



ABC Unified School District

16700 Norwalk Boulevard, Cerritos, CA 90703 (562) 926-5566

BOARD OF EDUCATION

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SUPERINTENDENT

Dr. Mary Sieu

July 3, 2012

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Dear Ms. Dortch:

Request for Review

Re: CC Docket No. 02-6

Summary:

The ABC Unified School District (ABC USD or ABC) is appealing USAC's decision to deny its Priority 1 funding requests for Funding Years 2009 and 2010 and USAC's decision to COMAD and seek recovery of all funds disbursed from Funding Years 2006 through 2008. The list of impacted FRNs is included on Attachment A of this appeal. If this appeal is denied, ABC will be required to repay over \$642 thousand for Funding Years 2006 through 2008 and will be denied over \$652 thousand for Funding Years 2009 and 2010.

The rationale for USAC's denial is:

“This FRN is being denied because the FCC Form 470 does not comply with the statutory mandate that applicants submit bona fide requests for services. Per the FCC's Ysleta Order, an applicant's FCC Form 470 must be based upon its carefully thought-out technology plan and must detail specific services sought in a manner that would allow bidders to understand the specific technologies that the applicant is seeking. Thus, a Form 470 that sets out virtually all elements that are on the eligible services list would not allow a bidder to determine what specific services the applicant was seeking. A Form 470 should not be a general, open-ended solicitation for all services on the eligible services list, with the hope that bidders will present more concrete proposals. We find that the Form 470 that established the bidding for this FRN is encyclopedic and does not list only those services for which funding were actually sought. Furthermore, a Request for Proposal was not issued to narrow the scope of the desired services to only those that you actually applied for in this funding request. Because you relied on an encyclopedic Form 470, the FRN is denied.”



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We strongly disagree with USAC's decision for several reasons that are summarized in the bullets below and provided in more detail in the body of our appeal. If the FCC does agree with USAC's assessment that program rules were violated, we request that the FCC waive its competitive bidding requirements due to USAC's failure to identify the problem in a timely manner.

- Program rules do not require that the establishing Form 470 include “only those services for which funding was actually sought as indicated in USAC’s denial rationale. Instead the Form 470 is intended to be a wish list of services a district desires. ABC received over 90 percent of the services included on its Forms 470 which contradicts USAC’s encyclopedic arguments.
- ABC complied with the Form 470 instructions, which indicate “The specific data requested in Items 8-11 are sought to provide potential service providers with information so that they may contact you if necessary for detailed information on your specific requirements.”
- In the *Native Decision*¹ the FCC found that “Form 470 contained enough detail for service providers to identify the desired services and to formulate bids.” The information contained on ABC’s Forms 470 does not differ significantly from what was included on Native’s Form 470.
- The Forms 470 are not encyclopedic in nature; rather, they provide a granular list of the services that ABC uses to meet its educational and administrative needs.
- The structure of ABC’s Form 470 did not impede the competitive bidding process and did not result in the E-rate program paying higher prices than what would have been paid if the Form 470 were structured differently. It is important to note that a large majority of the services were based on state contracts (including CMAS and CALNET) or tariff rates competitively negotiated.
- In the *Runnemedede Decision*², the FCC found that USAC’s month-and-a-half delay in posting Runnemedede’s Form 470 justified a waiver of the 28-day competitive bidding requirement. In this case, USAC did not notify ABC of what it thought was a fatal flaw in its Forms 470 until almost **ten years after the initial filing** despite the information

¹ See DA 12-334 at par. 1

² See DA 99-2957



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being readily available to USAC. Similar to *Runnemedede*, this delay justifies a waiver if the FCC agrees with USAC's assessment that program rules were violated.

Discussion:

In Funding Year 2001, ABC began using a Form 470 structure that provided a granular list of the services on which it was interested in receiving bids for its 30 schools. The Director of Information and Technology, at the time Mr. Lon Brunk, felt that providing a granular list that indicated the services were site-specific would allow vendors to understand the vast array of services ABC used to deliver education and information to the classroom. This granular list also helped to ensure that the technology staff did not fail to include a particular service they were using or had interest in possibly using. By providing potential bidders with this detailed list of requested services, ABC was certain it was providing more than enough information to begin the conversation with potential service providers.

USAC provided tacit approval of this approach by providing funding to ABC in FY 2001. Believing their approach to filing the Form 470 was approved by USAC, ABC continued to successfully use the same format for their Form 470 until Mr. Brunk retired during FY 2005. In FY 2006, ABC's E-rate process was taken over by Mr. Brunk's successor, Dr. Colin Sprigg. Being new to the complicated world of E-rate, Dr. Sprigg used the same approach to the Form 470 in FY 2006 and again the Form 470 resulted in the award of funding by USAC. The same held true for FY 2007 and FY 2008, and interestingly the FY 2008 award was not provided until after ABC went through an exhaustive USAC selective review.

One of the main purposes of a selective review is to ensure that the applicant complied with the FCC's competitive bidding requirements. Even after USAC performed a selective review for 2008, USAC again endorsed ABC's Form 470 approach by providing funding to ABC. We find it hard to fathom that USAC would subject ABC to a rigorous selective review and find no fault with its filings and then several years after the fact find a violation of program rules.

ABC continued to use the same format for its Form 470 in FY 2009 and FY 2010. In April of 2010, USAC first questioned the format of ABC's Form 470 and informed the district that it intended to deny and/or COMAD all Funding Requests from FY 2004 through FY 2010 for what it called an encyclopedic Form 470. On May 19, 2010, ABC disagreed with USAC's assessment and the district's response to Special Compliance can be found in Attachment B to this appeal.

In the fall of 2010, USAC Senior Management, Mel Blackwell and Catriona Ayer, met with ABC staff to discuss the matter in more detail. During that meeting, USAC Management informed ABC that there were no allegations of waste, fraud, or abuse and their only concern was the format of the Form 470. ABC staff presented arguments to USAC, hoping to influence its decision and avoid being punished for a perceived problem USAC should have resolved years



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earlier. ABC left that meeting feeling that it had adequately addressed USAC's concerns and demonstrated that the format of the Form 470 in no way impeded competition. It is important to note that ABC had only used the Form 470 as the vehicle for Priority 1 services and the majority of those services were purchased through state master contracts or tariff arrangements and required no bidding requirements from ABC.

It was not ABC's intent for service providers to bid based solely on the Form 470. Rather ABC expected potential bidders to contact them to discuss the services in greater detail and this is exactly what happened. ABC feels that this approach is fully consistent with the instructions to the Form 470, which indicate "The specific data requested in Items 8-11 are sought to provide potential service providers with information so that they may contact you if necessary for detailed information on your specific requirements."³ The Form 470 instructions do not indicate that the Form 470 must be the only document a potential bidder relies on to formulate a bid. In reality it is nearly impossible for a bid to be submitted based solely on the Form 470. We believe the Form 470 is intended to be a vehicle to provide bidders with a general understanding of a district's needs.

In USAC's denial explanation, they fault ABC because their Forms 470 were "an open-ended solicitation for all services on the eligible services list, with the hope that bidders will present more concrete proposals. We find that the Form 470 that established the bidding for this FRN is encyclopedic and does not list only those services for which funding were actually sought." It is important to note that ABC's Form 470 did not list all the services included on the eligible services list and ABC actually received over 90% of the services it listed on its Form 470. Rather ABC's list of services did provide an accurate picture of the desired services. The fact that ABC received over 90% of the services listed clearly demonstrates it was not an open-ended solicitation, but rather an accurate description of the services required.

From Funding Year 2001 to Funding Year 2008, ABC only requested Priority 1 services and many of these services are mileage sensitive, meaning the rate the district will be charged will depend on the distance a particular school is located from the bidder's central office. As different schools require different connectivity levels (e.g. elementary schools use less bandwidth than high schools), the only way for the Form 470 to be a stand-alone bidding document would be for a district to list the specific bandwidth required at a school and then also provide the address of the school and the address of the district data center. The Form 470 is not structured in a manner that would facilitate providing this type of information.

³ See Page 7 of the Form 470 Instructions available at http://www.usac.org/_res/documents/sl/pdf/forms/470i.pdf.



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ABC's Forms 470 indicated the services were site-specific meaning particular schools would be receiving certain services. For example, an elementary school might need a T1 line and a high school might need a T3 line. Had ABC indicated on its Form 470 that it required 13 T1 lines and 10 T3 lines, the result would have been the same as using the term site-specific. In both cases, a potential vendor would need to contact ABC to determine where the specific lines would be terminating.

Apparently, ABC's arguments were compelling to USAC because in late 2010 USAC requested that ABC provide a myriad of information pertaining to all procurements that occurred between FY 2005 and FY 2010. The information requested by USAC was very similar to the information requested in a competitive bidding review. ABC provided volumes of information relating to over 50 procurements that occurred over a six-year period, the majority of which had been previously deemed in compliance by USAC.

In its response, ABC demonstrated that it had received multiple bids for nearly every service and that any potential bidder that contacted ABC was provided with the same information as its competition. ABC expected USAC to view the "big picture" and understand that any perceived flaw in the Form 470 did not hinder competition or in any way cause the program to pay more for services than what it would have if ABC's Forms 470 had been structured differently. Nearly 18 months later, ABC began to receive denials for FY 2009 and FY 2010 and has been informed that it will be receiving COMAD's for FY 2006 through FY 2008. It is important to note that the only flaw USAC found was in the format of the Form 470. USAC did not find that ABC had done anything to give one service provider an advantage over another.

From discussion with USAC staff, it is apparent they believe the program rules explained in the *Ysleta Order*⁴ were violated by ABC and that they have no alternative but to deny funding. ABC feels that drawing any parallels between ABC and the Ysleta applicants is patently unfair and inappropriate. The Ysleta applicants' Form 470 did not identify the specific services they were requesting and in actuality their Form 470 was used to identify the systems integrator. The actual services and prices being requested by the Ysleta applicants were not discussed until after the systems integrator had been decided. By contrast, ABC's Form 470 did not impede competition and the actual services requested were fairly discussed with each service provider that contacted ABC. Additionally, the Ysleta applicants were requesting hundreds of millions of dollars of internal connections in a one-year period, whereas ABC requested approximately \$1.3 million in Priority 1 funding over a six-year period. The majority of Priority 1 services ABC received were either based on Master Agreements entered into by the state or through heavily regulated tariffs. The risk of the program overpaying for these types of services pales in comparison to the risk associated with Priority 2 services.

⁴ See FCC 03-313



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Instead of drawing parallels to the *Ysleta Order*, ABC feels USAC should have looked to the *Native Order* and realized that ABC's Forms 470 do meet the standard for a "bona fide" request for services. Native's Form 470 included references to the following services: Local Area Network- 17 buildings, Wireless LAN- 17 buildings, Hardware and upgrades- 16 buildings, and Basic Maintenance and technical support- network connecting eight sites. In its Order, the FCC found that the "Form 470 contained enough detail for service providers to identify the desired services and to formulate a bid."

It appears USAC is holding ABC to the standard that the Form 470 must contain enough information so that bidders can formulate responsive bids. This USAC notion conflicts with the Form 470 instructions, which only require that the Form include enough information for vendors to contact the applicant for more detailed requirements. In its *Native* decision, the FCC found that Native's references to broad groups of services provided sufficient detail to comply with program rules.

One can argue that ABC's Forms 470 contained much more useful information than Native's Form 470, which the FCC found compliant with its rules. ABC's Form 470 provided a very granular list of the services the district used to deliver information to the classroom that provided bidders with a detailed understanding of the types of services the district required, whereas, Native's Form 470 provided vague references to broader groups of services. Because the FCC found Native's Form 470 in compliance, we believe they also must find ABC's Forms 470 in compliance.

ABC does believe their Form 470 could have been structured in a different manner that would have made it easier for bidders to respond, but the real question here is, did the submitted structure of the Form 470 impede competition? The answer to that question is a resounding no.

Unlike the *Ysleta* applicants and *Native* which were informed of the fault in their applications almost immediately, ABC was not informed of the perceived flaw until over eight years after they begin using a similar format for their Form 470. We find it hard to understand how USAC could have the Form 470 in their databases for so long and fail to identify what they perceive to be a flaw. Had USAC acted as a responsible administrator and informed ABC of their concerns years ago, ABC would have corrected their structure and lost only one year of funding instead of five years of funding and facing the possibility of repaying over \$600K.

In the *Runnemedede* decision and subsequent orders, the FCC found that applicants should not be penalized for the inaction of the administrator. In the *Runnemedede* case, USAC delayed six weeks in posting a Form 470 and caused the district to choose between filing a timely Form 471 or violating the 28-day competitive bidding rules. The FCC found that this delay by USAC



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warranted a waiver of its rules. If the FCC feels that USAC acted correctly in denying ABC's requests, we request the FCC use the *Runnemede* principle to grant a waiver of its rules. The multi-year delay in USAC identifying a problem that should have been easily identified and should not result in ABC losing five years of E-rate discounts.

In closing we ask that the FCC provide an expedited review of our appeal, reverse USAC's decision, and direct USAC to provide funding for FY 2009 and FY 2010 and cease any recovery actions for FY 2006 through FY 2008. If the FCC finds that ABC did violate program rules, we request a waiver of the rules on the basis of USAC's inaction and the fact that there is no evidence of waste, fraud, or abuse.

If you have any questions please feel free to contact our E-rate consultant at:

Andrew Eisley
E-Rate Central
10238 Squires Way
Cornelius, NC 28031
Phone: 516-801-7821
E-mail: ae.review@e-ratecentral.com
Fax: 516-801-7831

We appreciate your attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Colin Sprigg".

Dr. Colin Sprigg
Director of Information and Technology
ABC Unified School District
16700 Norwalk Blvd.
Cerritos, CA 90703

CC: Regina Brown, Mark Nadel, and James Bachtell via e-mail