

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of )
)
Petition for Reconsideration 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 ON RECONSIDERATION

Adopted: October 23, 2013

Released: October 23, 2013

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

1. Consistent with precedent,<sup>1</sup> we grant a Petition for Reconsideration filed by Fall River Public School District (Fall River).<sup>2</sup> In the Fall River Order, we affirmed the decision of the Universal Service Administrative Company (USAC) to deny Fall River funding under the E-rate program (more formally known as the schools and libraries universal service support program) for funding year 2009.<sup>3</sup> In its decision, USAC determined that Fall River failed to use price as the primary factor in its vendor selection process in violation of the Commission’s competitive bidding requirements.<sup>4</sup> Based upon our

1 See 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, 6115-17, paras. 10-12 (Wireline Comp. Bur. 2011) (Allendale County Order); Requests for Review of Decisions of the Universal Service Administrator by Colorado Springs School District; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 27 FCC Rcd 7022 (Wireline Comp. Bur. 2012) (each finding that a waiver of the Commission’s competitive bidding rules, which require applicants to use price as the primary factor in the vendor selection process, was in the public interest when the applicant ultimately selected the least expensive bid).

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 June 21, 2013) (Petition for Reconsideration) (regarding funding year 2009 FCC Form 471 application number 662946 (funding request number (FRN) 1819200)). The Bureau has the authority to act on petitions requesting reconsideration of final actions taken pursuant to delegated authority. 47 C.F.R. § 1.106(a)(1). In this Order on Reconsideration, we describe the requirements of the E-rate program as they currently exist, but because the Order involves an application from funding year 2009, and the Commission has reorganized the E-rate rules since then, where the Commission’s codification of the rules in the Code of Federal Regulations has changed, we also cite to the relevant rules as they existed during the relevant funding year.

3 See Request for Review of a Decision of the Universal Service Administrator by Fall River Public School District; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 28 FCC Rcd 7427 (Wireline Comp. Bur. 2013) (Fall River Order).

4 See Letter from USAC, Schools and Libraries Division, to Bryan Mikolazyk, Fall River Public School District (dated Sept. 8, 2009).

review of the record, we affirmed USAC's decision and denied Fall River's Request for Review.<sup>5</sup> As discussed below, because Fall River has now provided evidence that it selected the lowest price vendor, we find that a waiver of the Commission's rules requiring applicants to use price as the primary factor in selecting E-rate vendors is in the public interest, and we therefore grant Fall River's Petition for Reconsideration.<sup>6</sup>

2. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible services.<sup>7</sup> The Commission's rules provide that these entities must seek competitive bids for all services eligible for support.<sup>8</sup> 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.<sup>9</sup> The Commission's rules require applicants to carefully consider all submitted bids prior to entering into a contract, and to treat the price of eligible products and services as the primary factor in selecting the winning bid.<sup>10</sup> 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.<sup>11</sup> When evaluating bids, however, applicants must have a separate "cost category" and that category must be given more weight than any other single factor.<sup>12</sup>

3. In the *Fall River Order*, based on the evidence in the record at that time, we found that Fall River failed to comply with the Commission's competitive bidding requirements for FRN 1819200, because it did not assign the greatest weight to price in selecting the winning bid.<sup>13</sup> However, in its

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<sup>5</sup> See *Fall River Order*.

<sup>6</sup> See 47 C.F.R. §§ 54.503, 54.511 (2011); 47 C.F.R. §§ 54.504, 54.511 (2009). Generally, the Commission's rules may be waived if good cause is shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule 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, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166.

<sup>7</sup> 47 C.F.R. §§ 54.501-54.502.

<sup>8</sup> 47 C.F.R. § 54.503 (2011); see also 47 C.F.R. § 54.504 (2009).

<sup>9</sup> See *id.* See also Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (FCC Form 470).

<sup>10</sup> See 47 C.F.R. §§ 54.503, 54.511 (2011); 47 C.F.R. §§ 54.504, 54.511 (2009). 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) (stating that price must be the primary factor in selecting the winning bid); *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District et al.*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407, 26429, para. 50 (2003) (*Ysleta Order*).

<sup>11</sup> See *Universal Service First Report and Order*, 12 FCC Rcd at 9029, para. 481. See also 47 C.F.R. § 54.511.

<sup>12</sup> See *Ysleta Order*, 18 FCC Rcd at 26429, para. 50 (stating that when evaluating bids, the "cost category" must be given more weight than any other single factor). 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.

<sup>13</sup> See *Fall River Order*, 28 FCC Rcd at 7428, para. 3.

Petition for Reconsideration, Fall River provides a chart comparing the cost of the four vendors' proposals, in support of its assertion that it selected the lowest-cost provider.<sup>14</sup>

4. The Commission's rules do not favor requests for reconsideration which rely on facts not previously presented to the Commission or to its designated authority.<sup>15</sup> However, in this case, we find that because (1) Fall River previously argued that it had selected the lowest-cost vendor, and has now presented documentation which is responsive to the evidentiary shortcoming identified in the underlying order, and (2) we have granted waivers to other applicants that have demonstrated that they selected the lowest-cost vendor even though they did not use price as the primary factor in their selection processes,<sup>16</sup> it is in the public interest for us to consider Fall River's newly presented evidence in support of that argument.<sup>17</sup> In light of the documentation Fall River has provided demonstrating that it selected the lowest-cost provider,<sup>18</sup> we find that the outcome of Fall River's vendor selection process is consistent with the policy goals underlying the Commission's competitive bidding rules.<sup>19</sup> Therefore, we find that it is in the public interest to waive sections 54.504 and 54.511 of the Commission's rules,<sup>20</sup> which require applicants to use price as the primary factor in the vendor selection process, with respect to the funding request identified herein.<sup>21</sup> Further, at this time, there is no evidence of waste, fraud and abuse in the record.

5. To ensure that the underlying application is resolved expeditiously, we direct USAC to complete its review of the underlying application no later than 60 calendar days from the release date of this order. In remanding this application to USAC, we make no finding as to the ultimate eligibility of the services in the underlying application. We therefore, on our own motion, waive section 54.507(d) of the Commission's rules for Fall River's funding year 2009 application, and direct USAC to waive any procedural deadline, such as the invoicing deadline, that might be necessary to effectuate our ruling.<sup>22</sup> We find good cause to waive section 54.507(d) because filing an appeal of a denial is likely to cause the applicant to miss the program's subsequent procedural deadlines in that funding year.

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 0.91, 0.291, 1.106, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.106, and 54.722(a), that the Petition for Reconsideration filed by Fall River Public School District on June 21,

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<sup>14</sup> See Petition for Reconsideration at Attach. A. According to this chart, Merrimack Education Center bid \$251,338 and was ultimately awarded the contract to provide the services at issue. *Id.* Three other vendors submitted bids as well: CELT bid \$303,783; USAi bid \$402,450; and Galaxy bid \$633,083. *Id.*

<sup>15</sup> See 47 C.F.R. § 1.106(c) (allowing petitions for reconsideration relying on new facts or arguments to be granted only under limited circumstances).

<sup>16</sup> See *supra* n.1.

<sup>17</sup> See 47 C.F.R. § 1.106(c)(2) (allowing consideration of new facts or arguments relied upon in a petition for reconsideration when it is in the public interest to do so).

<sup>18</sup> See Petition for Reconsideration at Attach. A.

<sup>19</sup> See 47 C.F.R. §§ 54.503, 54.511 (2011); 47 C.F.R. §§ 54.504, 54.511 (2009). See also *Allendale County Order*, 26 FCC Rcd at 6115, para. 10 (finding that the applicant satisfied the policy goals underlying the Commission's competitive bidding rules when it selected the least expensive responsive bid, even though it did not assign the highest weight to the price category in the bid evaluation process).

<sup>20</sup> See 47 C.F.R. §§ 54.503, 54.511 (2011); 47 C.F.R. §§ 54.504, 54.511 (2009).

<sup>21</sup> See 47 C.F.R. §§ 54.503, 54.511 (2011); 47 C.F.R. §§ 54.504, 54.511 (2009).

<sup>22</sup> 47 C.F.R. § 54.507(d) (requiring non-recurring services to be implemented by September 30 following the close of the funding year).

2013 IS REMANDED to USAC for further consideration in accordance with the terms of this Order on Reconsideration.

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 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 sections 54.504 (2009), 54.511 (2009), and 54.507(d) of the Commission's rules, 47 C.F.R. §§ 54.504, 54.511 (2009) and 47 C.F.R. § 54.507(d), ARE WAIVED to the limited extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Kimberly A. Scardino  
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