

**Before the
Federal Communications Commission
Washington DC 20554**

In the Matter of:

)	
Request for Review of a COMAD)	
from the Schools and Libraries Division)	Administrator Correspondence Dated
from Carroll County, Mississippi)	August 12, 2008
Public Schools)	
)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

Request for Review

In accordance with Sections 54.719 through 54.721 of the Commission’s Rules, now comes Carroll County, Mississippi Public Schools (Carroll) before the Federal Communications Commission (Commission) requesting review of a Commitment Adjustment decision of the Universal Service Administrative Company (Administrator). This request comes before the Commission in a timely manner from the Administrator letter dated August 12, 2008.

Appellant: Carroll County Mississippi Public Schools

BEN: 128591

Form 471: 581451

FRN: 1611018

Service Provider: Computer Software Innovations

SPIN: 143030970

In correspondence dated August 12, 2008, the Administrator rescinded all funding for the above referenced FRN because of an alleged competitive bidding violation with the associated Form 470 (Attached). Specifically, the Administrator cited language in Block 3, Item 15 F as the reason for the Funding Commitment Adjustment. Carroll inserted the following in Item 15 F of the Form 470: “This is a single source system that can only be supported by ACS.” The Administrator concluded that Carroll tainted the bidding process “By tailoring the establishing

Form 470 for FRN 1611018 toward one specific bidder (ACS), you deterred other potential bidders and thwarted the competitive bidding process in general. Accordingly, your funding commitment will be rescinded in full and USAC will seek recovery of any disbursed funds from the applicant.”

Carroll appealed this decision to the Administrator on October 3, 2008. In correspondence dated October 14, 2008 the Administrator denied the Carroll appeal.

Carroll disagrees with the Administrator’s conclusion that the statement tainted the bidding process. Bidding resulting from publication of this Form 470 was open to all potential, qualified vendors. The statement in Item 15 F was clarifying information about the unique nature of the services requested. Carroll would have considered proposals from qualified vendors able to support this terminal server, thin client network configuration.

Background

Carroll had previously purchased terminal server, thin client network systems for county schools. Thin client networks, also known as “terminal server” networks, typically utilize proprietary configurations to deliver information to inexpensive “dumb” terminals and user keyboards and monitors.

Form 470

Carroll posted a Form 470 for Basic Maintenance of Internal Connections. In the Service or Function section Carroll stated “Basic maintenance of terminal server system.” Under Quantity and/or Capacity Carroll stated: One server system w/capacity to serve 1200 users.”

Item 15 of the Form 470

The Form 470 Item 15 provides applicants the opportunity to certify and explain services and facilities that are *ineligible* for support. Item 15 F asks applicants to provide additional details of the *ineligible* services or items to “...help providers identify the services you desire.”¹ (emphasis added). Carroll put the statement cited by the Administrator as anti-competitive in this section believing that this would be the appropriate area to identify this unique aspect of requested services.

Carroll waited at least 28 days from the posting date of the Form 470 before selecting a vendor. There were no responses as a result of the Form 470 posting. In fact, there were no inquiries at all from the posting. Carroll selected ACS as the most cost effective response to the posting. On January 19, 2007, Carroll signed a maintenance contract with ACS for the networks.

¹ Form 470 Instructions page 15.

Carroll filed a Form 471 for Maintenance of Internal Connections for the maintenance contract with ACS. The Administrator reviewed the application and approved the funding request.

ACS sold the division to CSI on July 1, 2007. A SPIN change was initiated and approved by the Administrator. CSI submitted an invoice to the Administrator and was paid the discounted portion.

In correspondence dated August 12, 2008 the Administrator after a “routine review” of funding commitments unilaterally concluded that Carroll had violated Commission competitive bidding regulations and rescinded funding. The Administrator will request Carroll to return all funds paid under this FRN.

Discussion

With the E-Rate program a small amount of funds will be committed or disbursed in error. The Commission has recognized this in a number of Orders. In particular, the Fifth Order on Reconsideration specified under what conditions funds should be returned. The Fifth Order stipulates that violation of competitive bidding regulations warrant return of funds.² The Order states: “...we should recover the full amount disbursed for any funding requests in which the beneficiary failed to comply with the Commission’s competitive bidding requirements set forth in section 54.504 and 54.511 of our rules and amplified in related Commission Orders.” The related Orders include Mastermind Internet Services, Ysleta Independent School District and the Fourth Order on Reconsideration.

Although not codified in Commission Section 54 regulations *per se*, the Mastermind decision clarifies that a vendor may not serve as contact for the Form 470. The Ysleta decision states that a Form 470 may not list every item on the Eligible Services List but should reflect the actual needs of the applicant, based on the applicant’s technology plan.³ Like Mastermind requirements, this Order did not change Commission regulation in Section 54 but became Administrator policy nonetheless.

Commission regulations in Section 54, including 54.504 and 54.511 specify how applicants may apply for E-Rate eligible services. These sections also specify that applicants must make certain certifications within the Form 470 including a certification that all bids submitted were carefully considered and the most cost effective bid was selected, with price being the primary factor.

Carroll County filed a Form 470 in accordance with Commission regulations. We listed exactly the services we desired under the Maintenance of Internal Connections category of service – Basic maintenance of terminal server system, with a Quantity or Capacity – One server system w/capacity to serve 1200 users. In Item 15 F which allows applicants to expand on ineligible

² Fifth Report and Order, FCC 04-190, Rel. August 13, 2004 at 21.

³ Ysleta Order, FCC 03-313, Rel. December 8, 2003 at 37.

equipment or services we stated that the product (terminal server) is a single source item provided by ACS. This statement was included not to thwart competition but to notify prospective bidders that the product – terminal server system maintenance – was for a product exclusively provided by ACS. Carroll provided the statement in the section of the Form 470 reserved for ineligible service disclosure. Even if the Administrator determined that the statement itself was anti-competitive, the fact that it was disclosed in a section of the Form 470 reserved exclusively for discussions of ineligible items or services should mitigate any perceived anti-competitive effect.

If the statement in question is determined to make the Form 470 ineligible for use then it is appropriate that the statement should have been placed in the section reserved for ineligible items.

A prospective bidder would immediately know that the service requested was the ACS terminal server proprietary product. If the prospective bidder had expertise with the ACS product, they had the opportunity to submit a proposal, which would have been considered and evaluated with other responses. If a prospective bidder had absolutely no expertise with the ACS terminal server product, they would not waste their own resources to bid on a project for which they had no qualifications.

There is absolutely no statutory requirement, or Commission regulation forbidding the use of proprietary products or services that are eligible for E-Rate funding. Applicants are required to specify services requested on a Form 470, wait 28 days and select the most cost effective solution, with price being the primary consideration. Applicants may specify exact equipment types with requests. For example, an applicant may specify CISCO equipment or even a particular model number when requesting responses. The Administrator acknowledges this in general terms on training slides: “For example, applicants may require service providers to provide services that are compatible with one kind of system over another (e.g. Apple vs. Windows).”⁴

In this instance, Carroll requested maintenance support for a particular terminal server network. Any qualified vendor that could support the Carroll County terminal server network was welcome to respond.

Terminal Server Networks

A typical terminal server network maintains all application software at a central server location transmitting images of software applications to end users. Significant cost savings are achieved by replacing end-user computers with inexpensive dumb terminals. Ongoing cost savings are

⁴ Administrator training slide Number 11, Program Compliance presentation, 2008 training.

achieved with simple software upgrades and replacement to the central server without the expense of upgrading every end-user PC on the Local Area Network.⁵

Terminal Server networks have a small but growing share of the Local Area Network market and a relatively few companies are in the business, including CSI, Citrix Systems, VM Ware, and a small division of Hewlett Packard with the acquisition of Neoware in 2007. Each company has a proprietary system for implementation their products.

CSI uses DeliveryPoint software, a CSI brand name which was purchased from ACS on July 1, 2007. The ACS brand name was IDS (Information Delivery System) which ACS developed. CSI modified the ACS product and rebranded it DeliveryPoint. This was a proprietary product ACS developed for the K-12 network market. Although proprietary, other companies may or may not have personnel qualified in the operation of this particular type of network.

Further, the Commission in the Fifth Order on Reconsideration recognized that recovery of funds may be inappropriate in many instances:

On the other hand, we agree with commenters that recovery may not be appropriate for violation of all rules regardless of the reason for their codification.³⁹ For example, when the administrative costs of recovering funds disbursed in violation of a rule exceed the improperly disbursed amount, it may be reasonable not to seek recovery. Likewise recovery may not be appropriate for violation of procedural rules codified to enhance operation of the e-rate program. We seek to ensure that the determination is made and communicated to applicants in advance. Consistent with this policy, as described more fully below, we intend to evaluate whether there are USAC procedures that should be codified into the Commission's rules and whether violation of each should also be a basis for recovery. Applicants will be required to comply with procedural rules in applying for support—and applications that do not comply will be rejected. If, however, the procedural violation is inadvertently overlooked during the application phase and funds are disbursed, the Commission will not require that they be recovered, except to the extent that such rules are essential to the financial integrity of the program, as designated by the agency, or that circumstances suggest the possibility of waste, fraud, or abuse, which will be evaluated on a case-by-case basis.⁶

The limited criteria for recovery of funds for competitive bidding violations does not address the issue raised with this COMAD. The Administrator has failed to properly review this situation, contact either Carroll or the vendor or seek guidance from the Commission before seeking recovery of funds.

Conclusion

⁵ For more information on Terminal Servers see: http://en.wikipedia.org/wiki/Terminal_server

⁶ Fifth Order on Reconsideration FCC 04-190, Rel. August 13, 2004 at 19

The E-Rate program was enacted by legislation aimed at providing discounted service to schools and libraries for telecommunications, Internet access and advanced services. With any government program, a certain amount of funding will be disbursed in error. In a series of orders the Commission recognized that erroneous funding may occur but that great care must be taken by the Administrator before seeking repayment of funds.

The Commission has ruled numerous times on the complexity of the E-Rate program in general and several times on the Form 470 in particular. The Commission has admonished applicants to refrain from listing every item in the Eligible Services List. The Administrator on the other hand has denied applications where the Form 470 was not broad enough to include service ultimately requested on a Form 471. Applicants are understandably confused as to what to or not to disclose on a Form 470 posting. Indeed, Item 15f is rarely used by applicants. Carroll believed the statement should be made to clarify its funding request and determined that the space reserved for ineligible disclosure would be the most appropriate place.

In this instance, no violation of Commission regulation occurred. A Form 470 was properly filed with sufficient information for prospective bidders to respond. The Form 470 was available for at least 28 days before a vendor was selected and a proper contract was signed.

The Administrator improperly rescinded funding for this service and should overturn the COMAD decision.

Respectfully Submitted this 24th day of October, 2008,

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