

September 2, 2009

Letter of Appeal
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, DC 20554

**Appeal Regarding Notification of Commitment Adjustment Letter - Dated August 14, 2009
CC Docket Number 02-6**

FRN 1432666
471 Application: 502165
BEN: 142917
Billed Entity: Mesa Unified School District #4
FCC Registration Number: 0011923059
Service Provider: Qwest Communications Company, LLC
SPIN: 143001157

Please accept this letter and its attachments as an Appeal of the Notification of Commitment Adjustment Letter dated 8/14/2009 for FRN 1432666. The letter states that the reasons for the adjustment in funding are:

After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. During the course of an audit it was determined that the price of eligible products and services was not the primary factor in the vendor selection process. This determination is based on the ISP RFP which was due on April 21, 2004. During the evaluation process for the 5 year contract both cost and scope were given a weight of 30 percent. FCC rules require that applicants select the most cost-effective product and/or service offering with price being the primary factor. Applicants may take other factors into consideration, but in selecting the winning bid, price must be given more weight than any other single factor. Ineligible products and services may not be factored into the cost-effective evaluation. Since price was not the primary factor in the vendor selection process, the commitment has been rescinded in full and USAC will seek recovery of any disbursed funds.

The Mesa Unified School District disagrees with this decision and is requesting that the FRN dollar amount should not be modified, and funds not sought for recovery.

NICELY DONE

consulting

MUSD is aware of the requirement that price must be the primary factor in the evaluation of service offerings and has followed and complied with this requirement in all Erate related procurement processes since the 2003-2004 funding year. However, this requirement was by the FCC's own admission vaguely stated and contradicting on different FCC documents; until definitively defined and stated as part of the FCC's Ylseta decision (FCC 03-313) that was released on December 8, 2003. Please refer to paragraphs 49 and 50 which state:

49. In discussing the role of state and local procurement processes, however, the Commission stated that price would be "a primary factor" rather than "the primary factor."¹³⁵ However, in discussing the Fourth Reconsideration Order, the Commission stated that price would be "the primary factor" rather than "a primary factor."

50. We acknowledge that the Commission's use of varying phraseology in the same decision created some ambiguity on this issue. To strengthen the consideration of price as "the primary factor" in the competitive bidding process, we hereby depart from past Commission decisions to the contrary¹³⁶ and clarify that that the proper reading of our rule, in light of the Commission's longstanding policy to ensure the provision of discounts on cost-effective services, is that price must be the primary factor in considering bids.¹³⁷

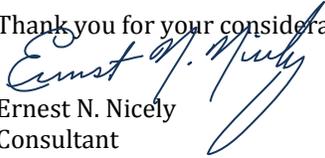
Recent FCC rulings on appeals have stated that applicants should not be held to this standard if their competitive process took place prior to the end of the 2003 Funding Year. We cite specifically FCC Order DA-07-1236 regarding the Long Beach, CA school district released March 13, 2007. In FCC Order DA-07-1236 the FCC ruled that USAC should allow applicants to use price as "a primary factor" (not THE primary factor) if their competitive bidding process took place "before the conclusion of the 2003 funding year".

The ISP RFP in question was due April 21, 2004; which was prior to the end of the 2003-2004 funding year. Secondly, in the MUSD ISP RFP both Price and Scope Response were weighted 30%, with the other evaluation factors being weighted lower. Thus Price was "a primary" factor. Based on this we submit that MUSD was in compliance with the FCC's rules as they were understood at the time that these offerings were evaluated and awarded. It is further submitted that there is precedence in other appeals being upheld under the exact same circumstances as this determination; and that MUSD requests the same consideration in ruling in favor of this appeal.

The following documentation has been submitted for your review:

- FCC 03-313 – the Ylseta Independent School District decision (51 pages)
(Available online at URL: <http://www.universalservice.org/res/documents/about/pdf/fcc-orders/2003-fcc-orders/FCC-03-313.pdf>)
- FCC Order DA-07-1236 – Long Beach Unified School District (6 pages)
(Available online at URL: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-1236A1.pdf)
- Letter of Agency for Nicely Done Consulting (3 pages)

Thank you for your consideration.


Ernest N. Nicely
Consultant
Nicely Done Consulting
888-222-3651 Office
602-635-3442 Fax
ernie@nicelydoneconsulting.com