

**Before the
Federal Communications Commission**

In the Matter of the)
)
Appeal of the Decision of the)
)
Universal Service Administrator by))
)
MEL BLOUNT YOUTH HOME)

File No. SLD -

CC Docket No. 02-6

Appeal
Request for Expedited Relief

April 20, 2011

Ms. Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street, S.W., Washington, D.C. 20554

This is an appeal from a decision by the USAC.

(1) **Funding Commitment Decision Letter Appealed**

Form 471 Application Number: 738159
Funding Year 2010: 07/01/2010-06/30/2011
BEN: 222402
Date of Funding Denial Notice: February 22, 2011
Date of Appeal: April 20, 2011

(2) **SLD Contact Information**

Linda Alexander
Mel Blount Youth Home
Ste 260-27600 Chagrin Blvd.
Cleveland Ohio 44122-4449
Tel. (216) 514-3336
Fax. (216)514-3337

(3) **Funding Request Numbers Appealed**

FRN:1993659 (off-site basic maintenance)

(4) **USAC's Reason for Funding Denial**

Funding is denied because:

“***as a result of a cost Effectiveness Review, which has determined that your request for BASIC MAINTENANCE of IC has not been justified as cost effective as required by FCC rules. Cost per student, Number of students per server, Number of students per switch, Number of ports per student, Number of students per WAP, cost per cabling drop & Number of cabling drops per student.” [Emphases added]

(5) Issue

In the context of this appeal, is there an FCC Rule that defines “cost effective” for off site basic maintenance?¹

(6) Facts

Applicant filed an FCC Form 470 for off site basic maintenance service. Also, an RFP was posted. In response to the 470 and RFP, Applicant conducted a bid evaluation all in accordance with objective FCC rules demanding a fair and open bid process. Applicant’s bid evaluation process, set forth below, was made available to all bidders. It states:

Blount Youth Home

E-Rate Bid Evaluation Process

**Basic Maintenance (On-Demand)
RFP release date: December 29, 2009
RFP responses due: January 26, 2010**

¹ While the USAC references “cost effective” this necessarily includes “most cost effective” which by definition means a fair and open bid process.

The SLD's web site sets forth what is required in the Bid Evaluation Process.

- The competitive bidding process must be fair and open.
- "Fair" means that all bidders are treated the same and that no bidder has advance knowledge of the project information.
- "Open" means there are no secrets in the process - such as information shared with one bidder but not with others - and that all bidders know what is required of them.
- The Form 470 or the RFP should be clear about the products, services, and quantities the applicant is seeking.
- Any marketing discussions held with service providers must be neutral, so as not to taint the competitive bidding process. That is, the applicant should not have a relationship with a service provider prior to the competitive bidding that would unfairly influence the outcome of a competition or would furnish the service provider with "inside" information or allow it to unfairly compete in any way. The SLD states: "price must be the primary factor when constructing the evaluation of bid responses."

While price should be the primary factor, price does not have to be the sole factor. Other relevant factors may include: prior experience including past performance; personnel qualifications including technical excellence; The SLD states that the following graft is an acceptable weighting of the evaluation factors to use in evaluating bid responses:

<u>Factor</u>	<u>Weight</u>
Price	30
Prior experience	25
Personnel qualifications	20
Management capability	15
Environmental objectives	<u>10</u>
Total	100

Note that the price competitiveness of services or products that are **ineligible** for support cannot be factored into the evaluation of the most cost-effective supplier of eligible services.

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**E-Rate Bid Evaluation Process
Basic Maintenance (On-Demand)
RFP release date: December 29, 2009
RFP responses due: January 26, 2010**

Key Points in the Bid Evaluation Process

- Documentation is essential
- Bid process must be consistent with local, state BID/RFP procurement guidelines
- All evaluations must be based on the same criteria, with price as the primary factor, but not necessarily the sole factor.

Documentation

	Vendor 1	Vendor 2
Company:	Progressive	Infinity
Contact:	Roxann Mathis 478-454-1011	Terry Schwindler 478-803-7108
Document:	Quote for Basic Maintenance (On-Demand)	Quote for Basic Maintenance (On-Demand)

1. Bid conference held? Yes/No, If Yes, When?
2. Evaluation sheet for each vendor follows.
3. "Bid Award" committee? Yes/No, If Yes. Who?

Two vendors responded to the RFP and were evaluated in the following manner:

Vendor 1: [Progressive]

Vendor Representative: Roxann Mathis

Vendor Products/Services: Basic Maintenance

Evaluation:

<u>Factor</u>	<u>Weight</u>	<u>Evaluation</u>
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Price	30	30
Prior experience	25	25
Personnel qualifications	20	20
Management capability	15	15
Environmental objectives	<u>10</u>	10
Total	100	100

Other key bid criteria. Local vendor; understands school district issues, etc. Please note below:

Quote:

Number of Hours not to exceed: 400

TOTAL PRICE BASIC MAINTENANCE CONTRACT: \$32,000.00

Vendor 2: [Infinity]

Vendor Representative: Terry Schwindler

Vendor Products/Services: Basic Maintenance

Evaluation:

<u>Factor</u>	<u>Weight</u>	<u>Evaluation</u>
Price	30	20
Prior experience	25	25
Personnel qualifications	20	20
Management capability	15	15
Environmental objectives	<u>10</u>	10
Total	100	90

Other key bid criteria. Local vendor; understands school district issues, etc. Please note below:

Quote:

Network Engineer technical support for up to 400 hours	\$	40,820.00
		<hr/>
Total Basic Maintenance Project	\$	<u>40,820.00</u>

This data was provided to the USAC, but was ignored.

In accordance with FCC/USAC procedure, Applicant provided the following table for the list of equipment that is covered by the off-site basic maintenance of Internal Connections (not to exceed 400 hours):

Make and Model Number	QTY
Servers	
HP Omniview ML380 DNS/DHCP Server	1
HP Compaq ProLiant G3 DL380 Web Server*	1
HP Compaq ProLiant G3 DL380 Email Server	1
Switches	
Cisco WS-C3550-12G	1
Cisco WS-C2950G-12-EI	6
Cisco WS-C2950-24	2
Cisco WS-C3550-24	4
Cisco WS-X3500XL	1
Transceiver module	
Cisco WS-G5484	14
Routers	
Cisco 2600 Series	1
Wireless Components**	
Cisco 350 Series AP	2
Cisco Wall Mount Antenna	2
Cisco 1231 G Series	22
Cabling Drops	200
VoIP Components	
Shoregear SG12 Switch	1
Video Equipment	
V-TEL H.323 MCU	1

*The Web server listed in the table of products above is used to transmit information to users of the Internet.

**The wireless equipment included in the list of products above is functioning in a LAN.

Applicant also provided the following scope of work:

SCOPE OF WORK

Hourly tasks and activities for the eligible equipment: (all of these activities occur only when requested/called by the school)

- Perform preliminary diagnosis of problems.
- Hardware troubleshooting and repair.
- Respond to hardware problems with corrective procedures.
- Perform diagnostic tasks to isolate hardware/network error conditions and determine if problems are due to equipment, cabling or network errors.
- Resolve routine and complex hardware, cabling and network problems.
- Test resolutions to problems, if necessary re-diagnose and isolate errors. Re-test as necessary, until problems are resolved.
- Certify/log all resolutions as completed.

Again, this data was ignored by the USAC Administrator.

(5) Law and Argument

To determine cost effectiveness, the USAC made a computation based on dollars per student. This is simply not relevant. A better method is to make an evaluation based on dollars per "equipment" serviced. USAC had all the data required to make this computation.

The Commission has directed program applicants to take full advantage of the competitive market to obtain cost-effective services

and to minimize waste, fraud, and abuse. *FCC 03-313, Para 2; Universal Service Order, 12 FCC Rcd at 9029-30, para. 481.*

To guard against waste, fraud and abuse Applicants are repeatedly told to follow the rules; apparently applicants should follow the rules even if they do not know what the rules are.

The FCC's rules:

do not expressly establish a bright line test for what is a "cost effective service." Although the Commission has requested comment on whether it would be beneficial to develop such a test, it has not, to date, enunciated bright line standards for determining when a particular service is priced so high as to be considered excessive or not cost-effective. *See Schools and Libraries Universal Support Mechanism, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912 (2003).* [Emphases added]

Contrary to what the USAC said in Applicant's FCDL, there is no FCC Rule that defines "cost effective" or "most cost effective" for off site basic maintenance. Even though the Applicant followed all objectively set forth fair and open bid procedures, the application was denied based on some unknown "rule" known only to the USAC. Applicant should know what the subjective nature of cost effectiveness consist of.

In the *Tennessee Order*, FCC 99-216, DA 99-2098, the Commission determined that a competitive bidding process complies with program rules if price is taken into account during bid selection and the contract is

awarded to the **most cost-effective bidder**. The Commission further concluded that other factors, such as prior experience, personnel qualifications, and management capability, also may form a reasonable basis on which to evaluate whether an offering is cost-effective.

In the *Ysleta Order*, FCC 03-313, the FCC revised the policies established in the *Tennessee Order*.

In the *Ysleta Order*, the Commission concluded that price must be the primary factor in selecting a winning bid. This policy differs from the direction given in the *Tennessee Order* in that schools are now required to have a separate “cost category” when evaluating bids and that category must be given more weight than any other category. The Commission stated that if, for example, a school assigns 10 points to reputation and 10 points to past experience, the school would be required to assign at least 11 points to price. In the *Ysleta Order*, the Commission acknowledged that the “varying phraseology in the same decision created some ambiguity on this issue.” *See Request for Review by Ysleta Independent School District of the Decision of the Universal Service Administrator, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26406, 26429, para. 50 (2003)* .

In selecting the winning bid, the Applicant made the following evaluation:

Vendor 1: [Progressive]

Vendor Representative: Roxann Mathis
 Vendor Products/Services: Basic Maintenance
 Evaluation:

<u>Factor</u>	<u>Weight</u>	<u>Evaluation</u>
Price	30	30
Prior experience	25	25
Personnel qualifications	20	20
Management capability	15	15
Environmental objectives	<u>10</u>	10
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Other key bid criteria. Local vendor; understands school district issues, etc. Please note below:

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Other key bid criteria. Local vendor; understands school district issues, etc. Please note below:

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		<hr/>
Total Basic Maintenance Project	\$	<u>40,820.00</u>

Price should be the primary factor in selecting a bid, but applicants are given maximum flexibility to take service quality into account and may choose the offering that meets their needs most effectively and efficiently. See *Tennessee Order*, 14 FCC Rcd at 13737-39, paras. 7-9. See also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776, 9029, para. 481 (1997) (*Universal Service Order*) **Isn't this designed to determine cost effectiveness?**

The record shows that Applicant conducted a competitive bidding process that adhered to FCC/USAC principles. The Applicant submitted documentation to USAC detailing the competitive bidding process, including bid requests, bid proposals, and cost evaluation criteria. USAC introduced a "factor" that did not exist in the 470, the RFP and the bid evaluation. The 470, RFP and evaluation was based on equipment; that is work to be performed on equipment. The Applicant also evaluated the responsive bidders, using price as a primary consideration, and selected the vendor that offered the most cost-effective offering.

As stated in *Academia Discipulos de Cristo Bayamon, Puerto Rico, et al.*, DA 06-1642, Released: August 15, 2006, based on these factors, Applicant's competitive bidding processes did not violate program rules.

There is no evidence of waste, fraud or abuse, or misuse of funds, or a failure to adhere to core program requirements.

In the Universal Service First Report and Order, the Commission determined that support for internal connections includes “basic maintenance services” that are “necessary to the operation of the internal connections network.” Subsequently, in the Schools and Libraries Third Report and Order and codified at section 54.506(b) of the Commission’s rules, the Commission defined eligible basic maintenance services as “an internal connections service if, but for the maintenance at issue, the internal connection would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services.” Specifically, the Commission determined that basic maintenance includes “repair and upkeep of previously purchased eligible hardware, [and] wire,” and “basic technical support including configuration changes.” The Commission concluded, however, that basic maintenance services do not include: technical support contracts that provide more than basic maintenance; “services that maintain equipment that is not supported or that enhance the utility of equipment beyond the transport of information, or diagnostic services in excess of those necessary to maintain the equipment’s ability to transport information;” and services such as “24-hour network monitoring and management.” *Universal Service First Report and Order, 12 FCC Rcd at 9021-22, para. 460. 47 C.F.R. 54.506(b); Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26921-22, para. 23 (2003) (Schools and Libraries Third Report and Order). Schools and Libraries Third Report and Order, 18 FCC Rcd at 26921-22, para. 23.*

(7) FCC Standards

The Applicant can not know what standard it must meet, if the so-called rules are subjective and constantly change.² The winning bid was not only cost effective, but it was the most cost effective.

Conclusion:

(a) Within 90 days or less Order funding for the telecommunications services requested in the 471 Application, specifically FRN: 1993659

(b) Set aside funds to totally fund Applicant's request.

Respectfully submitted,

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² The FCC has previously stated that schools and libraries are required to select "the most cost effective bid" when examining competing bids and that "price should be the primary factor." However other relevant factors that can be considered include: "prior experience; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives." See, *Telecommunications Discounts for Schools and Libraries: The "E-Rate" Program and Controversies, Updated January 9, 2003*