

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Request for Review of Decision of the Universal Service Administrator)	CC Docket No. 02-6
)	
Ravenswood City Elementary School District)	File No. FRN 1338646 (FY2005)
)	

To: Chief, Wireline Competition Bureau

REQUEST FOR REVIEW

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SUMMARY

The demand for repayment of \$790,625.98 by the Universal Service Administrative Company (“USAC”) six years after the funding year from one of the most impoverished and at risk school districts in our country based upon an erroneous conclusion that price was not the primary factor is wrong and a waste of public resources. USAC’s decisions leading to and including the denial beginning with the KPMG audit report to the final denial decision is riddled with inconsistencies and lack of supporting evidence and clear and specific information to justify its decision. USAC’s own record will demonstrate that USAC’s original finding was not based upon any KPMG audit finding related to price being the primary factor. Quite the contrary, the record evidence before KPMG and USAC unequivocally demonstrated that (1) all competitive bid documentation was retained and made available by Ravenswood City Elementary School District (“Ravenswood” or “District”), (2) Ravenswood conducted a fair and open competitive bid process and evaluation in accordance with FCC rules and state law with price being weighted the highest at 30%, (3) chose the most cost effective bid, and (4) sought the appropriate Board approval to enter into the contract with the winning service provider.

On May 24, 2011, the Schools and Libraries Division of the USAC (“SLD”) denied the appeal of Ravenswood seeking a reversal of SLD’s FY2005 Commitment Adjustment Letter dated January 25, 2011 (“COMAD”) through the issuance of an Administrator’s Decision on Appeal—Funding Year 2005-2006 (“SLD Denial”). In its Denial, the SLD reversed two of its original findings of competitive bid violations related to notice requirements under state law to publish bids in local newspapers as well as USAC’s auditors finding of failure to maintain proper documentation. The final rationale for the SLD Denial was based upon one erroneous finding and conclusion that price was not the primary factor.

The SLD Denial should be reversed. First, it is clear from the record evidence that Ravenswood not only complied with all FCC competitive bid requirements, but also made all documentation available to KPMG auditors in a timely, complete, succinct, and organized manner during the height of an E-Rate open window cycle for a subsequent funding year; thereby detracting from scarce staff resources during the most critical point of the E-Rate funding year. In addition, the Director of Technology for Ravenswood spent a great deal of time educating inexperienced KPMG auditors on E-Rate federal, programmatic, and operational rules, and clarifying and correcting the Auditor's findings. Second, the record is clear that Ravenswood adhered to the FCC requirement that price be the primary factor and weighted the highest.

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REQUEST FOR REVIEW

Ravenswood City Elementary School District (“Ravenswood” or “School”), acting through counsel, hereby files this Request for Review (“Appeal), pursuant to and in accordance with Section 54.719(c) of the Federal Communication Commission’s (“FCC” or “Commission”) rules, denying the School’s appeal of a May 24, 2011 decision¹ by Schools and Libraries Division (“SLD”) of the Universal Service Administrative Company (collectively, “USAC”) relating to Funding Request Number (“FRN”) 1338646 for funding year (“FY”) 2005.²

The District’s appeal is timely. Section 54.720(b) of the Commission’s rules requires the filing of an appeal “within sixty (60) days of issuance” of a decision by USAC. The Denial Letter is dated May 24, 2011, and 60 days thereafter is July 23, 2011, which is a Saturday so the due date for the appeal is Monday, July 25, 2011.

¹ AR000047-49 (USAC Denial Letter dated May 24, 2011 (“Denial Letter”)).

² AR000018 (USAC Funding Commitment Report attached to Funding Commitment Decision Letter for Ravenswood dated May 8, 2006 (“FCDL”)).

I. STATEMENT OF THE DISTRICT'S INTEREST IN THIS REQUEST FOR REVIEW

Ravenswood has standing to file this appeal because Section 54.719(c) of the Commission's rules provides that, "[a]ny person aggrieved by an action taken by a division of the Administrator . . . may seek review from the Federal Communications Commission."³ In this case, Ravenswood is aggrieved by USAC's recovery of funding due to an alleged competitive bidding violation, which USAC reached in error.

II. INTRODUCTION

On January 25, 2011, USAC issued a Notification of Commitment Adjustment Letter ("COMAD"),⁴ in which it determined that the funding commitment received from USAC for FRN 1338646 "must be rescinded in full."⁵ The amount of the COMAD is \$790,625.98. The COMAD is based on an audit conducted by KMPG LLP.⁶ The Audit Report erroneously concludes that Ravenswood did not comply with FCC competitive bidding requirements and California procurement laws.⁷

On March 24, 2011, the District's Counsel appealed the COMAD to USAC ("District Appeal").⁸ On May 24, 2011, the SLD wisely reversed two of its original denial reasons, namely that Ravenswood failed to meet state procurement law requirements that required publishing bids

³ 47 C.F.R. § 54.719(c).

⁴ AR000033-36 (Notification of Commitment Adjustment Letter and Funding Commitment Adjustment Report dated January 25, 2011).

⁵ AR000036 (COMAD).

⁶ AR000019-32 (KPMG LLP Audit Report No. SL-2008-235 dated August 3, 2009 ("Audit Report")).

⁷ AR000024-27 (Audit Report at Attachment 2).

⁸ AR000037-46 (Letter from J. Beiers, County Counsel for County of San Mateo, California, to USAC, regarding Appeal of Commitment Adjustment Decision, dated Mar. 25, 2011).

in local newspapers and failed to maintain proper documentation; yet, inexplicably still denied the appeal on one single ground. USAC improperly concluded that “price was not the primary factor when you selected your service provider” and denied Ravenswood’s District Appeal.⁹

The facts in this case unequivocally demonstrate that Ravenswood not only complied with all FCC competitive bid requirements, but also made all documentation available to KPMG auditors in a timely, complete, succinct, and organized manner during the height of an E-Rate open window cycle for a subsequent funding year; thereby detracting from scarce staff resources in the most critical cycle of the E-Rate funding year. In addition, the Director of Technology for Ravenswood spent a great deal of time educating inexperienced KPMG auditors on E-Rate federal, programmatic, and operational rules, and clarifying and correcting the Auditor’s findings. Second, the record is clear that Ravenswood adhered to the FCC requirement that price be the primary factor and weighted the highest. Therefore, the Commission should reverse USAC’s Denial Letter.

III. KEY BACKGROUND FACTS

A. The School

Ravenswood is an elementary school in the Ravenswood City School District. The District is located in San Mateo County, California and its students come from East Palo Alto and East Menlo Park. These are impoverished communities with a high crime rate. Its population is predominantly Hispanic (79%), African American (11%), Pacific Islander (9%) and other 1%.¹⁰ It serves approximately “4,000 students in kindergarten through eighth grades in eight elementary schools, and a child development center.¹¹ The District holds charters for two charter schools, including one high school.¹²

⁹ AR000047 (Denial Letter).

By implementing an aggressive and impressive Journey to Excellence plan, the District strives to improve the academic, social and economic conditions in East Palo Alto and East Menlo Park communities. The District works collaboratively to provide an excellent educational environment that encourages students to “make choices, achieve their personal best and be productive and responsible members of our society.”¹³ It also creates an experience for students that provides them with “a set of universal values or life skills, which recognize and celebrate [] cultural diversity.”¹⁴ Due to the California budget crisis, the District must adjust to operating with an additional \$4.2 million cut in state revenues. The District relies heavily upon on E-Rate funding to ensure students have access to technology. The majority of students in the District are socioeconomically disadvantaged and do not have access to technology outside of school.

B. The Critical Need for Reliable Telecommunications Service

In 2004, the telecommunications system for Ravenswood was in desperate need of an overhaul.¹⁵ At the time of the project, the Ravenswood phone system was plagued with many problems, including being very unreliable.¹⁶ Telephone lines at the District were often down on a weekly basis, and the copper telephone line infrastructure in the community was old and rusted.¹⁷ District phone lines were down for as long as two weeks if the phone company could

¹⁰ Ravenswood City School District, <http://www.ravenswood.k12.ca.us/> (“Ravenswood Website”); *see also* AR000086-89 (Declaration of Solomon Hill, Director of Technology, Ravenswood (“Hill Declaration”).

¹¹ AR000084 (Hill Declaration)

¹² *Id.*

¹³ Ravenswood Website

¹⁴ *Id.*

¹⁵ AR000085 (Hill Declaration).

¹⁶ *Id.*

¹⁷ *Id.*

not find good wiring to replace lines that went bad.¹⁸ In addition, there was poor telephone wiring within the schools as well. Most internal communications wiring had been installed decades before and was in need of substantial rehabilitation and modernization.¹⁹

These issues led to significant dissatisfaction with Ravenswood telephone system.²⁰ The Director of Technology received numerous complaints about the poor quality telecommunications system from parents, staff, police and fire departments, and the county office of education.²¹ There were too many times when parents could not reliably contact schools or when school staff could not use their phone to dial 911 in an emergency.²² Outside agencies could not reliably contact the district office or school officials.²³

Communication between classrooms, main offices, and emergency providers is critical and essential to the safety of the students and staff. For example, Ravenswood has alerts such as “gunman on campus” on its elementary school campuses; as such, reliable communication between teachers, classrooms, administrators, and police is extremely important. The lack of a sound and reliable infrastructure within the schools was a serious public safety issue.²⁴ As a result, there was a great deal of support by the District Board and Administration to procure a sound, reliable, and sustainable telecommunications system that would address the public safety and technology needs of the students.²⁵ Ravenswood took action through seeking E-Rate

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at AR000086 (Hill Declaration).

²⁵ *Id.* at AR000085-86.

funding for internal connections that would address the antiquated, inadequate and dangerous state of telecommunications in the schools.²⁶

As will be set forth in more detail below, Ravenswood conducted an open competitive bid process in adherence to FCC, state, and local requirements and chose the most cost effective bidder with price being the primary factor. The result of the E-Rate funding received in FY2005 for Ravenswood VOIP project was positively transformative for the schools, teachers, administrators, parents, and students. The current communications system is reliable and has helped Ravenswood heal critical relationships with parents and emergency providers who find the School District much more responsive.²⁷ In turn, these relationships have been critical to improving student achievement at Ravenswood.²⁸

C. SLD Guidance Used by the District to Evaluate Bids

In late 2004, while the District was preparing its bid evaluation materials, it consulted the USAC website for guidance.²⁹ At the time, the SLD website posted examples and listed best practices for applicants to use to evaluate bids.³⁰ The District also downloaded an E-Rate Proposal Evaluation Worksheet from E-Rate Central's web cite to conform with widely acceptable practices of E-Rate competitive bid evaluation requirements.³¹

²⁶ *Id.*

²⁷ *Id.* at AR000086.

²⁸ *Id.*

²⁹ *Id.* at AR000084-85.

³⁰ *Id.*; see also <http://www.usac.org/sl/applicants/step04/construct-evaluation.aspx>.

³¹ AR000072-73 (E-Rate Proposal Evaluation Worksheet – Aggregated).

D. The District's Competitive Bid Process, FCC Form 470, Request for Proposals, and FCC Form 471

On January 3, 2005, for FY2005, Ravenswood filed its FCC Form 470 requesting bids for internal connections.³² Ravenswood also posted an RFP on its web site detailing the services available for bid and seeking qualified vendors to upgrade or replace Ravenswood's PBX equipment to provide internal telephone and voicemail service for the district office and twelve school sites ("RFP").³³ As previously discussed, the telephone system at Ravenswood was not reliable, causing serious safety concerns in this low income and high crime community.³⁴ In addition, Ravenswood also sent the RFP proposal to thirteen (13) vendors³⁵ and received bid responses from only 3 vendors.³⁶

On February 7, 2005, a team of four employees of the Ravenswood Technology Department ("the Bid Evaluation Team"), including the Director of Technology, evaluated and assessed each RFP bid response according to the bid selection criteria set forth on its E-Rate Proposal Evaluation Worksheet.³⁷ The E-Rate Proposal Evaluation Worksheet utilized by Ravenswood was a template E-Rate Evaluation Worksheet published by E-Rate Central. During the evaluation of the Proposals, the Team each had a copy of the Proposals, met for several hours in a District conference room to evaluate and discuss the proposals, and "whiteboard" the

³² AR000001-7 (FCC Form 470, File No. 129460000528716).

³³ The RFP was available at <http://www.ravenswood.k12.ca.us/erate/rfp.htm>. The RFP was provided to KPMG during the audit and is part of USAC's records for Ravenswood's FY2005 application.

³⁴ AR000086 (Hill Declaration).

³⁵ *Id.* at AR000086.

³⁶ *Id.*; see also AR000074 (Memorandum from Hill to Ravenswood Superintendent) (seeking approval for New District PBX System Contract for E-Rate Application)). Due to the size of the bid responses and the fact that they are part of USAC's records, they are not being filed with this instant Request. A copy of the bid responses will be provided upon request.

³⁷ AR000084-85 (Hill Declaration); see also AR000072 (E-Rate Proposal Evaluation Worksheet).

proposals to compare and contrast each Proposal.³⁸ The scores of each Bid Evaluation Committee Member were tabulated and aggregated.³⁹ The E-Rate Proposal Evaluation Sheet contains, among other things, formulas in the “Raw Score” and “Weighted Score” columns. The formulas consist of the addition of each number each member of the Bid Evaluation Team assigned to specific criteria. For example, on the “Prices/Charges” line item, AMS.net (“AMS”) received a total raw score for price of 12 consisting of the following formula: $3 + 4 + 3 + 2 = 12$.

The Bid Evaluation Worksheet clearly demonstrates that price was given the highest weight. The Bid Evaluation Committee, after a thorough bid evaluation, properly assessed the selection criteria, rated each selection criteria based upon the bid evaluation and whiteboard discussion, aggregated the rated criteria, and chose AMS as the winning bidder based upon the highest number of total points.⁴⁰

On that same date, the Director of Technology signed the E-Rate Bid Evaluation Worksheet-Aggregated and prepared a Memorandum for Ravenswood’s Superintendent and Board President recommending and seeking approval for the AMS contract for E-Rate funding for a new District PBX System Contract.⁴¹ On February 10, 2005, at its regular Board meeting, the Board approved the AMS contract for E-Rate funding of internal connections.⁴² Ravenswood’s competitive bid process clearly complied with FCC, state, and local requirements. Moreover, Ravenswood maintained all of the bid responses, bid evaluation worksheet and tabulated scores, e-mails to interested bidders, spreadsheet of calls received by prospective

³⁸ AR000085-86 (Hill Declaration).

³⁹ See AR000072 (E-Rate Evaluation Worksheet).

⁴⁰ *Id.*; see also AR000084-85 (Hill Declaration).

⁴¹ See AR000074 (Hill Memorandum to Ravenswood Superintendant (dated Feb. 7, 2005)(“Hill Memorandum”).

⁴² See AR000075-77 (Board Agenda), see also AR000078-80 (Board Minutes).

bidders.⁴³ In sum, Ravenswood maintained all documents as required by FCC and state requirements. On February 18, 2005, the District filed its FCC Form 471 for Internal Connections with USAC and named AMS.Net, Inc. as its Internal Connections service provider.⁴⁴

E. The Funding Commitment Decision Letter

On May 8, 2006, Ravenswood's request for Internal Connections E-Rate funding was granted.⁴⁵ The District was awarded \$790,625.98, as requested.

F. The Audit

At the request of USAC, KPMG LLP conducted an audit of the District's FY2005 application for E-Rate funding. That audit was conducted in 2008 and the Auditor issued an Audit Report at the end of its investigation.⁴⁶ The Audit Report alleges that Ravenswood did not comply with the FCC's competitive bidding rules, including the erroneous conclusion that the District did not comply with state and local procurement laws.⁴⁷

The following excerpt from the Audit Report includes the Auditor's conclusions regarding the documentation the District was required to maintain evidencing its compliance with state procurement procedures and its evaluation of the bids. USAC's

⁴³ See AR000074 (Hill Memorandum), AR000075-77 (Board Agenda) and AR000078-80 (Board Minutes) recommending and approving the AMS contract. All of these documents were provided to KPMG during the audit and are part of USAC's documentation for Ravenswood's FY2005 application.

⁴⁴ AR000008-13 (FCC Form 471, File No. 482419).

⁴⁵ AR000014-18 (FCDL).

⁴⁶ AR000019-32 (Audit Report).

⁴⁷ AR000024-27 (Audit Report).

decision to COMAD to rescind all funding for FRN 1338646 is based on these audit findings. The Audit Report states:

Finding	No. SL2008BE235-F01
Condition	<p>For Funding Year 2005, Ravenswood City Elementary School District (“Beneficiary” or “District”) filed Federal Communications Commission (“FCC”) Form 470, <i>Description of Services Requested and Certification</i>, requesting funding for internal connections. Per the local procurement policies, since the estimated contract exceeded \$65,100, the Beneficiary was required to advertise the bid in a local newspaper. However, the Beneficiary did not maintain documentation to support that it followed local procurement policies by advertising the bid for services in the local newspaper.</p> <p>For Funding Year 2005, the Beneficiary also did not maintain all documentation utilized in comparing bids received related to internal connections. We were informed that two of the three bids received relative to Funding Request Number (“FRN”) 1338646 were deemed non-responsive by the Beneficiary because the bidders did not include all the elements required by the Beneficiary’s request for proposal. As such, management represented to us that they estimated the cost of the missing components for the two non-responsive bids in order to compare the costs of all three bids. The Beneficiary did not maintain the documentation to support the calculation of the estimated costs of the two non-responsive bids.</p> <p>This matter was noted while testing the only internal connections related FRN for which funding had been received during the period under the examination, and therefore, represents 100% of the disbursements relative to internal connections.</p>
Criteria	<p>Per FCC Rule 54.504 (a), an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids for all services eligible for support under Sections 54.502 and 54.503. These competitive bid requirements apply in addition to the state and local competitive bid requirements and are not intended to preempt such state or local requirements.</p> <p>Per FCC Rule 54.516 (a) (I), schools and libraries shall retain all documents related to the application for, receipt, and delivery of discounted telecommunications and other supported services for at least 5 years after the last day of service delivered in a particular Funding Year. Any other document that demonstrates compliance with the statutory or regulatory requirements for the schools and libraries mechanism should be maintained as well.</p>
Cause	<p>There was a lack of understanding by the Beneficiary relative to the FCC rules regarding document retention and competitive bidding since the Beneficiary personnel did not maintain adequate documentation to support that the Beneficiary followed all competitive bidding requirements.</p> <p>The lack of personnel with adequate understanding of the document retention requirements represents a deficiency in internal controls over compliance with FCC Rules relative to the Beneficiary’s document retention and service provider selection processes.</p>

It is significant to note that this audit finding makes no reference to the types of documents that KPMG had before it for review and it makes no reference to price not being the primary factor. The KPMG Audit found that Ravenswood complied with all FCC competitive bid rules. Even as KPMG reviewed the District's local procurement rules that contained a requirement of publication of bids in local newspapers – an antiquated requirement, the KPMG Senior Auditor noted that “(w)e do not believe that the inclusion of these components [Instructions and Procedures for Advertised Bids] would have changed the outcome of the bid selection, but we just want to understand what type of bids are these requirements applicable to.”⁴⁸ The audit finding was also incorrect and misleading, because it stated that the Beneficiary only provided documentation related to three bid responses. The fact is that Ravenswood only received 3 bid responses and made all three bid responses available to the auditors.

G. The COMAD

USAC did not weigh in on the Audit Report; but rather, in response to the Audit Report, USAC sent Ravenswood a Notification of Commitment Adjustment Letter (“COMAD”).⁴⁹ The COMAD stated that USAC determined the District's funding for FRN 1338646 “must be rescinded in full.”⁵⁰ USAC further stated:

During the course of an audit it was determined that the applicant failed to comply with the FCCs competitive bidding requirements. The Applicant did not advertise its Request for Proposal (RFP) 9-2004 in a local newspaper as required by its Bidding Policy and Procedure and the California Public Contract Code Section 20112. According to the FCCs competitive bidding requirements, Applicants are required to follow state and local procurement requirements. In addition, during the course of an audit it was determined that the price of eligible products and services was not the primary factor in the vendor selection process. The applicant failed to maintain all documentation utilized in comparing the bids received to

⁴⁸ See AR000081-82 (E-Mail from Leslie Maynard to Solomon Hill dated Feb. 24, 2009).

⁴⁹ AR000033-36 (COMAD).

⁵⁰ *Id.* at AR000036.

select the most cost effective bid. FCC rules require that applicants select the most cost-effective product and/or service offering with price being the primary factor. Applicants may take other factors into consideration, but in selecting the winning bid, price must be given more weight than any other single factor. Ineligible products and services may not be factored into the cost-effective evaluation. Since the Applicant failed to comply with the competitive bidding requirements and price was not the primary factor in the vendor selection process, the commitment has been rescinded in full and USAC will seek recovery of any disbursed funds from the applicant.⁵¹

Apparently, USAC failed to verify the information in the audit, because all documentation was made available to the Auditor. The COMAD fails to specify what documents were not maintained that did not allow Ravenswood to select the most cost effective bid. While the COMAD suggests that price was not deemed to be the primary factor, the Audit did not make such a finding at all. It could not do so, because price was listed as the primary factor on the E-Rate Bid Evaluation Worksheet with the highest weight of 30%, which was made available to the auditors and USAC, and because the bid evaluation committee properly evaluated all three bids in accordance with the FCC's rules and state procurement laws in reaching the conclusion that the AMS bid was the most cost effective.⁵²

H. The District Appeal and Denial

On March 24, 2011, District Counsel, on behalf Ravenswood, timely filed an appeal of the COMAD ("District Appeal").⁵³ In the District Appeal, the District explained that the Audit Report was based on an erroneous interpretation of the District's bid evaluation processes and that the COMAD is disproportionate to the Audit Report findings.⁵⁴ On May 24, 2011, USAC

⁵¹ *Id.*

⁵² *See* AR000072-73 (E-Rate Bid Evaluation Worksheet).

⁵³ AR000034-37 (District Appeal).

⁵⁴ *Id.* at AR000038-39.

denied the District Appeal.⁵⁵ In USAC's Denial Letter, USAC provided the following reasoning for denying the District Appeal:

- USAC's review of your Form 471 application determined that price was not the primary factor when you selected your service provider. Since you did not demonstrate in your appeal that price was the primary factor when you selected your service provider, USAC denies your appeal.
- FCC rules require that applicants select the most cost-effective products offering with price being the primary factor. 47 C.F.R. § 54.5 1 1(a). Applicants may take other factors into consideration, but in selecting the winning bid, price must be given more weight than any other single factor. 47 C.F.R. § 54.5 11(a); *Request for Review by Ysleta Independent School District, et al., Federal State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 97-21, Order, FCC 03-3 13 50 (rel. Dec. 8,2003). Ineligible products and services may not be factored into the cost-effective evaluation. *See Common Carrier Bureau Reiterates Services Eligible for Discounts to Schools and Libraries*, CC Docket No. 96-45, *Public Notice*, 13 FCC Rcd. 16,570, DA 98-1110 (rel. Jun. 11, 1998).⁵⁶

The second bullet appears to simply be a recitation of various FCC Rules and Orders. It does not contain any finding of fact or violation of FCC rules specific to Ravenswood.

I. The Instant Request

On July 18, 2011, before the 60-day deadline for filing an appeal with the Commission of the Denial Letter, Ravenswood filed an appeal with the FCC of the Denial Letter.⁵⁷ In that filing, Ravenswood explained that one purpose of the filing was to forestall the further implementation of USAC's red light collection process against Ravenswood, because the FCC appeal period had not yet expired. Ravenswood also stated that it would file a supplement to that appeal with a full discussion of the facts, the District's position and supporting arguments. Ravenswood requests

⁵⁵ AR000047-48 (Letter from SLD, USAC, to Timothy Fox, County Counsel of San Mateo, regarding Appeal of Commitment Adjustment Decision, dated May 24, 2011).

⁵⁶ *Id.*

⁵⁷ AR000049-70 (District Appeal).

that the Commission associate this instant Appeal with Ravenswood's previously-filed appeal dated July 18, 2011. This Appeal contains a detailed explanation of the facts, the District's position and supporting arguments raised in Ravenswood's initial placeholder appeal.⁵⁸ On July 19, 2011, USAC sent a Notice of Withdrawal of Action to Ravenswood.⁵⁹

IV. STANDARD OF REVIEW

USAC's authority to administer the E-Rate Program is limited to implementing and applying the Commission's rules and the Commission's interpretations of those rules as found in agency adjudications.⁶⁰ USAC is not empowered to make policy, interpret any unclear rule promulgated by the Commission,⁶¹ or to create the equivalent of new guidelines.⁶² USAC is responsible for "administering the universal support mechanisms in an efficient, effective, and competitively neutral manner."⁶³ The Commission's review of USAC's Denial Letters is *de novo*, without being bound by any findings of USAC.

The District brings this request to the Commission⁶⁴ after appealing to USAC, because USAC reached an erroneous conclusion in its finding that Ravenswood did not use price as the primary factor during its competitive bid process.

⁵⁸ The FCC should order USAC not to send Demand Payment Letters to Applicants or Service Providers until the 60-day appeal window expires. Requiring USAC to fix this "glitch" will greatly reduce confusion and public resources.

⁵⁹ AR000071 (Letter from USAC to Solomon Hill, Ravenswood regarding Notification of Withholding of Action Pending Red Light Rule, dated Jul. 19, 2011).

⁶⁰ 47 C.F.R. § 54.702(c).

⁶¹ *Id.*

⁶² *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n, Inc., Third Report and Order*, 13 FCC Rcd 25058, 25066-67 (1998).

⁶³ 47 C.F.R. § 54.701(a).

⁶⁴ 47 C.F.R. § 54.723(b) ("The Commission shall conduct *de novo* review of request for review of decisions issue[d] by the Administrator that involve novel questions of fact, law, or policy").

V. THE CONTROLLING LAW

A. The Competitive Bid Statute

The competitive bid requirements of the E-Rate federal statute require applicants (schools and libraries) to seek competitive bids for eligible services through completing, certifying, and submitting an FCC Form 470 to USAC.⁶⁵ The FCC Form 470 identifies the services sought by the applicant and identifies other competitive bid requirements.⁶⁶ Because the FCC Form 470 often serves as the applicant’s official type of “RFP” for federal E-Rate purposes, the Commission has adopted certain requirements that the applicant must follow to ensure that the competitive bid process is fair and open.

For example, the FCC Form 470 must be completed by an applicant that will negotiate with prospective service providers and signed by a person authorized to request the services on behalf of the applicant.⁶⁷ The FCC Form 470 also requires the applicant to name a contact person, who is responsible to speak to prospective service providers, and notify prospective service providers of a website link or address where a separately published RFP is available, if applicable.⁶⁸ Finally, the FCC rules require the applicant to wait 28 days⁶⁹ before selecting “the most cost-effective service or equipment offering, with price being the primary factor.”⁷⁰

⁶⁵ 47 C.F.R. § 54.504(a).

⁶⁶ Schools and Libraries Universal Service, *Description of Services Requested and Certification Form*, OMB 3060-0806 (FCC Form 470).

⁶⁷ FCC Form 470 Instructions at 19-20.

⁶⁸ *Id.*

⁶⁹ 47 C.F.R. § 54.504(b)(4).

⁷⁰ 47 C.F.R. § 54.504(b)(2)(vii).

B. The Commission's Governing Precedent

USAC is required to justify with specificity the reasons in support of its actions and cite rule a rule violation.⁷¹ In this instance, it is not clear why USAC is issuing a COMAD to Ravenswood because Ravenswood provided to USAC documentation that the Commission has said was adequate to support a determination that an applicant reviewed the bids received for services and selected the winning cost effective bid with price weighted as the most important factor.

Furthermore the *de novo* review in this case must consider the following relevant FCC precedents:

In *Ysleta*, the Commission reminded applicants that “[o]nce an applicant received bids with specific prices quoted for eligible services, it would select the most cost-effective services, with price as the primary factor.”⁷² It further explained that competitive markets and the selection of the most cost-effective bid will help prevent fraud, waste and abuse. The Commission explained in *Ysleta* that applicants need to evaluate the “actual dollar amount of eligible services during the bidding process.” Despite the fact that two of the bids were not responsive to the actual RFP, Ravenswood conducted a thorough evaluation of all three. Pursuant to the discretion of the District’s Contracting Officer, Ravenswood was not able to disqualify the bids for nonresponsiveness because it did not expressly allow for immediate disqualification pursuant to the RFP. As a result, the Bid Evaluation Committee considered all three bids and properly concluded that AMS was the most responsive and cost effective bid pursuant to FCC and state procurement rules. Ravenswood compared the bids it received for

⁷¹ *Request for Review of the Decision of the Universal Service Administrator by Academy of Careers and Technologies, San Antonio, TX, et al., Order*, 21 FCC Rcd 5348 (2006).

⁷² *Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al., Order*, 18 FCC Rcd 26406 (2003) (“Ysleta”).

services using the actual dollar amounts quoted but not all of the bids included costs for all of the services requested by the District so it selected the most cost effective provider that submitted the most complete bid for the services requested by Ravenswood.

In the *Fifth Report & Order*, the Commission details the documentation applicants are required to maintain as part of the competitive bidding process. Specifically, applicants are directed to retain all documents created during the competitive bidding, such as: “Request(s) for Proposal (RFP(s)) including evidence of the publication date; documents describing the bid evaluation criteria and weighting, as well as the bid evaluation worksheets; all written correspondence between the beneficiary and prospective bidders regarding the products and service sought; all bids submitted, winning and losing; and Documents related to the selection of service provider(s).”⁷³ Ravenswood maintained all documentation it created during the competitive bidding process.

In *Central Islip*, the Commission found that screen prints of an applicant’s bid evaluation worksheets were adequate evidence that the applicant did not violate the Commission’s competitive bidding rules.⁷⁴ Ravenswood provided KPMG with a complete set of its bid evaluation documentation that sufficiently documented the bid evaluation committee’s scoring of the bids pursuant to the selected criteria thereby adequately conducting a competitively open and fair competitive bid process using price as the primary factor.

In *Macomb*, the school sought bids for T3 connections and selected T3 connections from two different service providers so it was not relying solely on the services of one provider. Its funding was initially denied because it selected duplicative services and on appeal, denied in part

⁷³ *Schools and Libraries Universal Service Support Mechanism, Fifth Report and Order*, 19 FCC Rcd 15808, ¶48 (2004) (“*Fifth Report & Order*”).

⁷⁴ *Requests for Review of the Decisions of the Universal Service Administrator by Central Islip Free Union school District, Central Islip, NY, et al. Order*, DA 11-1087 (June 22, 2011) (“*Central Islip*”).

because did not select the most cost-effective provider.⁷⁵ The Commission explained that funding would only be provided for T3 connections purchased from the most cost-effective provider, which, in this case, was the lowest bidder, since all of the bids were for the same services. Ravenswood’s situation is easily distinguishable from *Macomb* because the lowest bid received was not for all of the services it requested. It selected the most cost-effective service provider that submitted a responsive bid for all of the services requested by Ravenswood.

VI. ARGUMENT

A. The Facts in this Case Demonstrate that the District Selected the Most Cost Effective Bid with Price Being the Primary Factor and Weighted Most Heavily

USAC’s May 24, 2011 letter denying the District’s appeal states that:

USAC’s review of your Form 471 application determined that price was not the primary factor when you selected your service provider. Since you did not demonstrate in your appeal that price was the primary factor when you selected your service provider, USAC denies your appeal.

USAC’s statement is demonstrably and factually incorrect. In its appeal, the District provided the evaluation worksheet used in determining the winning bidder. The worksheet follows the example provided on the USAC website

(http://www.usac.org/res/documents/sl/pdf/2007_training/samples-checklist-vendor-selection-templates.pdf) and considered six factors with weighting as follows:⁷⁶

Prices/charges	30%
Understanding of needs	10%
Relevant prior experience	15%
Vendor qualifications	15%

⁷⁵ *Review by Macomb Intermediate School District Technology Consortium, Clinton Township, MI; Schools and Libraries Universal Service Support Mechanism, Order, 22 FCC Rcd 8771 (2007) (“Macomb”)*.

⁷⁶ AR000049-70 (Appeal).

Overall quality of plan	10%
Quality of technical design	20%

The District’s worksheet shows that three bids were received, from SBC, MIT, and AMS.

District personnel made their evaluation in good faith and without bias. The points awarded to each bidder in each category were properly evaluated. Whereas the District specified a “deliverable-based engagement” (i.e., to be provided at fixed price) one bidder (SBC) failed to provide sufficient information to evaluate total cost because it provided no pricing for required cabling. Nonetheless, the District did not disqualify this bidder, but out of a sense of fairness and full compliance with all potential requirements, assessed them as fully as possible against the other bidders that provided fuller pricing.

Furthermore, the bids received varied extensively in the scope of work to be provided. USAC personnel, at training events and during conference calls with constituents, emphasize that prices are to be compared on an “apples-to-apples” basis. In the case of the two bids that included cabling costs, one of these bids (AMS) appeared to provide a substantially more complete solution, and subsequently its bid was the highest price of the three bids received.⁷⁷ In broad summary, from a cost-for-quality perspective, the three bids can be evaluated as follows:

- AMS: Highest cost, most complete solution for cabling
- SBC: Lowest cost, but no pricing for cabling included in bid
- MIT: Middle cost, less complete, reliable, and sustainable cabling solution

The District assessed priced accordingly, providing the lowest score to the SBC bid that failed to include pricing information for required cabling—consistent with an “apples-to-apples”

⁷⁷ The AMS bid included E-Rate eligible cabling components that were not listed in the MIT bid, such as junction boxes, faceplates, hangers, and ducting. The scope of work indicated in the AMS bid was substantially more complete, indicating that there would be no exposed cabling, and that the work would include sufficient data outlets for each classroom (five), each computer lab (40), and each library (10).

evaluation. The District provided the highest pricing score to MIT because, even though their cabling solution appeared less complete than AMS, they had a lower price. However, when all factors were considered under the weighting of the District’s evaluation worksheet, AMS was the winning bidder. This was because AMS had substantial prior experience with other schools in the region, and because their qualifications, plan, and design were judged favorably—all factors in the bid evaluation worksheet.

The overall ranking when all evaluation factors were considered (and with price being the highest weighted factor) was:

AMS	16.25 points
SBC	13.50 points
MIT	13.70 points

AMS had a substantially higher score than the other two bidders, and, accordingly, AMS received the bid award. This decision by the Bid Evaluation Committee squarely complies with USAC’s Guidance on this issue as set forth in its Sample Bid Evaluation Matrix.⁷⁸ USAC guidance indicates in its Sample Bid Evaluation Matrix that “each factor is worth the same number of points as the weighting percentage. The winning bidder is the one with the highest number of total points. The cost of the goods and services must be weighted most heavily.”⁷⁹ Ravenswood complied on all counts.

FCC requirements that price be the most heavily weighted factor cannot possibly mean that raw price must be compared regardless of what is or is not included in a bid. A requirement to compare “apples-with-oranges” would turn the competitive bidding process on its head, and create a perverse incentive for vendors to leave out whole sections that are necessary

⁷⁸ See AR000083 (USAC Sample Bid Evaluation Matrix).

⁷⁹ *Id.*

requirements in their bid responses, at great detriment to the objectives of the E-Rate program to foster workable technology solutions.⁸⁰

There should be no question that the District complied with the relevant competitive bidding requirements, and there is no support whatsoever for USAC's contention that price was not the primary factor. Both through a simple evaluation of the bid evaluation worksheet, or a more thorough review of the bids themselves, the District can clearly be seen to have complied with these requirements.

B. The District Maintained ALL Documentation

Though not a finding in USAC's Denial Letter, beyond any scintilla of doubt, it is very clear that Ravenswood complied with all document retention requirements pertaining to the competitive bid process. The Commission's *Fifth Report & Order* requires set forth a description of documents required for the competitive bidding process. Specifically, the Commission stated that

Bidding Process. All documents used during the competitive bidding process must be retained. Beneficiaries must retain documents such as: Request(s) for Proposal (RFP(s)) including evidence of the publication date; documents describing the bid evaluation criteria and weighting, as well as the bid evaluation worksheets; all written correspondence between the beneficiary and prospective bidders regarding the products and service sought; all bids submitted, winning and losing; and Documents related to the selection of service provider(s).

On this FCC requirement, Ravenswood scores 100% compliance. Ravenswood maintained the original FCC Form 470, the original RFP, the original 3 bid responses, the bid evaluation scoresheets that include each individual score as well as the aggregated score, all e-

⁸⁰ If cabling costs were removed from the two bids that included cabling costs, in an attempt to compare like solutions, then the (winning) AMS bid would have the lowest cost of all bids received, the MIT bid would have the second-lowest cost, and the SBC bid would have the highest cost. Although District needs required that cabling be part of its required technology solution, this additional analysis provides further support that the District, in selecting AMS as the winning bidder, chose a cost effective – and the most cost effective – solution.

mail correspondence with prospective bidders during the open bid cycle, a log of all phone calls received, a copy of the Memorandum recommending and seeking approval for AMS from the Superintendent and Board President, a copy of the Agenda and Meeting Minutes of the Board Approval for the E-Rate Contract awarding the contract to AMS for E-Rate funding for internal connections. All of this documentation was made openly available in a meticulous and organized format to the auditors. It is most unfortunate that instead of receiving a stellar audit report commending the District for its compliance efforts, USAC denied Ravenswood of the much needed federal funding that it deserved.

VII. CONCLUSION AND REQUEST FOR RELIEF

Ravenswood requests the Commission to reverse USAC's Denial and grant this Appeal. For the reasons set forth above, Ravenswood requests the Commission to make a finding that USAC's Denial reason was erroneous and not supported by the facts. Ravenswood requests the Commission to remand the application to USAC with instructions to cancel the COMAD no later than 30 days from the release date of the Commission's Order granting this Appeal.

Respectfully submitted,



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Dated: July 25, 2011

CERTIFICATE OF SERVICE

I, Carly T. Didden, certify on this 25th day of July, 2011, a copy of the foregoing Request for Review has been served via electronic mail or first class mail, postage pre-paid, to the following:

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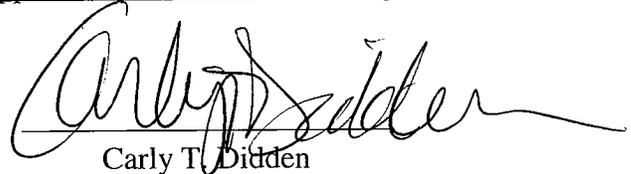
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