

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Requests for Review of Decisions of the
Universal Service Administrator by
Consortio de Escuelas y Bibliotecas de
Puerto Rico
San Juan, Puerto Rico
Hispanic Information and Telecommunications
Network, Inc.
Brooklyn, New York
Schools and Libraries Universal Service
Support Mechanism
File Nos. SLD-228207, 237466, et al.
CC Docket No. 02-6

ORDER

Adopted: October 30, 2008

Released: October 30, 2008

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

I. INTRODUCTION

1. In this order, we address two appeals filed by Consortio de Escuelas y Bibliotecas de Puerto Rico (Consortio) and its service provider, Hispanic Information and Telecommunications Network, Inc. (HITN), (collectively, petitioners) of decisions by the Universal Service Administrative Company (USAC) denying funding under the schools and libraries universal service support mechanism, also known as the E-rate program, for Funding Year 2001. USAC found that the underlying applications violated the Commission’s competitive bidding rules due to improper service provider involvement in the competitive bidding process. As discussed below, we find that, based on the record before us, special circumstances exist to justify a waiver of the Commission’s competitive bidding rules. We thus remand the underlying applications to USAC for further action consistent with this order. To ensure that the

1 See HITN Request for Review of SLD Funding Denial to CEBPR 2001 Funding Applications and Supporting Comments, CC Docket Nos. 02-6 and 96-45 (filed Aug. 25, 2006) (HITN Request for Review); Consortio Request for Review of a Decision by Schools and Libraries Division to Deny Funding Commitment for Funding Year 2001-2002, CC Docket Nos. 02-6 and 96-45 (filed Aug. 25, 2006) and Consortio Request for Review of a Decision by Schools and Libraries Division to Deny Funding Commitment for Funding Year 2001-2002, CC Docket Nos. 02-6 and 96-45 (Oct. 2, 2006) (collectively, Consortio Requests for Review). Funding Year 2001 started on July 1, 2001, and ended on June 30, 2002. In this order, we use the term “appeals” to generally refer to requests for review of decisions by USAC. 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).

2 See 47 C.F.R. §§ 54.504, 54.511.

underlying applications are resolved expeditiously, we direct USAC to issue an award or a denial based on a complete review and analysis no later than 60 calendar days from the release date of this order.

II. BACKGROUND

2. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access and internal connections.³ The Commission's rules provide that an eligible school, library, or consortium that includes eligible schools and libraries must seek competitive bids for all services eligible for support.⁴ Applicants thus must submit for posting on USAC's website an FCC Form 470 requesting discounts for E-rate eligible services, such as tariffed telecommunications services, month-to-month Internet access, or any services for which the applicant is seeking a new contract.⁵ The applicant must describe the desired services with sufficient specificity to enable potential service providers to submit bids for such services.⁶ The applicant must provide this description on its FCC Form 470 or indicate on the form that it has a Request for Proposal (RFP) available providing detail about the requested services.⁷ The RFP must be available to all potential bidders for the duration of the bidding process.⁸

3. After submitting an FCC Form 470, the applicant must wait 28 days before making commitments with the selected service providers.⁹ The applicant must consider all submitted bids prior to entering into a contract and price must be the primary factor in selecting the winning bid.¹⁰ Once the applicant has selected a provider and entered into a service contract, the applicant must file an FCC Form 471 requesting support for eligible services.¹¹ USAC assigns a funding request number to each request for discounted services and issues funding commitment decision letters approving or denying the requests for discounted services.¹²

4. In the *MasterMind Order*, released in May 2000, the Commission observed that the contact person listed on an applicant's FCC Form 470 influences an applicant's competitive bidding process by

³ 47 C.F.R. §§ 54.501-54.503.

⁴ 47 C.F.R. § 54.504. An existing contract signed on or before July 10, 1997, however, is exempt from the competitive bid requirements. *See* 47 C.F.R. § 54.511(c).

⁵ 47 C.F.R. § 54.504(b).

⁶ *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9078-79, para 575 (1997) (subsequent history omitted).

⁷ *See, e.g.*, Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (FCC Form 470).

⁸ FCC Form 470.

⁹ 47 C.F.R. § 54.504(b)-(c).

¹⁰ 47 C.F.R. § 54.511(a).

¹¹ *See, e.g.*, Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (FCC Form 471).

¹² *See* USAC website, Schools and Libraries, Schools and Library Applicants, <http://www.usac.org/sl/applicants/step09/> (retrieved Aug. 14, 2008)

controlling the dissemination of information regarding the services requested.¹³ For this reason, the Commission found that, when an applicant delegates that power to an entity that also participates in the bidding process as a prospective service provider, the applicant impairs its ability to hold a fair competitive bidding process.¹⁴ The Commission thus concluded that an applicant would be in violation of the competitive bidding rules “where a service provider that is listed as the contact person on the Form 470 also participates in the competitive bidding process as a bidder.”¹⁵

5. *Consortio and HITN Requests for Review.* USAC denied Consortio, a consortium of schools and libraries serving Spanish speakers, funding under the E-rate program for Funding Year 2001 on the grounds that it improperly listed an employee of its service provider, HITN, Gloria Bermudez, as a contact person on the FCC Forms 470.¹⁶ In their appeals to the Commission, the petitioners generally argue that Consortio’s language barrier contributed to its lack of a full understanding of the E-rate program rules, resulting in the Consortio members listing Ms. Bermudez as the alternate contact person on the FCC Forms 470.¹⁷ Consortio argues that Ms. Bermudez was the only person who could translate any E-rate program information or questions from English to Spanish on behalf of its members.¹⁸ Consortio asserts that USAC made virtually no effort to make the E-rate process accessible to Spanish-speaking participants thereby necessitating the translation services provided by Ms. Bermudez.¹⁹ Consortio further states that Ms. Bermudez was familiar with the E-rate program and the services Consortio had received in prior years and was invaluable in helping each consortium member navigate the E-rate program.²⁰ Lastly, the petitioners note that no other service provider disputed Consortio’s competitive bidding process and that there is no evidence that waste, fraud, or abuse of the E-rate program was caused by this error.²¹ HITN also asserts that its employee, Ms. Bermudez, was not involved in the competitive bidding process.²² The petitioners thus request that the Commission direct USAC to grant Consortio’s funding requests.²³

¹³ *Request for Review by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SPIN-143006149, CC Docket No. 96-45, 16 FCC Rcd 4028, 4033, para. 10 (2000) (*MasterMind Order*).

¹⁴ *Id.*

¹⁵ *Id.* The Commission also stated that “[To] the extent a [service provider] employee was listed as the contact person on the FCC Form 470 that initiated a competitive bidding process in which [the service provider] participated, such Forms 470 were defective and violated our competitive bidding requirements. In the absence of valid Forms 470, the requests for support were properly denied.” *Id.* at 4032, para. 9.

¹⁶ *See e.g.*, Letter from USAC, Schools and Libraries Division, to Ines O’Neil, Biblioteca Publica Aguada (dated June 26, 2006).

¹⁷ *See* Consortio Requests for Review at 5; HITN Request for Review at 2.

¹⁸ *See* Consortio Requests for Review at 5.

¹⁹ *Id.* at 2. USAC’s website indicates that it began to make its website and training materials available in Spanish in December 2004. *See* USAC website, Schools and Libraries Division, December 2004 Announcements, <http://www.usac.org/sl/tools/news-archive/2004/122004.asp> (retrieved Aug. 4, 2008).

²⁰ Consortio Requests for Review at 5.

²¹ *Id.* at 9-10; HITN Request for Review at 3-4.

²² HITN Request for Review at 2.

²³ Consortio Requests for Review at 9-10; HITN Request for Review at 6.

III. DISCUSSION

6. We grant Consorcio's and HITN's appeals. As discussed above, the Commission has determined that a competitive bidding violation occurs when a service provider that is listed as a contact person on the FCC Form 470 also participates in the competitive bidding process as a bidder.²⁴ Based on the facts and circumstances of this specific case, however, we find that good cause exists to waive the Commission's competitive bidding rules to the limited extent described herein.²⁵

7. First, Consorcio noted that it listed Ms. Bermudez as an alternative contact person because she spoke English, and Consorcio thought that it would need a contact person who spoke English to respond to any questions from USAC about the applications.²⁶ In contrast, other individuals were designated as the primary contacts on the FCC Form 470, and were available to speak with service providers as needed. The inability of the applicants to be able to communicate in English – the language in which the Commission's rules, E-rate forms, and USAC E-rate guidance were provided – combined with the lack (at the time) of USAC personnel fluent in Spanish presented special circumstances for these applicants.²⁷ We thus find that it was reasonable at that time for Consorcio to list an English-speaking person as an alternate contact person on its FCC Form 470.²⁸

8. Second, Consorcio listed Ines O'Neill, executive director of Consorcio, and Dr. Moises Velasquez, a member of the board of directors of Consorcio, as its primary contacts on the FCC Form 470.²⁹ Consorcio listed Ms. Bermudez only as an alternate contact person.³⁰ Therefore, if any other service providers in Puerto Rico wanted additional information about the services sought, or wanted to submit a bid for the services, they could have contacted a representative of the consortium to do so, rather than a person associated with a service provider. Moreover, USAC itself seems to have recognized the communication difficulties presented for applicants like Consorcio and now has Spanish-speaking personnel who can communicate with applicants like Consorcio. As a result, the language barriers that

²⁴ See *infra* para. 4; *MasterMind Order*, 16 FCC Rcd at 4032, para. 9.

²⁵ See 47 C.F.R. §§ 54.504(a)-(b). The Commission may waive any provision of its rules on its own motion and for good cause shown. 47 C.F.R. § 1.3. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972). In sum, 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. *Northeast Cellular*, 897 F.2d at 1166. Because we determine that special circumstances warrant waiver of the competitive bidding rules, we do not address the petitioners' argument that the mistake was ministerial error or that USAC improperly relied on pattern analysis procedure. See Consorcio Requests for Review at 5-8; HITN Request for Review at 2-3, 5.

²⁶ Consorcio Requests for Review at 5.

²⁷ *Id.* at 3, 5.

²⁸ We note that USAC now has employees that speak Spanish, so the inability of an applicant to communicate with USAC in English is no longer an issue and would not demonstrate good cause to waive the competitive bidding rules in the future.

²⁹ See *e.g.*, FCC Form 470, Biblioteca Publica Rio Grande, File No. SLD-236756, Item 6 (filed Dec. 7, 2000).

³⁰ See *e.g.*, FCC Form 470, Biblioteca Publica Rio Grande, File No. SLD-236756, Item 11 (filed Dec. 7, 2000).

necessitated an English-speaking intermediary to be designated by Consorcio appear to have been eliminated.

9. We thus find that the petitioners have demonstrated that adherence to the Commission's rules in this instance does not further the purposes of section 254(h) of the Communications Act of 1934, as amended (the Act), or serve the public interest.³¹ Specifically, section 254 of the Act directs the Commission to "enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers and libraries."³² In addition, at this time, we find no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements. We therefore find that denying the underlying applications on the grounds that the FCC Forms 470 contained improper service provider contact information is not warranted under these special circumstances.³³ Accordingly, we grant these appeals and remand the underlying applications to USAC for further action consistent with this order. To ensure that the underlying applications are resolved expeditiously, we direct USAC to issue an award or a denial based on a complete review and analysis no later than 60 calendar days from the release date of this order.³⁴ In remanding these applications to USAC, we make no finding as to the ultimate eligibility of the services or the petitioners' applications.³⁵ We remind USAC of its obligation to independently determine whether the disbursement of universal service funds would be consistent with program requirements, Commission rules and orders, or applicable statutes and to decline to disburse funds where this standard is not met.

10. We emphasize, however, the limited nature of this decision. We again stress that employees of the service provider cannot be listed as the contact person on an applicant's FCC Form 470 and also participate in the competitive process. Where there is improper service provider involvement in the competitive bidding process, the application will be denied. Thus, although we grant these appeals in this instance due to special circumstances, we continue to require E-rate applicants to comply with the Commission's competitive bidding rules when applying for support under the E-rate program.

11. Finally, we emphasize that the Commission is committed to guarding against waste, fraud, and abuse, and ensuring that funds disbursed through the E-rate program are used for appropriate purposes. Although we grant the appeals addressed here, this action does not affect the authority of the Commission or USAC to conduct audits or investigations to determine compliance with the E-rate program rules and requirements. Because audits or investigations may provide information showing that

³¹ See 47 U.S.C. § 254(h). The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, amended the Communications Act of 1934.

³² See 47 U.S.C. § 254(h).

³³ See *MasterMind Order*, 16 FCC Rcd at 4032, para. 9. We estimate that the appeals granted in this order involve applications for approximately \$9,537,202.57 in funding. We note that USAC has already reserved sufficient funds to address the outstanding appeals. Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter 2008 (Aug. 1, 2008). We thus determine that the action we take today should have minimal impact on the universal service fund as a whole.

³⁴ In performing a complete review and analysis of the underlying application, USAC shall either grant the underlying application before it, or, if denying the application, provide the applicant with any and all grounds for denial.

³⁵ Additionally, nothing in this order is intended: (1) to authorize or require payment of any claim that previously may have been released by a service provider or applicant, including in a civil settlement or plea agreement with the United States; or (2) to authorize or require payment to any person or entity that has been debarred from participation in the E-rate program.

a beneficiary or service provider failed to comply with the statute or the Commission's rules, such proceedings can reveal instances in which universal service funds were disbursed improperly or in a manner inconsistent with the statute or the Commission's rules. To the extent the Commission finds that funds were not used properly, the Commission will require USAC to recover such funds through its normal processes. We emphasize that the Commission retains the discretion to evaluate the uses of monies disbursed through the E-rate program and to determine on a case-by-case basis that waste, fraud, or abuse of program funds occurred and that recovery is warranted. The Commission remains committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under the Commission's procedures and in cooperation with law enforcement agencies.

II. ORDERING CLAUSES

12. 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 pursuant to authority delegated in sections 0.91, 0.291, 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3 and 54.722(a), that the requests for review filed by the Hispanic Information and Telecommunications Network, Inc., Brooklyn, New York, on August 25, 2006, and Consorcio de Escuelas y Bibliotecas de Puerto Rico, San Juan, Puerto Rico, on August 25, 2006, and October 2, 2006, respectively, ARE GRANTED and the underlying applications ARE REMANDED to USAC for further processing consistent with this order.

13. 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 in sections 0.91, 0.291, 1.3 and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3 and 54.722(a), that the requirements contained in sections 54.504(a)-(b) of the Commission's rules, section 47 C.F.R. §§ 54.504(a)-(b), ARE WAIVED as described herein.

14. IT IS FURTHER ORDERED that, 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 in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, USAC SHALL ISSUE an award or a denial based on a complete review and analysis no later than 60 calendar days form the release date of this order.

15. IT IS FURTHER ORDERED, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), that this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Jennifer K. McKee
Acting Chief
Telecommunications Access Policy Division
Wireline Competition Bureau