



**BURKE COUNTY PUBLIC SCHOOLS**

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**JAMES D. HYDER, JR.**  
General Counsel

October 26, 2010

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

RE: CC Docket No. 02-6

Dear Ms. Dortch:

This letter of appeal and request for waiver is submitted pursuant to 47 C.F.R § 54.700 *et seq.* on behalf of the Burke County Board of Education (the "District") in Waynesboro, Georgia. The undersigned counsel for the Board, as well as Cliff A. Battle, Director of Technology, may be contacted at the address given above to discuss the appeal.

Billed Entity Name: Burke County Board of Education  
Form 471 Application #: 529893  
Billed Entity Number: 127415  
FCC Registration Number: 0011647435  
Funding Request Number: 1457299  
Date of Commitment Adjustment Letter: August 31, 2010

**Description of USAC action being appealed**

The USAC Funding Commitment Adjustment Report dated August 31, 2010 (the "Report") states in pertinent part as follows:

On your FY 2006 FCC Form 470 you stated that you issued a request for proposal and, accordingly, you did not provide any additional sufficiently detailed and specific information of the services sought on your Form 470. You certified that you reviewed and complied with all FCC, state and local procurement/competitive bidding requirements. During an audit it was determined that you did not issue the request for proposal and failed to consider all bids. The service provider selected had an existing state master contract that was accepted by the Beneficiary without proper bid evaluation or

cost effectiveness analysis. The FCC rules require that the applicant submits a bona fide request for services by conducting internal assessments of the components necessary to use effectively the discounted services they order, submitting a complete description of services they seek So that it may be posted for competing providers to evaluate and certify to certain criteria under penalty of perjury. Since you failed to consider all bids received and choose the most cost-effective solution you violated the competitive bidding process. Accordingly, your funding commitment will be rescinded in full and USAC will seek recovery of any disbursed funds from the applicant.

Lastly, it was determined that the funding commitment for this request must be reduced by \$3,890.16. On the original Form 471 the applicant was approved at a 90 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally-approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive an 87 percent discount. This determination was based on the Beneficiary using a special call for NSLP applications in 2005 as a survey mechanism. FCC guidelines prohibit the use of NSLP applications as surveys. Accordingly, the commitment has been reduced by \$3,890.16 (pre-discount commitment amount\* (discount percentage approved on the Form 471 less the discount rate the applicant is actually eligible to receive)) and if recovery is required, USAC will seek recovery from the applicant. Please note that this amount is included in the full rescission above.

At issue on this appeal is whether the District in fact violated any applicable local policy or law relating to procurement and, even if so, whether the violation is such egregious non-compliance as to require reimbursement as contemplated by the Report.

Also at issue is whether any procedural errors associated with the discount rate calculation is so egregious as to require reimbursement as contemplated by the Report.

#### **Statement of Grouds for Appeal and/or Waiver**

1. Burke County Public Schools did not violate local or state procurement law or policy.

The local procurement policy upon which USAC relied in its Report reads in part as follows:

Purchases over \$5,000 require three quotes *when possible*. Expenditures for new buildings and major renovations must be based on written competitive bids. . . . All open market orders or contracts shall be awarded to the lowest responsible, qualified bidder, consideration being given to the qualities of the articles to be supplied, their conformity with the specifications, their suitability to the requirements of the educations [sic] system, the delivery terms, and the past performance of vendors.

In its Report, USAC erroneously determined that the District did not comply with this policy. Specifically, USAC found that the District “failed to *contact* at least 3 bidders for goods/services costing over \$5,000 and the *opening of bids at a public meeting*.” The Report concludes that “since [the District] failed to comply with local and state procurement laws [it] violated the competitive bidding process.” This conclusion is incurably flawed and seems to be based upon a misreading of the local policy or a misunderstanding of Georgia law, or both.

On its face, the policy does not require that three bidders must be *contacted* by the District. Thus, the observation by USAC that the District did not *contact* bidders is irrelevant. Indeed, the only requirement is that the District should obtain three quotes *when possible*. It is obviously not possible to obtain three quotes when, as happened in this matter, only two vendors respond to a Form 470 request for proposals. Thus, the policy was not violated.

The USAC also found that “opening of bids at a public meeting” was required. With respect to such purchases, however, there is no such requirement in either local policy or Georgia law and there is nothing in the policy or the law that would lead to such conclusion. In fact, the words “public meeting” do not even appear in the policy. Moreover, the USAC has not cited a single provision of Georgia law that contains such a requirement for this type of purchase. Indeed, Georgia law does *not* require public advertisement and open competitive bidding by boards of education for procurement of supplies and equipment.<sup>1</sup> Therefore, the USAC finding to the effect that the District was required to award E-Rate contracts only after “opening of bids at a public meeting” was in error.

The finding by USAC that the District failed to comply with local policy and state law is due to be reversed on the merits.

Furthermore, under Georgia law, the application and interpretation of local school system policies and school law is, in the first instance, within the authority of locally elected boards of education.<sup>2</sup> Indeed, a procedure exists for the review by the Georgia State Department of Education of local board decisions regarding local school law and such administrative procedures must be exhausted before the courts will take cognizance of the same.<sup>3</sup> Indeed, this procedure is the exclusive remedy under Georgia law for resolving questions of the application of school law and policies.<sup>4</sup> The District notes that “the Commission has traditionally refrained from acting or deferred action in matters of alleged violations of local or state laws where the matters have not been presented to or acted upon by the authority charged with the responsibility of interpreting and enforcing those laws.”<sup>5</sup> Thus, the

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<sup>1</sup> Georgia school boards are required to follow public advertisement and open, competitive bidding for certain *construction* projects over \$100,000. (O.C.G.A. § 20-2-507.)

<sup>2</sup> O.C.G.A. § 20-2-1160.

<sup>3</sup> Ga. Const. Art. 8, § 5, par. 2.; *Deriso v. Cooper*, 272 S.E.2d 274, 246 Ga. 540 (1980).

<sup>4</sup> *Arp v. Bremen Bd. of Educ.*, 171 Ga.App. 560, 320 S.E.2d 397 (1984).

<sup>5</sup> *In the Matter of Requests for Review of the Decision of the Universal Serv. Adm'r by Bienville Parish Sch. Bd. Arcadia, Louisiana Caldwell Parish Sch. Dist. Columbia, Louisiana Catahoula Parish Sch. Bd. Harrisburg, Louisiana Clairborne Parish Sch. Bd. Homer, Louisiana Concordia Parish Sch. Bd. Vidalia, Louisiana Desoto Parish Sch. Bd. Mansfield, Louisiana Franklin Parish Sch. Dist. Winnsboro, Louisiana Lincoln Parish Sch. Bd.*, 21 F.C.C.R. 1234, 1239 (2006).

Commission should refrain or defer commitment adjustment in this matter as it raises questions of local and state law and/or policy which questions should be resolved by the officials locally elected to decide them.

2. The District solicited competitive proposals and selected the vendor based upon legitimate competitive factors with price as the primary criteria.

The District developed a “Description of Desired Telecommunication Services” (“RFP”) seeking vendor proposals for telecommunication services as described therein. Potential vendors were advised: “we also expect each respondent to demonstrate its uniqueness in fulfilling this request. After review of your proposal, we should know why your company in the best choice for this project.”

The District submitted its funding request on Form 471 soliciting responses from interested vendors and received an “Allowable Contract Date” of January 31, 2006. After waiting the full period of time required by applicable law, the District reviewed the response of the sole vendor who tendered a proposal for Regional Cellular Service, and only one vendor tendered a proposal for Basic Phone Service. As a result, Southern Communications, Inc. was awarded the contract Regional Cellular Service on February 8, 2006 and Bellsouth Telecommunications, Inc was awarded the contract for Basic Phone Service on February 6, 2006.

According the Affidavit of Cliff A. Battle, Director of Technology, attached hereto<sup>6</sup>:

In response to the FORM 470, Regional Cellular Services only one vendor inquired and received a Description of Desired Telecommunication Services and they submitted a proposal. We accepted the proposal and afterward we started to test their equipment to verify the coverage area. During testing it became obvious that the provider could not cover this rural area. We then decide to contact the other cellular providers in this area which were Alltel and Verizon Wireless (the current provider at the time). Of these two providers only Verizon Wireless could provide the best coverage in this rural area, but not all of the desired features(i.e. push-to-talk to replace our hand-held radios). At that point, we decided to change the selected providers to Verizon Wireless(which was our current provider at that time) who had already negotiated a Master state contract with the State of Georgia. We accepted the pricing off of the state contract.

At that point, our desire to provide every administrator, campus police, every bus, and replace expensive handheld radios with the push-to-call capabilities and regional coverage became a fading desire. It became clear that at this point no vendor could satisfy our total need. We elected to reduce the feature set of the services desired which reduced the cost. The selection of Verizon Wireless was a cost effective decision. The initial request of \$116,704.91 for

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<sup>6</sup> Affidavit of Cliff A. Battle, attached hereto.

Southern Linc Services was reduced to \$63,509.05 for Verizon Wireless services over the funding period.

3. Even if a technical violation of local procurement policy were found to exist, compliance should be waived in the public interest.

The District now understands and recognizes that the use of NSLP application as a special call survey was not authorized for E-Rate purposes. But it is our opinion and situation that in Burke County Public School District that all school were at the 90% discount rate before 2006 except for the High School which was at 85%. This was only due to the fact that our high school students reject their poverty situation and the stigma associated with it and refuse to present themselves in that light. Thus, many will not return the SNPL application indicating such. There are three elementary (all 90% discount rate) and only one middle school (90% discount rate) that feeds the one high school (85%) in the District. This is why we chose to use the alternative mechanism (to calculate the discount rate) and gave an exhausting effort to get high school students to complete and return the special call survey.

The very next year FY2007 NSNLP process increased the poverty rate and our discount automatically went up to 90%.

As has been recognized by the Commission in other cases, “the goal of the competitive bidding process is to ensure that funding is not wasted because an applicant agrees to pay a higher price than is otherwise commercially available.”<sup>7</sup> In cases where the facts show that there was no misuse of funds and the purposes of the E-Rate program (ensuring access to discounted telecommunications and data services to public schools) would be thwarted by a recovery of funds, the Commission should waive its competitive bidding rules.

In the present case, there is no evidence of waste, fraud or abuse. USAC found only procedural/compliance related issues in its Report. In fact, as shown above, competitive solicitations were requested and the vendors who submitted responses were fairly and impartially evaluated. Thus, it would not advance the purposes of the competitive bidding requirements to penalize the District by rescinding previously committed funding.

Furthermore, the Commission may waive a provision in its rules for good cause shown or when the particular facts make strict compliance inconsistent with the public good.<sup>8</sup> In making such a determination, the Commission may consider hardship and the equities of the case.<sup>9</sup>

Strict compliance with USAC’s interpretation of local policy and law (which interpretation is in error) would be inconsistent with the public interest. Burke County, Georgia is a rural county in east central Georgia with a poverty rate roughly twice the average for other counties

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<sup>7</sup> *In the Matter of Application for Review of the Decision of the Universal Serv. Adm'r by Aberdeen Sch. Dist. Aberdeen, Wa, et al. Sch. & Libraries Universal Serv. Support Mechanism*, 22 F.C.C.R. 8757, 8763 (2007).

<sup>8</sup> 47 C.F.R. § 13; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C.Cir. 1990).

<sup>9</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C.Cir. 1969), *aff'd* 459 F.2d 1203 (D.C. Cir. 1972).

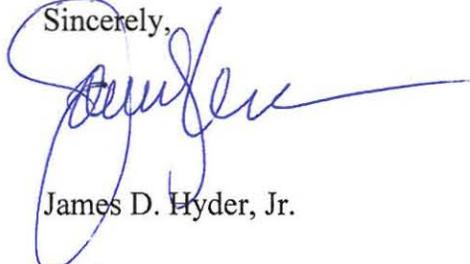
in Georgia. The students of this District are precisely the types of students that the E-Rate program is designed to benefit.

**CONCLUSION**

There was no evidence, and no finding by USAC, that the District engaged in activity intended to defraud or abuse the E-Rate program. The District faithfully and substantially complied with its own internal policy and Georgia law regarding procurement. It would be against the public interest and would cause substantial hardship to the District to deny this appeal. Based upon the foregoing, the findings contained in the Report are due to be overturned and/or the applicable provisions of the E-Rate regulations should be waived.

If further information is required or we can address any question about the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

A handwritten signature in blue ink, appearing to read "James D. Hyder, Jr.", with a long horizontal flourish extending to the right.

James D. Hyder, Jr.

Enclosures