

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

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| In the Matter of |) | |
| |) | |
| Request for Review of a Decision of the |) | Administrator Correspondence Dated |
| Universal Service Administration Corp. for |) | July 11, 2013 |
| Charlotte-Mecklenburg County Schools |) | |
| |) | |
| |) | |
| Schools and Libraries Universal Service |) | CC Docket No. 02-6 |
| Support Mechanism |) | |

Request for Review or Waiver

Form 471 Application Number: 846786
FRN: 2302679
Billed Entity Number: 126973
FCC Registration Number: 0001916063

In accordance with sections 54.719 through 54.721 of the Commission's rules, Charlotte-Mecklenburg County Schools, Charlotte, North Carolina (CMS) requests Federal Communications Commission (Commission) review of a decision of the Schools and Libraries Division of the Universal Service Administrative Company (Administrator). CMS requests the Commission establish precedent by overturning the language of the Eligible Services List related to this denial from 2007 through 2013.

The Administrator denied a Funding Request for \$113,679.36 of eligible services based on a 2007 wording change to the Eligible Services List (ESL) which the Administrator has read as prohibiting separate contracts for the purchase of equipment and the installation of that

equipment. This interpretation is anti-competitive and conflicts with the Commission's principle of Competitive Neutrality.

The Commission should reverse the Administrator's decision and affirm the eligibility of separate contracts for the installation and purchase of equipment. In the alternative, the Commission should grant CMS a waiver of the Commission's rules. This appeal comes timely filed within 60 days of the Administrator's decision.

OVERVIEW

Charlotte, North Carolina is an economically disadvantaged city in south-central North Carolina, as reflected by a discount rate of between 71-90% for E-Rate eligible services. CMS operates 159 schools across the Charlotte metropolitan and Mecklenburg County area and serves more than 141,100 students from kindergarten through 12th grade. Prior to the Great Recession of 2008, Charlotte was a banking center for the southeastern United States and was devastated by the near collapse of the banking industry.

CMS has long been a national leader in bridging the "achievement gap." A large part of that success has come through an emphasis on incorporating technology into the curriculum, made possible in large part because of the E-Rate program. Despite major budget restrictions, CMS focused a major technology initiative to continue and enhance the tremendous strides the district made in previous years.

BACKGROUND

When preparing for the technology initiative, CMS issued two Requests for Proposal (RFP) and released them to the public on January 25, 2012. Two Form 470s were posted to the Administrator's Web site directing interested parties to each RFP. Responses for both RFPs were

due on the same day – February 23, 2012. The two RFPs were linked to a single project which was for the purchase and installation of communication equipment. Two RFPs were issued in order to give CMS the maximum flexibility and cost savings with procurement.

Eight vendors responded to the equipment RFP and four responded to the installation RFP. Three submitted proposals for both equipment and installation and one vendor submitted a bid for installation only. CMS evaluated all responses and selected Presidio to provide the equipment and Southeastern Technology to install the equipment.

The Administrator denied this Funding Request on the grounds that the separate contracts for the purchase and installation of the equipment are allegedly ineligible for E-Rate funding per the wording of the ESL, as stated in the funding denial:

FRN is denied because more than 30% of the request amount is for the installation service, which was deemed ineligible due to different vendors between the product/service purchase and installation: The FCC's Eligible Services List states that installation and configuration of products/services is only eligible if it is a part of the contract or bid for those eligible products/services. This funding request is for installation charges that were not part of the bid for the product/services in FRN 2299890; therefore funding is denied.

On June 19, 2013 CMS appealed the decision with the Administrator. The Administrator denied the appeal on July 11, 2013 stating:

Based on the documentation that you provided during the review of your Funding Year 2012 FCC Form 471 application 846786, FRN 2302679 was denied. The FRN was denied because the request was for ineligible installation purchased under a separate bid/contract. On appeal you did not provide new information and you did not show that USAC erred in its original decision. Consequently your appeal is denied.

DISCUSSION

CMS released RFPs for both the purchase and installation of equipment on the same day in January 2012.¹ The bidding periods ran concurrently and both closed on the same date and at the same location within one half hour of each other. The simultaneous release of both RFPs shows that CMS intended to inform prospective bidders that CMS sought to both purchase equipment and have that equipment installed as a single capital project. CMS issued two RFPs for the project in order to maximize purchasing options and secure the most cost effective solution for this major technology implementation.

Three vendors submitted bids for both equipment² and installation³ with total bid prices of \$4,556,651.23, \$4,041,006.35, and \$3,209,202.21. Five other vendors bid only on the equipment and one vendor bid only on the installation. CMS selected Presidio to supply the equipment and Southeastern Technology Group to perform the installation for a total of \$3,146,914.18. Presidio offered the lowest price for equipment of the eight vendors responding to the equipment RFP. Presidio did not respond to the installation RFP. Southeastern Technology Group did not respond to the equipment RFP. By separating the installation and equipment, CMS was able to save 20 percent below the lowest price from one of the three vendors submitting a combined bid. In dollar terms the difference was \$62,288.03 which, given CMS's 90% discount rate, saved the program \$56,059 - not an insignificant amount. Had CMS selected one vendor under a single contract, as the current version of the ESL appears to require, the program would have unnecessarily spent between \$56,059 and \$1,409,737 more than the original funding requests. Although CMS issued two RFPs, it should be noted that it was abundantly

¹ Attachments 1 and 2 - RFPs

² Attachment 3 - Bid Response Sheet for Equipment

³ Attachment 4 - Bid Response Sheet for Installation

clear that the two RFPs were related to a single project and qualified vendors would be encouraged to submit bids for the entire project. When preparing responses for a project of this scope, it would be reasonable to conclude that vendors preparing responses would treat the responses as a “single bid” for the purposes of securing the business. The fact that three vendors submitted bids for both RFPs confirms that notion. With the responses, CMS had the option of selecting a single vendor for both components of the project but opted instead to select the most cost effective solution.

The table below illustrates the savings:

| Vendor | Equipment Quote | Installation Quote | Total Equipment and install quotes |
|------------------------------|-----------------------|--------------------|------------------------------------|
| Presidio | \$3,020,603.78 | | |
| W. W. Technology | \$3,290,961.23 | \$1,265,690 | \$4,556,651.23 |
| CSI | \$3,834,401.35 | \$206,605 | \$4,041,006.35 |
| NWN | \$3,143,713.75 | | |
| CNCI | \$4,539,348.14 | | |
| Disys Solutions | \$3,108,616.23 | | |
| Pomeroy IT Solutions | \$3,088,440.67 | | |
| Century Link Business | \$3,091,869.68 | \$117,332.53 | \$3,209,201.21 |
| Southeastern Tech. | | \$126,310.4 | |
| Selected Vendor Price | \$3,020,603.78 | \$126,310.4 | \$3,146,914.18 |

In August 2013, the State E-Rate Coordinators Alliance (SECA) submitted a filing with the Commission⁴ seeking clarification on this issue and noting that "...applicants can often achieve greater flexibility and cost efficiencies by negotiating separately for equipment purchases and for installation services." SECA further contended that the rule change appeared to be unintentional and offered a suggested new wording for the 2014 ESL which would eliminate this problem and restore applicants' ability to select separate vendors for the purchase and installation of equipment.

Eligible Service List History

Installation of eligible equipment has been specifically eligible as individual contracts since the beginning of the E-Rate program. In 1998 the ESL stated:

"Installation Labor & Maintenance Agreement (contract) fees" Includes the charges incurred for the installation and contractual maintenance of eligible telecommunications services and internal connections. No personnel costs incurred by schools and libraries will be eligible for discounts.

The ESL for 2001, in the "Miscellaneous" section under the heading "Maintenance and Installation" contained with the following:

Installation, Labor and Maintenance Agreement (contract or tariff) fees -The charges incurred for the installation and contractual maintenance of eligible Telecommunications Services, Internal Connections and Internet Access are eligible for discount. The charges incurred for the maintenance and installation performed on eligible Telecommunications Services, Internal Connections and Internet Access on a time and material basis are eligible for discount. The Service Category used for Maintenance & Installation should reflect the Service Category of the product or service being installed or maintained. As an example, if the service being installed is a Telecommunications Service, then the installation should also reflect that same category, Telecommunications Service. Labor costs for schools and library personnel are not eligible for discount.

⁴ Initial Comments to Public Notice DA 13-1513 Regarding Draft Eligible Services List for Schools and Libraries Universals Service Program filed by Gary Rawson, SECA Chair August 2, 2013, CC docket 02-6, page 4.

In 2002 the ESL listed installation charges under the heading “Professional Services” and for the first time included sub-categories of installation services, design, and project management. While not specified, the changes in the 2002 ESL may have been in response to widespread abuse of Priority 2 funding requests first discovered in 2001:

The category of service specified for Professional Services, i.e., Telecommunications Services, Internet Access, or Internal Connections, should reflect the appropriate service category for the professional service being obtained.

Design & Engineering Costs—Design and engineering costs are eligible if they are coincident with the installation of eligible equipment or services and if part of a contract or bid for those eligible products or services.

Installation—The charges incurred for the installation of eligible Telecommunications Services, Internal Connections and Internet Access are eligible for discount. (emphasis added).

Maintenance—Maintenance is eligible for discount only if it is a component of a maintenance agreement/contract for an eligible service or product. The agreement or contract must specifically identify the eligible products or services covered.

Project Management—Costs associated with the overall management of the installation and initial operation of eligible products and services are eligible if they are part of a contract or bid for the eligible products and services.

Training— Training is eligible **only** if it is basic instruction on the use of eligible equipment, coincident with and directly associated with the installation of such equipment. Training of teachers and staff in the use of covered services in their programs of instruction or for professional development is not eligible for discount.

Consulting Services—Costs of expertise in areas such as initial planning, consulting, development of technology plans, application assistance, and program advice are not eligible.

Personnel Costs—Labor costs for schools and library personnel are not eligible for discount.

The 2003 ESL included the same language as 2002 except the heading was changed to “Technical Services.” The ESL for “Technical Services” remained unchanged until 2007.

Separate bids and contracts for the installation of E-Rate equipment were eligible from the inception of the program until 2007 when the unintentional, yet profound change was made.

The ESL was condensed for Funding Year 2007 from 71 to 49 pages. The changes were primarily formatting, layout and consolidating language. Installation and Configuration was moved to the “Miscellaneous” section and the seven distinct installation components were condensed to a single paragraph:

Installation, activation, and initial configuration of eligible components are eligible if they are part of a contract or bid for those eligible components. Such eligible services may include basic design and engineering costs and basic project management costs if these services are provided as an integral component part coincident with installation.

From 2002 through 2007, the ESL expressly permitted separate contracts for the purchase of equipment and the installation of that equipment, limited only in three aspects of a typical installation project. For these three categories - Basic Design and Engineering, Project Management, and Training - installation costs were only eligible if under the same contract as the services themselves. The 2007 change in phrasing effectively expanded the previously narrow limitations to forbid all types of separate installation contracts. While the rationale for the requirement to combine design and engineering, project management and training may be sound and protect the program from abuse, separate bids strictly to install eligible equipment is not. This change in wording added significant new restrictions on E-Rate applicants and hinders their ability to select the most cost effective options for installation projects.

The Change was Not Intentional

There is no evidence that the installation language change in the 2007 ESL was intended by the Commission. There was no Commission decision or order that precipitated the change in the eligibility of installation contracts. Unlike 2002, there was no indication of program abuse

because of different vendors installing and selling equipment. Not a single comment was made on this issue in response to the Administrator's Proposed ESL for 2007 despite an otherwise robust discussion of proposed changes. Furthermore, significant changes to the ESL are routinely highlighted in the Order Release accompanying the ESL. Specifically, the 2007 Order Release listed seven such changes and clarifications, each listed in bold type. The first of these changes was a note that the ESL had been condensed. Examples of the other changes include the addition of a "KVM Switch" to the ESL and a clarification that redundant components are not eligible. If a change to the eligibility of all installation contracts was intended, it would have undoubtedly been mentioned there. Installation and Configuration was also listed only to the extent that training was eligible "...as long as training occurs within a reasonable time after installation of eligible components it is coincident with installation."⁵ There was absolutely no mention of the rule change requiring equipment installation to be part of the same contract or bid. Further, Administrator training for 2007 did not mention the change.

The Change was Not Enforced

This wording change continued to go unnoticed by virtually everyone involved in E-Rate for four years. In 2007, 2008, 2009 and 2010 not a single applicant was denied funding for signing separate contracts for purchase and installation of equipment. Starting in April 2011, nine applicants, including CMS had their funding requests denied for this reason. No change to the wording in the ESL was made during this time. This gap in time between the change in the wording of the ESL and its enforcement further suggests that the Commission was not seeking to address a perceived problem by adding new restrictions in 2007. Furthermore, because this new

⁵ Release of Funding Year 2007 Eligible Services List for Schools and Libraries Universal Service Mechanism, FCC 06-158, Rel. October 19, 2006, CC Docket 02-6, Public Notice.

rule was not being enforced as written, the E-Rate community had no reason to be aware that it existed. Indeed, the State E-Rate Coordinators Alliance, arguably populated with the largest number of program experts in the country, did not become aware of this issue until the summer of 2013 when two funding denials were brought to the attention of SECA members.

Rule is Anti-Competitive

Throughout the E-Rate program, great lengths are taken to ensure that funds are not wasted and that applicants select the most cost-effective vendors. The Commission consistently upholds Administrator funding denials for competitive bidding violations, such as failure to post the Form 470 for 28 days, for failing to use price as the primary consideration when evaluating responses, and failing to retain bidding documentation during review. CMS is well aware of these requirements and strictly adheres to them. However, prohibiting applicants from signing separate contracts for the purchase and installation of E-Rate eligible equipment only serves to limit applicants' ability to select the most cost effective option available to them. For example, as SECA noted, equipment can often be purchased at a lower price directly from manufacturers who may not offer installation services. Similarly, state contracts offering substantial savings on equipment may not provide for installation of that equipment. Indeed, in this case significant savings were achieved.

Another fast held hallmark of the E-Rate program is competitive neutrality. The ESL language since 2007 appears to *require* applicants to use the same company to purchase and install E-Rate eligible equipment. This unfairly excludes companies that specialize in installation of equipment, and small companies that lack the volume purchasing discounts major state contracts command for equipment alone. The interpretation of this rule by its very nature skews

the competitive playing field from small vendors to large companies contradicts the principle of Competitive Neutrality.

Competitive Neutrality

Competitive Neutrality in the E-Rate program is rooted in the enabling legislation itself.

The law requires that:

The Commission shall establish competitively neutral rules--
(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries...⁶

When enacting the first regulations governing the E-Rate program, the Commission adopted a set of governing principles. One of the principles was the concept of Competitive Neutrality. The Commission stated:

Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.⁷

In this case, the lowest priced bids which CMS received for the purchase of equipment and the installation of that equipment were from separate vendors. Therefore, had CMS followed the rule as written, it would have selected a single vendor for the purchase and installation of equipment at a significantly higher cost to taxpayers and to the E-Rate program.

⁶ 47 U.S.C. § 254(h)(2)

⁷ Report and Order on Universal Service, FCC 97-157, Rel. June 6, 1997, CC Docket 96-45 at 47.

CONCLUSION

In light of the facts presented above, the Commission should clarify that it never intended to create a prohibition on separate installation contracts outside of the three narrow areas described in the 2002-2006 ESL and that contracts for the installation of purchased equipment are eligible under the E-Rate program.

The Commission now has the opportunity to overturn what CMS believes to be an editing error with the 2007 ESL and restore badly needed funding to support CMS students.

CMS respectfully requests that the Commission grant this Request for Review or Waiver and remand this matter to USAC with instructions to fund the FRN in question. In the alternative, CMS asks the Commission to waive any minor procedural violations to further the purpose of section 254(h) and serve the public interest. Based on the facts as presented, the Commission can be assured that there was absolutely no attempt to waste or abuse the E-Rate program or program resources.

Respectfully submitted this Fourth day of September, 2013,

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