

FALL RIVER PUBLIC SCHOOLS

"The Scholarship City"

417 Rock Street, Fall River, MA 02720

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JUN 21 2013

FCC Mail Room

Meg Mayo-Brown, Superintendent

June 17, 2013

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

Re: Appeal
Fall River Public School District
Funding Year 2009
Form 471 Application 662946
Funding Request Number 1819200

Dear Secretary Dortch:

This is a petition for reconsideration of an order adopted May 20, 2013, File no. SLD-662946 for the Fall River Public School District. A request for review was filed on February 28, 2013 regarding a Notification of Commitment Adjustment Letter dated January 7, 2013.

The FCC order states that Fall River "failed to comply with the Commission's competitive bidding requirements for FRN 1819200 because it did not assign the highest weight to price in its vendor evaluation process".

Statement of Facts

During the evaluation process Fall River considered 4 service providers on the Massachusetts State contract list. Fall River selected MECNET which was priced at two hundred fifty one thousand three hundred and thirty eight dollars (\$251,338.00). See Attachment A. Three other vendors were evaluated, CELT which was priced at three hundred thousand seven hundred and eighty three dollars, \$303,783.00, GALAXY which was priced at six hundred and thirty three thousand and eighty three dollars (\$633,083.00) and USAi which was priced at four hundred and two thousand four hundred and fifty dollars (\$402,450.00). See Attachment A, Fall River selected MECNET, the lowest cost provider.

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In a Bid Evaluation worksheet Fall River shows that the vendors received identical scores in the “price/charges” category. See Attachment B. Fall River acknowledges that they made ministerial/clerical errors on their Bid evaluation worksheet, as the pricing components were clearly different and documented in the spreadsheet of posted ITT 37 state contract pricing for the four vendors evaluated. See Attachment A. There was never any waste, fraud or abuse or misuse of funds on part of Fall River. They also ranked knowledge of infrastructure with the same weight as price – again a ministerial/clerical error. This was an important consideration for the district but in no way more important than price.

Discussion

The Fall River Public School District acknowledges the Federal Communications Commission's' competitive bidding rules are as follows:

The price of the E-Rate eligible products and services must be included as a factor and must be weighted more heavily than any other single factor.

The commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 . This is the case here. There was no waste, fraud or abuse, or misuse of funds. Fall River selected the most cost effective provider for their services. See Attachment A. Merrimack Education Center not only proposed the lowest cost for the services provided, but also had the best knowledge of the school’s infrastructure. See Attachment A. There was never any attempt to undermine the framework of the competitive bidding process. Attachment A shows each vendor with products that match the criteria of the district’s internet service. Merrimack Education Center had lower NRC costs than the next lowest vendor Celt, based on its previously completed work at the schools. (Please see the note about the “make ready” work previously completed at 11 schools.) That knowledge and previous work performed provided Merrimack Education Center with a significantly lower cost to bring their product/service to the district. Fall River would benefit from additional cost avoidance by selecting Merrimack Education Center , making them the more cost effective choice. Furthermore, In assigning weight to the “knowledge of the district” aspect, Fall River recognized the importance of not only the condition of each school, but also the needs with respect to the work needed to make each site ready for service.

. Similarly, in the matter of Colorado Springs School District, Federal Communications Commission CC Docket No. 02-6, Colorado Springs School District selected the least expensive and most cost-effective service offering. The Commission in that matter found that a waiver of sections 54.503 ©(2)(vii) and 54.511 (a) of the Commissions rules, which require applicants to use price as the primary factor in the vendor selection process, is in the public interest. See 47 C.F.R. §§ 54.503 (c)(2)(vii), 54.511 (a) and Federal Communications Commission, CC Docket No. 02-6.

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Conclusion

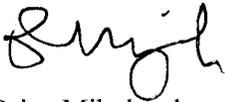
The FCC has recognized that *“a waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule”*.

Fall River did select the lowest cost vendor based on:

- a. the cost tables submitted from the state contract shows which shows Merrimack Education Center had the lowest monthly prices compared to the other 3 vendors.
- b. Fall River only needed to budget NRC make ready construction costs with Merrimack Education Center for 6 of its 17 buildings whereas the other 3 vendors would need to pay for all 17 buildings.

Therefore, Fall River respectfully requests a waiver of sections 54.503 © (2) (vii) and 54.511 (a) of the Commission's rules as the vendor selection was in the public interest.

Sincerely,



Brian Mikolazyk
Fall River Public School District

Attachments:

Attachment A

Attachment B

FCC DA-13-1159

Notification of Commitment Adjustment Letter

**Before the
Federal Communications Commission
Washington, DC 20554**

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In the Matter of)) Request for Review of a) Decision of the) Universal Service Administrator by)) Fall River Public School District) Fall River, MA)) Schools and Libraries Universal Service) Support Mechanism)	JUN 21 2013 FCC Mail Room File No. SLD- 662946 CC Docket No. 02-6
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ORDER

Adopted: May 20, 2013

Released: May 20, 2013

By the Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

1. Consistent with precedent,¹ we deny a request from Fall River Public School District (Fall River)² seeking review of a decision made by the Universal Service Administrative Company (USAC) under the E-rate program (more formally known as the schools and libraries universal service support program).³ USAC initiated recovery actions against Fall River for funding already disbursed pursuant to Fall River's funding year 2009 FCC Form 471 application on the basis that Fall River violated the Commission's competitive bidding rules by failing to use price as the primary factor in its vendor selection process.⁴ Based on our review of the record, we agree with USAC's determination and find that Fall River violated the Commission's competitive bidding rules.⁵

2. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible services.⁶ The Commission's rules provide that

¹ See *Request for Review by Henrico County School District 81 of the Decision of the Universal Service Administrator*, CC Docket No. 02-6, Order, DA 13-999 (Wireline Comp. Bur. rel. May 3, 2013) (*Henrico Order*) (finding that the applicant failed to use price as the primary factor in its vendor selection process).

² See Letter from Brian Mikolazyk, Fall River Public School District, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Feb. 28, 2013) (Request for Review) (regarding funding year 2009 FCC Form 471 application number 662946 (funding request number (FRN) 1819200)) (Request for Review).

³ 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).

⁴ See Letter from USAC, Schools and Libraries Division, to Brian Mikolazyk, Fall River Public School District (dated Jan. 7, 2013) (regarding funding year 2009 FCC Form 471 application number 662946 (FRN 1819200) (Notification of Commitment Adjustment Letter (COMAD))); see also 47 C.F.R. §§ 54.504, 54.511 (2009); 47 C.F.R. §§ 54.503, 54.511 (2011) (requiring applicants to use price as the primary factor in the vendor selection process).

⁵ 47 C.F.R. §§ 54.504, 54.511 (2009); see also 47 C.F.R. §§ 54.503, 54.511 (2011).

⁶ 47 C.F.R. §§ 54.501-54.502 (2009); see also 47 C.F.R. §§ 54.501-54.502 (2011).

rules.¹⁸ There is no way to know what weight Fall River would have assigned to price, if it had properly assigned the greatest weight to price in its bid evaluation process, nor is there a way to know what weight it would have then assigned to the other criteria.¹⁹ As a result, there is no way to know whether Fall River would have reached the same outcome.²⁰

5. We recognize that, on occasion, we have waived the Commission's rules for applicants that failed to use price as the primary factor in its vendor evaluation process, but selected the lowest-cost provider.²¹ In this instance, however, it is not clear from the record that Fall River selected the lowest-cost provider, as Fall River claims.²² In particular, Fall River does not identify the total cost for each of the four vendors to provide the services at issue, or illustrate a comparison of those costs. Further, according to Fall River's vendor evaluation matrix, each of the vendors it considered received identical scores in the "price/charges" category.²³ Thus, it appears from the record that the cost of each vendor's service offering was equivalent. Given these circumstances, we are unable to confirm that Fall River selected the lowest-cost provider. We therefore find that Fall River failed to comply with the Commission's rules to assign the highest weight to price when evaluating bids and that there is no justification for a waiver of those rules.²⁴ As the Commission has previously indicated, we are deeply concerned about practices that undermine the framework of the competitive bidding process.²⁵ When an applicant constructs a bid evaluation process that circumvents the Commission's competitive bidding requirements, the applicant suppresses fair and open competitive bidding and ultimately damages the integrity of the program.²⁶

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

¹⁸ See *Henrico Order*, DA 13-999, at para. 4.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See, e.g., *Request for Review of the Decision of the Universal Service Administrator by Allendale County School District, et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 26 FCC Rcd 6109 (2011) (finding that a waiver of the Commission's competitive bidding rules was in the public interest where the petitioners did not assign the highest weight to price when evaluating bids, but ultimately selected the vendor with the least expensive service offering). We stress that, under the Commission's rules, applicants need not select the lowest-priced service provider, but must assign the greatest weight to price when evaluating competing bids. See 47 C.F.R. §§ 54.504, 54.511 (2009); 47 C.F.R. §§ 54.503, 54.511 (2011); *Ysleta Order*, 18 FCC Rcd at 26429, para. 50.

²² See Request for Review.

²³ *Id.*

²⁴ See 47 C.F.R. §§ 54.504, 54.511 (2009); see also 47 C.F.R. §§ 54.503, 54.511 (2011).

²⁵ See *Universal Service First Report and Order*, 12 FCC Rcd 8776, 9076-80, paras. 570-80 (requiring applicants to conduct a fair and open competitive bidding process when seeking support for eligible products and services); *Federal-State Joint Board on Universal Service; Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, and 95-72, Report and Order and Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5425-26, para. 185 (1997) (stating that competitive bidding is a key component of the Commission's effort to ensure that universal service funds support services that satisfy the precise needs of an institution, and that the services are provided at the lowest possible rates).

²⁶ See, e.g., *Request for Review of the Decision of the Universal Service Administrator by Central Islip Free Union School District, et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 26 FCC Rcd 8630 (Wireline Comp. Bur. 2008).



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Schools and Libraries Division

Notification of Commitment Adjustment Letter

Funding Year 2009: July 1, 2009 - June 30, 2010

January 07, 2013

Brian Mikolazyk
FALL RIVER PUBLIC SCHOOL DIST
417 ROCK ST
FALL RIVER, MA 02720 3344

Re: Form 471 Application Number: 662946
Funding Year: 2009
Applicant's Form Identifier: YR09 Pty I
Billed Entity Number: 120720
FCC Registration Number: 0013099742
SPIN: 143004624
Service Provider Name: Merrimack Education Center
Service Provider Contact Person: Joseph DiFonzo

Our routine review of Schools and Libraries Program (Program) funding commitments has revealed certain applications where funds were committed in violation of Program rules.

In order to be sure that no funds are used in violation of Program rules, the Universal Service Administrative Company (USAC) must now adjust your overall funding commitment. The purpose of this letter is to make the required adjustments to your funding commitment, and to give you an opportunity to appeal this decision. USAC has determined the applicant is responsible for all or some of the violations. Therefore, the applicant is responsible to repay all or some of the funds disbursed in error (if any).

This is NOT a bill. If recovery of disbursed funds is required, the next step in the recovery process is for USAC to issue you a Demand Payment Letter. The balance of the debt will be due within 30 days of that letter. Failure to pay the debt within 30 days from the date of the Demand Payment Letter could result in interest, late payment fees, administrative charges and implementation of the "Red Light Rule." The FCC's Red Light Rule requires USAC to dismiss pending FCC Form 471 applications if the entity responsible for paying the outstanding debt has not paid the debt, or otherwise made satisfactory arrangements to pay the debt within 30 days of the notice provided by USAC. For more information on the Red Light Rule, please see "Red Light Frequently Asked Questions (FAQs)" posted on the FCC website at http://www.fcc.gov/debt_collection/faq.html.

JUN 21 2013

TO APPEAL THIS DECISION:

You have the option of filing an appeal with USAC or directly with the Federal Communications Commission (FCC).

FCC Mail Room

If you wish to appeal the Commitment Adjustment Decision indicated in this letter to USAC your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and email address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify the date of the Notification of Commitment Adjustment Letter and the Funding Request Number(s) (FRN) you are appealing. Your letter of appeal must include the
 - Billed Entity Name,
 - Form 471 Application Number,
 - Billed Entity Number, and
 - FCC Registration Number (FCC RN) from the top of your letter.
3. When explaining your appeal, copy the language or text from the Notification of Commitment Adjustment Letter that is the subject of your appeal to allow USAC to more readily understand your appeal and respond appropriately. Please keep your letter to the point, and provide documentation to support your appeal. Be sure to keep a copy of your entire appeal including any correspondence and documentation.
4. If you are an applicant, please provide a copy of your appeal to the service provider(s) affected by USAC's decision. If you are a service provider, please provide a copy of your appeal to the applicant(s) affected by USAC's decision.
5. Provide an authorized signature on your letter of appeal.

To submit your appeal to us on paper, send your appeal to:

Letter of Appeal
Schools and Libraries Division - Correspondence Unit
100 S. Jefferson Rd.
P. O. Box 902
Whippany, NJ 07981

For more information on submitting an appeal to USAC, please see the "Appeals Procedure" posted on our website.

If you wish to appeal a decision in this letter to the FCC, you should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received by the FCC or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. We strongly recommend that you use the electronic filing options described in the "Appeals Procedure" posted on our website. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554.

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FUNDING COMMITMENT ADJUSTMENT REPORT

FCC Mail Room

On the pages following this letter, we have provided a Funding Commitment Adjustment Report (Report) for the Form 471 application cited above. The enclosed Report includes the Funding Request Number(s) from your application for which adjustments are necessary. See the "Guide to USAC Letter Reports" posted at <http://usac.org/sl/tools/reference/guide-usac-letter-reports.aspx> for more information on each of the fields in the Report. USAC is also sending this information to your service provider(s) for informational purposes. If USAC has determined the service provider is also responsible for any rule violation on the FRN(s), a separate letter will be sent to the service provider detailing the necessary service provider action.

Note that if the Funds Disbursed to Date amount is less than the Adjusted Funding Commitment amount, USAC will continue to process properly filed invoices up to the Adjusted Funding Commitment amount. Review the Funding Commitment Adjustment Explanation in the attached Report for an explanation of the reduction to the commitment(s). Please ensure that any invoices that you or your service provider(s) submits to USAC are consistent with Program rules as indicated in the Funding Commitment Adjustment Explanation. If the Funds Disbursed to Date amount exceeds your Adjusted Funding Commitment amount, USAC will have to recover some or all of the disbursed funds. The Report explains the exact amount (if any) the applicant is responsible for repaying.

Schools and Libraries Division
Universal Services Administrative Company

cc: Joseph DiFonzo
Merrimack Education Center

Funding Commitment Adjustment Report for
Form 471 Application Number: 662946

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Funding Request Number: 1819200
Services Ordered: INTERNET ACCESS
SPIN: 143004624
Service Provider Name: Merrimack Education Center
Contract Number: ITT 37
Billing Account Number:
Site Identifier: 120720
Original Funding Commitment: \$241,729.80
Commitment Adjustment Amount: \$241,729.80
Adjusted Funding Commitment: \$0.00
Funds Disbursed to Date \$190,814.80
Funds to be Recovered from Applicant: \$190,814.80
Funding Commitment Adjustment Explanation:

After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. During a review, it was determined that the price of eligible products and services was not the primary factor in the vendor selection process. This determination was based on the bid evaluation sheet provided by the applicant, which indicated that both Price and Knowledge of Infrastructure had a 25% weight. FCC rules require that applicants select the most cost-effective product and/or service offering with price being the primary factor in the vendor selection process. Applicants may take other factors into consideration, but in selecting the winning bid, price must be given more weight than any other single factor. Ineligible products and services may not be factored into the cost-effective evaluation. Since price was not the primary factor in the vendor selection process, the commitment has been rescinded in full and USAC will seek recovery of any improperly disbursed funds from the applicant.

0.91, 0.291 and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and 54.722(a), that the Request for Review filed by Fall River Public School District IS DENIED.

7. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 54.722(a), that USAC SHALL CONTINUE its recovery actions against Fall River Public School District, to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Kimberly A. Scardino
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

these entities must seek competitive bids for all services eligible for support.⁷ Applicants must submit for posting on USAC's website an FCC Form 470 requesting discounts for E-rate eligible services or any services for which the applicant is seeking a new contract.⁸ The Commission's rules require applicants to carefully consider all submitted bids prior to entering into a contract, and that the price of eligible products and services must be the primary factor in selecting the winning bid.⁹ Applicants may also consider relevant factors other than the pre-discount prices submitted by providers, such as prior experience, personnel qualifications, management capability, and environmental objectives.¹⁰ When evaluating bids, however, applicants must have a separate "cost category" and that category must be given more weight than any other single factor.¹¹

3. After reviewing the record, we find that USAC correctly denied Fall River's request for support. Specifically, we find that Fall River failed to comply with the Commission's competitive bidding requirements for FRN 1819200, because it did not assign the highest weight to price in its vendor evaluation process.¹² The record shows that Fall River considered five criteria in its vendor evaluation process: (1) "prices/charges" (representing 25 percent of the total evaluation weighting); (2) "understanding of needs" (representing 15 percent of the total evaluation weighting); (3) "prior experience" (representing 15 percent of the total evaluation weighting); (4) "knowledge of infrastructure" (representing 25 percent of the total evaluation weighting); and (5) "E-rate compliance" (representing 15 percent of the total evaluation weighting).¹³ In its appeal, Fall River acknowledges that two criteria on its bid evaluation matrix – "price/charges" and "knowledge of infrastructure" – were both weighted 25 percent.¹⁴ Fall River explains that the "knowledge of infrastructure" category was established to reflect the importance of selecting a vendor that had experience and knowledge of the district.¹⁵ Fall River argues that if the district had correctly prepared the spreadsheet with "price/charges" as the most heavily weighted factor and "knowledge of infrastructure" weighted less, the same service provider would have been selected.¹⁶ Fall River also claims that the winning vendor offered the lowest price for the services to be provided.¹⁷

4. After reviewing the record, we are not persuaded by Fall River's arguments. The fact that Fall River can, with the benefit of hindsight, find one way to re-engineer its evaluation criteria to reach an identical result using price as the primary factor does not demonstrate compliance with the Commission's

⁷ 47 C.F.R. § 54.504 (2009); *see also* 47 C.F.R. § 54.503 (2011).

⁸ *Id.* *See also* Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (FCC Form 470).

⁹ *See* 47 C.F.R. §§ 54.504, 54.511 (2009); 47 C.F.R. §§ 54.503, 54.511 (2011). *See also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029, para. 481 (1997) (*Universal Service First Report and Order*) (subsequent history omitted); *Request for Review by Ysleta Independent School District of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407 (2003) (*Ysleta Order*).

¹⁰ *Universal Service First Report and Order*, 12 FCC Rcd at 9029-30, para. 481; *see also* 47 C.F.R. § 54.511.

¹¹ *See Ysleta Order*, 18 FCC Rcd at 26429, para. 50. For example, if an applicant assigns 10 points to reputation and 10 points to past experience, the applicant would be required to assign at least 11 points to price. *Id.* at n.138.

¹² *See* 47 C.F.R. §§ 54.504, 54.511 (2009); *see also* 47 C.F.R. §§ 54.503, 54.511 (2011).

¹³ *See* Request for Review.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*