

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

In the Matter of)	
)	
Request for Review of a Decision of the)	Administrator Correspondence Dated
Universal Service Administration Corp. for)	August 20, 2013
Knox County Schools, Knoxville, TN)	
)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

Request for Review or Waiver¹

Billed Entity Number: 128407

Form 471 Application Number: 796288

FRNs: 2162584, 2162541, 2162565, 2162603, 2162578, 2162616 and 2162586

In accordance with sections 54.719 through 54.721 of the Commission's rules, Knox County Schools in Knoxville, Tennessee (KCS) requests Federal Communications Commission (Commission) review of a decision of the Schools and Libraries Division of the Universal Service Administrative Company (Administrator). KCS 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 Funding Requests for \$421,260.00 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

¹ This appeal is substantially similar to that of an appeal filed by Charlotte-Mecklenburg County Schools on September 4, 2013. The issue and substantive argument is the same, though the details of the situation are specific to Knox County Schools

equipment. KCS contends that 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 KCS a waiver of the Commission's rules. This appeal comes timely filed within 60 days of the Administrator's decision (including the Commission's ordered 16 day extension).²

OVERVIEW

Knox County, Tennessee school system is a metropolitan school district comprised of 88 schools and over 56,000 students.³ Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts on eligible telecommunications services, Internet access, internal connections, and basic maintenance of internal connections⁴. Under this regulatory authority, Knox County annually submits E-rate application(s) for discounts on eligible products and services.

BACKGROUND

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

² See DA-13-2025A1 issued October 17, 2013 extending all filing deadlines that were to fall between October 17 and November 4, 2013 until November 4, 2013.

³ Statistics available at:

<http://knoxschools.org/modules/cms/pages.phtml?sessionid=6a9098c9ecd1f175830b20faff5d3e28&pageid=93508&sessionid=6a9098c9ecd1f175830b20faff5d3e28>.

⁴ 47 C.F.R. §§ 54.502, 54.503

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 contract/bid for the product/services in FCC Form 471 numbers 795997, 795972, and 796085; therefore funding is denied.

On April 18, 2013 KCS appealed the decision with the Administrator. The Administrator denied the appeal on August 20, 2013 stating:

Your FCC Form 471 application included costs for the following ineligible products and/or services: installation of cabling materials requested in application 795997, 795972 and 796085 – materials provided by a different service provider. Accordingly, your funding request was denied. In your appeal, although you state that Knox County has historically gone out to competitive bid for each component of service and a separate bid/RFP was released for equipment, cabling and installation and an award is made for each bid/RFP that is solicited, 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. The funding requests cited above are for installation charges that were not part of the contract/bid for the products/services in FCC Form 471 numbers 795997, 795972 and 796085. In your appeal you did not show that USAC's determination was incorrect. Consequently, your appeal is denied.

DISCUSSION

Knox County Schools' IT department serves as its own "general contractor" for the purposes of developing, specifying, estimating, deploying, and managing network systems utilized by the district for all district networking projects including those supported by the E-rate program,

Specifically, the Knox County IT department maintains personnel with the appropriate experience and certifications to design, engineer, specify, estimate, and manage the deployment of all networking systems utilized by the school district. Consequently, "turn-key" vendor

proposals or quotations are not sought nor used in the defining of the design development proposal forwarded to USAC in the form of an Item 21 Attachment.

The following is a summary of the process followed to develop a network design and subsequent cost estimate that is submitted to USAC as an Item 21.

Pre-deployment Network Design and Cost Estimation Process:

- 1) KCS IT personnel work with other district personnel (such as the Facilities, Maintenance, or Curriculum departments) to define and prioritize projects to deploy, enhance, or upgrade campus networks.
- 2) A campus network design is developed, reviewed, and documented using KCS' Network Requirements. All designs must be consistent with and appropriately reflect current state-approved district technology planning documents.
- 3) Project specifics are developed utilizing knowledge of the specific site including but not limited to floor plans, architectural drawings, current network documentation, site visits, previous campus trouble tickets, etc.
- 4) An overview of specific services and components required to complete the project is developed and refined.
- 5) After defining the needed resources, the project is divided into logical subgroups to facilitate an even more detailed component analysis and specification.
- 6) Cost estimates (Item 21 Attachments) are then developed. Cost estimates for specific components or services are drawn from existing E-rate eligible term contracts, E-rate eligible consortium agreements, or E-rate eligible state contracts. In cases where no prior contractual agreement exists, KCS issues appropriate Request for Proposals or Request for Bids according to local/state governmental regulations and consistent with E-rate regulations to establish new contractual agreements and acquire cost proposals.
- 7) Cost estimates supporting Knox County's Priority II requests are attached to the application as Item 21 Attachments and submitted for review.

Advantages:

It is our experience that the above process affords Knox County and, consequently, the E-rate program, several quantifiable advantages.

First, since KCS is serving as the "general contractor", procurement and management costs are significantly reduced. It has been our experience that quotations from most

“integrators” for “turn-key” solutions include “mark-ups” for component prices and materials. Consequently, it is not unreasonable that the costs of procurement, recordkeeping, storage, handling, delivery and other intangible integrative “services” are passed on to the end user in the total cost of a “turn-key” proposal.

By not bundling projects into “turn-key” proposals, Knox County has determined that these “mark-ups” and service charges are minimized or avoided allowing better overall value in the procurement process.

Further, since the project is divided into logical component areas, Knox County is able to target bids and Requests for Proposals to the core competency of manufacturers, resellers, VARs, and service providers. This has proven to allow Knox County to determine the most competitive pricing for specific components and services while working with providers that know their products or crafts at a superior level.

Also, by developing and implementing the projects at this level of detail, Knox County IT personnel maintain an intimate knowledge of the components comprising the network. This allows our network support team to better troubleshoot and manage the network and allows our E-rate team to better assert that all the requested materials, components, and services have been delivered and are functioning appropriately.

Finally, being involved with the network system from inception allows Knox County to logically upgrade and expand network services to students and staff when necessary. In our experience, this system allows for the maximum utilization of the critical resources procured through the E-rate program.

In August 2013, the State E-Rate Coordinators Alliance (SECA) submitted a filing with the Commission⁵ 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.

⁵ Initial Comments to Public Notice DA 13-1513 Regarding Draft Eligible Services List for Schools and Libraries Universal 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."⁶ 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 KCS 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

⁶ 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 (one of which was Knox County).

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. KCS 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...⁷

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.⁸

In this case, the lowest priced bids which KCS received for the purchase of equipment and the installation of that equipment were from separate vendors. Therefore, had KCS 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.

⁷ 47 U.S.C. § 254(h)(2)

⁸ 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 KCS believes to be an editing error with the 2007 ESL and restore badly needed funding to support KCS students.

KCS respectfully requests that the Commission grant this Request for Review or Waiver and remand this matter to USAC with instructions to fund the FRNs in question. In the alternative, KCS 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,

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