



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 12th 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: 1463004
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 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. Documentation provided during the audit determined that the applicant is only eligible to receive an 85 percent discount. This determination was made since all schools in Burke County were to operate under Provision 2 discount for three years. Instead the beneficiary used an

unqualified special call survey method which increased the beneficiaries discount percentage. Pursuant to the FCC rules, requests for internal connections are given second priority and, when demand for discounts for internal connections exceeds available support, funding should be awarded first to applicants eligible for 86% discount level and then at each descending single discount percentage level until funds are depleted. Since it was determined that your FY 2006 request for funding was for internal connections and the discount was adjusted to 85 percent, and taking into account a fact that there were not sufficient funds for FY 2006 to provide internal connections to applicants at your discount rate, your funding commitment has been rescinded in full and USAC will seek recovery of any disbursed funds from the applicant.

On your FY 2006 FCC 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 failed to comply with all FCC, state and local procurement/competitive bidding requirements. The Beneficiary failed to contact at least 3 bidders for goods/services costing over \$5,000 and the opening of bids at a public meeting. The posting for internal connections and maintenance received 2 bids. No other potential service providers were contacted in these cases. . . . Since you failed to comply with local and state procurement laws 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.

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 the appropriate discount rate was applied and even if not whether such error is such egregious non-compliance as to require reimbursement as contemplated by the Report.

Statement of Grounds 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 education [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.¹ 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.² 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.³ Indeed, this procedure is the exclusive remedy under Georgia law for resolving questions of the application of school law and policies.⁴ 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.”⁵ Thus, the

¹ 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.)

² O.C.G.A. § 20-2-1160.

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

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

⁵ *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 “Request for Proposal E-Rate 2006” (“RFP”) seeking vendor proposals for building and maintaining a data network as described therein. Potential vendors were advised in bold type at the heading of the RFP: “we also expect each respondent to demonstrate its uniqueness in fulfilling this request. After review of your proposal, we should know why your company is the best choice for this project.” In addition, at Section 2.11 of the RFP, potential vendors were advised of the criteria and weights given to each factor in the selection process, as follows:

Factor	Weight
Price	30%
Prior Experience	25%
Personnel Qualifications	20%
Management	15%
Environmental Objectives	10%

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 responses of the only two vendors who tendered proposals. These vendor proposals were vetted pursuant to the criteria listed above. As a result, Automated Network Systems (“ANS”) received a rating of 100% and Computer Software Innovations received a rating of 75%. Thus, ANS was awarded the business on February 11, 2006. In fact, the ANS proposal was the only proposal that fully addressed all aspects of the RFP. Computer Software Innovations fail to address any of the data network requirements, which was the majority of the cost for this RFP.

Moreover, in this case, the funding commitment letter stated that the documentation provided during the audit determined that the applicant is only eligible to receive an 85% discount. This is incorrect. The use of an unqualified special call survey (alternative method) would have only reduced the percentage from 90% to 87%, which would still qualify the Beneficiary for funding FY2006 which had a cut-off at 86%.⁶

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

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

⁶ For all of the foregoing, see Affidavit of Cliff A. Battle, attached hereto.

higher price than is otherwise commercially available.”⁷ 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.⁸ In making such a determination, the Commission may consider hardship and the equities of the case.⁹

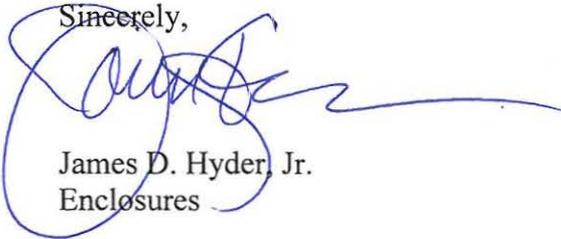
Strict compliance with USAC’s interpretation of local policy and law (which interpretation is in error) would be inconsistent with the public interest. Burke County, Georgia is a rural county in east central Georgia with a poverty rate roughly twice the average for other counties in Georgia. (In 2008, according to the U.S. Census Bureau, 28.1% of Burke County citizens lived below the poverty level, compared to a statewide rate of 14.7%.) 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 if the Commission has any questions 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

⁷ *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).

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

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