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October 11, 2010

Request for Review
CC Docket No. 02-6

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

To Whom It May Concern:

We are filing a Request for Review of an Administrator's Decision on Appeal on behalf of the Tolleson Elementary School District 17 for Funding Year 2009-2010.

Re: **Billed Entity**: Tolleson Elementary School District 17
Billed Entity Number (BEN): 143011
Form 471 Application Number: 681384
FRN: 1861928
Administrator's Decision on Appeal Date: August 18, 2010

Request for Review filed by:
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Reason for Denial: USAC has determined that on June 15, 2009 (during the Selective Review Process) the applicant was contacted and sent a Selective Review Information Request. The responses that followed included a Letter of Agency that allowed Nicely Done Consulting to be the authorized contact representative. On March 25, 2010 the authorized contact was sent a letter of denial for price not being the primary factor in the vendor selection process. USAC determined that the Tolleson Elementary School District was purchasing off of a Mohave multi-vendor contract and price was not the primary factor when choosing the winning bid. According to the program rules an applicant must complete a mini-bid evaluation if there are multiple vendors available on a State Master Contract. On appeal, you state: "when using the State Form 470 and purchasing off of the State Master Contract, the applicant is not required to perform any

additional criteria regarding the vendor selection process." USAC has determined that no new information was provided on appeal to overturn the original decision. Consequently, your appeal is denied.

Basis of Appeal:

It is our contention that the findings of the Selective Review process and subsequent denial of appeal are based on written guidance that is in direct conflict with other contract guidance provided by USAC; and further that the Selective Review Guidance is faulty as it is in direct conflict with the FCC Rulings, upheld by landmark appeals to the FCC.

It is our contention that the applicant followed the correct process and by FCC Rules was not required to complete a secondary procurement process; and that the funding requests are valid.

The Mohave Educational Services Cooperative had awarded master contracts to multiple service providers, after filing an FCC Form 470 and conducting a competitively bid procurement compliant with the FCC's competitive bid requirement.

Applicant personnel assessed the list of service providers and chose Network Infrastructure Corp as its service provider for several reasons. The applicant had prior positive experience during the course of a five year working relationship with NIC. NIC had shown tremendous customer service and product quality during its previous work with the applicant. Pricing quoted was required to conform to the pricing structure reflected on the Master Contract, which is checked by the Master Contract holder, MESC. The applicant determined that a separate procurement process would not result in improved pricing due to the economy of scale presented by the Master Contract; and that selection of a different service provider would have been counterproductive.

According to State and Local Procurement Regulations, and FCC rules, no further procurement process was required on the part of the applicant. A bid or "mini-bid" process was not required of the applicant in this case, as a State Master Contract was utilized that was awarded based on a Form 470 process that was filed and conducted by the State Master Contract holder, and compliant with FCC rules.

Corrective Measure:

The applicant is asking that upon completion of this Request for Review that the Funding Request in question (FRN 1861871) be approved in its entirety.

Supporting Documentation:

The basis of the denial of the appeal to the USAC is the guidance provided on the USAC website, Step 8 on Selective Review Guidance; which states:

"Whether you use a state Form 470 or your own Form 470, if the state master contract that you are purchasing from is a multiple award schedule or similar vehicle you must show that the service provider that you selected is the most cost-effective provider."

According to this guidance, the applicant was required to conduct a secondary procurement process to select the most cost effective service provider from among the five service providers available on the State Master Contract; regardless of who conducted the Form 470 procurement process. This guidance is in direct conflict with the Contract Guidance provided on the USAC Website, Step 4 STATE MASTER CONTRACTS; which states:

"If the state files a Form 470, then the applicant may cite the state's Form 470 on its Form 471. The state must follow a competitive bidding process pursuant to FCC requirements and state procurement law.

The applicant is required to follow the applicable provisions of the state master contract and state and local procurement laws. No separate bidding documents or contracts are required by the applicant citing the state's Form 470, other than what is required by the state master contract and state and local procurement laws. The signed state master contract between the state and the service provider meets the FCC signed contract requirement."

According to the above guidance, the applicant is NOT required to conduct a secondary procurement process to select the most cost effective service provider from among the five service providers on the State Master Contract.

The guidance provided on the USAC website, Step 8 on Selective Review Guidance is also in direct conflict with the FCC **FOURTH ORDER ON RECONSIDERATION IN CC DOCKET NO. 96-45, REPORT AND ORDER IN CC DOCKET NOS. 96-45, 96-262, 94-1, 91-213, 95-72 Adopted:** December 30, 1997 **Released:** December 30, 1997 in paragraphs 232 and 233 under the section discussing Master Contracts; which states:

"232. We find that eligible schools, libraries, and rural health care providers seeking discounted services or reduced rates should be allowed to purchase services from a master contract negotiated by a third party.[705] In the *Order*, the Commission found that the competitive bid requirement would minimize the universal service support required by ensuring that schools, libraries, and rural health care providers are aware of cost-effective alternatives.[706] The Commission concluded that, like the language of section 254(h)(1) that targets support to public and

nonprofit rural health care providers, this approach "ensures that the universal service fund is used wisely and efficiently."[707] Insofar as an independent third party negotiating a master contract may be able to secure lower rates than an eligible entity negotiating on its own behalf, we conclude that allowing schools, libraries, and rural health care providers to order eligible telecommunications services from a master contract negotiated by a third party is consistent with our goal of minimizing universal service costs and therefore is also consistent with section 254(h)(1).[708].

233. We wish to emphasize, however, that for eligible schools and libraries to receive discounted services, and for rural health care providers to receive reduced rates, the third party initiating a master contract either must have complied with the competitive bid requirement or qualify for the existing contract exemption before entering into a master contract.[709] An eligible school, library, or rural health care provider shall not be required to satisfy the competitive bid requirement if the eligible entity takes service from a master contract that has been competitively bid under the Commission's competitive bid requirement. If a third party has negotiated a master contract without complying with the competitive bid requirement, then an eligible entity must comply with the competitive bid requirement before it may receive discounts or reduced rates for services purchased from that master contract."

The ruling in the FCC Fourth Order on Reconsideration stated above is reinforced and upheld in subsequent appeals by the State of West Virginia Department of Education and the State of Wyoming Department of Administration and Information:

Order in Appeal, **DA 05-2179:**
In the Matter of Request for Waiver
West Virginia Department of Education, CC Docket No. 02-6
Charleston, West Virginia
Schools and Libraries Universal Service Support Mechanism
ORDER Adopted: July 26, 2005 Released: July 27, 2005

"4. Applicants may purchase eligible services from "master contracts" negotiated by a third party such as a governmental entity. The third party initiating the master contract must comply with the Commission's competitive bidding requirements and state procurement laws. The applicant is not required to satisfy the competitive bidding requirements if it takes service from a master contract that either has been competitively bid or qualifies for the existing contract exemption. If a third party has negotiated a master contract without complying with the competitive bidding requirements, then the applicant must comply with

the competitive bidding requirements before it may receive discounts or reduced rates for services purchased from that master contract."

Order in Appeal, **DA 06-484:**
In the Matter of Request for Review
State of Wyoming Department of Administration and Information, CC Docket No. 02-6
Cheyenne, Wyoming
Schools and Libraries Universal Service Support Mechanism
ORDER Adopted: February 28, 2006 Released: February 28, 2006

"3. Applicants may purchase eligible services from "master contracts" negotiated by a third party such as a governmental entity. The third party initiating the master contract must comply with the Commission's competitive bidding requirements and state procurement laws. The applicant is not required to satisfy the competitive bidding requirements if it takes service from a master contract that either has been competitively bid or qualifies for the existing contract exemption. If a third party has negotiated a master contract without complying with the competitive bidding requirements, then the applicant must comply with the competitive bidding requirements before it may receive discounts or reduced rates for services purchased from that master contract."

In summary, it is our contention that the guidance being applied by the Selective Review process is different and in conflict with the guidance regarding the use of State Master Contracts, and further that it is in conflict with FCC Rules. The applicant only comes into contact with the guidance being applied by the Selective Review process if a Selective Review is ordered. This creates and ambiguity and places the applicant in an unfair position. The denial of the USAC appeal took into account only the faulty guidance of the Selective Review process, and did not take into consideration the FCC Rules and landmark appeals cited above.

Your consideration in this matter is greatly appreciated.

Thank you,

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