

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

In the Matter of Request for Review)	
by Baltimore City School District)	CC Docket No. 02-6
of Decision of Universal Service)	
Administrator and Petition for Waiver)	File No. SLD-553330 (FY 2007)
)	

To: The Commission

**BALTIMORE CITY SCHOOL DISTRICT
REQUEST FOR REVIEW AND PETITION FOR WAIVER**

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SUMMARY

The Baltimore School City District (“BCPS”) relies on the E-rate program to ensure that its students have access to the technology that is crucial in today’s learning environments. In implementing a comprehensive upgrade to its wireless area network, BCPS followed both the Commission’s and the State of Maryland’s rules with respect to the selection of a service provider. Yet, USAC imposed a new requirement restricting “two-tier” vendor selection processes and characterized BCPS’ state-mandated process as failing that requirement. USAC now seeks recovery of nearly \$1.6 million disbursed on behalf of BCPS for Funding Year 2007, which has created a disastrous budgetary problem for BCPS. USAC previously denied BCPS’ requests for funding under the same service provider contract for Funding Years 2006 and 2008 – bringing the total and detrimental economic loss to BCPS to over \$7.2 million.

This loss is inexplicable, given that BCPS conducted an open and fair competitive bidding process consistent with the Commission’s requirements. It timely filed an accurate FCC Form 470. It issued a detailed request for proposals that required bidders to submit both technical solutions and proposed price. It complied with state and local procurement requirements. It objectively evaluated the bids received. It timely filed an accurate FCC Form 471. When the process was completed, BCPS selected the only bidder that offered a solution that would meet its needs. And the selected bidder offered the lowest price by nearly \$86,000,000!

BCPS respectfully requests that the Commission expeditiously (1) reverse USAC’s commitment adjustments for Funding Year 2007, (2) direct USAC to discontinue recovery actions against BCPS, (3) direct USAC to grant the appeals for Funding Years 2006 and 2008 and grant those funding requests and (4) to the extent necessary, waive Section 54.511 and any other Commission rules necessary to grant the relief requested.

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The Baltimore City School District (also known as Baltimore City Public Schools or “BCPS”), by its attorneys and pursuant to Section 54.719(c) of the Federal Communications Commission’s (“FCC”) rules, hereby requests review of the action taken by the Universal Service Administrative Company (“USAC”) with respect to five Funding Request Numbers (“FRNs”) in the above-captioned application.¹ USAC granted the application and disbursed \$1,596,193 to service providers for services rendered to BCPS. USAC has now determined to rescind these funding commitments in full, years later, because BCPS allegedly failed to use price as the primary factor in the vendor selection process. However, the vendor selected by BCPS offered the lowest price by nearly \$86,000,000.

As discussed below, BCPS conducted an open and fair competitive bidding process consistent with the Commission’s requirements. It timely filed FCC Form 470. It issued a detailed request for proposals (“RFP”) that required bidders to submit both technical solutions

¹ The affected FRNs are (1) in the category of “Telecom Services,” 1566234, 1583021, 1566299, and 1612695 and (2) in the category of “Internet Access,” 1570796. See Exhibit A. The Billed Entity Name is Baltimore City School District and the Billed Entity Number is 126376.

and proposed price. It complied with state and local procurement requirements. It objectively evaluated the bids received. It timely filed FCC Form 471. And, when the process was completed, BCPS selected the only bidder that offered a solution that would meet its needs. The selected bidder also offered the lowest price by nearly \$86,000,000.

If the demand for recovery of nearly \$1.6 million is enforced, BCPS' resources will be severely strained given current budget cuts, economic conditions, and limited public funding. In addition, as described below, BCPS has appealed USAC's denial of nearly \$5.6 million in post-discounted funds for Funding Years 2006 and 2008, which arose from the same service provider contract at issue here.

BCPS respectfully requests that the Commission expeditiously (1) reverse USAC's commitment adjustments for Funding Year 2007, (2) direct USAC to discontinue recovery actions against BCPS, (3) direct USAC to grant the appeals for Funding Years 2006 and 2008 and grant those funding requests, and (4) to the extent necessary, waive Section 54.511 and any other Commission rules necessary to grant the relief requested. Given prior Commission precedent and the facts of this case, there are ample grounds to reverse USAC's decision and, if necessary, grant the requested waiver.

I. BACKGROUND

BCPS is responsible for the education of over 80,000 students in Baltimore City, Maryland. It serves over 200 elementary, middle and high schools, and special education schools. Based on the high number of students that are eligible to participate in the National School Lunch Program, the vast majority of these schools qualify for 80% and 90% E-rate discounts.

For nearly two decades, the State of Maryland has implemented programs demonstrating

its commitment to providing technological opportunities to its students.² BCPS has been tasked with fulfilling this vision by ensuring that the most current technology resources are available to students and educators as part of their daily work.

In 2005, BCPS began a comprehensive upgrade to its wide area network and associated telecommunications facilities. BCPS issued a RFP in accordance with its procurement procedures.³ Two parties submitted bids – TKCC Communications LLC (“TKCC”) and Verizon, Inc. (“Verizon”). After evaluating the bids, BCPS selected Verizon as the only bidder that would meet its needs. In making this selection, BCPS adhered to its internal procurement rules which, in turn, adhere to the procurement regulations issued by the State of Maryland. BCPS also complied with the Commission’s policy that requires E-rate applicants to use price as a primary factor in selecting a vendor. Interestingly, USAC granted funding for Funding Year 2007 and denied BCPS’ funding requests for Funding Years 2006 and 2008, which were based on this same multi-year service provider contract. On February 16 and 23, 2010, BCPS submitted appeals to USAC of the denials of the funding requests for Funding Years 2006 and 2008 – which have a post-discount value of over \$5.6 million.⁴ After nearly a year, USAC still has not acted on the appeals.

In the Funding Year 2007 Notification of Commitment Adjustment Letters, USAC stated:

² See e.g., The Maryland State Department of Education, *The Maryland Educational Technology Plan for the New Millennium: Anytime, Anywhere Technology to Improve Teaching & Learning (2007-2012)* at <http://www.marylandpublicschools.org/MSDE/programs/technology/technologyplanning/planning>.

³ See Baltimore City Public School System, “*Requests for Proposals for Procurement of Wide Area Network (WAN) Upgrade*,” Nov. 4, 2005, which is attached as Exhibit B.

⁴ See Exhibit C.

[I]t was determined that the price of eligible products and services was not the primary factor in the vendor selection process. This determination was based on the bid evaluation sheets provided by the applicant, which indicated that the two-tiered vendor selection did not contain price as a factor in the first tier and price must be the primary factor in each tier of a multi-tier vendor selection process.⁵

As discussed more fully below, USAC's characterization of BCPS' selection process is not accurate.

II. ARGUMENT

The Commission should reverse USAC's decision to rescind the funds for three reasons. First, BCPS conducted an open and fair competitive bidding process in accordance with state and local procurement rules and selected the only bidder that would meet its needs. The selected bidder also offered the lowest price. Second, there is no Commission rule or policy requiring disqualification criteria to be "binary" or providing guidance concerning the use of a "two tier" vendor selection process – and USAC may not impose such requirements on its own. Third, even if the Commission decides to adopt such a rule or policy in the future, and even if BCPS' selection processes did not comport with that newly-adopted rule or policy, it could not be applied retroactively to the FRNs at issue.

A. BCPS conducted an open and fair competitive bidding process and selected the lowest price vendor.

BCPS conducted an open and fair competitive bidding process consistent with Commission rules. It timely filed FCC Form 470. It issued a detailed RFP that required bidders to submit both technical solutions and proposed price. It complied with state and internal

⁵ See Exhibit A. Similarly, in denying Funding Years 2006 and 2008, USAC stated, "The first round of your vendor selection process is not considered to be a disqualification round because the criteria used in that round were subjective and scored, rather than being binary criteria. As a result, the first round of your vendor selection process is considered to be the first tier of a two tier vendor selection process. Price of the eligible goods and services was not a factor in your first tier. Consistent with procedures, price of the eligible goods and services must be the primary factor in each tier of a multi-tier vendor selection process."

procurement requirements. It had five members of a selection review committee independently evaluate the two received bids based on several factors. It timely filed FCC Form 471. And, when the process was completed, it selected Verizon as the only bidder that offered a solution that would meet BCPS' needs. Verizon also offered the lowest price by nearly \$86 million – four times less than the TKCC proposal.⁶ Significantly, if TKCC had been the only bidder, BCPS would have rejected the bid.⁷

Pursuant to BCPS' procurement process, which was established in accordance with the State of Maryland's procurement regulations, the RFP directed bidders to submit technical, price and involvement of minority and women's business enterprise proposals in separate envelopes. In accordance with Commission rules, the RFP stated: "As required by the E-rate program, price will be the largest, but not the sole, consideration."⁸

Under the BCPS scoring system, price was weighted at 50% of the evaluation, while eight technical and related factors were weighted at 6 1/4% each – making price by far the "primary factor" as required.⁹ The RFP stated that no contract would be awarded "except to responsive Offerors capable of performing the class of service contemplated."¹⁰ The RFP further stated that technical proposals "must clearly show compliance with requirements of the

⁶ See Affidavits attached hereto as Exhibit D.

⁷ See Affidavit of John Egerton. BCPS specifically reserved the right "not to award this contract to any vendor that [BCPS] determines is not qualified or desirable due to information discovered as a result of proposal and evaluation...." RFP at 25.

⁸ RFP at 12. See 47 C.F.R. § 54.511(a) ("In determining which service offering is the most cost-effective, entities may consider relevant factors other than the pre-discount prices submitted by providers but price should be the primary factor considered.").

⁹ See 47 C.F.R. § 54.511(a). BCPS also explained this percentage allocation to USAC during the application's review.

¹⁰ RFP at 21.

Specifications.”¹¹

The five members of the BCPS selection review committee each scored the technical proposals of the two entities that submitted bids – TKCC and Verizon. BCPS established a minimum score in order to rule out proposals that did not provide an acceptable solution and would not, in the terminology of the state procurement regulations, be “reasonably susceptible of being accepted for award.”¹² Not one of the five reviewers gave TKCC the minimum score. Indeed, TKCC fell far short of the minimum with an average score that was 38% below the required minimum. Only the Verizon proposal reached the minimum. Again, if TKCC had been the only bidder, BCPS would have rejected the proposal.¹³ Even USAC’s auditor found no issues with BCPS’ selection process.¹⁴

What USAC calls a “two tier” bidding process was, in fact, a reasonable way to determine if a proposal was even responsive to BCPS’ needs. And while USAC alleges that BCPS disqualified bidders based on “subjective” criteria, in fact, BCPS simply removed offers from the bidding process that were not responsive to its minimum specifications.

This was fully consistent with the Commission’s previous determination that “applicants are

¹¹ *Id.* at 23.

¹² See the then-applicable regulations at New Baltimore City Board of School Commissioners, Baltimore City Public School System, Procurement Policies and Procedures, July 1, 2000 at 14, which is attached as Exhibit E. See also COMAR 21.05.03.03.

¹³ See Affidavit of John Egerton.

¹⁴ A multi-year contract was signed with Verizon on February 15, 2006. In May 2009, KPMG LLP reviewed the RFP and associated materials in connection with an audit and reported in its Exit Conference on May 26, 2009, that it “did not note any findings within the Service Provider Selection Matters.” See Exhibit F.

given maximum flexibility to take service quality into account and may choose the offering that meets their needs most effectively and efficiently.”¹⁵

The selection process used by BCPS also complied with state procurement requirements, which BCPS was *required* to follow.¹⁶ The State of Maryland requires technical and price proposals be evaluated independently in all state procurements conducted by competitive proposals.¹⁷ If the Commission does not reverse USAC’s decision, USAC’s new two tier bidding and binary disqualification policies will be at odds with the State of Maryland’s

¹⁵ *Request for Review of the Decision of the Universal Service Administrator by Wyoming Department of Education, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 21 FCC Rcd 2110 (2006) (Upholding applicant’s selection process where the selected vendor received the highest number of points in the bid evaluation, which assigned the highest weight to “functionality,” and offered the lowest cost).

¹⁶ *See* 47 C.F.R. § 54.504(a) (E-rate competitive bid requirements “apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements.”). *See also* 47 C.F.R. § 54.504(c)(1)(vi) (requiring certification on Form 471 that “The entities listed on the FCC Form 471 application have complied with all applicable state and local laws regarding procurement of services for which support is being sought.”). *See also Request for Review of the Decision of the Universal Service Administrator by Academia Discipulos de Cristo, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 21 FCC Rcd 9210, ¶ 4 (2006) (“The Commission generally relies on state or local procurement regulations that include competitive bidding requirements as a means to ensure compliance with the Commission’s competitive bidding requirements because such rules will likely consider price to be a primary factor, resulting in selection of the most cost-effective proposal.”) (*footnote omitted*) (“*Academia Discipulos Order*”).

¹⁷ COMAR 21.05.03.03. BCPS’ current procurement rules that apply specifically to the E-rate program follow applicable state regulations and also require the separate submission and evaluation of technical and price proposals. Those rules mandate that “Procurements executed under the E-rate program must be an open and fair competitive bidding process and price must be the primary factor when selecting vendor.” *See* https://www.baltimorecityschools.org/216710113124529637/lib/216710113124529637/PDF/Procurement_Administrative_Regulations.pdf. Both the State of Maryland’s and BCPS’ rules provide that proposals may be classified as “(a) Reasonably susceptible of being selected for award or (b) Not reasonably susceptible of being selected for award.” *See* COMAR 21.05.03.03. Thus, the process acknowledges both that price must be primary factor in selecting the vendor but, quite reasonably, only proposals that could even be accepted as meeting the specifications are considered.

procurement regulations. There is no need for such a conflict because **there is no inconsistency between ensuring that a technical proposal meets a RFP’s specifications, and then using price as the primary factor to award the contract.** Indeed, it would be perverse to require the award of a contract to the lowest-price bidder if that bidder does not meet the minimum technical specifications in a RFP.¹⁸

At the time BCPS issued its RFP and evaluated the bids received, the *Ysleta* order set forth the Commission’s most recent guidance on competitive bidding.¹⁹ However, unlike the applicant in *Ysleta*, BCPS (1) specified the services and products that it required and obtained price proposals from each bidder, and (2) complied with both the Commission’s E-rate competitive bidding rules and applicable state and local procurement law. The process resulted in BCPS selecting the vendor that was both the most responsive to its needs and the lowest-priced.

B. There is no Commission rule or policy requiring disqualification criteria to be “binary” or providing guidance on the use of a “two tier” vendor selection process – and USAC may not impose such requirements on its own.

There is ample precedent to support the proposition that the competitive bidding rules in effect at the time an RFP is issued are to be used to judge whether the procurement process was consistent with the Commission’s E-rate requirements.²⁰ And, although USAC has authority to

¹⁸ Such a circumstance is not even the case here as the selected bidder was the only responsive bidder and offered the lowest price.

¹⁹ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26406 (2003) (“*Ysleta*”).

²⁰ *See, e.g., Academia Discipulos Order; Requests for Review of Decisions of the Universal Service Administrator by Colegio Nuestra Senora del Carmen, Hatillo, Puerto Rico, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 23 FCC Rcd 15568 (2008) (“*Colegio Nuestra Order*”).

implement Commission rules and policies, it does not have authority to issue new rules or adopt new policies.²¹ Yet, that is precisely what USAC did here.

USAC's proscription against disqualifying bidders on factors that are not "binary" is found nowhere in the Commission's rules or prior precedent. Indeed, at the time BCPS entered into the Verizon contract, USAC was telling applicants that they could "set some requirements for bidders" provided they inform bidders "of any requirements that could lead to disqualification."²² It was not until over a year later (during USAC's annual training in fall of 2007) that USAC started to tell applicants and service providers that disqualification had to be based on "binary" factors.²³ USAC's pronouncements on disqualification factors and multi-tier bidding cannot be applied to BCPS unless and until they are properly promulgated by the Commission and, then, only on a prospective basis.

C. Even if the Commission decides to adopt new rules and policies in the future, they may not be applied retroactively to the FRNs.

Even assuming that USAC's "binary" and "multi-tier" rules are valid (which they are

²¹ See 47 C.F.R. § 54.702(c) ("The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission."). See also "USAC's Role as the Administrator of the USF" posted by USAC at <http://www.usac.org/about/usac/usac-role.aspx> ("USAC may not: Make policy; Interpret unclear provisions of the statute or rules; Interpret the intent of Congress; Advocate policy positions before the FCC or its staff...").

²² See Exhibit G.

²³ It appears that USAC first posted the new policy on its website on September 11, 2006, which is still well after the time that BCPS awarded the Verizon contract. But, most applicants and service providers rely on annual training sessions to be apprised of program changes. Furthermore, it appears that USAC did not include its new determination on multi-tier bidding in its list of administrative procedures, submitted annually to the FCC, until September 2008, two years after posting it on the website. To further complicate matters, although USAC included a discussion of binary factors and multi-tier bidding in its 2009 training presentations, it appears to have omitted it in its recent 2010 training sessions.

not), such rules cannot be applied retroactively to BCPS. The Commission has made clear that new E-rate policies, even when properly issued by the Commission, may not be applied to applications initiated prior to the adoption of the policy.²⁴ For example, the Commission significantly revised its policies in *Ysleta* when it directed applicants to use price as the primary factor in selecting bids. Yet, when USAC applied these policies to applications that were submitted prior to the release of *Ysleta*, the Commission repeatedly overturned those decisions and made clear that applicants were expected to comply with the Commission's policies in place at the time of their competitive bidding processes.²⁵

III. IF DEEMED NECESSARY, A WAIVER IS APPROPRIATE

BCPS maintains that it complied with all Commission rules and did not conduct a “two-tier” process as defined by USAC. Yet, if the Commission deems it necessary to grant BCPS’ requested relief, a waiver of Section 54.511 and such other Commission rules as are necessary is appropriate given the facts of this case and the significant hardship that would result if a waiver is not granted.²⁶ BCPS went above and beyond the minimum competitive process that it could have followed. Instead, it issued a comprehensive RFP and formed a committee of five reviewers to analyze all received bids. Given that BCPS followed its mandatory state and local procurement requirements, which is also required by the E-rate program, BCPS could not have reviewed and selected the submitted bids in any other reasonable and compliant method. Indeed,

²⁴ See, e.g., *See Request for Review of the Decision of the Universal Service Administrator by Keyport School District, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 24 FCC Rcd 12702 (2009) (applicant not subject to documentation retention rules adopted after applicant completed competitive bidding process).

²⁵ See, e.g., *Academia Discipulos Order*; *Colegio Nuestra Order*.

²⁶ The Commission’s authority to grant waivers to further the public interest is well established. See, e.g., 47 C.F.R. § 1.3; *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972).

USAC's decisions here call into question how any Maryland entity can abide by both the state's requirements and USAC's internal policies as applied by USAC.

The Commission has granted waivers of the competitive bidding rules where there was no intent to undermine the program and no waste, fraud or abuse. Most recently, the Commission granted a waiver to an applicant that clearly failed to comply with Section 54.511 of the Commission's rules, stating: "[W]e find that there was no actual harm to the competitive bidding process and that the underlying policy of ensuring service providers a fair opportunity to bid on the services sought by E-rate applicants was not compromised by [the applicant's] error."²⁷ Similarly, the Commission granted sixty-two waivers of the competitive bidding requirements when it found that (1) there was no waste, fraud, or abuse; (2) there was no payment of a higher price than was otherwise commercially available; and (3) there was no benefit from the mistake or harm to other service providers.²⁸ All three elements are satisfied in this case. BCPS used a competitive bidding process that complied with state and local procurement requirements, was consistent with the Commission's requirements, and resulted in the selection of the only responsive bidder at a price that was \$86,000,000 less than the non-responsive bidder. There was no fraud, waste or abuse.

²⁷ *Application for Review of the Decision of the Universal Service Administrator by Green Bay Area Public School District, Schools and Libraries Universal Service Support Mechanism*, File No. SLD-681595, *et al.*, CC Docket No. 02-6, Order, DA 10-2305 at ¶1 (rel. Dec. 6, 2010).

²⁸ *Application for Review of the Decision of the Universal Service Administrator by Aberdeen School District, Aberdeen, WA, et al., Schools and Libraries Universal Service Support Mechanism*, File No. SLD-297249, *et al.*, CC Docket No. 02-6, Order, FCC 07-63 (rel. May 8, 2007) ("May Order"). *See also Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, New Orleans, LA, et al., Schools and Libraries Universal Service Support Mechanism*, File No. SLD-487170, CC Docket No. 02-6, Order, 21 FCC Rcd 5316 (2006) ("Bishop Perry").

USAC's mischaracterization of BCPS' bidding process, as well as its retroactive application of newly created policies against BCPS, has severe ramifications. The payment of nearly \$1.6 million, combined with the loss in funding from Funding Years 2006 and 2008, would cost BCPS over \$7.2 million. If USAC's decisions stand, BCPS may need to take the needed funds from its already stretched and limited resources that are allocated for the education of its students.

The Commission has granted other E-rate applicants waivers based, in part, on the undue hardship that would follow if the waivers are not granted.²⁹ Furthermore, as the Commission has observed in other cases, the relief requested for Funding Year 2007 will have minimal effect on the overall Universal Service Fund because the monies in question were not only already collected, but actually disbursed by USAC with no intention, at the time of such disbursement, of recovering such funds.³⁰

IV. CONCLUSION

BCPS respectfully requests that the Commission (1) reverse USAC's commitment adjustments for Funding Year 2007, (2) direct USAC to discontinue recovery actions against BCPS, (3) direct USAC to grant the appeals for Funding Years 2006 and 2008 and grant the funding requests thereunder, and (4) to the extent necessary, waive Section 54.511 and any other Commission rules necessary to grant the relief requested.

²⁹ See, e.g., *May Order* at ¶ 9; *Bishop Perry*, 21 FCC Rcd at 5326, ¶ 22.

³⁰ See, e.g., *Bishop Perry*, 21 FCC Rcd at 5317, ¶ 2.

Respectfully submitted,

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