

~~DOCKET FILE COPY ORIGINAL~~
 Before the
 Federal Communications Commission
 Washington, DC 20554

In the Matter of)
)
 Request for Review of Decisions of the)
 Universal Service Administrator by)
)
 Joseph M. Hill)
 Trustee in Bankruptcy for)
 Lakehills Consulting, LP.)
)
 Schools and Libraries Universal Service)
 Support Mechanism)

MAILED
 DEC 7 X 2011
 FCC Mail Room

File Nos. SLD-295389, 337296,
 377451, 398823, 398827

CC Docket No. 02-6

ORDER

Adopted: November 28, 2011

Released: November 28, 2011

By the Commission:

I. INTRODUCTION

1. In this order, we deny the appeal filed by Joseph M. Hill, trustee in bankruptcy for Lakehills Consulting, LP (Lakehills) of the decision by the Universal Service Administrative Company (USAC) concerning Houston Independent School District's (Houston ISD) applications for discounted services under the E-rate program (more formally known as the schools and libraries universal service support program) for funding years (FY) 2002-2004.¹ USAC rescinded Houston ISD's applications on the grounds that its competitive bidding processes violated the Commission's rules.² Specifically, USAC found that Houston ISD had pre-selected Lakehills's predecessor Analytical Computer Services (ACS) for its contracts.³ USAC further found that Houston ISD had met with ACS during the bidding period and accepted gifts from ACS.⁴ Upon review of the record, we find that Houston ISD and ACS violated the Commission's competitive bidding rules, and that E-rate funds should not have been committed or disbursed to ACS or its successors, including Lakehills.⁵ We therefore affirm USAC's decision to rescind funding commitments for FYs 2002-2004 and deny Lakehills's request for review.

¹ See appendix; Request for Review of a Decision of the Universal Service Administrator/Waiver for Lakehills Consulting LP, CC Docket No. 02-6 (filed May 31, 2011) (regarding Houston ISD FY 2002 - 2004 FCC Form 471 application numbers 295389, 367296, 377451, 398823, and 398827) (Request for Review). In this order, we use the term "appeals" to generically refer to requests for review of decisions issued by USAC. Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c).

² See Letter from USAC, Schools and Libraries Division, to Houston Independent School District (dated Mar. 29, 2011) (regarding FYs 2002 - 2004 FCC Form 471 application numbers 295389, 367296, 377451, 398823, and 398827) (*Further Explanation of the Administrator's Decision*).

³ See *id.*

⁴ See *id.*

⁵ See 47 C.F.R. § 54.504 (2008) amended by 47 C.F.R. § 54.503 (2011); see also 47 C.F.R. § 54.511.

II. BACKGROUND

2. E-rate Program Rules and Procedures. Under the E-rate program, eligible schools, libraries, and consortia may apply for discounts for eligible services.⁶ The Commission's rules provide that these entities must seek competitive bids for all services eligible for support.⁷ In accordance with the Commission's competitive bidding rules, applicants must submit for posting on USAC's website an FCC Form 470 requesting discounts for E-rate eligible services, such as tariffed telecommunications services, month-to-month Internet access, or any services for which the applicant is seeking a new contract.⁸ The applicant must describe the requested services with sufficient specificity to enable potential service providers to submit bids for such services.⁹ The applicant must provide this description on its FCC Form 470 or indicate on the form that it has a request for proposal (RFP) available, providing detail about the requested services.¹⁰ The RFP must be available to all potential bidders.¹¹ The applicant must consider all submitted bids prior to entering into a contract, and price must be the primary factor in selecting the winning bid.¹²

3. After submitting an FCC Form 470 or issuing an RFP, the applicant must wait 28 days before making commitments with the selected service providers¹³ and submitting an FCC Form 471.¹⁴ Section 54.504(a) of our rules also states that the FCC Form 471 requesting support for the services ordered by the applicant shall be submitted "upon signing a contract for eligible services."¹⁵ Thus, applicants must have a "signed contract" or a "legally binding agreement" with the service provider "for all services" ordered on the FCC Form 471.¹⁶ USAC assigns a funding request number (FRN) to each request for discounted services and issues Funding Commitment Decision Letters (FCDL) approving or denying the requests for discounted services.¹⁷

⁶ 47 C.F.R. §§ 54.501-54.502 (2002).

⁷ *Id.* § 54.504(a) (2002).

⁸ *Id.* § 54.504(b) (2002).

⁹ *Id.*

¹⁰ *See, e.g.,* Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (Oct. 2010) (FCC Form 470).

¹¹ *Id.*

¹² 47 C.F.R. § 54.511(a) (2011).

¹³ 47 C.F.R. § 54.503(c)(4)(2011). *See also* Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407, 26408-09, para. 39 (2003) (*Ysleta*) ("To the extent that the applicant also relies on an RFP as the basis of its vendor selection, that RFP must also be available to bidders for 28 days.").

¹⁴ *See* Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (FCC Form 471).

¹⁵ 47 C.F.R. § 54.504(a); *see also* Request for Review of Waldwick School District, Schools and Libraries Universal Service Support Mechanisms, File No. SLD-234540, CC Docket No. 02-6, Order, 18 FCC Rcd 22994, 22995, para. 3 (Wireline Comp. Bur. 2003) (*Waldwick Order*); Request for Review of St. Joseph High School, Schools and Libraries Universal Service Support Mechanisms, File No. SLD-234540, CC Docket Nos. 96-45, 97-21, Order, 17 FCC Rcd 22499, 22500-01, para. 4 (Wireline Comp. Bur. 2002) (*St. Joseph Order*).

¹⁶ *See* Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (FCC Form 471 Instructions).

¹⁷ *See* USAC website, Schools and Libraries, Funding Commitment Decision Letter, <http://www.universalservice.org/sl/applicants/step09/funding-commitment-decision-letter.aspx> (last visited Nov. 17, 2011).

4. The Commission has consistently stated that the competitive bidding process must be fair and open and must not have been compromised because of improper conduct by the applicant, service provider, or both parties.¹⁸ In essence, all potential bidders and service providers must have access to the same information and must be treated in the same manner throughout the procurement process.¹⁹ The Commission has also made clear its intent to “recover the full amount disbursed for any funding requests in which the beneficiary failed to comply with the Commission’s competitive bidding requirements as set forth in section 54.504 and 54.511 of our rules and amplified in related Commission orders.”²⁰

5. Houston ISD’s Application Process. Our decision encompasses three different funding year requests from Houston ISD and its service providers. On September 24, 2001, Houston ISD submitted its FCC Form 470 application to USAC for posting on USAC’s website.²¹ The FCC Form 470 sought bids for telecommunications services, Internet access, and internal connections for FY 2002.²² On December 7, 2001, Houston ISD released RFPs for network cabling, network development and network maintenance.²³ In response, Houston ISD received bids from multiple vendors, including Texas Cooperative Purchasing Network at Region IV Educational Service Center (Region IV ESC).²⁴ Region IV ESC’s bid included ACS and Micro Systems Engineering (MSE) as resellers of equipment offered by Compaq Computers Inc. (Compaq) and Hewlett Packard Company (HP).²⁵ On January 16, 2002, Houston ISD submitted its FCC Form 471 application certifying that it had a contract with Region IV

¹⁸ See, e.g., *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, 26939, para. 66 (*Schools and Libraries Third Report and Order*) (stating that a fair and open competitive bidding process is critical to preventing waste, fraud, and abuse of program resources); *Request for Review by Mastermind Internet Services, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028 (2000) (*Mastermind Order*) (finding that the FCC Form 470 contact person influences an applicant’s competitive bidding process by controlling the dissemination of information regarding the services requested and, when an applicant delegates that power to an entity that also participates in the bidding process as a prospective service provider, the applicant impairs its ability to hold a fair competitive bidding process); see also *Request for Review by Dickenson County Public Schools, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 17 FCC Rcd 15747, 15748, para. 3 (2002); *Request for Review by Approach Learning and Assessment Center, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 22 FCC Rcd 5296, 5303, para. 19 (Wireline Comp. Bur. 2007) (*Approach Learning Order*) (finding that service provider participation may have suppressed fair and open competitive bidding). More recently, in the *Schools and Libraries Sixth Report and Order*, the Commission codified the existing requirement that the E-rate competitive bidding process be fair and open. See *Schools and Libraries Universal Service Support Mechanism and A National Broadband Plan for Our Future*, Sixth Report and Order, CC Docket 02-6, 25 FCC Rcd 18762, 18798-800, paras. 85-86 (2010) (*Schools and Libraries Sixth Report and Order*); 47 C.F.R. § 54.503.

¹⁹ See *Mastermind Order*, 16 FCC Rcd at 4033, para. 10.

²⁰ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15815, para. 21 (*Schools and Libraries Fifth Report and Order*).

²¹ See FCC Form 470, Houston Independent School District (posted Sept. 24, 2001) (Houston ISD 2001 FCC Form 470).

²² See *id.*; see also *Further Explanation of the Administrator’s Decisions* at 4 & Tab 1.

²³ See *Further Explanation of the Administrator’s Decision* at 4.

²⁴ See *Further Explanation of the Administrator’s Decision* at Tabs, 11, 12, 13. For network cabling, Houston ISD received bids from five entities: Orius Corp., Network Cabling Division; MCA, Texas Cooperative Purchasing Network, Avatar Computer Solutions, Inc., and Inteleserv, Inc. See *id.* at Tab 11. For network development and maintenance, Houston ISD received bids from two entities: Computer Tech. and Texas Cooperative Purchasing Network. See *id.* at Tabs 12-13.

²⁵ See *Further Explanation of the Administrator’s Decision* at 4 & Tabs 6, 7, 8. USAC notes that “Compaq Computers, Inc. merged with Hewlett Packard Company in the 2000/2001 timeframe.” See *id.* at 5, n. 20.

ESC as of January 10, 2002.²⁶ However, Houston ISD's documentation shows that it did not actually have a signed contract with Region IV ESC until February 6, 2002, which was later approved by its board on February 14, 2002.²⁷

6. For funding year 2003, Houston ISD issued RFPs for network cabling, network hardware and workstations, and network maintenance on November 15, 2002.²⁸ On December 11, 2002, Houston ISD received three identical responses to the RFPs with three identical price lists: one from a group consisting of ACS, MSE and Region IV ESC, combined; a second response from Acclaim Professional Services, Inc.; and a third response from ACS, individually.²⁹ On December 16, 2002, Houston ISD submitted its FCC Form 470 for posting, seeking bids on telecommunications services, Internet access, and internal connections for FY 2003.³⁰ On December 19, 2002, ACS added MSE as a co-respondent on its individual proposal,³¹ and Houston ISD awarded one contract to ACS and MSE on the same day and the remaining contracts on the next day.³² On February 5, 2003, however, Houston ISD filed two FCC Form 471 applications, stating that the contracts were awarded on January 16, 2003, nearly one month after Houston ISD actually awarded the contracts to ACS and MSE.³³ Also in January of 2003, Houston ISD requested that the service provider identification number (SPIN) for all funding requests involving Region IV ESC be changed to ACS.³⁴ USAC granted Houston ISD's request, and ACS became the eligible recipient for Houston ISD's FY 2002 funding requests.³⁵

7. For funding year 2004, on October 10, 2003, Houston ISD submitted its FCC Form 470 application for telecommunications services, Internet access, and internal connections.³⁶ On November 12, 2003, Houston ISD issued RFPs for network development, desktop computers, printers and related peripheral devices, network maintenance and network cabling.³⁷ On the same day, ACS and MSE submitted a bid.³⁸ Houston ISD also received bids from five other companies.³⁹ On December 5, 2003,

²⁶ See Houston ISD FY 2002 FCC Form 471 application number 295389, Block 5 (filed Jan. 16, 2002) (stating that award date was January 10, 2002).

²⁷ See *Further Explanation of the Administrator's Decision* at Tabs 11-13.

²⁸ See *Further Explanation of the Administrator's Decisions* at 9.

²⁹ See *id.*

³⁰ See FCC Form 470, Houston Independent School District (posted Dec. 16, 2002).

³¹ See *Further Explanation of the Administrator's Decisions* at Tab 44.

³² *Further Explanation of the Administrator's Decisions* at 9 & Tabs 41-43 (awarding network cabling on December 20, 2002; network hardware and workstations on December 19, 2002; and network maintenance on December 20, 2002).

³³ See *Further Explanation of the Administrator's Decisions* at Tabs 46-47.

³⁴ See *id.* at Tab 10 (Houston ISD SPIN Change Request) (requesting that all funding requests involving Region IV be changed to ACS); see also *id.* at Tab 9 (Original FCC Form 471 identifying Region IV as the SPIN associated with the FY 2002 funding requests).

³⁵ See Email from USAC to Jill Duncan, (Mar. 3, 2003, Jun. 10, 2003) (on file).

³⁶ See FCC Form 470, Houston Independent School District (posted Oct. 10, 2003); see also *Further Explanation of the Administrator's Decisions* at Tab 79.

³⁷ See *Further Explanation of the Administrator's Decisions* at Tabs 80-82.

³⁸ See *id.* at 16, & Tabs 83-85. While the bid appears to be submitted by ACS and MSE, the proposal states that ACS and MSE, "together with Lakehills ISC, LLC, U.S. Tech, Data Projections, Inc., and Anixter, Inc. have teamed to provide a superior offering to Houston" ISD. See *id.* at Tab 83 at 6.

³⁹ For network development, desktop computers, printers and related peripheral devices, Houston ISD received bids from the following six vendors: ACS/MSE, Advancetech Systems 2, Inc., NetView Technologies, Tech Depot,

(continued...)

Houston ISD awarded all three contracts to ACS and MSE.⁴⁰ On January 28, 2004, and February 4, 2004, Houston ISD filed its FCC Form 471 applications stating that it had awarded the contracts to ACS on December 11, 2003.⁴¹

8. Lakehills's Acquisition of ACS and USAC's Funding Hold. On January 12, 2007, Lakehills acquired ACS.⁴² In a letter to Houston ISD, Lakehills stated that it had acquired all the assets and liabilities of ACS, including all of ACS's contracts and employees.⁴³ Lakehills assured Houston ISD that all of the products and services promised by the ACS contracts would be delivered by Lakehills.⁴⁴ On March 8, 2007, Lakehills requested that USAC transfer all E-rate activity related to ACS's SPINs to Lakehills's SPIN.⁴⁵ On March 9, 2007, USAC granted Lakehills's SPIN request and as a result, Lakehills became the eligible service provider of all of the applications for which ACS had been the service provider.⁴⁶

9. While Lakehills was undertaking these changes, a news media outlet, the *Houston Chronicle*, published a news article on January 7, 2007, regarding Houston ISD's selection of ACS, a reseller of HP products, as its service provider.⁴⁷ The *Houston Chronicle* article called into question Houston ISD's decision to select ACS due to ACS's business relationship with MSE.⁴⁸ The article alleged that MSE's president, Mr. Wong, who had a management role in ACS, bribed employees of the Dallas Independent School District (Dallas ISD) to obtain contracts for MSE.⁴⁹ Both ACS and MSE were resellers of HP products to Dallas ISD, as well as to Houston ISD, and HP decertified ACS as a reseller as a result of the allegations. The article also questioned the decision of ACS president, Mr. Trifilio, to

(...continued from previous page)

TEICC Texas Electronic Information & Computer Corp., and US Tech. *See id.* at Tab 86. For network cabling, Houston ISD received bids from Amherst, ACS/MSE, AVNet, MCA, McBride, and SBC. *See id.* at Tab 87.

⁴⁰ *See id.* at Tabs 86-87.

⁴¹ *See id.* at Tab 88-89.

⁴² *See id.* at 21, & Tabs 1120-13. ACS was owned by Frank Trifilio in 2002, but became Southwest Analytical Computer Services (SWACS) in March 2004. The general partnership of SWACS was owned by WT Technology, which was co-owned by Trifilio, Sally Hall, and William Froechtenicht, the Vice President for Marketing and Business Development at MSE. WT Technology was sold back to Trifilio in September 2005. Additionally, Acclaim Computer Services, Ltd. d/b/a Acclaim Professional Services (Acclaim) handled all billing and reimbursement issues for MSE and ACS. Frankie Wong (President, CEO, and partial owner of MSE) and Trifilio were partners in Acclaim, along with Alan Chan (partial MSE owner), Jack Yang (partial MSE owner), Froechtenicht, Larry Lehmann (de facto managing partner of Acclaim), and Kevin Killebrew (owner of Lakehills). Acclaim has been accused of money laundering by the Department of Justice. *See The United States' Notice of Election to Partially Intervene at 6, United States v. Analytical Computer Services*, No. H-05-3836, (S.D. Tex. Nov. 1, 2010).

⁴³ *See Further Explanation of the Administrator's Decisions* at Tab 113 (Letter from ACS to Houston ISD, dated Jan. 15, 2007); *see also* Letter to USAC, Schools and Libraries Division from Lakehills Consulting, LP (dated Oct. 3, 2007) (stating that "Lakehills merged with ACS in January 2007 as a direct result of the ACS reseller de-authorization by [HP]").

⁴⁴ *See id.* at Tab 113 at 2 (Lakehills Transition Plan for Houston Independent Schools District).

⁴⁵ *See id.* at 22.

⁴⁶ *See id.* at 22 & Tab 115.

⁴⁷ *See School Board Weighs Ties to Vendor, HP Drops Local Tech Company Amid Probe in Dallas, but HISD Still Eyes Low Bid*, Houston & Texas News (Jan. 7, 2007), available at <http://www.chron.com/disp/story.mpl/metropolitan/4453657.html>.

⁴⁸ *See id.*

⁴⁹ *See id.*

make political donations to certain Houston ISD board members.⁵⁰ On March 19, 2007, USAC sent a letter to ACS inquiring about its business ties with MSE, its involvement in Houston ISD's competitive bidding process, and its alleged violations of HP's ethics rules.⁵¹ Among other questions, USAC asked ACS to respond to the *Houston Chronicle's* discussion of ACS's alleged participation in "bribery and kickbacks."⁵² In response, Mr. Trifilio, president of ACS and minority owner in Lakehills, denied any wrongdoing and stated HP did not offer a specific reason for severing its ties with ACS.⁵³

10. In a letter dated September 27, 2007, USAC informed Lakehills that it would hold E-rate payments to Lakehills, successor to ACS, because of ACS's business ties with MSE.⁵⁴ In this second letter, this time addressed to Lakehills, USAC noted that ACS and MSE had co-signed contracts for Houston ISD, and that federal criminal charges had been filed against Mr. Wong, president of MSE, alleging bribery in connection with the awarding of E-rate contracts by the Dallas ISD.⁵⁵ USAC asked Lakehills to explain MSE's involvement with ACS's contracts.⁵⁶ USAC also asked Lakehills to identify the individuals employed by Lakehills and explain whether they had also been employed by ACS.⁵⁷ On October 3, 2007, Lakehills responded to USAC's letter and explained that Houston ISD had required MSE to be a part of ACS's contracts.⁵⁸ Lakehills also confirmed that all ACS personnel had become employees of Lakehills.⁵⁹ After receiving this information, in November of 2007, USAC issued a letter stating that it would continue to hold payments to Lakehills because of the ties between ACS, Lakehills, and MSE, and because of the indictment of MSE's president, Mr. Wong.⁶⁰

11. Lakehills's Bankruptcy and Court Proceedings. In June of 2009, Lakehills filed for Chapter 7 bankruptcy.⁶¹ Lakehills claims that USAC's failure to pay for its E-rate work is the primary cause for its filing.⁶² Lakehills also claims the E-rate funds as assets in the bankruptcy proceeding.⁶³ On December 2, 2009, the United States government filed a proof of claim for \$225,182,370, an amount

⁵⁰ *See id.*

⁵¹ *See* Letter from USAC, Schools and Libraries Division, to Analytical Computer Services (dated March 19, 2007). USAC sent this letter to ACS owner and President, Frank Trifilio, notwithstanding the fact that ACS had been acquired by Lakehills.

⁵² *See id.* at Attachment.

⁵³ *See* Letter from ACS to USAC, Schools and Libraries Division (dated April 5, 2007).

⁵⁴ *See* Letter from USAC, Schools and Libraries Division, to Lakehills Consulting, L.P. (dated Sept. 27, 2007).

⁵⁵ *See id.* at 1. USAC noted that Mr. Wong had been charged with Conspiracy, Bribery Concerning Programs receiving Federal Funds and Aiding and Abetting, and Conspiracy to Money Launder Instruments, among other charges. *See id.* at 3. *See also* Letter from USAC, Schools and Libraries Division, to Lakehills Consulting, L.P. (dated Nov. 27, 2007) (concluding that it would continue to hold payments due to the "indictment [of Mr. Frankie Wong] and the ties between ACS, Lakehills, Acclaim, and MSE").

⁵⁶ *See id.* at 6.

⁵⁷ *See id.*

⁵⁸ *See* Letter from Lakehills Consulting L.P. to USAC, Schools and Libraries Division (Oct. 3, 2007) at 1.

⁵⁹ *See id.* at 2.

⁶⁰ *See* Letter from USAC, Schools and Libraries Division, to Lakehills Consulting, LP (Nov. 27, 2007).

⁶¹ *See* Request for Review at 8; *see also* Voluntary Petition for Bankruptcy, *In re Lakehills Consulting, L.P.*, Case No. 09-34049 (S.D. Tex. June 5, 2009) (Voluntary Petition). Mr. Trifilio signed Lakehills's bankruptcy petition as the Sole Manager of the General Partner. *See id.* at 3.

⁶² *See* Voluntary Petition at 8.

⁶³ *See id.*

equal to the sum of the ACS contracts, trebled as permitted by the False Claims Act (FCA).⁶⁴ The United States stated that USAC is required to recover the full amount of funds disbursed for any funding requests in which the applicant or service provider failed to comply with Commission rules and order.⁶⁵ The government⁶⁶ contends that Lakehills “through its predecessor ACS and its joint venture partners provided extensive gratuities, including meals, tickets to sporting events, monetary loans and trips to Las Vegas and Miami to school district personnel in charge of technology purchasing at . . . [Houston ISD].”⁶⁷ The United States noted that “the co-owner and president of ACS’s joint venture partner and the chief technology officer of the Dallas Independent School District were convicted of various charges, including bribery and defrauding a federal program.”⁶⁸ The court has stayed the bankruptcy proceeding pending the Commission’s decision in this order.⁶⁹

12. In a separate action, on March 5, 2010, Houston ISD entered into a settlement agreement with the United States government.⁷⁰ This agreement settled a Department of Justice investigation into Houston ISD’s competitive bidding processes.⁷¹ Specifically, the government again alleged that employees of Houston ISD had engaged in non-competitive bidding practices by accepting significant gratuities from Acclaim and others and, consequently, submitted false claims for payment to the United States in violation of the FCA.⁷² As part of the agreement, Houston ISD agreed to pay a settlement amount and relinquish all of its rights to funding requests from FY 2002-2004.⁷³ The funding requests covered in the settlement agreement were those originally awarded to Region IV ESC; ACS, the predecessor of Lakehills; MSE; or Acclaim.⁷⁴

13. On December 22, 2010, the United States intervened in a *qui tam* action in the District Court for the Southern District of Texas.⁷⁵ The United States claims that

ACS and [Larry] Lehmann [de facto managing partner of Acclaim] colluded to rig the competitive bidding process for E-rate contracts by providing illegal gifts of goods and services to [Houston ISD] officials, including Laura Palmer and Steve Kim at [Houston ISD] in exchange for providing ACS and its business partners with inside information and/or favorable undue consideration in the bidding process for contracts to provide technology services under [Houston ISD’s] E-rate programs.⁷⁶

⁶⁴ See Request for Review, Exhibit D (*Proof of Claim for the United States Government and Attachments*).

⁶⁵ See *id.* at 2.

⁶⁶ For purposes of this order, we use the term “government” to refer to the United States government.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See Request for Review at 15 n.10.

⁷⁰ See Request for Review, Exhibit B; see also *Further Explanation of the Administrator’s Decisions* at Tab 34 (*Settlement Agreement*).

⁷¹ See generally *Settlement Agreement*.

⁷² See *id.*

⁷³ See *id.* at 3 (requiring Houston ISD to pay \$850,000 to the United States).

⁷⁴ See *id.* at 2.

⁷⁵ Complaint in the Intervention of the United States of America for Violations of the False Claims Act, Payment by Mistake, and Unjust Enrichment, *United States ex rel. Richardson*, No. 05-cv-03836 (S.D. Tex., filed Nov. 14, 2005).

⁷⁶ See *id.* at 13.

The United States also claims, among other things, that ACS entertained Houston ISD employees in its suites at the Houston Reliant Stadium for football games including the Super Bowl,⁷⁷ and that ACS knowingly caused false statements to be made to the United States.⁷⁸ As a result, the United States seeks to recover treble damages under the FCA and under common law from ACS and Larry Lehmann for payment by mistake and unjust enrichment.⁷⁹

14. USAC Rescission of Houston ISD Funding Requests. In 2011, USAC rescinded numerous funding requests for Houston ISD from funding years 2002-2004 because of competitive bidding violations.⁸⁰ For FY 2002, USAC found that Houston ISD selected Region IV ESC and its partners, which included ACS, as the winning bidder before it concluded its competitive bidding process.⁸¹ To support this finding, USAC relied on email correspondence between bidders and Houston ISD, in which things of value were offered in exchange for Houston ISD selecting the bidder as the service provider. For example, USAC cited to an email between MSE and an employee of Houston ISD in which MSE offered to provide advance pricing information for Compaq and gifts to the employee in return for business with Houston ISD.⁸² USAC noted that Region IV ESC's bid included ACS and MSE as resellers of Compaq equipment.⁸³ USAC also relies on another example in which an employee of Houston ISD instructed other employees involved in the competitive bidding process to give bidders the impression that their bids were considered equally, even if the employee knew that Houston ISD was not interested in using the particular bidder.⁸⁴ A third email from Houston ISD's principal E-rate employee, Jill Duncan, to the Houston ISD employee responsible for selecting the winning bid, Steve Kim, informed Mr. Kim to provide a potential bidder with information on equipment "like items we know we can get a better price elsewhere...TCPN [*i.e.*, Region IV ESC]," again showing a preference to Region IV ESC.⁸⁵ USAC also found that Houston ISD had filed an FCC Form 471 prior to signing any contracts for services.⁸⁶ In addition to the lack of signed contracts and the evidence that Houston ISD had predetermined the outcome of its process, USAC found that Houston ISD accepted numerous gifts from ACS, MSE, and HP, in violation of Commission rules that applicants conduct a fair and open competitive bidding process, and in violation of Houston ISD's own policies and RFPs.⁸⁷ These gifts included meals, entertainment,⁸⁸ and sponsorship in a golf tournament.⁸⁹

⁷⁷ See *id.* The government also lists the numerous meals, trips, loans, and other gifts given by ACS's business partners – MSE, HP, and Acclaim – in support of its pleading.

⁷⁸ See *id.* at 1.

⁷⁹ See *id.* at 1.

⁸⁰ See *Further Explanation of the Administrator's Decisions* at 1; see also Letter from USAC, Schools and Libraries Division, to Kevin Killebrew, Lakehills Consulting, LP (Oct. 26, 2011) (regarding Houston ISD FY 2002 FCC Form 471 application number 295389; FY 2003 FCC Form 471 application number 367296; FY 2003 FCC form 471 application number 377451).

⁸¹ See *Further Explanation of the Administrator's Decisions* at 4-5 (describing an email from September 26, 2001, between an HP representative and a Houston ISD employee, in which the HP representative thanked the Houston ISD employee for meeting for lunch, noted enthusiasm towards strategizing for its future partnership with the District, and offered dates to treat the Houston employee to a University of Texas game). This email was dated two days after the posting of Houston's FY 2002 FCC Form 470 on September 24, 2001.

⁸² See *id.* at 5.

⁸³ See *Further Explanation of the Administrator's Decisions* at Tab 7.

⁸⁴ See *id.*

⁸⁵ See *id.* at Tab 17.

⁸⁶ See *Further Explanation of the Administrator's Decisions* at 4.

⁸⁷ See *id.* at 6-8.

15. For FY 2003 and 2004, USAC also found that Houston ISD awarded ACS and contracts before it completed its competitive bidding process.⁹⁰ USAC provided detailed examples of meetings between Houston ISD employees, ACS and MSE prior to the completion of the competitive bidding process. For example, USAC found that a Houston ISD employee met with ACS, MSE, and Houston ISD procurement employees on December 18, 2002, to specifically discuss Houston ISD's RFP two days before it posted its FCC Form 470.⁹¹ USAC also relied on an email between Houston ISD employees and HP in which HP asked Houston ISD if it had a preference in resellers for HP equipment and offered to "prepare a bid for MSE to submit."⁹² USAC also found that Houston ISD accepted gifts from ACS, MSE, and HP in the form of meals,⁹³ sporting events,⁹⁴ and trips to places such as Las Vegas, Nevada and Seattle, Washington.⁹⁵ For example, three days after Houston ISD posted its FCC Form 470 for FY 2003, ACS provided a restaurant lunch to seven Houston ISD employees.⁹⁶ USAC notes that in 2004, ACS, MSE, HP, and Acclaim provided Houston ISD employees with meals, gift cards,⁹⁷ monetary loans,⁹⁸ and Super Bowl tickets worth between \$400 and \$600 each at Houston's Reliant Stadium.⁹⁹ In addition to the above violations, USAC also determined that for FY 2003, Houston ISD failed to wait 28 days to select a winner as required by Commission rules, and instead, selected ACS and MSE within four days of posting the FCC Form 470.¹⁰⁰

16. In the FY 2002-2004 commitment adjustment letters, USAC notes that it could not recover funds from Houston ISD due to the settlement agreement between the Houston ISD and the United States government.¹⁰¹ However, the Commission has stated that in instances where both the beneficiary and the service provider share responsibility for a statutory or rule violation, USAC may initiate recovery against both parties and shall pursue such claims until the amount is satisfied by one of the parties.¹⁰² In the

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⁸⁸ See *id.* at 6-8. For example, ACS hosted a "Welcome to the Weekend" at Dave and Busters restaurant for Houston ISD employees and provided a buffet, drinks, pool and game tokens. See *id.* at 6. HP provided numerous dinners to Houston ISD employees at restaurants such as Tokyohana, P.F. Chang's, and Paesanos Riverwalk Restaurant, among others. See *id.* 6-8.

⁸⁹ HP sponsored Houston ISD employees in MSE's annual golf tournament. See *id.* at 6-8.

⁹⁰ See *id.* at 9-21.

⁹¹ See *id.* at 10.

⁹² See *id.* at 11.

⁹³ See *id.* 11-14.

⁹⁴ See *id.* at 12-13 (discussing tickets given by HP to Astros games and a day at AstroWorld offered by ACS).

⁹⁵ See *id.* at 12-14.

⁹⁶ See *id.* at 10. USAC also notes that on December 20, 2002, the day that ACS and MSE were awarded the contract, MSE provided a restaurant lunch to 6 Houston ISD employees. See *id.*

⁹⁷ See *id.* at 19 (describing \$100 gift cards to Morton's and Pappadeaux given to Houston ISD employees).

⁹⁸ See *id.* at 19 (describing a loan to a Houston ISD employ in the amount of \$60,000).

⁹⁹ See *id.* at 17.

¹⁰⁰ See *id.* at 10.

¹⁰¹ See, e.g. Letter from USAC, Schools and Libraries Division, to Lakehills Consulting, L.P. (regarding Houston ISD's FY 2004 FCC Form 471 application number 398823) (Houston ISD Commitment Adjustment Letter for Form 471 Application Number 398823, FRN 1123651).

¹⁰² See Federal-State Joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Association, Inc., Schools and Libraries Universal Service Support Mechanism, CC Docket Nos. 96-45, 97-21, 02-6, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252, 15255 para.15 (2004).

instant case, USAC found that ACS engaged in rule violations that should render Houston ISD, ACS and any successor to ACS ineligible for E-rate funds related to the Houston applications for FY 2002-2004.¹⁰³

17. Lakehills's Request for Review. On May 31, 2011, Lakehills filed the instant appeal with the Commission.¹⁰⁴ In its Request for Review, Lakehills broadly argues that the Commission has wrongly expanded the scope of its rules regarding withholding and recovering E-rate funds to include full recovery for violations of Commission rules, rather than limiting such recovery to violations of statutes.¹⁰⁵ Lakehills claims that the case *OPM v. Richmond*,¹⁰⁶ relied upon by the Commission as a basis for its recovery mechanism, only supports recovery for statutory, not regulatory violations.¹⁰⁷ Lakehills claims that the Telecommunications Act of 1996 does not require compliance with the Commission's competitive bidding rules as a prerequisite to obtaining universal service funds, and that the Commission should not adopt a policy that does so either.¹⁰⁸ To the extent that the Commission does not "confine[] . . . the FCC Rule to violations of statute only," Lakehills requests that "the FCC . . . waive application of the Rule" here.¹⁰⁹

18. Lakehills also claims that all of its work for HISD was performed satisfactorily, and that notwithstanding the directives of the applicable Commission rule, USAC should have accounted for the benefits bestowed on HISD in determining the amount of recovery.¹¹⁰ Lakehills argues that principles under the False Claims Act, Federal Assignment of Claims Act (Assignment of Claims Act) and contract law should guide the Commission in this proceeding.¹¹¹ Failure to consider the value of the services Lakehills provided, according to Lakehills, effectively amounts to issuing an invalid forfeiture.¹¹² Alternatively, Lakehills argues that the Commission should waive its rules in light of the special circumstances in this case.¹¹³ Essentially, Lakehills claims that it was unaware of the settlement between Houston ISD and the United States government which cancelled and/or rescinded certain funding requests involving Lakehills.¹¹⁴ Lakehills also argues that MSE was compensated for its work despite its rule violations and criminal convictions and that it is unfair to decline to compensate Lakehills.¹¹⁵ Further, Lakehills claims that USAC should have informed it of the possible taint with the Houston ISD-ACS contracts.¹¹⁶ Lakehills complains that it undertook an expensive project to install switches in Houston ISD schools under the impression that payment was delayed for administrative reasons and that, ultimately, it is inequitable for Houston ISD to retain the benefit of the work done by Lakehills.¹¹⁷

¹⁰³ See *Further Explanation of the Administrator's Decisions* at 22.

¹⁰⁴ See generally Request for Review.

¹⁰⁵ See *id.* at 9-14.

¹⁰⁶ 496 U.S. 414 (1990).

¹⁰⁷ See Request for Review at 12-13.

¹⁰⁸ See *id.* at 13.

¹⁰⁹ Request for Review at 3 n.4.

¹¹⁰ See *e.g., id.* at 15.

¹¹¹ See *id.* at 14-17.

¹¹² See *id.* at 17-19.

¹¹³ See *id.* at 19-24.

¹¹⁴ See *id.* at 20.

¹¹⁵ See *id.* at 22.

¹¹⁶ See *id.* at 23.

¹¹⁷ See *id.*

III. DISCUSSION

19. We deny Lakehills's appeal. We find that Houston ISD decided to select ACS as its service provider prior to the conclusion of its funding year 2002, 2003 and 2004 competitive bidding processes and accepted extensive gifts from ACS in violation of Commission rules. We also find that for FY 2002, Houston ISD failed to have a signed contract at the time of its FCC Form 471 filing and that it failed to wait 28 days prior to selecting ACS as its winner for FY 2003. We reject Lakehills's argument that the Commission cannot recover funds for regulatory violations, and we also deny Lakehills's specific arguments as to the calculation of recovery in this case. Finally, we decline to grant a waiver in this case as requested by Lakehills.

A. USAC Correctly Found that the Applicants Violated the Competitive Bidding Rules.

20. The Commission has consistently required that the competitive bidding process for E-rate services be fair and open, and that no bidders receive an unfair advantage.¹¹⁸ The process cannot be compromised through improper conduct by the applicant, service provider, or both parties.¹¹⁹ Here, we find that USAC correctly determined that Houston ISD, ACS/Lakehills, MSE, and Acclaim violated the Commission's competitive bidding rules for funding years 2002, 2003 and 2004. As an initial matter, for FY 2002, Houston ISD filed its FCC Form 471 on January 16, 2002, but did not have signed contracts until February 6, 2002, in violation of our rules.¹²⁰ More significantly, however, the record is replete with examples demonstrating that Houston ISD selected Region IV ESC and its partners, including ACS, prior to the conclusion of the competitive bidding process.¹²¹ The email correspondence shows that Houston ISD tailored its process to reflect the services and products offered by Region IV ESC, ACS, and MSE.¹²² Also, the fact that Houston ISD selected ACS within four days of posting its FCC Form 470 for FY 2003 not only violates Commission rules requiring applicants to wait 28 days prior to making a selection, but also further demonstrates that Houston ISD's competitive bidding process was not fair and open.¹²³ Further, Houston ISD met with and accepted extensive gifts from ACS, HP, MSE, and Acclaim.¹²⁴ The extensive list of examples from USAC includes meals,¹²⁵ tickets to sporting events at Minute Maid Park,¹²⁶ tickets to ACS's suite for the Super Bowl at the Houston Reliant Stadium,¹²⁷ monetary loans in the amount of \$60,000,¹²⁸ and trips to Las Vegas, Nevada,¹²⁹ and Seattle, Washington.¹³⁰ These gifts were

¹¹⁸ See *supra* para 4.

¹¹⁹ *Id.*

¹²⁰ See *supra* para. 2 (discussing Section 54.504 (a) and its requirement to file an FCC Form 471 "upon signing a contract for eligible services).

¹²¹ See *supra* para. 13; see also *Further Explanation of the Administrator's Decisions* at 4-9.

¹²² See *supra* para. 13.

¹²³ See *supra* para. 6.

¹²⁴ See *supra* para. 13-14.

¹²⁵ See, e.g., *Further Explanation of the Administrator's Decisions* at 6 - 12 (discussing meals given by ACS, HP, or MSE to multiple employees of Houston ISD at venues such as, but not limited to: Dave and Busters, Quizno's, Tokyohana, P.F. Chang's, Little Pappasitos, Paesanos Riverwalk Restaurant, Collina's Italina Cafe, Vietopia, UGO's Italian Grill, HIDO Japanese Grill, Cafe Pappadeaux, Houston's, Chachos, Hollister Grill, Champps Americana, Jason's Deli).

¹²⁶ See *id.* at 12-13.

¹²⁷ See *id.* at 17.

¹²⁸ See *id.* at 19.

¹²⁹ See *id.* at 12-13.

given to various Houston ISD employees, including those with the authority to select the winning service provider.¹³¹ Lakehills does not dispute any of these facts.

21. We are deeply concerned about practices such as these that undermine the framework of the competitive bidding process. Service provider actions of the type addressed here suppress fair and open competitive bidding and ultimately damage the integrity of the E-rate program.¹³² The Universal Service Fund is a limited resource, and applicants and service providers who acquire funds by violating our rules reduce the amount available for compliant applicants. Based on our review of the record, we find that Houston ISD conducted a bidding process that was not fair and open and selected ACS in violation of the competitive bidding rules.¹³³ Universal service funding should not have been distributed to ACS, nor to any successor of ACS, including Lakehills.

B. Recovery for Regulatory Violations Is Allowable.

22. We reject Lakehills's argument that the Commission cannot recover funds when violations of the Commission's rules have occurred, as opposed to statutory violations. The Supreme Court has long held that the government can recover funds which have been wrongfully, erroneously, or illegally paid, and no statute is required to authorize the government to do so.¹³⁴ To the contrary, "properly promulgated, substantive agency regulations have the 'force and effect of law.'"¹³⁵

23. Lakehills also argues that the Commission has impermissibly broadened the applicability of the holding of *OPM v. Richmond*¹³⁶ to include recovery for rule violations, and that the Telecommunications Act of 1996 does not require competitive bidding compliance before we commit funds to an applicant or service provider.¹³⁷ Lakehills misreads the cases. The Supreme Court precedent does not hold that agencies may only recover funds when a statute has been violated. In *OPM v. Richmond*, the Supreme Court held that money could not be disbursed from the Treasury without statutory authorization.¹³⁸ However, to arrive at this holding, the Supreme Court cited to *Schweiker v.*

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¹³⁰ See *id.* at 13-14.

¹³¹ See *id.* at 4-19.

¹³² See *supra* n.18.

¹³³ See 47 C.F.R. § 54.504 (2010) amended by 47 C.F.R. § 54.503 (2011). We note that in the *September 2010 Schools and Libraries Sixth Report and Order*, the Commission amended section 54.503 of the E-rate program rules and adopted more specific gift rules consistent with the gift rules applicable to federal agencies to ensure that all program participants would conduct fair and open competitive bidding processes. See 47 C.F.R. § 54.503(d); *Schools and Libraries Sixth Report and Order*, 25 FCC Rcd at 18800-02, paras. 87-90. These gift rules took effect on January 3, 2011. See *Wireline Competition Bureau Provides Guidance Following Schools and Libraries Universal Service Support Program Sixth Report and Order*, CC Docket No. 02-6, GN Docket No. 09-51, Public Notice, 25 FCC Rcd 17332, 17333 (Wireline Comp. Bur. 2010) (*2010 Sixth Report and Order Public Notice*). Because these rules became effective after the completion of Houston's competitive bidding process, the current gift rules are not applicable to the instant matter. Instead we review USAC's denials by determining whether the gifts impeded a fair and open competitive bidding process under our applicable requirements and precedent at the time these gifts occurred. See 47 C.F.R. §§ 54.504(b)-(c) (2008).

¹³⁴ See *United States v. Wurts*, 303 U.S. 414, 415 (1938).

¹³⁵ *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (quoting *Batterton v. Francis*, 423 U.S. 416, 425 n.9 (1977) and earlier cases).

¹³⁶ 496 U.S. 414 (1990).

¹³⁷ See *Request for Review* at 9-13.

¹³⁸ See 496 U.S. at 424.

Hanson, which found that a violation of an agency rule also prohibited the expenditure of public funds.¹³⁹ Furthermore, in *Schweiker*, the Supreme Court stated that while Congress had provided by statute that only one who had filed an application for benefits may receive them, the Social Security Administration was responsible for promulgating rules to determine the requisite manner of application.¹⁴⁰ Similarly, in our case, the Telecommunications Act of 1996 directed the Commission to promulgate rules to preserve and advance universal service.¹⁴¹ To that end, the Commission's competitive bidding rules ensure that the fund supports services that satisfy the needs of an institution at the lowest possible price.¹⁴² These rules further the Act's substantive goals, and therefore must be adhered to by applicants and service providers.

24. Furthermore, if an entity receives government funds wrongfully, it is as if the government funds were given for an obligation that did not exist in the first instance.¹⁴³ In the E-rate context, applicants must comply with the Commission's rules requiring a fair and open competitive bidding process to be eligible to receive E-rate funding.¹⁴⁴ By this order, we find that Lakehills, through its predecessor ACS, acquired the Houston ISD contracts in a manner that violated the Commission's competitive bidding rules. Therefore, the universal service funds should not have been committed or disbursed to ACS in the first instance.¹⁴⁵

C. USAC Properly Sought Full Recovery from Lakehills.

25. We next reject Lakehills's arguments that we must consider the value of the services given to Houston ISD as an offset to the amount of recovery for the government, as Lakehills claims would be done under the FCA, the Assignment of Claims Act, and contract law. First, under E-rate rules, which are the binding authority here, we find that whether the work was performed is not relevant to whether there was a violation of the competitive bidding rules.¹⁴⁶ The contracts between Houston ISD

¹³⁹ See *OPM v. Richmond*, 496 U.S. at 429; see also *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981) ("A court is no more authorized to overlook a valid regulation... than it is to overlook any other valid requirement for the receipt of benefits"); *Doe v. United States*, 372 F. 3d 1347, 1356 (Fed. Cir. 2004).

¹⁴⁰ See *Schweiker*, 450 U.S. at 790. See generally, *Doe*, 372 F. 3d at 1357 (finding that OPM was not limited by the statute to promulgate merely administrative directives, but was empowered to issue regulations setting forth substantive requirements); *Contreras v. United States*, 215 F.3d 1267 (Fed. Cir. 2000) (finding that Congress authorized OPM to issue regulations "necessary for the administration" of the Act, which meant that OPM could "fill gaps in the statutory scheme left by Congress if it does so in a manner that is consistent with the policies reflected in the statutory program.").

¹⁴¹ See 47 U.S.C. § 254(a)(2); see also 47 U.S.C. § 254(b)(1) & (6).

¹⁴² Federal-State Joint Board on Universal Service, CC Docket No 96-45, Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5426, para. 185 (1997).

¹⁴³ See *Mt. Vernon Cooperative Bank v. Gleason*, 367 F.2d 289, 291 (1st Cir. 1966); *Cabel v. United States*, 113 F.2d 998, 1000 (1st Cir. 1940) ("Persons receiving payments illegally made by a government disbursing officer are liable to refund them.").

¹⁴⁴ See generally 47 C.F.R. §§ 54.504-511 (competitive bidding requirements); see also *Mastermind Order*, 16 FCC Rcd 4028 (2000) (affirming denial of applications for E-rate funding based on a finding that applicant violated the Commission's competitive bidding rules).

¹⁴⁵ *Schools and Libraries Fifth Report and Order*, 19 FCC Rcd at 15815-16, para. 21. The Commission has found that funds disbursed in violation of the statute or a rule that implements the statute or a substantive program goal must be recovered in full. See *id.* at 15814-15.

¹⁴⁶ *Accord Request for Review of a Decision of the Universal Service Administrator by Lazo Technologies, Inc., et al.*, 24 FCC Rcd. 10675, 10680-81 (Wireline Comp. Bur. 2009) (*Lazo*).

and ASC were awarded outside of fair and open competitive bidding processes in violation of the Commission's rules, and therefore neither ACS nor Lakehills is entitled to any E-rate funding.¹⁴⁷

26. Furthermore, we find unpersuasive Lakehills's collateral attacks on the Commission's rules as violating "the legal norms" established in the FCA, the Assignment of Claims Act, and contract law.¹⁴⁸ Although we do not find the other legal frameworks cited by Lakehills to be applicable here, even if they were, we are not persuaded that they would require a different result. In this case, Lakehills has not demonstrated that the FCA would prohibit full recovery of the universal service funding committed and disbursed. As explained in the *SAIC* case relied upon by Lakehills,¹⁴⁹ the fact-finder seeks to "set an award that puts the government in the same position as it would have been if the defendant's claims had not been false" when calculating damages under the FCA.¹⁵⁰ Moreover, in cases such as this where

the defendant fraudulently sought payments for participating in programs *designed to benefit third-parties rather than the government itself*, the government can easily establish that it received nothing of value from the defendant and that all payments made are therefore recoverable as damages.¹⁵¹

Although Lakehills alleges that a potential benefit to the United States was "a more technologically savvy and educated citizenry," we find no cognizable benefit was conferred on the United States by Lakehills or its predecessors for purposes of the FCA.¹⁵² In this regard, we find the court's decision under the FCA in *U.S. v. Rogan* more analogous to the circumstances here than the cases cited by Lakehills.¹⁵³ In *Rogan*, the court found that certain Medicaid funding conditions were not met because the patients had been referred to the defendant fraudulently, and thus "nothing is due."¹⁵⁴ Likewise here, Lakehills did not satisfy the conditions required under the Commission's rules for receiving universal service support because it

¹⁴⁷ 47 C.F.R. §§ 54.503, 54.511; *MasterMind Order*, 16 FCC Rcd at 4032-35, para. 9-14 (E-rate funding properly denied due to competitive bidding violations); *see also Ysleta*, 18 FCC Rcd at 26408-09, paras. 1-4 (USAC properly denied funding due to competitive bidding violations); *cf., Request for Immediate Relief filed by the State of Tennessee, 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*, 18 FCC Rcd 13581, 13587 para. 18 (2003) (*Tennessee Order*) (relief is appropriate only where there were no allegations of waste, fraud, abuse, or other wrongdoing relating to the award of the specific contract itself").

¹⁴⁸ Request for Review at 3-4.

¹⁴⁹ Request for Review at 15 (citing *United States v. Science Applications International Corporation*, 626 F.3d 1257, 1278 (D.C. Cir. 2010) (*SAIC*)).

¹⁵⁰ *See SAIC*, 626 F.3d at 1278 (emphasis added). The FCA imposes liability on a person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval to the government. *Id.* at 1266.

¹⁵¹ *Id.* at 1279 (emphasis added). Courts have reached the same conclusion in different contexts. *See id.* (citing *United States v. TDC Management Corp.*, 288 F.3d 421, 428 (D.C. Cir. 2002); *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 473 (5th Cir.2009); *United States v. Rogan*, 517 F.3d 449, 453 (7th Cir.2008)).

¹⁵² Although language in *SAIC* suggests that, under the FCA, the government would need to demonstrate that it received no value, *SAIC*, 626 F.3d at 1279, we observe that USAC is not proceeding under the FCA in the decisions for which Lakehills seeks review here. In any event, as discussed below, we conclude that there was no value received by the government here cognizable under the FCA.

¹⁵³ *See United States v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008) (finding that where the government offered a subsidy for the provision of medical services to patients, no service was provided to the United States).

¹⁵⁴ *Id.*

violated the Commission's competitive bidding rules. In *Rogan*, the court further found that regardless of whether or not medical services were provided to the patients, the defendant "did not furnish any medical service to the United States."¹⁵⁵ Likewise here, we find that Lakehills provided no services to the United States, and that the value of any goods or services provided by Lakehills benefited Houston ISD, not the United States. Thus, under *Rogan*, the FCA does not compel the Commission to offset any amount of E-rate payments for Lakehills's provision of services or products at issue here. Indeed, Lakehills cites no cases where the government was precluded from recovering payments under the FCA on the basis that it received intangible benefits such as "a more technologically savvy and educated citizenry" that are speculative at best.¹⁵⁶

27. Lakehills's arguments under the Assignment of Claims Act and general contract law are equally unpersuasive.¹⁵⁷ Essentially, the Assignment of Claims Act prohibits the assignment of claims against the United States, with an exception for monies due to financing institutions.¹⁵⁸ Lakehills argues that under the Assignment of Claims Act, "the government still is obligated to pay the financial institution up to the value the contractor delivered to the government."¹⁵⁹ First, the provision cited by Lakehills applies to contracts for services or products provided to the government to which the government is a party, and Lakehills has not explained how it could apply in this case, where there is no such contract. E-rate funding is provided to eligible entities such as Houston ISD pursuant to government regulations, not through a contract. Moreover, we find the cases cited by Lakehills to be inapposite, because they involve goods and services received by the United States government under a contract with the United States government.¹⁶⁰ Here, by contrast, Lakehills had a contract with Houston ISD, and the goods and services provided by Lakehills went to Houston ISD. We therefore reject Lakehills's contention that the Assignment of Claims Act compels any payments to be made to Lakehills, or to any financial institution. Similarly, as to Lakehills's arguments regarding general contract law, no contract exists between USAC and Lakehills or the Commission and Lakehills. Thus, Lakehills's argument that it should receive funding from the Universal Service Fund for the work it completed under a tainted contract with Houston ISD is untenable.

28. Additionally, we deny Lakehills's forfeiture arguments. Lakehills claims that USAC's denial of funding is a forfeiture that exceeds the Commission's statutory authority.¹⁶¹ Specifically, Lakehills argues that the amount of recovery sought by USAC exceeds the maximum dollar amount, *i.e.*, \$112,500, collectible under the Commission's forfeiture rules.¹⁶² Lakehills also claims the time in which the Commission had to act, *i.e.* one year following discovery of a violation, has passed.¹⁶³ First, we note

¹⁵⁵ *Id.*

¹⁵⁶ Lakehills also fails to quantify any value of this alleged intangible benefit. At most, only those benefits to the government that can be quantified could possibly be subtracted from sums recoverable under the FCA. *See Longhi v. Lithium Power Technologies, Inc.*, 575 F.3d 458, 473 (5th Cir. 2009) (holding that "[i]n a case such as this, where there is no tangible benefit to the government and the intangible benefit is impossible to calculate, it is appropriate to value damages in the amount the government actually paid to the Defendants").

¹⁵⁷ *See* Request for Review at 17.

¹⁵⁸ *See Delmarva Power and Light Co. v. United States*, 542 F.3d 889, 892 (Fed. Cir. 2008) (*citations omitted*).

¹⁵⁹ *See* Request for Review at 17.

¹⁶⁰ *See Arlington Trust Co. v. United States*, 100 F. Supp. 817 (Ct. Cl. 1951); *Chelsea Factors, Inc. v. United States*, 181 F. Supp. 685, 692 (Ct. Cl. 1960).

¹⁶¹ *See* Request for Review at 17.

¹⁶² *See id.* at 18.

¹⁶³ *See id.* at 19.

that a forfeiture¹⁶⁴ is far different from the denial of funding to which one has no entitlement, e.g., universal service funds.¹⁶⁵ Neither ACS nor Lakehills has a right to funding from the Universal Service Fund. Furthermore, all applicants must certify on their FCC Form 471 applications that they have complied with all program rules and must acknowledge that the failure to do so may result in denial of discount funding and/or cancellation of funding commitments.¹⁶⁶ Applicants who have received funding commitments are subject to audits and other reviews that USAC or the FCC may undertake. USAC may be required to reduce or cancel any amount of a funding commitment that was not issued in accordance with such requirements.¹⁶⁷ Furthermore, USAC's recovery of government funds paid to an applicant or service provider who has no just right to keep the funds is not barred by the passage of time.¹⁶⁸ Therefore, we find that USAC's denial of funding to Lakehills is not a forfeiture action, and that USAC acted appropriately in seeking recovery from Lakehills.

D. Waiver of Commission Rules Is Not Appropriate.

29. After reviewing Lakehills's arguments, we do not find that waiver is appropriate in the instant case.¹⁶⁹ First, Lakehills mistakenly believes that MSE retained universal service funding for its work. Pursuant to the ruling in *Lazo*, USAC was required to recover any money paid out to MSE and its consortium members.¹⁷⁰ Next, USAC was not obliged to reveal its reasons for holding back funding to Lakehills. On the contrary, as part of its ongoing responsibility to protect against waste, fraud, and abuse, USAC sometimes cannot notify applicants that an application may be on hold when doing so might jeopardize nonpublic law enforcement investigations.¹⁷¹ In this case, as discussed above, the Department of Justice investigation involving Houston ISD was ongoing, as well as the federal criminal proceedings involving Mr. Wong, president of MSE.¹⁷²

30. Furthermore, waiver of the Commission's rules is appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.¹⁷³ For example, the Commission has waived the rules in instances where applicants have committed minor errors in filling out their applications.¹⁷⁴ The Commission has not found waiver appropriate in instances

¹⁶⁴ See *Black's Law Dictionary*, Second Pocket Edition (2001) at 289 (defining a forfeiture, among other things, as the loss of a right privilege or property because of a crime, breach of obligation, or neglect of duty).

¹⁶⁵ Benefits are not considered protected entitlements "if government officials may grant or deny [them] in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005).

¹⁶⁶ See FCC Form 471, Schools and Libraries Universal Service Description of Services Ordered and Certification Form, OMB 3060-0806, Block 6 (October 2010).

¹⁶⁷ See USAC website, Principles for Treating Entities Under Investigation, <http://www.usac.org/sl/tools/reference/principles-for-treating-entities.aspx> (last visited Nov. 17, 2011).

¹⁶⁸ See *Wurts*, 303 U.S. at 416.

¹⁶⁹ The Commission's rules may be waived when good cause is demonstrated. See 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). An applicant for waiver faces a "high hurdle," and must plead the facts and circumstances of its case with particularity. See *Wait Radio*, 418 F.2d at 1157 (citation omitted).

¹⁷⁰ See *Lazo*, 24 FCC Rcd at 10680.

¹⁷¹ See *id.*

¹⁷² See *supra* para. 10-11.

¹⁷³ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *Request for Review of a Decision of the Universal Service Administrator by Idaho Falls School District 91*, CC Docket No. 02-6, Order, 25 FCC Rcd. 5512, 5516 n.29 (2010); *Ysleta*, 18 FCC Rcd at 26436.

¹⁷⁴ See *Request for Review of a Decision of the Universal Service Administrator by Albert Lea Area Schools*, CC Docket No. 02-06, Order, 24 FCC Rcd 4533, 4537-4539 (Wireline Comp. Bur. 2009), citing *Request for Review of* (continued...)

where, for example, the contract is signed more than a few days prior to the expiration of the 28-day period,¹⁷⁵ or where there has not been a fair and open competitive bidding process.¹⁷⁶ We also do not find that the public interest is served by waiving our rules when there is evidence of waste, fraud, and abuse in the record. In the instant case, the activities engaged in by Houston ISD, and ACS and its partners substantially undermined Houston ISD's competitive bidding process. The public interest does not support Lakehills retaining funding obtained in violation of Commission rules under ACS's tainted contracts. The concerns about waste, fraud, and abuse here also outweigh Lakehills's speculation that a contrary holding could "discourage potential creditors from investing in E-rate projects,"¹⁷⁷ particularly because this decision does not limit access to E-rate funds for companies that comply with the program requirements. Nor are we persuaded that a different balancing of interests should apply in the context of work performed between May and September 2007 based on claims that "USAC knew of allegations of competitive bidding violations by ACS" at that time.¹⁷⁸ Well before Lakehills performed the work at issue—as early as 2005—entities financing its work appear likely to have known of the potential irregularities with some of the consortium vendors (such as MSE) and the investigation into wrongdoing involving the Dallas ISD, providing reason to suspect that USAC was likely to hold or deny funding for applications involving MSE not just in Dallas ISD but in Houston ISD as well.¹⁷⁹ We therefore find waiver inappropriate in the instant matter. We deny Lakehills's Request for Review and affirm USAC's decision.

IV. ORDERING CLAUSES

31. ACCORDINGLY, IT IS ORDERED, pursuant to authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, that the requests for

(...continued from previous page) _____

the Decision of the Universal Service Administrator by Bishop Perry Middle School, et al., Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 21 FCC Rcd 5316, 5321, para. 11 (2006) (*Bishop Perry*).

¹⁷⁵ See *Request for Review of the Decision of the Universal Service Administrator by Sackets Harbor Central*, CC Docket No. 96-45, Order, 15 FCC Rcd (Common Carrier Bur. 2000); *c.f. Application for Review of the Decision of the Universal Service Administrator by Aberdeen School District*, CC 02-6, Order, 22 FCC Rcd 8757, 8763 para. 9 (2007) (granting waiver for a violation of the 28-day rule because the applicants only missed the deadline by one to three days, thereby allowing their requests for services to be competitively bid for a meaningful period of time). However, the Commission emphasized in *Aberdeen* that "[a]pplicants are not free to disregard the 28 day rule based on their own determination that only one service provider can provide the desired services—they must use the bidding process to determine whether this is the case." *Aberdeen*, 22 FCC Rcd at 8764 para. 10.

¹⁷⁶ See *Nec-Business Network Solutions, Inc.*, Notice of Debarment and Order Denying Waiver Petition, 21 FCC Rcd 7491 (2006).

¹⁷⁷ Request for Review at 21.

¹⁷⁸ Request for Review at 22-23.

¹⁷⁹ See *Lazo*, 24 FCC Rcd. at 10680-81, para. 13 & n.46 (explaining that "[i]n the summer of 2005, there were numerous media reports about the federal investigation of DISD and MSE, and these reports included the fact that USAC had frozen E-rate payments"). See also, e.g., *DISD Vendor's Funding Frozen*, redOrbit, Aug. 24, 2005, http://www.redorbit.com/news/education/218123/disd_vendors_funding_frozen/ (last visited Nov. 22, 2011); *Helping to Land the Big One?*, Dallas Morning News, Jul. 24, 2005, <http://www.ewa.org/docs/dsmseries.pdf> (last visited Nov. 22, 2011); *Dallas Administrators Investigate Official's Trips on Vendor's Boat*, Education Week, Aug. 10, 2005, <http://www.edweek.org/ew/articles/2005/08/10/44brief-5.h24.html?tkn=RXZFFVx1zHeglyhtN7niu7XpFSvHUoyQR0vfH> (last visited Nov. 22, 2011). USAC's website clearly states that USAC will defer funding for entities under investigation. See USAC Principles for Treating Entities Under Investigation.

review filed by Joseph Mr. Hill, Trustee in Bankruptcy for Lakehills Consulting, LP as listed in the appendix ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink that reads "Marlene H. Dortch". The signature is written in a cursive style with a large, stylized initial "M".

Marlene H. Dortch
Secretary

APPENDIX

Petitioner	Funding Years	Application Numbers	Funding Request Numbers	Date of Appeal
Lakehills Consulting, LP Houston, TX	2004	398823	1123651 1130318 1130278 1132234 1132964 1132480 1138010 1159769 1138156 1177791 1159949 1174686	May 31, 2011
	2004	398827	1123906	May 31, 2011
	2003	367296	1000282 1021650 1027095 1027444 1000308 1016212 1016795 1018477 1018900 1018552 1020956 1018950 1020833 1021715 1021131 1021159	May 31, 2011
	2003	377451	1035115 1035249	May 31, 2011
	2002	295389	790995 790882 790943 791123 791022 791109 791148 791194	May 31, 2011