

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
Request for Waiver and Review of a)
Decision of the)
Universal Service Administrator by)
West Oso Independent School District) File No. SLD- 858082
Corpus Christi, TX)
Schools and Libraries Universal Service) CC Docket No. 02-6
Support Mechanism)

ORDER

Adopted: June 12, 2014

Released: June 12, 2014

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

1. Consistent with precedent,¹ we deny a request from West Oso Independent School District (West Oso)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 In its decision, USAC determined that West Oso violated the Commission’s competitive bidding rules by failing to use price as the primary factor in its vendor selection process.⁴

1 See 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.; Schools and Libraries Universal Service Support Mechanism, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407, 26429, para. 50 (2003) (Ysleta Order) (stating that when evaluating bids, the “cost category” must be given more weight than any other single factor); Request for Review of a Decision of the Universal Service Administrator by Henrico County School District; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 28 FCC Rcd 6277 (Wireline Comp. Bur. 2013) (Henrico Order) (Application for Review pending) (stating that Henrico’s ability to find a way to re-engineer its competitive bidding process after the conclusion of that process, to reach its desired result, does not demonstrate compliance with the Commission’s competitive bidding rules). See also 47 C.F.R. §§ 54.503, 54.511 (requiring applicants to use price as the primary factor in the vendor selection process).

2 See Letter from Kevin Witte, E-rate Consulting Personal E-rate Partner, on behalf of West Oso Independent School District, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed July 10, 2013) (Request for Waiver) (regarding funding year 2012 FCC Form 471 application number 858082 (funding request number (FRN) 2334699)).

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 Rhonda Scholwinski, West Oso Independent School District (dated Apr. 30, 2013) (regarding funding year 2012 FCC Form 471 application number 858082 (FRN 2334699)). See also 47 C.F.R. §§ 54.503, 54.511.

Based on our review of the record, we agree with USAC's determination and find that West Oso 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 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 West Oso's request for support.¹² Specifically, we find that West Oso failed to comply with the Commission's competitive bidding requirements for FRN 2334699, because it did not assign the highest weight to price as required by the Commission's rules in its vendor selection process.¹³ The record shows that West Oso considered five criteria in its vendor evaluation process: (1) "price/charges" (representing 25 percent of the total evaluation weighting); (2) "understanding of needs" (representing 25 percent of the total evaluation weighting); (3) "prior experience" (representing 20 percent of the total evaluation weighting); (4) "personal qualifications" (representing 20 percent of the total evaluation weighting); and (5) "support" (representing 10 percent of the total evaluation weighting).¹⁴

4. In its appeal, West Oso argues that a waiver of the Commission's competitive bidding requirements is justified because, if it had re-assigned the point value to its evaluation criteria using a weight of 40 percent for price/charges, 20 percent for understanding of needs, 15 percent for prior experience and personal qualifications, and 10 percent for support, the same vendor would have been

⁵ See 47 C.F.R. §§ 54.503, 54.511.

⁶ See 47 C.F.R. §§ 54.501-54.502.

⁷ See 47 C.F.R. § 54.503.

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. §§ 54.503, 54.511. See also *Universal Service First Report and Order*, 12 FCC Rcd at 9029, para. 481; *Ysleta Order*, 18 FCC Rcd at 26429, para. 50.

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 The Bureau must conduct a *de novo* review of requests for review of decisions issued by USAC. 47 C.F.R. § 54.723.

¹³ See 47 C.F.R. §§ 54.503, 54.511.

¹⁴ See Email from Kevin Witte, E-rate Consulting Personal E-rate Partner, on behalf of West Oso Independent School District, to Dhara Patel, USAC, Schools and Libraries Division (dated Nov. 5, 2012) (Response to Selective Review Information Request).

selected to provide the services at issue.¹⁵ We are not persuaded by this argument. As we recently found in the *Henrico Order*, the fact that West Oso can, with the benefit of hindsight, re-assign point values to its evaluation criteria to reach an identical result using price as the primary factor does not demonstrate compliance with the Commission's rules.¹⁶ Similarly, in this instance, there is no way to know what weight West Oso 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. As a result, there is no way to know whether West Oso would have reached the same outcome.

5. We note that, on occasion, we have waived the Commission's rules¹⁷ for applicants that failed to use price as the primary factor in its vendor evaluation process, but selected the lowest-cost provider.¹⁸ In this case, however, the record shows that the winning vendor's cost proposal received the same score in the price category as another vendor, and thus it is unclear whether West Oso selected the lowest-cost provider.¹⁹ Moreover, unlike the circumstances presented in the *Midlothian Order*, West Oso did not argue that it selected the lowest-cost vendor in its appeal.²⁰ We therefore find that West Oso 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.²¹ As the Commission has previously indicated, we are deeply concerned about practices that undermine the framework of the competitive bidding process.²² When an applicant constructs a bid evaluation process that circumvents the

¹⁵ See Request for Waiver (citing *Request for Review of a Decision of the Universal Service Administrator by Midlothian School District 143; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 28 FCC Rcd 8970 (Wireline Comp. Bur. 2013) (*Midlothian Order*) (finding that a waiver of the Commission's competitive bidding requirements was in the public interest because, despite the ambiguity as to whether Midlothian assigned the highest weight or value to price in its vendor evaluation process, it ultimately selected the least expensive service offering)); Response to Selective Review Information Request.

¹⁶ See *Henrico Order*.

¹⁷ 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.

¹⁸ See, e.g., *Midlothian Order; Request for Review of Decisions 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 (Wireline Comp. Bur. 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. §§ 54.503, 54.511; *Ysleta Order*, 18 FCC Rcd at 26429, para. 50.

¹⁹ See Request for Waiver; Response to Selective Review Information Request.

²⁰ See *Midlothian Order*.

²¹ See 47 C.F.R. §§ 54.503, 54.511.

²² See *Universal Service First Report and Order*, 12 FCC Rcd at 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-

(continued...)

Commission's competitive bidding requirements, the applicant suppresses fair and open competitive bidding and ultimately damages the integrity of the program.

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, 1.3 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 Request for Waiver filed by West Oso Independent School District IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Vickie S. Robinson
Acting Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

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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).