

**Before the
Federal Communications Commission
Washington, D.C. 20554**

_____)	
In the Matter of)	
)	
Request for Review by)	
Oakland Unified School District)	
Billed Entity No. 144227, of)	
)	
Decision of Universal Service Administrator)	CC Docket No. 02-6
)	
Schools and Libraries Universal Service)	
Support Mechanism)	
Form 471 App. No. 414000)	
_____)	

**REQUEST FOR REVIEW BY OAKLAND UNIFIED SCHOOL DISTRICT OF
DECISION OF UNIVERSAL SERVICE ADMINISTRATOR**

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I. STATEMENT OF INTEREST AND ISSUES

Pursuant to 47 C.F.R. §§ 59.719(c) and 54.722, the Oakland Unified School District (“OUSD”) hereby seeks review of the Universal Service Administrative Company’s (“USAC”) Notification of Commitment Adjustment Letter, dated March 16, 2011 (“Adjustment Letter”), attached as Exhibit A.¹ In particular, OUSD seeks review of USAC’s determination that the funding commitment of \$1,711,441.15 for 2004 must be rescinded, based on USAC’s conclusion that OUSD failed to comply with California state procurement law. *See* Adjustment Letter at 4.

II. QUESTION PRESENTED FOR REVIEW

Whether the funding commitment for 2004 should be rescinded for OUSD allegedly failing to comply with state and local competitive bidding requirements when USAC’s

¹ OUSD has also filed a separate but related appeal to the Commission, which seeks review of a second Notice of Commitment Adjustment Letter from USAC. CC Docket 02-6.

interpretation of state law places sections of California procurement law in irreconcilable conflict?²

III. SUMMARY OF THE FILING

OUSD seeks review of USAC's Adjustment Letter, which contends that OUSD failed to comply with California state procurement law. OUSD submitted a Form 470 for the 2004 funding year in November 2003. OUSD posted a Request for Proposals ("RFP") on its website and advertised the RFP in a local newspaper. The lowest responsible bidder was AEKO Consulting, Inc. ("AEKO"), and OUSD informed AEKO by letter that it was selected as a successful E-Rate vendor. The letter was a legally enforceable contract to negotiate between AEKO and OUSD, which requested additional information from AEKO so that a contract to provide services could be entered into. OUSD filed its completed Form 471 and attached the signed contract to negotiate.

AEKO was not licensed to perform public works at the time OUSD and AEKO executed the contract to negotiate. However, AEKO became duly licensed on or before October 8, 2004, several months before entering into a public works to perform services contract with OUSD on April 14, 2005, and before providing any such services.

In 2008, USAC audited OUSD and now contends that OUSD failed to comply with a state procurement requirement because AEKO was not licensed at the time the contract was awarded. Therefore, USAC contends, the funding commitment with respect to the AEKO contract must be rescinded.

² USAC alleges that OUSD failed to comply with state and local competitive bidding requirements, Adjustment Letter at 4, which is required by 47 C.F.R. §§ 54.504(a), 54.504(b)(2)(vi), and 54.504(c). All citations to 47 C.F.R. § 54.504 in this appeal are to the version in effect in 2004.

USAC's basis for rescinding OUSD's 2004 funding is invalid. OUSD did not violate California state procurement law by entering into a contract to negotiate with AEKO. California state procurement law requires, in short, that OUSD award the contract to the lowest responsible bidder, not invalidate the bid of an unlicensed bidder, and not enter into a public works contract until the winning bidder is licensed. AEKO was the lowest responsible bidder, and OUSD accepted its bid even though AEKO was not licensed, because California state procurement law required that OUSD do so. Moreover, OUSD and AEKO did not enter into a public works contract until after AEKO became licensed. OUSD and AEKO entered into a contract to negotiate before AEKO obtained its license, but California law does not prohibit such agreements. Thus, OUSD did not violate California state procurement law as USAC contends.

IV. RELIEF SOUGHT

In the past, the Commission and the Wireline Competition Bureau ("Bureau") have waived the rule that a contract for eligible services be submitted with Form 471. Compliance with California law prevented OUSD from executing a signed public works contract at the time it submitted its Form 471. Therefore, OUSD requests that, under these special circumstances, the Bureau waive the FCC rule requiring that OUSD submit with its completed Form 471 a signed contract for eligible services.

Even if the Bureau finds that OUSD violated California law, there was no waste, fraud, or abuse to justify rescinding OUSD's funding. Indeed, it obtained the best pricing and there were no complaints about the service provided. In addition, rescinding funds would impose an undue hardship on OUSD. Thus, there are special circumstances that warrant waiver of the FCC rules requiring compliance with state and local procurement law.

For the reasons set forth below, OUSD respectfully requests that the Bureau reverse USAC's erroneous determination and hold that USAC should not fully rescind OUSD's 2004 funding.

V. BACKGROUND

A. Eligibility Rules For The E-Rate Program

USAC administers the Schools and Libraries universal service support mechanism (the "E-Rate" program), which provides discounts for telecommunications and Internet services and infrastructure "to elementary schools, secondary schools and libraries for educational purposes." 47 U.S.C. § 254(h)(1)(B). The level of discount ranges from 20 to 90 percent—the greater economic disadvantage a school faces, the greater the discount. Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 ¶ 468 (1997); *see also* USAC Discount Matrix, <http://www.usac.org/sl/applicants/step05/discount-matrix.aspx> (last visited May 16, 2011).

The FCC's rules for the E-Rate program require discount recipients to comply with state and local competitive bidding requirements. 47 C.F.R. §§ 54.504(a), 54.504(b)(2)(vi), 54.504(c). A number of FCC rules also regulate the application and selection process for discounts. *See generally* Overview of the Process - Schools and Libraries - USAC, <http://www.usac.org/sl/about/overview-process.aspx> (last visited May 16, 2011) ("Process"). In relevant part, an applicant must submit a Form 470 to USAC to open a competitive bidding process for providers of the discounted services. The applicant may then make its RFP publicly available to solicit bids. Process at Step 3. Form 470 requires the applicant to, among other things, certify that it has reviewed and complied with all FCC, state, and local procurement/competitive bidding requirements. *See* FCC Form 470, Block 5, line 23.

After the bidding process opens, an applicant must wait at least twenty-eight days before selecting a vendor. Process at Step 4. The applicant must select the most cost-effective provider of the services requested who meets the requirements. *Id.*; *see also* Cal. Pub. Cont. Code³ § 20111 (“[T]he governing board of any school district” must award contracts for “the purchase of equipment, materials, or supplies . . . to the lowest responsible bidder.”). The applicant may then apply for an E-Rate discount by submitting a Form 471, *see* Process at Step 7, which may be submitted only “upon signing a contract for eligible services.” 47 C.F.R. § 54.504(c). Like Form 470, Form 471 requires the applicant to certify that it has reviewed and complied with all FCC, state, and local procurement/competitive bidding requirements. *See* FCC Form 471, Block 6, line 28. USAC then reviews the Form 471 application and issues its funding decision. Process at Steps 8, 9.

B. OUSD’s Selection Process For An E-Rate Provider

For the 2004 funding year, OUSD submitted a Form 470 on November 20, 2003. It posted an RFP on its website and also advertised the RFP in the Oakland Tribune on December 14th and 22nd. (Declaration of Paul Hoy, dated May 13, 2011 (“Decl.”) ¶¶ 4-5 (attached as Exhibit B)). Responses were due January 14, 2004, but OUSD granted a one-week extension for submission of additional information. (*Id.* ¶ 6). OUSD staff evaluated the bids and OUSD’s State Administrator⁴ approved the staff’s selection on January 28, 2004. (*Id.* ¶¶ 7-9).

The next day, OUSD informed AEKO in writing that it was selected as a successful E-Rate vendor. Exhibit C (Letter from Randolph Ward, State Administrator, to Gboyega Aladegbami, AEKO, dated Jan. 29, 2004) (“January 2004 Agreement”). This letter was

³ All Cal. Pub. Cont. Code cited were also effective in 2004.

⁴ During this time, OUSD was under full state control. All decisions were ultimately the responsibility of the State Administrator.

captioned “Binding Agreement Preparatory to Signed Contract” and stated in the body that “[t]his letter along with the Purchase Orders constitutes a binding agreement between you and the District preparatory to a formal signed contract between you and the District.” *Id.* The letter continued: “it is imperative that you get your proposed contract language to the District as soon as possible so that it can be reviewed, revised if needed, approved and a formal contract entered into.” *Id.*

To take advantage of the E-Rate discounts, OUSD had to submit its Form 471 by February 2, 2004. (Decl. ¶ 10). OUSD did so on February 2, 2004, and attached the January 29, 2004 Agreement as accepted by AEKO. (*Id.*). USAC approved this application on July 20, 2004. (*Id.* ¶ 11). On or before October 8, 2004, AEKO acquired an active contractor’s license, which qualified it under state law to perform the work in question. Exhibit D (California Department of Consumer Affairs, Contractor’s License Detail). Months later, OUSD completed its negotiations with AEKO (Decl. ¶ 12) and entered into a Formal Contract and Statement of Work on April 14, 2005. *See* Exhibit E (AEKO Master Agreement, signed Apr. 20, 2005); Exhibit F (AEKO Statement of Work, signed Apr. 20, 2005) (collectively “April 2005 Contract”). OUSD did not pay AEKO, and AEKO did not perform any services, until after OUSD and AEKO entered into the April 2005 Contract. (Decl. ¶ 13).

C. The USAC Audit

Three years later, in 2008, USAC audited OUSD’s use of E-Rate funds. (Decl. ¶ 14). Based on this audit, and after its follow-up investigation, USAC alleged that OUSD failed to comply with a state procurement requirement. Adjustment Letter at 4. In particular, “where federal funds are involved,” the California Public Contract Code requires that “at the time the contract is awarded, the contractor shall be properly licensed in accordance with the laws of this state.” Cal. Pub. Cont. Code § 20103.5; *see also* Adjustment Letter at 4. USAC alleges that

OUSD awarded a contract to AEKO on January 29, 2004, rather than on April 14, 2005, and that, therefore, “at the time the contract [was] awarded,” AEKO was not properly licensed to perform the work that was bid upon. *See id.* Thus, USAC argues, the funding commitment with respect to the AEKO contract must be rescinded due to OUSD’s failure to comply with state procurement law. Adjustment Letter at 4.

VI. ARGUMENT

USAC’s basis for rescinding OUSD’s 2004 funding is invalid. USAC opines in its Adjustment Letter that OUSD, through its January 2004 Agreement, violated state procurement law by awarding a public works contract⁵ to a contractor that was not licensed at the time of the award. However, this argument is without merit because the January 2004 Agreement did not constitute a public works contract under California procurement law. Instead, it was a contract to negotiate in good faith, and not to provide public works services. The contract to provide public works services was not agreed to until April 2005, after AEKO had been licensed. Thus, OUSD did not violate California procurement law requirements.

Section 54.504(c) of the FCC’s rules requires that “an eligible school, library, or consortium . . . seeking to receive discounts for eligible services under this subpart, shall, upon signing a contract *for eligible services*, submit a completed FCC Form 471 to the Administrator.” 47 C.F.R. § 54.504(c) (emphasis added). OUSD submitted only the January 2004 Agreement to negotiate with its Form 471, but this too provides no basis for USAC to rescind funding. OUSD could not enter into a “contract for eligible services” at the time that it submitted its Form 471 because California law required OUSD to (1) award the contract to the lowest responsible

⁵ A “[p]ublic works contract,” as a school district would award in this program, is an agreement to provide services such as “the erection, construction, alteration, repair, or improvement of any public structure.” Cal. Pub. Cont. Code § 1101.

bidder,⁶ (2) not invalidate the bid of an unlicensed bidder, and (3) not enter into a public works contract until the winning bidder was licensed. *See* Cal. Pub. Cont. Code §§ 20103.5, 20111.

Where state law impedes the submission of a contract for eligible services, the Commission and the Bureau have routinely waived the rule that a “contract for eligible services” be submitted with Form 471.⁷ Indeed, the Bureau has directed USAC not to recover funds where the petitioner had at least some form of “binding agreement” upon submission of its Form 471.⁸

Although OUSD’s compliance with California law prevented it from executing a signed public works contract at the time it submitted its Form 471, OUSD had a legally enforceable “contract to negotiate” at that time. Such facts are sufficient to warrant waiver here.

Finally, even if the Bureau finds that the January 2004 Agreement was a public works contract and thus violated California law, special circumstances here warrant waiver of the FCC rules requiring compliance with state and local procurement law. The competitive bidding requirements are designed to ensure more efficient pricing and help deter waste, fraud, and abuse.⁹ Here, AEKO was licensed before performing any work, and there was no waste, fraud, or abuse to justify rescinding OUSD’s funding. AEKO was the lowest responsible bidder and

⁶ Federal regulations similarly required OUSD to award the contract to the most cost-effective provider. Process at Step 4.

⁷ *See, e.g.,* Order, *Requests for Waiver of the Decision of the Universal Service Administrator by Adams County School District 14, Commerce City, CO, et al., Schools and Libraries Universal Service Support Mechanism*, 22 FCC Rcd 6019 (2007) (“*Adams County Order*”); Order, *Request for Review of a Decision of the Universal Service Administrator by Franklin-McKinley School District, San Jose, CA, Schools and Libraries Universal Service Support Mechanism*, 23 FCC Rcd 2578 (2008); Order, *Requests for Waiver of Decisions of the Universal Service Administrator by Academy for Academic Excellence, Apple Valley, CA, et al., Schools and Libraries Universal Service Support Mechanism*, 22 FCC Rcd 4747 (2007).

⁸ Formal Guidance Letter from Dana Shaffer, Wireline Competition Bureau Chief, to Scott Barash, USAC CEO, dated Jan. 16, 2009, 24 FCC Rcd 417, 418.

⁹ *Adams County Order*, 22 FCC Rcd at 6022 ¶ 8.

was clearly qualified; thus, the requirement that it be licensed at the time of the contract was a mere procedural technicality. To deny OUSD's appeal and refuse to grant a waiver of either (i) the FCC's rule requiring submission of a contract for eligible services with Form 471 (§ 54.504(c)) or (ii) the rule requiring compliance with state procurement law (§§ 54.504(a), 54.504(b)(2)(vi), 54.504(c)) would create undue hardship for a school district both millions of dollars in debt and serving some of the poorest children in the country. Indeed, the entire objective of the E-Rate program is to assist these very school districts with needy student bases—this essential funding should not be withdrawn on the basis of a procedural technicality.

A. OUSD's January 2004 Agreement With AEKO Did Not Violate California Procurement Law Because It Was Not A Public Works Contract

OUSD did not violate California state law when it entered into an agreement in January 2004, "preparatory to a . . . signed contract," with AEKO. As discussed, "[i]n all contracts . . . where federal funds are involved," California law requires that, "at the time *the contract* is awarded, the contractor shall be properly licensed." Cal. Pub. Cont. Code § 20103.5 (emphasis added). Here, OUSD did not award a *public works contract* to AEKO before submitting Form 471 to USAC, or before AEKO held a license. Rather, the January 2004 Agreement was a *contract to negotiate*, which is legally enforceable under California law, and legally distinct from a public works contract to provide services with respect to § 20103.5.

There are three reasons why the January 2004 Agreement was not a public works contract, and thus did not violate state law. First, a public works contract is not "awarded" until a final contract to actually perform services has been approved by the school board or other appropriate governing body. *See, e.g., Santa Monica Unified Sch. Dist. of Los Angeles Cnty. v. Persh*, 85 Cal. Rptr. 463, 467-68 (Cal. Ct. App. 1970) (stating that California law requires a school district's governing board to ratify or approve a contract) (citing predecessor statutes to

Cal. Edu. Code §§ 17604, 35163). Like the disputed contract in *Persh*, the proposed contract terms of the January 2004 Agreement did not have the appropriate final approval. Indeed, in the January 2004 Agreement letter to AEKO, OUSD stated that “it is imperative that you get your proposed contract language to [OUSD] as soon as possible so that it can be reviewed, revised if needed, *approved and a formal contract entered into.*” January 2004 Agreement (emphasis added). Because such approval was not given until the April 2005 Contract, the January 2004 Agreement was not an award of a public works contract.

Second, OUSD did not award a public works contract in January 2004 because material terms were still open to negotiation. Where the essential terms of an agreement “are reserved for the future agreement of both parties, no legal obligation arises ‘until such future agreement is made.’” *Copeland v. Baskin Robbins*, 117 Cal. Rptr. 2d 875, 879 (Cal. Ct. App. 2002) (citing *City of Los Angeles v. Superior Court*, 333 P.2d 745, 750 (Cal. 1959)). In the January 2004 Agreement, the essential terms of any public works contract were still open to negotiation as OUSD requested AEKO’s “proposed” contract language so that OUSD could “revise[] if needed.” Consequently, a public works contract was not awarded under the January 2004 Agreement because the terms depended on a future agreement. *Compare with City of Susanville v. Lee C. Hess Co.*, 290 P.2d 520, 526-27 (Cal. 1955) (finding that a contract had been awarded and could not be rescinded because “[a]ll the essentials of contract were present”).

That essential terms were in fact added or changed after OUSD executed the January 2004 Agreement further evidences that material terms were open to negotiation and thus the January 2004 Agreement was not a public works contract. For example, it was not until the April 2005 Contract that the parties agreed to essential terms such as the price, scope of work to be performed and at which schools, contract term, and warranties. *See Exhibit G, Row 1*

(reflecting change in price and scope of work); Row 2 (reflecting added interest charges); Row 3 (reflecting change in contract term); Row 4 (reflecting added warranties); Row 5 (reflecting added maintenance terms); Row 6 (reflecting change in substitutions allowed); Row 7 (reflecting change in hardware to install); Row 8 (reflecting added hardware placement terms). Thus, because essential terms of the contract ultimately awarded in April 2005 were not final as of the January 2004 Agreement, only the April 2005 Contract was a public works contract under California procurement law.

Finally, elementary principles of statutory construction reveal that USAC was wrong to conclude that the January 2004 Agreement to negotiate violated California procurement law. A statute should be construed so that it does not conflict with itself or related provisions. *See, e.g., Cal. Retail Portfolio Fund GmbH & Co. v. Hopkins Real Estate Group*, 122 Cal. Rptr. 3d 614, 618-19 (Cal. Ct. App. 2011) (2011) (“Statutes must be harmonized, both internally and with each other.” (citations omitted)). Here, California law required OUSD to (1) award the contract to the lowest responsible bidder, Cal. Pub. Cont. Code § 20111, (2) not invalidate the bid of an unlicensed bidder, *id.* § 20103.5, and (3) not enter into a public works contract until the contractor was licensed, *id.* Thus, California law required OUSD to accept AEKO’s bid, and OUSD did so in the January 2004 Agreement. Under USAC’s interpretation, this agreement also constituted a public works contract. But such a contract would violate state law. The only way to reconcile the California procurement requirements here is to conclude that the January 2004 Agreement did constitute acceptance of AEKO’s bid, but was not a public works contract. USAC’s interpretation, by contrast, would place sections 20111 and 20103.5 of the California code—and separate provisions within section 20103.5—in irreconcilable conflict. The Bureau should reject this nonsensical statutory interpretation.

This does not mean that the January 2004 Agreement had no binding effect. To the contrary, it was a legally enforceable “contract to negotiate.” *See Copeland*, 117 Cal. Rptr. 2d at 879-82 (holding that “a cause of action will lie for the breach of a contract to negotiate an agreement” (capitalization altered)). OUSD sent to AEKO the January 2004 Agreement, along with the Purchase Orders, as a “binding agreement” with the expectation that AEKO return its “proposed contract language . . . so that it can be reviewed, revised if needed, approved and a formal contract entered into.” January 2004 Agreement. Such an agreement to propose, review, and revise contract language is a legally enforceable contract to negotiate.¹⁰ *See, e.g., Copeland*, 117 Cal. Rptr. 2d at 878-80 (finding that an agreement subject to further negotiation is an enforceable contract to negotiate); *id.* at 881-82 (stating that a signed letter containing a draft contract “[to] discuss . . . and hopefully . . . have a completed contract” was a legally enforceable contract to negotiate the terms of an agreement); *cf. Channel Home Centers, Div. of Grace Retail Corp. v. Grossman*, 795 F.2d 291, 293-96, 298-99 (3d Cir. 1986) (holding that a letter of intent to enter into the lease of a store, and to negotiate the terms of the lease, is a binding obligation to negotiate in good faith). No California law prohibits public entities from contracting to negotiate with unlicensed contractors.

Accordingly, OUSD did not violate California’s requirement that a contractor be licensed at the time that a public works contract is awarded because the January 2004 Agreement was not a public works contract. Rather, OUSD executed such a contract only in April 2005, months after AEKO acquired an active contractor’s license.

¹⁰ The January 2004 agreement here is not an unenforceable “agreement to agree.” *See Beck v. American Health Group Int’l, Inc.*, 260 Cal. Rptr. 237, 241-42 (Cal. Ct. App. 1989). There was no requirement in the January 2004 Agreement that AEKO enter into an agreement, only that it propose its contract language for review, revision, and approval.

B. Under FCC Precedent, OUSD’s January 2004 Agreement With AEKO Was Sufficient To Entitle OUSD To A Waiver Of Form 471’s Signed Contract Requirement

Even if the January 2004 Agreement was not an award of a public works contract under California procurement law, then the funds might still be rescinded because, in that case, OUSD failed to comply with the FCC’s requirement that Form 471 be submitted only “upon signing a contract for eligible services.” 47 C.F.R. § 54.504(c). FCC precedent expressly provides, however, that section 54.504(c) should be waived¹¹ in this circumstance because OUSD nevertheless had some form of binding agreement at the time it submitted its Form 471.

The Commission and the Bureau have routinely waived section 54.504(c) where the petitioner had some form of agreement with their service providers before submitting its Form 471, but missed the deadline for having a signed contract. *See, e.g., Order, Requests for Waiver of the Decision of the Universal Service Administrator by Adams County School District 14, Commerce City, CO, et al., Schools and Libraries Universal Service Support Mechanism*, 22 FCC Rcd 6019 (2007) (“*Adams County Order*”); *Order, Request for Review of a Decision of the Universal Service Administrator by Franklin-McKinley School District, San Jose, CA, Schools and Libraries Universal Service Support Mechanism*, 23 FCC Rcd 2578 (2008); *Order, Request for Waiver of the Decision of Universal Administrator by Barberton City School District, Barberton, OH, et al., Schools and Libraries Universal Service Support Mechanism*, 23 FCC Rcd 15526 (2008) (“*Barberton City Order*”). In the *Adams County Order*, the Commission considered a number of scenarios where applicants “missed the program deadline for having a written contract in place” when submitting Form 471. 22 FCC Rcd at 6022-23 ¶ 9. The applicants’ reasons for not having a signed contract in place before submitting their Form 471s

¹¹ The Bureau has the power to waive the Commission’s rules under 47 U.S.C. §§ 151-154, and 254, and 47 C.F.R. §§ 0.91, 0.291, 1.3, and 54.722(a).

included adherence to local or state procurement law, having to wait for USAC's approval before their governing board would approve, or simply ministerial mistakes. *Id.* at 6023 ¶ 9. In all of these scenarios, the Commission granted a waiver of section 54.504(c) because the petitioners had "some form of agreement" before submitting Form 471. *Adams County Order*, 22 FCC Rcd at 6023 ¶ 9. The Commission further supported its grant of waiver by reasoning that the "rigid adherence to . . . requirements that are 'procedural' in nature does not promote the goal[]" of the E-Rate program, namely "ensuring access to discounted telecommunications and information services to schools and libraries." *Id.* at 6023-24 ¶ 10.

Like some of the petitioners in the *Adams County Order*, OUSD "could not or did not comply with [section 54.504(c)] due to conflicting local or state procurement requirements." *See* 22 FCC Rcd at 6021 ¶ 7. State and federal law required OUSD to select AEKO because it was the most cost-effective and lowest responsible bidder. *See* Cal. Pub. Cont. Code § 20111; Process at Step 4. AEKO was not licensed when OUSD evaluated its bid in January 2004, but pursuant to Cal. Pub. Cont. Code § 20103.5, AEKO's bid could not "be invalidated by the failure of the bidder to be licensed." Moreover, when OUSD notified AEKO in January 2004 that it was selected "as a successful E-Rate vendor," January 2004 Agreement, OUSD could not award AEKO a signed public works contract for services because California procurement law requires that "at the time the contract is awarded, the contractor . . . be properly licensed in accordance with the laws of this state." *See* Cal. Pub. Cont. Code § 20103.5. Thus, California and federal law required OUSD to select AEKO as the most cost-effective and lowest responsible vendor, but OUSD could not award AEKO a contract because the state required the vendor to be licensed. OUSD did the most that it was empowered to do under California law when it entered into the January 2004 Agreement to negotiate, and thus it had entered into "some form of an

agreement” with AEKO before submitting its Form 471. *Adams County Order*, 22 FCC Rcd at 6023 ¶ 9. Under these circumstances, OUSD is entitled to a waiver of the rule requiring submission of a public works contract with Form 471. Rigid adherence to this procedural requirement here would not promote the goals of the E-Rate program.

In fact, citing the *Adams County Order*, the Bureau has expressly directed USAC *not* to recover funds where the petitioner had a legal “binding agreement” under state law for the relevant funding years, but failed to have a signed contract until after the Form 471 was due. *See* Formal Guidance Letter from Dana Shaffer, Wireline Competition Bureau Chief, to Scott Barash, USAC CEO, dated Jan. 16, 2009, 24 FCC Rcd 417, 418 & n.5 (citing *Adams County Order*). Thus, in following the *Adams County Order* and its own directive, the Bureau should waive section 54.504(c) here.

C. Alternatively, The Bureau Should Waive The Commission’s Rule Requiring Compliance With State Procurement Law Because It Is A Mere Technicality In The Circumstances Presented Here For Which The Bureau Regularly Grants Waivers

Even if the January 2004 Agreement that was submitted with OUSD’s Form 471 did constitute a public works contract, and it therefore violated state law requiring that the contractor hold a license at the time the contract was awarded, special circumstances here support waiver of sections 54.504(a), 54.504(b)(2)(vi), and 54.504(c) of the FCC’s rules (requiring compliance with state and local procurement requirements), and of Form 470 Block 5, line 23 and Form 471 Block 6, line 28 (certifying such compliance). The Commission or the Bureau¹² may waive a rule for good cause “where the particular facts make strict compliance inconsistent with the public interest.” *Adams County Order*, 22 FCC Rcd at 6021 ¶ 6 n.16 (citing *Northeast Cellular*

¹² To the extent this issue raises “novel questions of fact, law or policy,” then this request “shall be considered by the full Commission.” 47 C.F.R. § 54.722(a).

Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990)). The Commission and the Bureau have repeatedly granted waivers, as in the Form 471 scenario discussed in Part VI.B above, where “rigid adherence to certain E-rate rules and requirements that are ‘procedural’ in nature does not promote the goal[] of . . . ensuring access to discounted telecommunications and information services to schools and libraries[,] and therefore does not serve the public interest.” *See, e.g., Adams County Order*, 22 FCC Rcd at 6023-24 ¶ 10 (citing *Order, 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*, 21 FCC Rcd 5316, 5316-17, 5319-20 ¶¶ 2, 9 (2006) (“*Bishop Perry Order*”)); *see also Barberton City Order*, 23 FCC Rcd at 15530 ¶ 7 & n.29 (same).

Denying a waiver here would rescind E-Rate funding on the basis of a procedural technicality where the most cost-effective bidder happened to be unlicensed at the time the contract was awarded. Indeed, much like the failure to have a signed contract when submitting Form 471, the failure to have an active license at the time the contract is awarded is also procedural in nature—i.e., it neither affects the ability to perform, nor the price of the services provided nor any other material term of the parties’ agreement. *See generally* Cal. Pub. Cont. Code § 20103.5. Thus, OUSD respectfully requests that the Bureau not mandate rigid adherence to this procedural technicality, and instead waive it here rather than rescind funding that promotes the E-Rate program’s goal of enabling the very needy schools in OUSD to utilize the Internet to enhance teaching and learning. *See, e.g., Order, Requests for Waiver of Decisions of the Universal Service Administrator by Academy for Academic Excellence, Apple Valley, CA, et al., Schools and Libraries Universal Service Support Mechanism*, 22 FCC Rcd 4747, 4749 ¶ 5 (2007) (“*Academy Order*”) (granting waiver to “better ensure that universal service support is

distributed first to the applicants who are determined by our rules to be most in need,” and thus, further the goals of the E-Rate program).

In fact, in *substance*, the bidding process remained competitive to ensure more efficient pricing and that there was no waste, fraud, or abuse. *See, e.g., Adams County Order*, 22 FCC Rcd at 6022 ¶ 8 (Commission’s rules ensure a competitive bidding process for more efficient pricing and help deter waste, fraud, and abuse); *id.* at 6023-25 ¶¶ 10, 12 (considering the absence of waste, fraud, and abuse as further justification for granting a waiver). OUSD posted its RFP in accordance with the 28-day waiting period and, after two meetings to evaluate bids, selected AEKO as the most cost-effective contractor. (Decl. ¶¶ 4-8). Importantly, AEKO was a duly licensed contractor at all times during performance of its contract for OUSD. (*Id.* ¶ 13; Exhibit D).

Finally, waiver is warranted because if the Bureau views the January 2004 Agreement as a public works contract, then compliance with California procurement law was impossible. The Bureau should not require strict compliance with state law when such compliance is impossible regardless of what action a funding applicant takes. Here, OUSD would have violated state law in either (1) disqualifying the lowest responsible bidder for not having a license or (2) awarding the contract to an unlicensed bidder. The former option would violate either Cal. Pub. Cont. Code § 20103.5 (prohibiting OUSD from invalidating a bid because of the bidder’s failure to be licensed) or § 20111 (requiring OUSD to award the contract to the lowest responsible bidder), whereas the latter option would violate a separate provision of § 20103.5 (prohibiting OUSD from awarding a contract to an unlicensed bidder). This structural incompatibility was beyond the control of OUSD and the FCC’s rules broadly requiring compliance with state and local procurement law did not account for such a nuance. For OUSD to both timely apply for E-Rate

funding and comply with California procurement law, the rule requiring compliance with state procurement law should be waived where (as is the case here) the most cost-effective, lowest responsible bidder, was not yet licensed.

Whether based on the procedural nature of the rule or the impossibility of compliance with California procurement law, or especially in conjunction with each other, the circumstances here warrant waiver of sections 54.504(a), 54.504(b)(2)(vi), and 54.504(c), Form 470 Block 5, line 23, and Form 471 Block 6, line 28.

D. Rescinding Funds Here Would Impose An Undue Hardship On OUSD, Which Is Already In Financial Crisis

Waiver of the Commission's rules under either Part VI.B or VI.C above is further warranted given the undue hardship on OUSD that would result from an adverse ruling. The FCC's orders make clear that the "undue hardship" that a denial of a waiver request would impose is an important factor in determining whether waiver is appropriate. *See, e.g., Adams County Order*, 22 FCC Rcd at 6021 ¶ 6 n.16 ("[T]he Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.") (citation omitted); *id.* at 6024 ¶ 12 (considering the creation of undue hardship as another factor supporting waiver). Here, granting a waiver would have minimal effect on the Universal Service Fund. *See, e.g., Order, Requests for Review of Decisions of the Universal Service Administrator by Allendale County School District, Cedar Mountain, NC, et al.*, -- FCC Rcd ---, 2011 WL 1525342, at *3 n.30 (rel. Apr. 21, 2011) (noting that "USAC has already reserved sufficient funds to address outstanding appeals" and thus "the action . . . should have

minimal impact on the universal service fund as a whole”).¹³ Yet to deny a waiver—even though there was no waste, abuse, or fraud—would create further undue hardship on OUSD, which is already one of the school districts most in need of E-Rate discounts and receiving some of the very deepest discounts.

“Public education in California is in a time of crisis” and, “[f]or years now, California has dramatically reduced funding for education and asked schools to do more with less.” Oakland Unified School District – Budget Crisis Information, <http://www.ousd.k12.ca.us/budgetcrisis> (last visited May 16, 2011). OUSD, after a near financial collapse in 2003 and a state takeover, “faces the very real prospect of losing . . . roughly \$30 million” in state general purpose funding for the 2011-12 school year, on top of already cutting \$122 million for the current 2010-11 school year and already having to send \$6 million a year to repay the state of California for its bailout loan in 2003. Oakland Unified School District – Update on March and May 15 Notices (Rescissions) 04.14.11, <http://www.ousd.k12.ca.us/budgetcrisis> (last visited on May 16, 2011); Jill Tucker, *A lesson in frustration*, S.F. Chron., Apr. 12, 2011, at A1; Katy Murphy, *Education Report: Oakland school district’s budget balancing act* (Apr. 8, 2011), http://www.contracostatimes.com/news/ci_17796830 (last visited on May 16, 2011).

Rescinding over one-and-a-half million dollars here would significantly exacerbate such hardship. For example, when USAC withheld E-Rate funds in 2009, it substantially impeded OUSD’s ability to make crucial broadband network repairs and forced OUSD to borrow funds to pay its telephone and Internet charges. (Decl. ¶¶ 16-17). OUSD’s 80 percent or greater average

¹³ This appeal, if granted, involves \$1,711,441.15. USAC should have sufficient funds to address this appeal. See USAC Federal Universal Service Support Mechanisms Fund Size Projections for the Second Quarter 2011, *available at* <http://search.universalservice.org/query.html?qt=fund+size+projections> (projecting Schools and Libraries Support Mechanism Fund Size of \$574.82 million for second quarter of 2011).

discount rate since 1998 (*id.* ¶ 3), which borders near the 90 percent maximum, is also telling—the high rate, which correlates with a district’s economic disadvantage, reflects OUSD’s strong need for E-Rate funding. Thus, according to the FCC’s standards, OUSD, which received multiple discounts for the 2010 funding year¹⁴ at the maximum 90%, is one of the most economically disadvantaged school districts and therefore most in need of E-Rate funding.

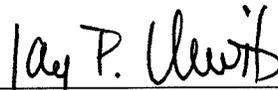
The E-Rate program has heavily subsidized much of the technology that has enabled OUSD to enhance teaching and learning for some of the most disadvantaged students in California. (*See* Decl. ¶ 3). Waiver, rather than rigid adherence to procedural technicalities, would thus serve the public interest by enhancing access to advanced telecommunications and information services for one of the neediest districts in California. *See, e.g., Bishop Perry Order; Academy Order*, 22 FCC Rcd at 4749 ¶ 5 (granting waiver to “enhance . . . access to advanced telecommunications and information services” and to “better ensure that universal service support is distributed first to the applicants who are determined by our rules to be most in need”).

¹⁴ *See* Automated Search of Commitments, <http://www.usac.org/sl/tools/commitments-search/Default.aspx> (last visited May 16, 2011).

VII. CONCLUSION

For the foregoing reasons, OUSD respectfully requests that the Bureau reject USAC's decision to fully rescind its year 2004 funding.

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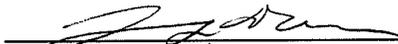
* Admitted only in California. Practice supervised by members of the firm who are admitted to the D.C. Bar.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2011, I caused two copies of the foregoing Request for Review for Oakland Unified School District to be served via Federal Express at the following addresses:

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