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 #: 535983
Billed Entity Number: 127415
FCC Registration Number: 0011647435
Funding Request Number: 1483243
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 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. These requirements date back to 1997

> and do not identify circumstances under which it might be appropriate to deviate from them. 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 comply with local and state procurement laws you violated the competitive bidding process.

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.

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 eduations [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 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. <u>The District solicited competitive proposals and selected the vendor based upon legitimate competitive factors with price as the primary criteria</u>.

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 in 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:

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[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).

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. [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 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

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[6] Affidavit of Cliff A. Battle, attached hereto.

[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).

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 we can address any question about the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

James D. Hyder, Jr.

Enclosures