

ALAMOGORDO PUBLIC SCHOOLS

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September 20, 2012

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

Att: Telecommunications Access Policy Division, Wireline Competition Bureau

Request for Review by Alamogordo Public Schools, CC Docket No. 02-6

FY 2007, Form 471 No. 581531, FRN 1623567
FY 2008, Form 471 No. 613214, FRN 1762179
FY 2009, Form 471 No. 659321, FRN 1841899
FY 2010, Form 471 No. 735508, FRN 1988956

Dear Ms. Dortch:

The Alamogordo Public Schools (Alamogordo) is appealing USAC's decision to deny Funding Request Numbers (FRN) 1988956 and 1841899 and its decision to COMAD FRNs 1623567 and 1762179. As set forth below, USAC erred when it denied the FRNs and issued the COMADs because Alamogordo had a valid and enforceable contract with its service provider at the time the FCC Form 471 was submitted for Funding Year 2007. If this appeal is denied, Alamogordo will be required to repay over \$123 thousand for Funding Years 2007 and 2008 and will be denied over \$292 thousand for Funding Years 2009 and 2010, causing it extreme financial hardship and threatening the availability of E-Rate services desperately needed by the students it serves.

The rationale for USAC's denial and for the COMADs is that Alamogordo and Trillion could not have had a contract in place at the time it submitted its FY 2007 Form 471 because negotiations between the parties were still ongoing. These decisions were made despite the fact that Alamogordo provided USAC with a contract that was signed on February 4, 2007 (three days before the Form 471 was submitted), which can be found as Attachment 1 to this appeal. During a Special Compliance review, conducted more than three years after the contract was signed, Alamogordo provided USAC with copy of a proposal from Trillion that was dated on February 7, 2007 (the date the Form 471 was submitted), which is included as Attachment 2 to this appeal. USAC then questioned why the contract was dated prior to the proposal date. By the time the review was conducted, staffing changes had occurred at Alamogordo and Trillion and neither party, was able to explain to USAC's satisfaction why the contract date was prior to the date of the proposal.

Alamogordo asked its former Technology Director about the dates on the proposal and contract and he explained that while he could not remember the specific dates he did know that he dealt with multiple people at Trillion and that it was very possible that Alamogordo may have received multiple copies of the same or similar proposal even after the contract between the parties had been executed. He also pointed out that the contract itself did contain enough detail to be considered a proposal. It is important to note that the contract signed February 4, 2007 and the proposal dated February 7, 2007 both referenced the same services at the same exact price. USAC also noted, as a further example that negotiations were ongoing, that the contract and proposal both indicated the district would be receiving 466 ports for VOIP, but the Item 21 attachment indicated Alamogordo would be receiving 500 ports. It should be noted that the per unit cost included on the Item 21 Attachment is consistent with the imputed per unit cost included in the contract. USAC felt this change in the number of ports and the fact that the proposal was dated after the contract was signed clearly indicates that negotiations were still ongoing at the time the Form 471 was filed. Copies of USAC's denial letters can be found as Attachment 3 to this appeal. Alamogordo strongly disagrees with USAC's conclusion.

Regardless of the date of the proposal, no one can argue that the contract was signed before the Form 471 was submitted. That fact is not contested and it alone justifies granting the appeal. It is understandable that a proposal dated after the date of the contract would raise some concern on the part of USAC. However, Alamogordo has found no evidence that the Form 471 was filed before it had a legally binding contract with the service provider. The fact that there is a proposal bearing the date of February 7, 2007 does not prove that the parties had not negotiated and entered into a valid contract at the time the Form 471 was filed. Furthermore, the services included in the contract are the same as those included in the proposal, which does not lend credence to USAC's claim that negotiations were "ongoing." Instead it suggests, as explained by the former technology director of APS, that APS was dealing with multiple parties at Trillion and it is likely that the proposal was sent in an attempt by the Trillion salesperson to be responsive to a customer request without knowledge that a contract had been sent to APS and signed by both parties. Alamogordo should not be penalized because they received a document dated after they executed a contract. This was not in Alamogordo's control and does not change the fact that Alamogordo had a binding contract in place¹.

Additionally, USAC's argument re Item 21 uses flawed logic. . While no one knows why the former technology director included more ports than indicated in the Form 471, there are several possible explanations, none of which are violations of program rules. Perhaps he simply rounded up the number of ports or perhaps he anticipated adding additional ports at some time during the funding year, which was allowable under the contract. It is unfair and unjustified for USAC to conclude that a change in the number of ports means negotiations between the parties were ongoing and, therefore, there was no contract. The fact is that there was and is a contract and

¹ Under New Mexico state law, the contract signed on February 4, 2007 by Alamogordo and February 5, 2007 by Trillion was clearly a "contract" as of February 5, 2007. The statutory definition of a contract is "any agreement for the procurement of items of tangible personal property, services or construction." (2006 New Mexico Code – Article 1- Procurement – 13-1-41.) In the case at hand, USAC is in possession of a written agreement to procure services that is signed by both parties, signed by people who had authority to sign on behalf of their respective organizations, before February 8, 2007.

USAC cannot dismiss its existence, regardless of what the technology director did regarding the number of ports.

Further evidence of the existence of the contract is comparing the services and prices specified in the contract with the services and prices Alamogordo actually received from Trillion. Attachment 4 to this appeal is a copy of the invoice from Trillion for FY 2007 and it is consistent with the services and prices specified in the contract. The contract and proposal indicate a monthly charge of \$8,490.58 for 466 ports of VOIP Service. The invoice shows a charge of \$69,020.20 for service from October 28, 2007 through June 30, 2008, which is the prorated amount indicated in the contract (\$8,490.58 for eight months (November through June) and 4/31 of \$8,490.58 for the partial month of service in October is equal to \$69,020.20). The fact that Alamogordo was billed the EXACT same amount specified in the contract demonstrates that the parties knew they had a contract and were abiding by its terms. Had negotiations actually continued after the contract was signed and the Form 471 was submitted, the parties would not have abided by the terms of the February 4 contract; rather, they would have abided by either amendments to the February 4 contract or by a new contract negotiated after the February 4 contract was signed.

Furthermore, while there is a discrepancy between the proposal date and the contract date (which does not demonstrate that a contract was not in place when the FY 2007 Form 471 was filed), there is no reason for USAC to assume that no contract was in place for FY 2008 through FY 2010. If an applicant signed a multiyear contract after the Form 471 submittal date of the first year that flaw should only impact the first year of the contract. If you were to accept USAC's conclusion that no contract was in place for FY 2007 before the Form 471 was submitted it defies logic to determine that no contract was in place for the subsequent funding years. There is no evidence to support that a new contract was being negotiated after the submittal of the Funding Years 2008 through 2010 Forms 471 nor does USAC claim such evidence exists.

In actuality, the original contract was in place as well as two addendums to the original contract that were properly posted to Funding Year 2008 Form 470 Number 865520000626447. In preparation for Funding Year 2008, Alamogordo decided it wanted to increase the number of VOIP lines and posted the aforementioned Form 470 and, after selecting Trillion as the winning vendor, signed addendums to their original contract which are included as Attachment 5 to this appeal. The addendums clearly explained the additional services Alamogordo wished to procure from Trillion. Therefore, if the FCC decides no contract was in place prior to the filing of the Form 471 for FY 2007, it is clear that a contract was in place prior to the filing of the Forms 471 for FY 2008 through FY 2010.

If the FCC concludes program rules were violated in Funding Year 2007, Alamogordo respectfully requests a waiver of FCC rules consistent with Commission precedent. In the *Adams County Order*² the FCC determined that the appellants "had some form of an agreement with their service providers before submitting their FCC Forms 471. We find, therefore, that in these specific circumstances, a limited waiver of rule 54.504(c) is warranted."³ Alamogordo clearly meets the standard for waiver as described in the *Adams County Order*.

² *Adams County School District 14*, FCC 07-35 (rel. Mar. 28, 2007) ("*Adams County Order*")

³ *Adams County Order* at ¶ 9.

Denying this appeal would provide an unfair hardship on Alamogordo and would be inconsistent with *Adams County Order*. If a mistake was made by Alamogordo, "These mistakes do not warrant the complete rejection of these Petitioners' applications for E-rate funding. Importantly, these appeals do not involve a misuse of funds. ...[u]nder certain circumstances, rigid adherence to certain E-rate rules and requirements that are "procedural" in nature does not promote the goals of section 254 of the Act ...and therefore does not serve the public interest."⁴ Alamogordo has demonstrated compliance with program rules, there is no evidence of misuse of funds, and all contracts were competitively bid in accordance with the Commission's rules and regulations. Therefore, grant of this appeal will serve the public interest.

In closing, Alamogordo asks 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 to cease any recovery actions for FY 2007 and FY 2008.

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

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We appreciate your attention to this matter.

Sincerely,



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⁴ Id. at ¶ 10.