

Before the
Federal Communications Commission
Washington, DC 20554

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

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).

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.*

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).

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
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