

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Request for Review of a Decision of the Universal Service Administrator by)	File Nos. SLD-360412, 360904, 369205, 369537
Lazo Technologies, Inc., et al)	
)	CC Docket No. 02-6
Schools and Libraries Universal Service Support Mechanism)	

**SUPPLEMENT AND ERRATA TO
PETITION FOR RECONSIDERATION**

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September 25, 2009

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PETITION FOR RECONSIDERATION**

Lazo Technologies, Inc., Hill Professional Services, and Advanced Technology Solutions South (“Petitioners”), by counsel, and pursuant to the Federal Communications Commission’s (“Commission”) Rules, 47 C.F.R. § 1.106, petitioned the Wireline Competition Bureau (“Bureau”) for reconsideration of the above-captioned Order,¹ on September 11, 2009 (“Petition”). This filing amends, clarifies and supplements the Petition.²

I. PETITIONERS WERE INDEPENDENT SUBCONTRACTORS UNDER TEXAS STATE LAW AND SHOULD NOT BE HELD LIABLE FOR THE ILLEGAL ACTS OF MSE UNDER TEXAS OR COMMISSION PRECEDENT

In the Order, the Bureau stated that the contract between the Dallas Independent School District (“DISD”) and the Consortium³ violated the Commission’s competitive bidding requirements.⁴ Petitioners do not dispute this fact. Petitioners demonstrate however that as

¹ *Request for Review of a Decision of the Universal Service Administrator by Lazo Technologies, Inc., et al*, File Nos. SLD-360412, 360904, 369205, 369537, CC Docket No. 02-6, Order, DA 09-1797 (released Aug. 12, 2009) (“Order”).

² Petitioners noted that they would amend or supplement within two (2) weeks of their initial filing. Petition at 4.

³ Master Agreement for Products and Services Between Dallas Independent School District and The Consortium, dated December 18, 2003 (“Master Agreement”), attached hereto as Exhibit 1.

⁴ Order at 5.

independent subcontractors they cannot and should not be held liable or punished for the acts of MSE or DISD, under either Texas law or Commission precedent.

A. Legal Status of Petitioners; Texas State Law

All of the Petitioners (indeed, all members of the Consortium) were independent contractors, subcontractors, and/or vendors. The Letter Agreements that each Petitioner signed with MSE refer to Petitioners interchangeably as “vendor/subcontractor,” “subcontractor,” and “vendor.”⁵ The Master Agreement characterizes Petitioners (and all members) as “subcontractors” and “vendors.”⁶ In the Master Agreement the Petitioners again identify themselves as merely an “alliance of vendors.”⁷ The Master Agreement refers to the “Contractor” as an “independent contractor.”⁸

Texas law⁹ (the governing law of the Master Agreement) defines an independent contractor as “any person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details.” *Indus. Indemnity Exch. v. Southard*, 160 S.W.2d 905, 907 (Tex. 1942). Several factors may be considered to determine whether or not a person (or entity) is an independent contractor, including: “(1) the independent nature of his business; (2) his obligation to furnish necessary tools, supplies, and material to perform the job; (3) his right to control the progress of the work, except as to final results; (4) the time for which

⁵ See Letter Agreements between Lazo Technologies, Ltd., Hill Professional Services, ATS South and Micro System Enterprises, Inc. all dated Jan. 23, 2003, attached hereto as Exhibits 2-4.

⁶ See Master Agreement, at 10, ¶ 22. (“Contractor agrees to allocate work to subcontractors and vendors, which are historically underutilized businesses in accordance with the Minority and Women Owned Business Enterprise (M/WBE) forms and guidelines attached hereto as Exhibit G.”).

⁷ See, e.g., Master Agreement at Ex. B-1 (“Consortium Description. The listed alliance of vendors, both minority and non-minority firms, is built on the premise that expertise exists . . . to provide the solutions [DISD] seeks.”)

⁸ Master Agreement at 4, para. 9.

⁹ The Commission may look to state law where appropriate, although it ultimately bases decisions on its own policies and regulations. See *Application of Algreg Cellular Engineering*, CC Docket No. 91-142, Decision, 9 FCC Rcd 5098 ¶ 46 (1994).

he is employed; and (5) the method of payment, whether by time or by the job.” *Tex. A & M Univ. v. Bishop*, 156 S.W.3d 580, 584-85 (Tex. 2005) (citing *Indus. Indemnity Exch.*, 160 S.W.2d at 906). Petitioners meet each factor in the definition of an independent contractor.

Each Petitioner is an individual, independent cabling business. Each performed its work under the Master Agreement alone with no supervision from MSE nor any other Consortium member.¹⁰ Each Petitioner is an independently owned and operated company. There is no common ownership or control among the Petitioners or with MSE. Outside of the work performed under the Master Agreement, Petitioners had no other business relationship with MSE. Petitioners therefore satisfy the first factor.

Each Petitioner purchased its own supplies and materials to complete its work -- other than the cabling to be installed which they purchased as a group in order to receive bulk discounts. Each Petitioner had its own employees, used its own vehicles, and utilized its own tool belts, supplies and other day-to-day consumable materials. Petitioners therefore satisfy the second factor.

Perhaps the most important factor Texas courts use to determine whether or not an entity is an independent contractor is whether the employer or prime contractor has the right to control the “progress, details, and methods of operations of the work” done by the independent contractor. *Limestone Prods. Distribution, Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002). MSE had no such right of control over any Petitioner. Each Petitioner was in charge of its own progress made on each respective project and was only required to meet individual project deadlines on a per school basis. Neither MSE nor any other subcontractor or vendor had

¹⁰ As further evidence of Petitioners' independent nature, they attach hereto as Exhibits 5 through 7, the curriculum vitae of their CEOs. Each Petitioner is a distinct and individual business, and the community involvement and leadership roles of their founders stand in stark contrast to Wong's illegal actions.

oversight on the order in which work was undertaken so long as the final deadlines were met.

Petitioners therefore meet the third factor.

Each Petitioner was only engaged for so long as required to complete the projects under the Master Agreement. There was no continuing “employment” of any Petitioner. Each Petitioner was individually and independently engaged until such time as it completed its respective project as this was a project-based matter. Petitioners therefore meet the fourth factor.

The method of payment was project-based as well, and it was incumbent upon each Petitioner to complete its individual projects efficiently to within its own internal cost structure. No Petitioner was paid by the hour. No Petitioner was paid as an employee. Each Petitioner was paid per project completed. Each Petitioner was responsible for the payment of its own employees. Petitioners therefore meet the fifth factor.

Accordingly, under the five factor test, Petitioners were clearly independent subcontractors. In addition, a contract defining an entity as an independent contractor is evidence of that specific relationship (absent evidence that the contract is a sham). *See Newspapers, Inc. v. Love*, 380 S.W.2d 582, 588-90 (Tex. 1964). The Master Agreement defines Petitioners as subcontractors and/or vendors, and defines their duties consistent with the duties of independent contractors. *See* Ex. 4 at 10 and Ex. B-1.

As independent contractors, subcontractors and/or vendors, Petitioners cannot lawfully be penalized for the independent, illegal actions undertaken by the prime contractor. It is well-settled law that an entity who hires an independent contractor is not vicariously liable for the tort or negligence of that independent contractor, unless the “employer” exercises a sufficient amount of control over the independent party’s work. *See, e.g., Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 791-92 (Tex. 2006); *Baptist Mem’l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex.

1998). It is reasonable then also, that an independent contractor cannot be held liable for the torts or crimes of the individual or entity who hired it. The Petitioners, as independent contractors, cannot be held responsible or liable for the actions of MSE.

B. Legal Status of Petitioners; Commission Precedent

The Bureau should revisit the *Tennessee Order*¹¹ and apply its ruling therein to Petitioners' specific situation. In the Order, the Bureau distinguished the *Tennessee Order* from the present case by noting that there was no evidence that the underlying E-rate contract between Tennessee and its service provider, ENA, was tainted by fraud. The Bureau *inadvertently misconstrued* the opinion of the Commission in the *Tennessee Order*. The Commission stated that it was "not aware of any allegations of waste, fraud, abuse, or other wrongdoing relating to any of the subcontractors that have provided service under the ENA contract, or, for that matter, the award of the specific ENA contract itself. *Tennessee Order* at 13587. The correct interpretation of the Commission's observation is that the *subcontractors themselves* were the subject of allegations of neither (i) *general* waste, fraud, abuse or wrongdoing, nor (ii) waste, fraud, abuse or wrongdoing in the *award of the specific contract itself*.

The focus of the *Tennessee Order* was not whether there was fraud in the award of the contract¹², but that the *subcontractors* were not alleged to have taken part in fraudulent activities. The Petitioners are in exactly the same position. There has never been any allegation that any Petitioner was in any way involved with the illegal activities of MSE or the DISD. There has never been any allegation of fraud or abuse by any Petitioner. *The Petitioners are in the exact*

¹¹ *Request for Immediate Relief Filed by the State of Tennessee, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 97-21, 18 FCC Rcd 13581, 13584-589 (2003) ("*Tennessee Order*"), cited in the Order at 5-6, n. 29, 4.

¹² In fact, there appears not to have been a determination whether fraud played a role in the contract, at least at the time of the *Tennessee Order*, therefore, that situation is very similar to the instant case.

position as the subcontractors in the Tennessee Order. There is no excuse for the Bureau not according the exact same treatment to the Petitioners.

In the *Tennessee Order*, ENA used various telecommunications and network *subcontractors* in its work under the E-rate contract. *Id.* at 13584. When a criminal investigation began into the relationship between ENA and a former Tennessee governor, USAC delayed further processing of the corresponding funding request. *Id.* at 13584-585. Tennessee, in turn, requested a substitute service provider to take ENA's place so that the subcontractors who were innocent of any wrongdoing could receive the payments owed to them. *Id.* ENA itself would receive no payments until the investigation was resolved. *Id.* The Commission permitted such a substitution in service providers noting that delays in funding contracts "may have the effect of penalizing parties that are in no way implicated in potential wrongdoing." *Id.* at 13586-587. The Commission observed that "The relevant subcontractors have provided service in good faith to the schools of Tennessee, in reliance on the contractual agreement between ENA and Tennessee." *Id.* at 13587.

The same is true of Petitioners. Petitioners were among the various subcontractors used by MSE. At no time did any of them engage in any wrongdoing, nor were they ever suspected of any wrongdoing. Each Petitioner performed its work to completion, in good faith. As in the *Tennessee Order*, permitting payments to the innocent subcontractor Petitioners will avoid the effect of penalizing Petitioners when they are not implicated in wrongdoing. *See, id.* As Wong and Bohuchot already have been convicted and debarred, and MSE is no longer a Consortium member, there is no danger of the wrongdoer, MSE, receiving any payments rightfully earned only by Petitioners. As with ENA in the *Tennessee Order*, there is no risk of payments going to the wrongdoer MSE. *See id.*

In the *Tennessee Order*, the Commission concluded that the following two goals were of equal importance: (i) requiring USAC to act with caution on a funding request associated with a criminal investigation, and (ii) avoiding harm to third parties. *Id.* at 13588. In permitting payments to the subcontractors in Tennessee, it also emphasized the narrowness of such a fact specific case. Petitioners urge the Commission to again adhere to its stated goal of protecting innocent third parties from harmful consequences by issuing a narrow ruling in their favor that will not affect any Commission rules governing USAC and the E-rate program. The Petitioners are in the exact same position as the subcontractors in the Tennessee Order and should be accorded the exact same relief. Granting this relief will not expand the application of the *Tennessee Order*.

C. Good Samaritan

Furthermore, Petitioners note that they acted as Good Samaritans, fulfilling their obligations to ensure that critical internet services would be timely delivered to the school children of Dallas, who would otherwise also have been innocent victims of the actions by MSE and DISD if all work on the Master Agreement had ceased. Petitioners are dedicated and active members of their communities, as evidenced by their resumes attached hereto. As community and business leaders they would not abandon the school children of Dallas. They fulfilled their commitments to the school children of Dallas to ensure that their schools were cabled for internet access critical to their education. Petitioners, like the subcontractors in the *Tennessee Order*, should not be penalized for acting as Good Samaritans, and should be extended a similar modification of the Good Samaritan policy as was granted the subcontractors in the *Tennessee Order* so that they can receive full payment for the services rendered. *Id.* at 13587.

II. ERRATA

Petitioners make the following two (2) clarifications and amendments to the Petition:

First, in the Petition, the text on page 10, paragraph 2, line 3 reads: "Petitioners are minority-owned members of the Dallas Consortium that have not received payment under the DISD contract." This line should be amended to read "Petitioners are minority-owned members of the Dallas Consortium *who did not receive all of their payments* due under the DISD contract." Italics identify the principal change in language. Petitioners wish to clarify that each of them did receive some payments, but they did not receive payment for all of their services. Petitioners have previously sent statements to the Bureau detailing monies received from MSE and DISD during the informal review and are available to review those again in more detail.

Second, in the Petition on page 10, paragraph 2, line 6 reads: "Further, Petitioners' role in the competitive bidding process was limited to submitting their own companies' information and minority certifications to be included in the entire bid proposal sent to DISD." This line should be amended to read "Further, Petitioners' role in the competitive bidding process was limited to *agreeing to their tasks, statements of work, and pricing for those tasks, plus* submitting their own companies' information and minority certifications to be included in the entire bid proposal sent to DISD." Petitioners provide this clarification in order to be completely accurate. Each Petitioner agreed to be responsible for its overall projects and agreed to the overall compensation they would receive for their work; however, none of the Petitioners were otherwise involved in the bidding process. They simply committed to provide the specified services at the specified compensation in the event the contract was granted. This clarification does not otherwise change the independent nature of each Petitioner except to strengthen it. No independent contractor would agree to work on a project without knowing the scope of work and agreeing to the final

payment terms. Accordingly, Petitioners also undertook obtaining this assurance from the prime contractor under the Master Agreement.

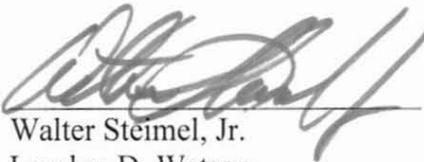
III. Request for Relief

Petitioners repeat their request for reconsideration of the Bureau's Order and the granting of the relief requested herein. As independent subcontractors Petitioners cannot and should not be held liable or punished for the acts of MSE or DISD, under either Texas law or Commission precedent. Petitioners seek a reconsideration of the Order and a determination ordering USAC to pay Petitioners' invoices. In the alternative, Petitioners seek a waiver of the rules as applied to them under the instant facts and circumstances so that they may be paid in full on their invoices, or treatment as Good Samaritans and full payment for the work they performed.

Respectfully submitted,

LAZO TECHNOLOGIES, INC., HILL PROFESSIONAL
SERVICES, AND ADVANCED TECHNOLOGY
SOLUTIONS SOUTH
Petitioners

By:



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Its Counsel

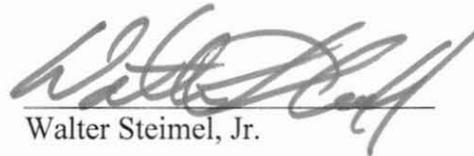
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September 25, 2009

Certificate of Service

I, Walter Steimel, Jr., an attorney with the law firm of Greenberg Traurig, LLP, hereby certify that the foregoing Supplement and Errata to Petition for Reconsideration was served the 25th day of September, 2009, via electronic filing on:

Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554


Walter Steimel, Jr.