology Solutions nor Mr. Jordan were a “service provider.” The decision also focuses on the problem of “surrendering control” of the process to a bidder. Presumably, however, the portion of the decision relied on by USAC in the case involving Mr. Jordan reads: “We do not believe that denial of an application is proper only if the service provider in control of the bidding process also was awarded the service contract. We believe that the participation of the contact person in the bidding process may significantly affect the submission of bids by other prospective bidders, thereby undermining the ability of the applicant to obtain the most cost-effective bid.” (*Id.*, ¶ 11.)

First, it should be noted that the facts presented in *MasterMind* were that a *MasterMind* employee was listed as a contact person, and that *MasterMind* was selected as the service provider. Therefore, the FCC extrapolating to situations in which a prospective bidder, who ultimately is not selected to be the service provider, was addressing situations not presented in the case it was examining. As such, it is dicta, and non-precedential. (*Terminix v. Dobson* (1995) 513 U.S. 265.) In addition, it should be noted that the dicta portion of the opinion actually conflicts with the true holding, which applies only to actual service providers (i.e., those awarded bids) as opposed to prospective bidders. To that extent, the portion of the opinion relied on by USAC is not only not binding, but it is also contradicted by the actual holding.

Under these circumstances, it would be patently unfair to hold the District responsible for adhering to statements contained in FCC orders, but not in any published rules, regulations or statutes, particularly where such statements constitute dicta and are contradicted elsewhere in the same order (see Section C, below).

¹ Presumably, the reason for denying the funding was his connection with the District. However, at the point in time that the contract with Technology Solutions was denied, the funding for the other two vendors was approved.

Federal Communications Commission
CC Docket #02-6
January 22, 2007
Page 9

C. The District Did Not Violate Any Statute Or Rule, And Punishing The District Therefore Constitutes A Violation Of Due Process

The only regulations regarding competitive bidding are contained in 47 C.F.R. § 54.504(a), which provide: “. . . an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under Secs. 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.”

The FCC, in its Fifth Report and Order No. 04-190, provided that recovery should be required only when funds are “disbursed in violation of the statute or a rule” With respect to competitive bidding, the FCC ruled that recovery is appropriate only where “the beneficiary failed to comply with the Commission’s competitive bidding requirements as set forth in section 54.504 and 54.511 of our rules”

The District has complied with all applicable rules and statutes. Indeed, the March 24, 2006 letter from USAC did not cite violation of any specific rule or statute, and counsel for the District was required to contact USAC to inquire on what basis the previous funding was suddenly being retroactively denied. The only citation then provided was to the *MasterMind* decision. Orders issued by the FCC adjudicating complaints are binding on the parties. (See 47 U.S.C. § 416(c) (“It shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with [all FCC] orders so long as the same shall remain in effect.”).) However, it is unclear how or whether such decisions are binding on other parties. Indeed, the FCC has noted that on appeal, its focus is on whether the applicant violated an actual rule. (See, e.g., *In the Matter of Academy of Careers and Technologies*, FCC Order No. 06-55; *In the Matter of Academia Discipulos de Cristo Bayamon, Puerto Rico*, FCC Order No. DA 06-1642.) There appears to be no law that would justify retroactively denying funding based on an applicant’s failure to adhere to dicta in an FCC decision.

A careful review of all the actual statutes and regulations, as well as FCC Universal Service Orders in existence at the time, make it clear that there was no indication that the Pacific Bell and Quest contracts might be “tainted.” To infer that District administrators in a small, rural community serving less than 450 students should have been able to infer or deduce that allowing Technology Solutions to submit a bid would taint the entire process, depriving them of nearly \$200,000 in much-needed funding, constitutes a violation of the due process clause of Fourteenth Amendment to the Constitution, which guarantees individuals the right to fair notice of whether their conduct is prohibited by law. (*Colautti v. Franklin* (1979) 439 U.S. 379, 390-91.) Although only constructive rather than actual notice is required, individuals must be given a reasonable opportunity to discern whether their conduct is proscribed so they can choose whether or not to comply with the law. (*Giaccio v. Pennsylvania* (1966) 382 U.S. 399, 402-03.) Statutes need not be written with “mathematical” precision, nor can they be thus written. But they must

Federal Communications Commission

CC Docket #02-6

January 22, 2007

Page 10

be intelligible, defining a “core” of proscribed conduct that allows people to understand whether their actions will result in adverse consequences. (*Planned Parenthood v. Arizona* (9th Cir. 1983) 718 F.3d 938, 947 (holding that a statute is void for vagueness if persons of common intelligence must necessarily guess at its meaning).)

Applying the law above to the situation here, there were no rules, statutes or guidelines in existence at the time that would have adequately put the District on notice that allowing its own employee, who happened to be the most knowledgeable person about technology, to be listed as a mere “contact person” would compromise its entitlement to E-rate funding, particularly five years after it had already spent the funds. The lack of such a rule, regulation or guidelines is particularly striking given that USAC was or should have been aware of this alleged “taint” in the process, because it disapproved the Technology Solutions funding, and yet approved the funding for the other projects. If the holding in the *MasterMind* case was so clear and obvious that rural school district administrators should have been aware of it, then surely the people reviewing the District’s application should have been aware as well. The fact that they were not would indicate that the District could not have been reasonably put on notice that listing Mr. Jordan as a contact person compromised its right to funding entirely, and that taking action now violates due process principles.

D. The District Properly Engaged In Competitive Bidding And The Process Was Not Tainted

FCC orders amplify the importance of competitive bidding. As the Commission has previously observed:

Competitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed about all of the choices available to them. Absent competitive bidding, prices charged to schools and libraries may be needlessly high, with the result that fewer eligible schools and libraries would be able to participate in the program or the demand on universal service support mechanisms would be needlessly great. (Universal Service Order, 12 FCC Rcd at 9029, ¶ 480.)

The Commission has also ruled that applicants must select the most cost-effective offerings, and price must be the primary factor in determining whether a particular vendor is the most cost-effective. (Universal Service Order, 12 FCC Rcd at 9029-30, ¶ 481; 47 C.F.R. § 54.511(a).) It is true that where applicants failed to seek competitive bids for specific eligible services, funding has been denied. (Ysleta Order, FCC 03-313.)

The District complied with the competitive bidding requirements. With respect to the contract ultimately awarded to Quest, the District received a total of three bids. The bids were

Federal Communications Commission
CC Docket #02-6
January 22, 2007
Page 11

received, opened and reviewed by Mr. Lucas, Superintendent of the District. Mr. Jordan was not involved in any way in consideration of the bids. Mr. Lucas reviewed the bids, considered the responsiveness and qualifications of the bidders, and keeping price as the primary consideration, selected Quest, which was the lowest bidder.

With respect to the contract ultimately awarded to Pacific Bell, Pacific Bell was the only bidder. However, at that time (2001), Pacific Bell was the only company that could lawfully and practically offer the services at issue. The Commission has expressly recognized, in previous decisions, that the fact that only one vendor submits a bid does not indicate any violation of competitive bidding rules. Specifically, the Commission has noted that the “rules require applicants to seek competitive bids; they do not require an applicant to have competing bidders where none appear.” (*In the Matter of Winston-Salem/Forsyth County School District*, FCC Order No. 03-314.)

Therefore, the District complied with the competitive bidding requirements. There is no indication that the number of bids or the amount of bids would have been remotely different had Mr. Lucas, rather than Mr. Jordan, been listed as the contact person. To infer that the process was somehow tainted by this action is pure speculation. Particularly with respect to the bid submitted by Pacific Bell, there were simply no other companies anywhere in existence that could have bid on the services described. To penalize the District by retroactively revoking funding for an allegedly “tainted” process, where it would have been completely impossible to have impacted the bidding process for such services, is manifestly unjust.

E. There Was No Waste, Fraud Or Abuse, And Retroactive Denial Of Needed Funding Would Run Counter To The Purpose Of The E-Rate Program

As FCC Commissioner Michael J. Copps noted in his support of *In the Matter of Bishop Perry Middle School*, FCC Case No. 06-54, “E-Rate plays a decisive role in providing schools and libraries with the communications tools they need for our children and communities to compete and prosper in this digital age. Because access to E-Rate is so important, we need to be dead serious about rooting out abuses and punishing those few bad actors who would exploit the program.” He went on to distinguish the case before him from those involving “waste, fraud or abuse,” and noted that where there are “relatively minor ministerial errors . . . flat-out denial is a harsh consequence In fact, it becomes hard to square denial for slight clerical errors like these with our duties under the statute to further the deployment of advanced services.”

In the recent past, when reviewing appeals such as the one presented here, the FCC has taken into consideration when the applicant is “among the neediest schools and libraries in the country.” (See, e.g., *In the Matter of Academy of Careers and Technologies*, FCC Order No. 06-55.) In that case, the FCC overturned USAC’s decision to deny funding where USAC presumed that the schools violated competitive bidding rules without performing any applicant-specific evaluations, and without actually verifying that the competitive bidding rules were violated. The

Federal Communications Commission

CC Docket #02-6

January 22, 2007

Page 12

FCC ruled that if there is a suspicion of a rule violation, "it is incumbent on USAC to conduct further investigation and analysis prior to denying funding." As applied here, USAC retroactively denied funding of nearly \$200,000 based on assumption that the process was "tainted" by virtue of Mr. Jordan's name being listed as a contact person. But USAC performed no investigation whatsoever to determine whether any violation of competitive bidding rules had actually occurred. Had they conducted such an investigation, they would have found that no violation occurred, and that in fact, all work was performed in the most cost effective manner, and all competitive bidding requirements were met. Under no circumstances would they have found any evidence of "waste, fraud or abuse, or misuse of funds, or a failure to adhere to core program requirements," the standard applied by the FCC in reviewing appeals. (See *In the Matter of Academia Discipulos de Cristo Bayamon, Puerto Rico*, FCC Order No. DA 06-1642; *In the Matter of Academia Claret, Puerto Rico*, FCC Order No. 06-1907.)

Given that there was no waste, fraud, or abuse, and given that requiring an impoverished District to pay back nearly \$200,000 that have already been spent on much needed technology, requiring return of the funds would run counter to the purpose of the E-rate funding scheme, which was designed specifically to provide such resources to the entities that needed them most. Therefore, granting of the appeal is appropriate in this case.

F. USAC Should Be Estopped From Requiring Restitution Of The Funds Previously Granted

Presumably, USAC was aware of the fact that Mr. Jordan had been involved in submitting a bid to the District through his own company, Technology Solutions, at the time it initially denied funding for those portions of the E-rate request. This would have been in the fall of 2001. In addition, because the *MasterMind* decision was issued in May 2000, USAC knew or should have known about that decision, and any potential arguments about the process being "tainted." And yet, the only portions of the funding request that were denied were those portions associated with Technology Solutions. The portions of the work to be performed by Pacific Bell and Quest Media were fully approved. In reasonable reliance on the approval of funding, the District entered into contracts with these companies and expended approximately \$196,000 to have the work completed. Nearly five years later, USAC suddenly contacted the District and advised that because Mr. Jordan was affiliated with a company that had submitted a bid, the entire process was "tainted" and USAC was demanding repayment of all the money, even though not a penny had ever gone to Mr. Jordan. Because USAC specifically reviewed and approved funding for the Pacific Bell and Quest contracts, because there is no statute that prohibited approving such funding, and because the District relied on USAC's initial approval of the funding and purchased nearly \$200,000 worth of computer equipment and supplies, USAC should be estopped from recovering the funds.

The doctrine of equitable estoppel "is applied by courts to preclude a litigant from asserting a claim or invoking a defense predicated upon his own wrongdoing." (Note, Equitable

Federal Communications Commission

CC Docket #02-6

January 22, 2007

Page 13

Estoppel of the Government, 79 Colum. L. Rev. 551 (1979).) An equitable estoppel may arise when there is voluntary conduct by the party to be estopped that induces detrimental reliance on the part of the party asserting the estoppel. (See e.g., *Learning Works, Inc. v. Learning Annex, Inc.* (4th Cir. 1987) 830 F.2d 541, 545.) The traditional elements of estoppel consist of: (1) the party to be estopped must know the fact; (2) the party to be estopped must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended, (3) the party asserting the estoppel must be ignorant of the true facts and (4) he must rely on the former's conduct to his injury. (See *United States v. Georgia-Pacific Co.* (9th Cir. 1970) 421 F.2d 92, 95.)

While the *MasterMind* decision briefly discussed the issue of estoppel, citing *Office of Personnel Management v. Richmond* (1990) 496 U.S. 414, 427, it glossed over the actual legal parameters for establishing estoppel against the government. It is true that the United States Supreme Court has held that "the Government may not be estopped on the same terms as any other litigant." (*Heckler v. Community Health Services, Inc.* (1984) 467 U.S. 51, 60.) However, the court in *Richmond* declined to adopt a blanket rule that no estoppel will ever lie against the Government. (496 U.S. at 423.) Moreover, the *Richmond* holding was extensively discussed in *Burnside-Ott Aviation Training Ctr. Inc. v. The United States* (Fed. Cir. 1993) 985 F.2d 1574, where the Federal Circuit noted that the *Richmond* holding "is limited to claim[s] for the payment of money from the Public Treasury contrary to a statutory appropriation."

The Court held that "because the Supreme Court's analysis in *Richmond* was based entirely on the Appropriations Clause of the Constitution, Article 1, Section 9, Clause 7, which provides that 'no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,' its holding must be limited to claims of entitlement contrary to statutory appropriations." (*Id.*) The Federal Circuit, therefore, held that *Richmond* did not preclude estoppel in *Burnside-Ott* because *Burnside-Ott's* assertion of a right to payment of money from the Public Treasury was not based upon a statutory entitlement, but was based upon its contract with the Navy. The Federal Circuit also noted that *Burnside-Ott's* entitlement was not contrary to statutory eligibility criteria, as was the case in *Richmond*. Moreover, the line of case law defining when a party may properly claim estoppel against the government all involve consideration of the Government's interest in preserving a uniform rule of law that outweighs any equitable rights the other party could assert by pleading estoppel. (*Heckler, supra* at 60.) (See also *The Howard Bank v. United States of America* (1991) 759 F.Supp. 1073, 1080 (estoppel against government found where private party was not seeking to obtain funds contrary to a congressional appropriation); *Griffin v. Reich* (1997) 956 F.Supp. 98, 108-110 (estoppel against government found where plaintiffs relied on HUD's written and/or oral representations and were in compliance with HUD's policies and representations).) As noted above, there simply is no rule, statute, guideline, or regulation that would have put the District on notice that it was not permitted to list Mr. Jordan as the contact person.

Federal Communications Commission

CC Docket #02-6

January 22, 2007

Page 14

Even the FCC, in its Fifth Report and Order No. 04-190, provided that recovery should be required only when funds are “disbursed in violation of the statute or a rule” With respect to competitive bidding, the FCC ruled that recovery is appropriate only where “the beneficiary failed to comply with the Commission’s competitive bidding requirements as set forth in section 54.504 and 54.511 of our rules”

In addition, the rules related to estoppel have been recognized to be different when the agency asserting the estoppel is also an arm of the government. In *United States of America v. Cox* (4th Cir. 1992) 964 F.2d 1431, the issue involved which party should be obligated to pay for the court-appointed psychiatrist’s fees, where the mental condition of a criminal defendant was at issue. The Federal Defender’s office argued that guidelines contained in the Guide to Judiciary Policy and Procedures indicated that the DOJ should be responsible for psychiatric examiners selected by the defense. The Fourth Circuit held that the Guidelines clearly indicated that the DOJ would assume responsibility for the fees, and the DOJ informed the other side that it had no objections to the guidelines with respect to payment responsibilities, and the Federal Defender’s office relied on these representations. The Fourth Circuit noted that in distinction with other cases involving estoppel against the government, the “beneficiary of the estoppel holding will not be a private individual, but the Federal Defender’s Office Thus, a finding of estoppel here will not cause any non-uniformity in the application of the law among individuals, such as the Court decried in *Community Health Services*. (*Id.*) Nor will estoppel against the DOJ cause funds to be appropriated in contravention of Congressional authority as in *Richmond* [*supra*] In fact, application of the estoppel doctrine in the present case will have the opposite effect—encouraging the orderly appropriation of funds by preventing government entities from refusing to make budgetary expenditures on items for which they have previously accepted financial responsibility.”

If school districts and other entities eligible for E-rate funding had any idea that USAC could demand repayment of funds approved, up to five years after the funding is approved, for such technical and speculative violations of unpublished “rules” as the one at issue here, no entity would even apply for funding, and this would defeat the entire purpose of the legislation. Under the facts presented here, where the recipient of the funds is itself a public entity and has put the funds to excellent use, where the violation cited is not found anywhere in statute, rule or regulation, and where USAC knew or should have known if a rule violation existed and yet approved the funding, it is appropriate to invoke the estoppel doctrine.

G. Even If A Technical Violation Of A Rule Is Found, Waiver Is Appropriate

The Commission may waive any provision of its rules on its own motion and for good cause shown. (47 C.F.R. Section 1.3; *In the Matter of Bishop Perry Middle School New Orleans, LA*, FCC Order No. 06-54, ¶. 6.) A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. (*Northeast Cellular* (DC Cir. 1990) 897 F.2d 1164, 1166, cited by *Ysleta* Order FCC 03-313.) In addition, the Commission may take into

Federal Communications Commission

CC Docket #02-6

January 22, 2007

Page 15

account considerations of hardship, equity, or effective implementation of overall policy on an individual basis. (*Id.*, citing *WAIT Radio v. FCC* (DC Cir. 1969) 418 F.2d 1153.) Where there are no substantive violations, where there would be an undue hardship on the entity, and where the public interest would not be served, the FCC has held that waiver is appropriate. (*In the Matter of Academia Claret, Puerto Rico*, FCC Order No. DA 06-1907, ¶ 13; *In the Matter of Bishop Perry Middle School New Orleans, LA*, FCC Order No. 06-54, ¶ 11.) In the past, the Commission has noted that where existing rules and past decisions did not expressly address the specific circumstances presented, this may be taken into account, and that when considering how to remedy a “violation,” the Commission seeks to enforce rules to prevent waste, fraud, and abuse, while also considering factors of hardship, fairness, and equity. (Ysleta Order, *supra*, ¶ 72.) The Commission has also acknowledged that where an applicant’s good faith reliance and previous decisions and communications, and potential for confusion, waiver may be appropriate, particularly where enforcement would impose an unfair hardship. (*Id.*, ¶ 73.)

Waivers have been permitted where the policy behind the rule was satisfied even where the technical requirements were not. (See, e.g., *In the Matter of Illinois School for the Visually Impaired*, FCC Order No. DA 06-785.) The Commission has expressly recognized that the “E-rate program is fraught with complexity from the perspective of beneficiaries, resulting in a significant number of applications for E-rate support being denied.” (*In the Matter of Pasadena Unified School District*, FCC DA 06-486.) Waivers have also been granted when taking into account the fact that the “primary jobs of most of the people filling out these forms include school administrators, technology coordinators and teachers, as opposed to positions dedicated to pursuing federal grants, especially in small school districts.” (*In the Matter of Bishop Perry Middle School New Orleans, LA*, FCC Order No. 06-54, ¶ 14.) In sum, a waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. (*Id.*, citing *Northeast Cellular*, 897 F. 2d 15 1166.)

As applied here, the District involved here is small and rural and serves a student community that already suffers from significant economic hardship. The District has an annual budget of only approximately \$3 million, the vast majority of which goes to pay its employees. The District is currently deficit spending at a rate of approximately \$124,000 annually. If the District maintains its current budget situation, at the end of the third year the unrestricted balance will be approximately \$135,000, far short of the required minimum reserve. Having to repay the E-rate funds expended would have a devastating financial impact on the District, and in the end, the students, who have been the primary beneficiaries of the new and upgraded technology, would be the ones to suffer.

The offense cited was not clarified in any statute, rule or regulation. The District and its administrative staff had no reasonable notice that listing Mr. Jordan as a contact person could conceivably compromise its eligibility for funding. The District engaged in competitive bidding, selected the low bidders, and otherwise complied in every way with actual legal requirements.

Federal Communications Commission

CC Docket #02-6

January 22, 2007

Page 16

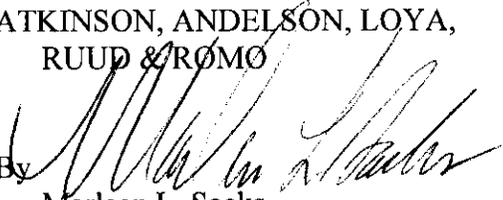
There is no evidence that the process was actually tainted, or that the District did not receive the best and most cost effective services available. The District reasonably relied on the E-rate funding and put it to excellent use, bringing needed technology to staff and students and making them more competitive in a technology driven society. The offense cited, if it was indeed even an offense, was so minor, and so technical, and had no real impact on the process. Forcing the District to repay the money at issue would detrimentally impact the students, those that the E-rate program was designed to help. If ever waiver were justified, this would be the appropriate case in which to apply it.

V. CONCLUSION

For the reasons stated herein, the District respectfully requests that the FCC grant the appeal of the decision by USAC retroactively denying E-Rate funding to the District.

Very truly yours,

ATKINSON, ANDELSON, LOYA,
RUUD & ROMO

By 

Marleen L. Sacks

MLS:hc

Attachments: Exhibits A-F

cc: J. Scott Lucas, Superintendent

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

I am employed in the County of Alameda, State of California. I am over the age of 18 and not a party to the within action; my business address is: 5776 Stoneridge Mall Road, Suite 200, Pleasanton, California 94588.

On January 22, 2007, I served the foregoing document described as

**LETTER OF APPEAL OF NOTIFICATION
OF COMMITMENT ADJUSTMENT LETTER/REQUEST FOR REVIEW OF
USAC ADMINISTRATOR'S DECISION ON APPEAL**

on all interested parties in this action by placing [X] the original and/or [] a true copy thereof enclosed in a sealed envelope(s) addressed ("as follows:" or "as stated on the attached mailing list.").

Letter of Appeal/Request for Review
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MC 20743

(BY MAIL) I caused such envelope to be deposited in the mail at Pleasanton, California. The envelope(s) was mailed with postage thereon fully prepaid.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

BY OVERNIGHT COURIER: I sent such document(s) on January 22, 2007, by Federal Express with postage thereon fully prepaid at Pleasanton, California.

[x] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 22, 2007 at Pleasanton, California.



Helene Chase

EXHIBIT A

School Fact Sheet, 2004-2005

LE GRAND UNION ELEMENTARY SCHOOL DISTRICT

Le Grand Union Elementary School

ADDRESS: 13071 E. Le Grand Road, Le Grand, CA 95333 PHONE: (209) 389-4515

PRINCIPAL: Jay S. Lucas GRADE RANGE: K-8 SCHEDULE: Traditional

TEACHERS AND STUDENTS

Teachers

KEY FACTOR	OUR SCHOOL	COUNTY AVG	STATE AVG
Number of teachers (FTE)	19	26	27
Students per teacher	22	19	20
Average years of teaching experience	12	12	12
Teachers with one or two years of teaching experience	32%	10%	11%
Male teachers	26%	15%	14%
Full credential holders	89%	97%	96%
Trainee credential holders	5%	2%	4%
Emergency permit holders	5%	2%	2%

SOURCE: 2004 CBEDS data, California Dept. of Education. County and state averages represent elementary schools only. Because teachers can hold more than one type of credential, percentages rarely add up to 100 percent.

Our teachers bring an average of 12 years of teaching experience to their classes. About 89 percent have a full credential. Statewide about 96 percent of elementary school teachers hold this credential.

Average Class Sizes

GRADE	OUR SCHOOL	COUNTY AVG	STATE AVG
Kindergarten	22	20	20
First grade	20	19	19
Second grade	18	19	19
Third grade	18	19	20
Fourth grade	29	28	29
Fifth grade	34	28	30
Sixth grade	23	29	30
Seventh grade	30	28	27
Eighth grade	18	22	26

SOURCE: 2004 CBEDS data, California Dept. of Education. County and state averages represent elementary schools only.

Average class sizes at our school vary across grade levels from a low of 18 students to a high of 34 students. Our average class size schoolwide is 22 students. The average class size for other elementary schools in the state is 23 students.

Students

KEY FACTOR	OUR SCHOOL	COUNTY AVG	STATE AVG
Number of students	424	507	558
English learners	46%	42%	32%
Low-income students	83%	73%	56%
Students whose parents attended/graduated college	87%	37%	52%

SOURCE: 2004 CBEDS data, California Dept. of Education. County and state averages represent elementary schools only.

The factors above may affect students' performance in school. Most of the 195 students at our school whose native language is not English speak Spanish at home.

KEEPING YOU INFORMED

Data presented in this report was current as of September 2005. School data provided by the California Department of Education is often updated throughout the year. An annual report about our school is available on our district Web site. You can also request printed copies of this report at our school and district office. For more information, contact our district office at:

Le Grand Union Elementary School District
13071 E. Le Grand Road
Le Grand, CA 95333
(209) 389-4515

To view this report and the reports of other schools in our district online, please visit our Web site at:
<http://www.legrand.k12.ca.us>

ACADEMIC PERFORMANCE

California Standards Tests

This series of tests is based on what California students are expected to know and learn at each grade level.

Student Proficiency

BAR GRAPHS SHOW THESE PROFICIENCY GROUPS FROM LEFT TO RIGHT:

■ FAR BELOW BASIC ■ BELOW BASIC ■ BASIC ■ PROFICIENT ■ ADVANCED

STUDENT SUBGROUP	PERCENT PROFICIENT OR HIGHER	LOW SCORES	HIGH SCORES
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English/Language Arts (Reading and Writing)

Our school	22%	
Calif. elementary schools	41%	

Math

Our school	27%	
Calif. elementary schools	51%	

Science

Our school	5%	
Calif. elementary schools	29%	

SOURCE: The scores for the California Standards Tests are from the spring 2005 test cycle. State averages represent elementary schools only.

MEASURES OF ACADEMIC PROGRESS

We track our school's academic achievement over time with two measures: the Academic Performance Index (API) and Adequate Yearly Progress (AYP). These measures combine test results differently and often provide conflicting views of student progress.

Academic Performance Index (API)

This is California's way of rating schools. The API is based on student test scores, and it rates schools on a scale from 200 to 1000. The state expects schools to obtain an API of 800. Underperforming schools have APIs falling in the bottom half of all schools in the state and are eligible for state-funded programs to improve student achievement. Our school's API was 651, compared with 752 for the average elementary school.

Adequate Yearly Progress (AYP)

This is a federal measure that requires schools to meet test score goals schoolwide and for subgroups* of students. If just one group of students fails to meet its goals, the school does not make AYP. Program Improvement (PI) schools did not make AYP for two or more years in a row in the same subject. They must offer students transfers to other schools in the district and, in their second year in PI, tutoring services as well.

CALIFORNIA API ACADEMIC PERFORMANCE INDEX		FEDERAL AYP ADEQUATE YEARLY PROGRESS	
Met schoolwide growth target	Yes	Met AYP	No
Met growth target for prior school year	No	Met schoolwide participation rate	Yes
API score	651	Met schoolwide test score goals	No
Growth attained from prior year	+31	Met subgroup* participation rate	Yes
Met subgroup* growth targets	Yes	Met subgroup* test score goals	No
Governor's Performance Award	Yes	Met schoolwide API for AYP	Yes
Underperforming school†	Yes	Program improvement school	Yes

SOURCE: API growth score, spring 2005 test cycle.
* - Includes English learners, special education students, low-income students, and ethnic groups that must meet separate API and AYP goals.
† - Data were not available or not reported; the number of valid test scores was too small for statistical significance; the school or district is changing the testing data and a new API will be released in 2006; or the school participates in an alternative accountability program.
* - Includes schools participating in the Immediate Intervention/Underperforming Schools Program and the High Priority Schools Grant Program.

Advanced Micronet Solutions Attn Lisa Moomau
6690 Amador Plaza Road, Suite #110
Dublin, CA 94568
Phone: (510) 551-3660
Fax: (510) 551-3664

Quest Systems, Attn Chris Puehse
7729 Montero Dr.
Rohnert Park, CA 94928
Phone: (800) 315-3773
Fax: (707) 664-0250

Davis Office Systems
357 W 18th Street
Merced, CA 95340
Phone: (209) 383-3000
Fax: (209) 384-1913

Le Grand Elementary School ERATE IV
ERATE YEAR 4 Bidding

NOTICE: All contracts are based upon FULL Erate funding to be received by the Le Grand Union Elementary School District. Please include Cisco Smartnet for any new Cisco item.

Group 1, Servers for Student Email and Web Data

- 1 ea. Cisco Server (Cisco Part Number IPTV-3431-ARCH)
Dual PIII 850, 512Mb Ram, 36.2GB Storage, RAID, Windows 2000
- 1 ea. Cisco Server (Cisco Part Number CVPN-3030-RED-BUN)
Dual PIII 850, 512MB Ram, 36.2GB Storage, RAID, No OS
- 1 ea. Cisco Server Upgrade Card Additional RAM 256MB

Price above including tax and shipping __\$45,045.00_____

Vendor and SPIN # __Quest Systems, 143005814_____

Group 2, LAN Equipment for Data Traffic

- 1 ea. Cisco Catalyst 6500 Chassis with the Following Parts (MDF)
 - 1 ea Cisco Num WS-C6506-1300AC
 - 1 ea Cisco Num WS-X6K-S2-MSFC2
 - 1 ea Cisco Num WS-X6316-GE-TX
 - 1 ea Cisco Num WS-X6348-RJ45V
 - 1 ea Cisco Num WS-X6516-GBIC
 - 1 ea Cisco Num WS-CAC-1300W
 - 1 ea Cisco Num WS-C6500-SFM
- 1 ea. Cisco Catalyst 4000 Chassis with the Following Parts (Com Lab)
 - 1 ea Cisco Num WS-C4006-S2
 - 2 ea Cisco Num WS-X4148-RJ45V
 - 1 ea Cisco Num WS-X4412-2GB-T
- 5 ea. Cisco 24 port 10/100 Switches (Cisco Part Number WS-C3524-XL-EN-PWR)
- 1 ea. Cisco T3 Module for 3600 (Cisco Part Num NM-1A-T3)
- 10 ea. Cisco Gigabit GBICS (Cisco Part Num WS-G5484)
- 30 ea. Cisco 2 port Ethernet Switch (Cisco Part Number CS-7910+SW)

Price above including tax and shipping _\$143,712.43_____

Vendor and SPIN # __Quest Systems, 143005814_____

Group 3, UPS Equipment

1 ea APC Symmetra Rack Mount (Apc Part Number SYH6K6RMT-P1)
8 ea APC Rack MT UPS 1400 Net (Apc Part Number SU1400RM2U)

Price above including tax and shipping __ \$19,856.23 _____

Vendor and SPIN # __ Quest Systems, 143005814 _____

Group 4, Phone Service

Basic Phone Service for 28 POTS, 2 T1 Lines, 1 PRI Line

Monthly- \$1500, Yearly- \$18,000

Pacific Bell- 143002665

Group 5, Internet Service

Basic Internet Service, 1.544mb Frame

Pacific Bell internet Services- 142004610

Monthly- \$1000 Yearly- \$12,000

Group 6, Cabling Service

Install additional (6) drops in every classroom, to accommodate new Mini Labs installed in the last year, total of 132 Drops.

Install new 12 Strand Fiber optic Cable to (3) new IDF locations throughout the campus, termination and end equipment required. Total of 2300 Ft of Fiber, total of 1200 ft of Conduit needed.

Install New Telephone Cabling plant throughout the campus, install new telephone drop in every classroom.

TOTAL COST OF PROJECT- \$98,367.69

Vendor and Spin Technology Solutions, 143020261

Le Grand Elementary School District
ERATE IV, July 2001-June 2002
District Installation and Repair Contract

BID Spec's for LGELM, July 2001-June 2002 All Contracts Based on FULL ERATE FUNDING

PLEASE BID THE FOLLOWING ITEMS:

Company will install all new Servers, Switches, and equipment for ErateV.
All equipment included on All ERATE 471 Applications.
TOTAL HOURS 900 Hours

MINIMUM QUALIFICATIONS OF INDIVIDUALS:

Cisco CCNA

Microsoft MCSE 2000

3+ Years Experience in Networking Client/Server Setup

NCS SasiXP

Cisco IPTV/Cisco IP Telephony/Cisco IPVC Knowledge

TOTAL COST FOR 900 Hours _____

Extend existing maintenance on all products currently held by the district covered under Erate list to include:

1- Cisco Catalyst 6500 Series Switches	2-Cisco Catalyst 4000
15-HP Server	10- Cisco 3500 Series
Maint. on 3 PBX Systems	Maintenance of Cable Plant

All of the previous equipment will fall under a Next Business Day replacement and no hours charged to install and replace.

Total Cost for Service Above _____

COMPANY _____

SPIN _____