

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

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|---|---|---|
| In the Matter of |) | Biblioteca Abelardo Díaz Alfaro |
| |) | Billed Entity Number 16052522 |
| Requests for Review of |) | Funding Year 2010 |
| Decisions of the |) | Form 471 Application Nos. 753259 and |
| Universal Service Administrator by |) | 752817 |
| |) | Funding Requests Nos. 2073612, 2073637, |
| Biblioteca Abelardo Díaz Alfaro |) | 2073671, 2073709, 2073739, 2073768, |
| |) | 2073803, 2073868, 2073901, 2074071, |
| |) | 2074111, 2074141, 2075908, 2035550, |
| |) | 2035611, 2035907, 2035954, 2035452, |
| |) | 2035511, 2036057, 2035989, 2036014, |
| |) | 2073459, 2073516, 2073577, 2073719, |
| |) | 2073741, 2073758, 2073777, 2073799, |
| |) | 2073689, 2073844, 2073881, 2073860, |
| |) | 2073917, 2073929, 2073949, 2075827, |
| |) | 2073970, 2073981, 2034903, 2034873, |
| |) | 2034886, 2034920, 2034944, 2034967, |
| |) | 2035123, 2035158, 2035190, 2071655 |
| |) | |
| Schools and Libraries Universal Service |) | CC Docket No. 02-6 |
| Support Mechanism |) | |

ATT: Telecommunications Access Policy Division
Wireline Competition Bureau

SUPPLEMENT TO REQUEST FOR REVIEW AND WAIVER

Biblioteca Abelardo Díaz Alfaro of the Municipality of San Juan (hereinafter, the “Municipality”) in the Commonwealth of Puerto Rico hereby files this *Supplement* to its *Request for Review and Waiver* filed with the Commission on January 24, 2014.¹ The purpose of this

¹ Request for Review and Waiver by Biblioteca Abelardo Díaz Alfaro of the Municipality of San Juan, CC Docket No. 02-6, filed January 24, 2014 (“*Municipality’s Request*”).

Supplement is to provide the Commission with all the necessary elements and information in support of its request for waiver, as discussed with Commission staff on July 2, 2014.²

There are two fundamental issues in this case: (a) whether the Municipality assigned the highest weight or value to the price category in its vendor evaluation process, and (b) whether the Municipality selected the most cost-effective service offering. Both of these issues implicate Sections 54.503 and 54.511 of the Commission's rules.

The Municipality is certain that it selected the most cost-effective service offering and, through the instant *Supplement*, provides the Commission with complete documentation of the proposals received therefore evidencing that the Municipality selected the lowest cost proposal. With respect to the question of whether the Municipality assigned the highest weight or value to the price category, the instant *Supplement* explains in greater detail that, consistent with Commission precedent, there is good cause for a waiver because the Municipality actually selected the lowest cost proposal and, thus, the outcome of the vendor selection processes was consistent with the policy goals underlying the Commission's competitive bidding rules. Finally, the instant *Supplement* explains why, as a matter of equity and fairness, the Commission should take into consideration special circumstances affecting the Municipality and the hardship that it would suffer if a waiver is not granted.

I. BRIEF BACKGROUND

The *Municipality's Request* provides an explanation of the facts in this case.³ However, it is important to briefly review the key facts that gave rise to USAC's denials and the Municipality's ensuing appeal.

² See Ex Parte Notice by Biblioteca Abelardo Díaz Alfaro of the Municipality of San Juan, CC Docket No. 02-6, filed July 3, 2014 (stating that, "[a]t the suggestion of the Division's staff, the Municipality agreed to file a supplemental submission to its E-rate appeal for funding year 2010, providing, *inter alia*, additional information in support of its waiver request.").

- On December 17, 2009, the Municipality filed Form 470, Application Number 751710000796513, for Funding Year 2010.
- In response to its Form 470, the Municipality received bids for internal connections and Internet access from the following three entities: Educational Services Network (“EdNet”), the Hispanic Information and Telecommunications Network (“HitNet”), and A New Vision in Educational Services & Materials (“Nevesem”).
- The Municipality created a matrix designed to evaluate proposals pursuant to the following seven categories: price (30 points), experience (25 points), personnel qualifications (20 points), managerial and technical qualifications (10 points), availability (5 points), value-added (5 points), and local vendor (5 points); for a total of 100 points.
- Within the price category, the Municipality considered sub-factors and assigned points to each sub-factor. The sub-factors and the points assigned were as follow:

| Price Category | Points Assigned |
|---|------------------------|
| Eligibility to participate in the E-Rate program | 5 |
| Ability to provide service | 5 |
| Per-service cost offered in the proposal | 5 |
| Quality of service vis-à-vis quoted price | 5 |
| Bandwidth | 5 |
| Evaluation of the locations to support accuracy of the proposal | 5 |
| Total Points - Price Category | 30 |

- After the required 28-day period, the Municipality selected Nevesem as the most cost-effective bid.
- On September 7, 2012, the Universal Service Administrative Company (“USAC”) began an audit of thirty one (31) Funding Request Numbers (“FRNs”), which represent \$594,216.00 of the funds disbursed for Funding Year 2010.
- USAC’s auditors issued an “Independent Auditor’s Report on Biblioteca Abelardo Díaz Alfaro’s Compliance with Schools and Libraries Support Mechanism Rules (USAC Audit No. SL2012BE022)” (“Audit Report”).⁴ The Audit Report alleged that: “*HitNet’s bid quoted a total cost of \$431,725 for the requested Internet access services and internal connections. [...] However, HitNet was awarded only 20 points for the cost category for the same requested services and equipment. [...] Of the three bids received, HitNet submitted the most cost effective bid; however, it does not appear that the Beneficiary used price as the primary factor when it awarded NEVESEM the most points for the cost category and selected NEVESEM as the most cost-effective service offering as required by the rules.*”

³ See Municipality’s Request, at pp. 2-7.

⁴ The Audit Report was attached as Exhibit A to the *Municipality’s Request* filed with the Commission on January 24, 2014.

- On November 27, 2013, USAC issued two Notification of Commitment Adjustment Letters (“COMAD Notifications”) rescinding funding commitments for 51 FRNs for the following reason: *“The auditors reviewed the Beneficiary’s competitive bidding documentation and determined all bids were not carefully considered using price as the primary factor. FCC rules require that price of the eligible goods and services must be the primary factor in evaluating bids. Applicants may also take other factors into consideration, but in selecting the winning bid, price must be given more weight than any other single factor. The Beneficiary’s bid evaluation provided during the audit assigned scores for the cost factor based on actual prices and whether the bidders conducted site visits to the various library locations. While applicants may take factors other than price into consideration, the other factors should not be included in the same category as price. The Beneficiary did not utilize a different category than price to score site visits and, therefore, price was not the primary factor when selecting the winning service provider.”*⁵
- On January 24, 2014, the Municipality timely filed a Request for Review and Waiver with the Commission.
- On July 2, 2014, Municipality representatives had a conference call with staff in the Commission’s Telecommunications Access Policy Division to discuss the *Municipality’s Request*, including why a waiver would be appropriate in this case. The Commission staff suggested that the Municipality file a supplement to provide additional information in support of the request for waiver, thus expanding its arguments as exposed in its *Request*.

II. GOOD CAUSE EXISTS TO WAIVE SECTIONS 54.503 AND 54.511 OF THE COMMISSION’S RULES

A. A waiver is appropriate because, contrary to USAC’s determination, the Municipality ultimately selected the lowest cost proposal.

The Commission’s rules require that applicants “select the most cost-effective service offering.”⁶ When determining which service offering is the most cost-effective, applicants “may consider relevant factors other than the pre-discount prices . . . , but price *should* be the primary factor considered.”⁷ While applicants may take factors other than price into consideration, price

⁵ The Notification of Commitment Adjustment Letter regarding FCC Form 471 Application No. 753259 was attached as Exhibit B to the *Municipality’s Request*. The Notification of Commitment Adjustment Letter regarding FCC Form 471 Application No. 752817 was attached as Exhibit C to the *Municipality’s Request*.

⁶ 47 C.F.R. § 54.511(a).

⁷ 47 C.F.R. § 54.511(a) (emphasis added).

must be given more weight than any other factor.⁸ The purpose of the requirement that applicants select the most cost-effective service offering is to ensure that the size of the universal service support mechanisms is no higher than necessary to effectuate a comprehensive federal universal service policy.⁹ In this case, the evidence demonstrates that the Municipality complied with the requirement that it select that most cost-effective service offering because it ultimately selected the lowest cost proposal.

As previously stated, the Municipality received three cost proposals. Nevesem's cost proposal was \$1,089,417 (*see* Exhibit A). HitNet's cost proposal was \$1,169,800 (*see* Exhibit B). EdNet cost proposal was \$1,310,664 (*see* Exhibit C).

In its *Request for Review and Waiver*, the Municipality did not include the copy of the cost proposals received from Nevesem and EdNet. However, by this *Supplement*, the Municipality provides complete copies of all three proposals to permit the Commission to carefully review and compare the content of each documents.

The Audit Report stated that HitNet bid quoted a total cost of \$431,725 for the requested Internet access services and internal connections but, as explained herein, that is incorrect. HitNet's cost proposal states that the cost of providing Internet access and telecommunications services is \$2,783.00 per month per site. Because the Municipality sought E-rate support for the entire funding year, the \$2,783.00 figure must be multiplied by 12 to account for the entire funding year, which results in \$33,396 per site ($\$2,783 \times 12 = \$33,396$). Furthermore, because the Municipality sought proposals for service at twenty five (25) locations, the \$33,396 figure

⁸ *In the Matter of the Request of Review of the Administrator's Decision by Ysleta Ind. Sch. Dist. et al.*, CC Docket Nos. 96-45, 97-21, Order, FCC 03-313, 18 FCC Rd. 26407, 26429, ¶ 50 (2003) (Ysleta Order).

⁹ *See In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, Report and Order, 12 FCC Rcd 8776, para. 55 (1997); *see also Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202 (2003) (codifying 47 C.F.R. § 54.511(a)).

must be multiplied by twenty five (25) to account for all of the Municipality's locations, which results in a bid for the total amount of \$834,900 per year for all locations ($\$33,396 \times 25 = \$834,900$).

Furthermore, HitNet's cost proposal states that the one-time cost of the equipment is \$11,403 per site and the one-time cost of installation of such equipment is \$1,993 per site, which is a total of \$13,396 per site ($\$11,403 + \$1,993 = \$13,396$). Because the Municipality sought proposals for service at twenty five (25) locations, the \$13,396 figure must be multiplied by twenty five (25) to account for all of the Municipality's locations, which totals \$334,900 ($\$13,396 \times 25 = \$334,900$).

In sum, adding up the \$834,900 cost proposal for the provision of Internet access and telecommunications services and the \$334,900 cost proposal for the provision of equipment and Internal Connections, HitNet's total cost proposal for funding year 2010 was \$1,169,800 ($\$834,900 + \$334,900$). Thus, HitNet's cost proposal was higher than Nevesem's \$1,089,417 cost proposal.

The Municipality does not know how or why USAC's auditors concluded that "HitNet's bid quoted a total cost of \$431,725 for the requested Internet access services and internal connections." Admittedly, HitNet's proposal was extremely confusing because the quotes were provided on a per site and per month basis. However, the evidence presented herein clearly demonstrates that the Municipality ultimately selected the lowest cost proposal.

B. Even if the Commission concluded with USAC's contention that the Municipality did not assign the most points to the price category, a waiver is appropriate in this case because the Municipality selected the lowest cost proposal.

USAC alleges that the Municipality did not consider price as the primary factor in selecting the winning bidder because: "The Beneficiary did not utilize a different category than

price to score site visits and, therefore, price was not the primary factor when selecting the winning service provider.” The *Municipality’s Request* explains why the Municipality believed that it was appropriate and necessary to consider site visits as part of the price category.¹⁰ Nevertheless, even if it was erroneous for the Municipality to consider site visits as part of the price category, a waiver would be appropriate because, as stated above, the Municipality actually selected the lowest cost proposal, which is ultimately the policy goal of the requirement that applicants select the most cost-effective service offering. Consequently, as discussed below, a waiver under these circumstances would be consistent with Commission precedent.

In Allendale County School District, the Commission considered a situation in which applicants did not assign the highest weight to the price category when evaluating bids.¹¹ For instance, the applicants Our Lady of Fatima School and Hmong Academy assigned the same number of points to each of the evaluation criteria used.¹² The applicants Irving Independent School District, St. Cecilia School, Benson Unified School District, Meridian Joint School District and Point Pleasant Board of Education assigned more points to categories other than price.¹³ However, the Commission did not stop its analysis there. Instead, the Commission went

¹⁰ The *Municipality’s Request* stated that the Municipality considered site visits as part of the price factor because site visits allow bidders to gain an understanding of the applicant’s actual operational environment, the actual facilities and technologies in use, the specific locations where the equipment is to be located, the challenges to deploying equipment and services to particular locations, and the applicant’s overall development and service priorities in light of its technology needs, and that this information allows a bidder to provide a more accurate bid relating to the cost of the E-Rate services and products. *Request* at p. 11.

¹¹ *Requests for Review of Decisions of the Universal Service Administrator by Allendale County School District, Cedar Mountain, North Carolina*, CC Docket No. 02-6, Order, 26 FCC Rcd 6109 (2011).

¹² *Allendale County School District*, para. 10, n.42 (“According to the evaluation worksheet used in Fatima’s vendor selection process, each of the five evaluation criteria was given equal weighting”) (“Hmong gave equal weight to each of the five evaluation criteria used in its process”).

¹³ *Allendale County School District*, para. 10, n.42 (noting that Irvin assigned points in each category “on a scale of 1 to 10”) (“The decision matrix used in St. Cecilia’s vendor selection process shows that “price” was given a weighting of 30 points, while the “requirements match” category was given a value of 50 points”) (“Benson and Hmong each considered “cost” as a separate evaluation criterion, but neither applicant assigned the greatest weight to that criterion for bid evaluation purposes.”) (“The bid evaluation sheet used in Meridian’s vendor selection process shows that the “quality of service, skill of vendor, and ongoing service and maintenance” category was

on to consider the fact that the applicants selected the lowest priced bids, which alleviated any mistakes the applicants may have made in their evaluation matrices. The Commission stated that, while it agreed with USAC that the applicants “...did not comply with the Commission’s rule to assign the highest weight to price when evaluating bids...,” the record showed that the applicants “...conducted a competitive bidding process that resulted in the selection of the most cost-effective service offering” and that “... rejecting the petitioners’ funding requests is not warranted in these circumstances.”¹⁴ The Commission also stated that there was no evidence of any violation of state or local procurement laws, and no evidence of waste, fraud or abuse, or misuse of funds.

In Euclid City School District, an applicant assigned “cost” and “perception of needs” were each weighted at forty (40) percent and “national presence” was weighted at twenty (20) percent.¹⁵ Another applicant conducted two (2) vendor selection processes in which there were nine (9) equally-weighted evaluation criteria.¹⁶ Here, too, the Commission granted a waiver because the applicants “...**ultimately selected the least expensive responsive service offerings, despite failing to assign the highest weight to price in their vendor evaluation processes,**” noting that “...the outcomes of their vendor selection processes were consistent with the policy goals underlying the Commissions’ competitive bidding rules.”¹⁷

In Midlothian School District, the applicant prepared two vendor evaluation matrices for the funding request at issue. According to the first evaluation matrix, “total cost” was weighted

given 20 points, while the “price” category was given 10 points”) (“When evaluating each proposal, Point Pleasant assigned an 80 percent weight to performance and a 20 percent weight to price.”).

¹⁴ *Allendale County School District*, paras. 10 and 12.

¹⁵ *Requests for Review of Decisions of the Universal Service Administrator by Euclid City School District, Euclid, OH*, CC Docket No. 02-6, Order, 27 FCC Rcd 14169, para 2, n.8 (2012).

¹⁶ *Euclid City School District*, para 2, n.8.

¹⁷ *Euclid City School District*, para. 2.

at hundred (100) percent, while the remaining two evaluation factors, “number of units” and “pooled minutes,” were each given a weight of zero.¹⁸ The second evaluation matrix showed that two of the four evaluation factors considered, “walkie-talkie capability” and “price,” were each assigned a point value of thirty five (35) points.¹⁹ Even though it was not clear that price was given the highest weight or value, the Commission considered the fact that the applicant selected the lowest priced bid, which alleviated any mistakes the applicant may have made in its evaluation matrices. Specifically, the Commission granted a waiver on the following grounds: “[t]he record shows that Midlothian selected the lowest priced bid for the funding request at issue. Given that Midlothian ultimately selected the least expensive service offering, despite the ambiguity as to whether it assigned the highest weight or value to price in its vendor evaluation process, we find that the outcome of Midlothian’s vendor selection process was consistent with the policy goals underlying the Commission’s competitive bidding rules.”²⁰

In light of the above, even if the Commission concludes that it was not appropriate for the Municipality to consider site visits as part of the price category, the Commission’s decisions in Allendale County School District, Euclid City School District and Midlothian School District, support a waiver in favor of the Municipality.

Like the applicants who obtained waivers in these cases, a waiver is appropriate here because: (1) the Municipality selected the least expensive service offering; (2) the outcome of the Municipality’s selection process is consistent with the policy goals underlying the competitive bidding rules; (3) the Municipality complied with all state and local procurement laws; and (4) the Municipality has not engaged in waste, fraud or abuse, or misuse of funds. Furthermore, the

¹⁸ *Request for Review of a Decision of the Universal Service Administrator by Midlothian School District 143 Midlothian, IL*, CC Docket No. 02-6, Order, 28 FCC Rcd 08970, , para. 2, n.5. (2013).

¹⁹ *Midlothian School District*, para. 2, n.5.

²⁰ *Midlothian School District*, para. 2.

Municipality was and continues to be in compliance with all core program requirements. Specifically, the Municipality submitted the required application forms within the requisite deadlines, waited the requisite twenty eight (28) days before selecting a service provider, and conducted a fair and open competitive bidding process in which all vendors had access to the same information.

C. As a matter of equity and fairness, the Commission should take into consideration special circumstances affecting the Municipality and the hardship that it would suffer if a waiver is not granted.

The *Municipality's Request* explained that, absent Commission grant of a waiver, the Municipality would be liable for \$721,784 for funding year 2010, which would be devastating to the Municipality and its library patrons, because the Municipality simply does not have such funds to provide such an important public service.²¹ That continues to be the case, as the Municipality's economic situation has not changed. Furthermore, since the filing of the *Request*, USAC has rescinded the Municipality's applications for funding years 2012 and 2013. For funding year 2012, USAC made virtually the same allegations it made with respect to funding year 2010, and is seeking recovery of \$254,768.40.²² For funding year 2013, USAC faulted the Municipality for not selecting a service provider who attempted to improperly influence the outcome of the Municipality's competitive bidding process by proposing to make a cash payment to the Municipality in clear violation of section 54.523 of the Commission's rules, and USAC is seeking recovery of \$290,736.00.²³ Thus, for funding years 2010, 2012 and 2013 combined, USAC is seeking recovery for the total amount of \$1,267,288.40.

²¹ *Request* at pp. 3, 19.

²² On June 30, 2014, the Municipality filed with the Commission a Request for Review and Waiver for FY2012, which is currently pending.

²³ On July 15, 2014, the Municipality filed with the Commission a Request for Review and Waiver for FY2013, which is currently pending.

Funding year 2010 was the first year that the Municipality of San Juan applied for E-rate funds. If the Municipality did not have a full command of the nuances of each and every aspect of the E-rate program, it was not because it willfully chose to do so, but because it was struggling to “catch up” with the rules and regulations of a program that was new to the Municipality and its employees and that, as the Municipality quickly learned, has complex rules and procedures. Furthermore, the program is conducted in English, which presents an additional challenge because the employees responsible for the Municipality’s E-rate applications, for whom Spanish is their first language and, in some cases, the *only* language, oftentimes struggled to appreciate the nuances of the program’s rules and requirements.²⁴

The Municipality does not provide this information in an effort to excuse non-compliance with rules that the Commission has determined are important to the integrity of the program. The Municipality merely requests that, as a matter of equity and fairness, the Commission take into consideration the special circumstances affecting the Municipality, *i.e.*, a local municipality located in a Spanish-speaking territory applying, for the very first time, for funds under a program that has complex rules and procedures.

A waiver would have minimal impact on the universal service fund, as the funds were already approved in Funding Commitment Decision Letters and disbursed by USAC. In the absence of a waiver, the Municipality will have to: (a) stop participating in the program because USAC will get the Municipality “red-lighted” and the Municipality will not have the funds necessary to get the red light lifted, (b) ask its current service provider to discontinue service, as the Municipality cannot afford to incur more liability to USAC, and (c) leave its patrons without Internet access at a time when such services are most critical for those seeking educational and

²⁴ The Municipality does not have the financial resources to hire E-rate consultants to administer the program for it, which means that the Municipality must rely on its own human resources.

employment opportunities, health care information, information about government services and benefits, among others.

Such a result would be most unfortunate because the Municipality is confident that it ultimately selected the lowest cost bid and that it did not engage in fraud, waste, abuse or misuse of funds. The monies received from USAC were used for good and valuable services received from a service provider who was selected through a fair and unbiased competitive bidding process and who, as an undisputed fact, offered the lowest cost proposal. This was a good use of E-rate funds. Under these facts, the Commission should exercise its discretion to waive its rules because strict compliance would be completely inconsistent with the public interest.²⁵

III. CONCLUSION

For the reasons set forth in the *Request* submitted on January 24, 2014 and the instant *Supplement*, the Municipality respectfully requests a waiver of sections 54.504(c) and 54.511(a) as well as any other relevant sections of the Commission's rules.

²⁵ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

Respectfully submitted,

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Via the FCC's Electronic Comment
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