

E-rate Program

Program Compliance

May 10, 2012 - Atlanta | May 15, 2012 - Los Angeles

Overview

- Know Your Role
- Technology Plans
- Fair and Open Competition
- Lowest Corresponding Price
- Contracts
- Pre-Commitment Issues
- Document Retention

- **Applicants**

- Write tech plan (Priority 2 services only), file FCC Form 470 and write RFP, evaluate bids, select provider, document the process, file FCC Form 471 and Item 21, get tech plan approved, file FCC Form 486, select invoice method, file BEARs, retain docs

- **Service Providers**

- Respond to FCC Forms 470/RFPs, assist with preparing Item 21 attachments, provide technical answers on questions regarding specific goods and services requested, but NOT on competitive bidding; file SPIs and/or approve BEARs; file SPAC, retain docs

- **Consultants**

- Follow the role of their client – either applicant or service provider, obtain a consultant registration number, retain docs

Technology Plan Requirements for Priority 2 Services

- Created by schools or libraries ONLY (no service providers involvement)
- Contains sufficient detail to support and validate the services requested and covers the funding year
- Must follow FCC rules **and** state or local technology plan requirements
- Four Required Elements
 - Goals and Strategies; Professional Development; Needs Assessment; and Evaluation
- Plans must be approved prior to start of service or filing of FCC Form 486, whichever is earlier.

The Competitive Bidding Process

- Must be a **fair and open** process
- Avoid conflicts of interest
 - Applicant consultant ↔ Service Provider
 - Applicant ↔ Service Provider
- Open competition and bid evaluation
- Follow all rules – FCC and state/local
- Read the Form 470/RFP responses and contract fine print
- [6th Report and Order](#) provides further clarifications and examples of rule violations

Service Providers **Cannot:**

- Determine the types of service the applicant will seek on an FCC Form 470
- Prepare, assist applicants with the filling out of the FCC Form 470
- Sign, certify and/or submit FCC Form 470
- Negotiate with prospective bidders
- Assist or run the competitive bidding process for the applicant

Service Providers **Cannot:**

- Be privy to information about the bid not shared with other potential bidders (“inside information”)
- Provide charitable donations that have a relationship to the competitive bid and would circumvent FCC competitive bidding rules or influence the E-rate competitive bidding process
- Provide charitable donations that function as inducements to make additional purchases of eligible products or services

Service Providers **Cannot:**

- Offer or provide gifts worth \$20 or more or exceed \$50 per school or library employee from any single service provider participating in or seeking to participate in the E-rate program per year.
 - Gifts include meals, travel and entertainment (e.g., sporting events, trips etc.)

Service Providers Can:

- Have pre-bidding discussions with applicants
 - Discuss their product offering with applicants
 - Teach applicants about new technologies
 - Present product demonstrations
- Provide *de minimis* items to applicants
 - Modest refreshments, not offered as a part of a meal
 - Items with little intrinsic value such as certificates and plaques

Applicants Cannot:

- Have a relationship with service providers that would **unfairly influence** the outcome of the competition
- Furnish service providers with inside competitive information
- Have ownership interest in a service provider's company competing for services
- Violate applicant's own ethical regulations policy
- Fail to describe the desired products and services with sufficient specificity to enable interested parties to bid.

FCC Form 470

- Indicates the services and categories of service which entities are seeking
- Must be based on tech plan for Priority 2 services
- Must be posted for at least 28 days
- Indicates if they are planning/have issued RFP
- Indicates any special requirements and/or disqualification factors
- Indicates who will be receiving the services

Requests for Proposal

- FCC rules refer to RFPs generically but they may have a variety of names (Request for Quotes, Scope, or Work)
- FCC rules do not require RFPs but state and local procurement rules may
- Must be based on entities' tech plan (if applicable)
- Must be available to bidders for at least 28 days
 - Applicants must count 28 calendar days from whichever (FCC Form 470 or RFP) was posted or available last
 - **Example:** RFP posted on December 1, Form 470 posted on December 15, **December 15 starts the 28-day count**

Form 470 and RFP Issues

- Applicants must ensure that they post for the correct category of service
 - PIA can switch the category of services if applicants make a mistake on their Form 471
- Sufficient detail in Form 470
 - Cannot provide **generic descriptions** (e.g., all eligible telecom services, Digital Transmission Services)
 - Cannot provide **laundry lists** of products and services

Form 470 and RFP Issues

- Third party entities
 - Non-state agencies that conduct the competitive bidding and contract negotiations on behalf schools or libraries must have Letter of Agency to act on behalf of applicants.
 - If multiple vendors are selected, applicants must conduct a **mini-bid** to award contract
 - Applicants must memorialize their decision
 - Document retention rules apply

Imposing Restrictions

- Set some eligible services requirements
 - Applicants may require service providers to provide services that are compatible with one kind of system over another (e.g. Cisco compatible)
- Bidder disqualification criteria must be spelled out in FCC Form 470 and/or RFP and be available to all.
- Starting in FY 2013, applicants are not allowed to list the specific make and model of services sought without also allowing equivalent products and/or services to be bid.

Bid Evaluation

- Retain all vendor selection documentation
 - Winning and losing bids, correspondences, memos, bid evaluation documents, etc.
- Price of the eligible goods and services must be primary factor or most heavily weighted overall in any tier.
 - [USAC sample evaluation](#) matrix available
- Evaluation begins after 28-day waiting period
- Service Providers may not pay for applicant's termination charges incurred in breaking a contract.

Most Cost Effective

- Selecting the winning bidder
 - Price of the **ELIGIBLE** goods and services must be the primary factor.
 - Other factors, including other price factors, can be considered as well but they cannot be weighted equally or higher than cost of the eligible goods and services
 - See [Construct An Evaluation](#) for weighting samples

Cost Effectiveness

- Solution must be cost-effective (not just *the most* cost-effective)
 - *Ysleta* Order, para. 54: Routers priced at two or three times greater than the prices available from commercial vendors would not be cost-effective, absent extenuating circumstances.
 - Receiving only one bid does not automatically make it cost-effective
 - Applicants must be able to demonstrate why a solution with higher than average pricing is cost-effective
 - Service Providers may work with the applicant to help them understand the technical needs for this expensive solution.

Free Services

- Can't use E-rate to get free stuff (ineligible or eligible)
- Must deduct the value of the “free stuff”, discounts, trade-in etc, from the pre-discount amount in order get equal comparison between offerings

Example: Discount rebate

- Cost for product = \$100 pre-discount
- Rebate of 20% is available
- Can **ONLY** apply for \$80 ($\$100 * 80\%$) pre-discount

Free Services

- A proportionate cost allocation is required between eligible and ineligible components.
- Cost of eligible goods and services cannot be inflated to cover the “free” ineligible stuff

Example: “Free products” included in a bid

- Vendor A: \$10,000 products includes \$1,000 of free ineligible products (Deduct \$1,000 free products)
- Vendor B: \$8,000 for eligible products – no free products
- Must compare:
 - Vendor A: **\$9,000** (\$10,000 - \$1,000) to Vendor B: **\$8,000**

What is the Lowest Corresponding Price (LCP) rule?

- 47 CFR § 54.500(f): Lowest corresponding price is the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services.

What is the Lowest Corresponding Price (LCP) rule? (cont.)

- 47 CFR § 54.511(b): Providers of eligible services shall not charge schools, school districts, libraries, library consortia, or consortia including any of these entities a price above the lowest corresponding price for supported services, unless the Commission, with respect to interstate services or the state commission with respect to intrastate services, finds that the lowest corresponding price is not compensatory.

What is the purpose of the LCP rule?

- To ensure that service providers do not charge schools and libraries in the E-rate program more than they would charge their other customers for the same services.
- To ensure that any lack of experience in negotiating in a service market does not prevent applicants from receiving competitive prices.

What is “similarly situated”?

- Service providers are required to offer schools and libraries their services at the lowest corresponding prices throughout their geographic service areas. The “geographic service area” is the area in which a serviced provider is seeking to serve customers with any of its E-rate services.

What is “similarly situated”? (cont.)

- Service providers may not avoid the obligation to offer the lowest corresponding price to schools and libraries for interstate services by arguing that none of their non-residential customers are identically situated to a school or library or that none of their service contracts cover services identical to those sought by a school or library.

What is “similarly situated”? (cont.)

- The Commission will only permit providers to offer schools and libraries prices above prices charged to other similarly situated customers when those providers can show that they face demonstrably and significantly higher costs to serve the school or library seeking service. Factors that could affect the cost of service – volume, mileage from facility, and length of contract.
- Similar services include those provided under contract as well as those provided under tariff.

Who is responsible for ensuring the LCP is provided?

- All service providers regardless of the size of the company!
- The applicant is not obligated to ask for the LCP, but must receive it!

Who is responsible for ensuring the LCP is provided? (cont.)

- A service provider's obligation to provide the LCP is not tied to a response to an FCC Form 470 or RFP. The service provider must charge a rate that is the LCP – it is not sufficient merely just to offer the LCP in a bid response. If a service provider does not know that a school or library is participating in E-rate and therefore does not offer the LCP rate, the service provider must actually charge the LCP once they realize the school or library is participating in the E-rate program.

Who is responsible for ensuring the LCP is provided? (cont.)

- Note: A service provider should be aware of a school's or library's participation in E-rate prior to the funding year as the service provider receives a copy of the FCC Form 471 Receipt Acknowledgment Letter (RAL) for the FRNs on which they are cited. At the very least a service provider will know when they receive a copy of the FCDL.

What can a school or library do if they think they did NOT get LCP?

- 47 CFR § 54.504(c)(1): Schools, libraries, consortia including those entities may request lower rates if the rate offered by the carrier does not represent the lowest corresponding price.

What can a service provider do if it thinks the LCP is not enough for the service?

- 47 CFR 54.504(c)(2): Service providers may request higher rates if they can show that the lowest corresponding price is not compensatory, because the relevant school, library, or consortium including those entities is not similarly situated to and subscribing to a similar set of services to the customer paying the lowest corresponding price.

Commission orders also mandate:

- There is a rebuttable presumption that rates offered within the previous three years are still compensatory.
- Promotional rates offered by a service provider for a period of more than 90 days must be included among the comparable rates upon which the lowest corresponding price is determined.

Contracts Overview

- A contract must be signed and dated by the applicant prior to the Form 471 certification postmark date
 - Applicant must not sign a contract before the Allowable Contract Award Date (CAD)
 - Service providers may sign before the CAD
 - When state and/or local contract law doesn't require signature and/or date, the applicant will be given the opportunity to complete a certification statement.
- A purchase order may be considered a contract **ONLY** if your state considers it a contract

Voluntary Contract Extensions

- Are allowable when the option for contract extensions is stated in the original provision of the contract.
- Applicant must rebid the services (i.e., file a new **FCC** Form 470) if contract extensions are not stated in the contract or RFP.
- If a contract is extended post-commitment, applicants must notify USAC by filing an FCC Form 500.

State Master Contracts

- A state master contract (SMC) is competitively bid and put in place by a state government for use by multiple entities in that state
- **Single winner:** Single vendor wins the bid
- **Multiple winners:** State awards contract to several bidders
- **Multiple Award Schedule (MAS):** State awards contract for same goods and services to multiple vendors that can serve the same population

State Master Contracts

- Multiple winners always require vendor selection justification
- If multiple vendors can provide the services to applicants, then the applicant must conduct a **mini-bid** based on FCC rules.
 - Applicants do not need to file another FCC Form 470
 - But they must comply with all FCC Rules regarding vendor selection (i.e., most cost effective, price must be primary, cost-effectiveness)
- Contract Award Date = Date applicant decides to purchase off State Contract.

Necessary Resources

- Check applicant's certification that they have them.
 - Are there end user computers?
 - Must have reasonable plans to fully utilize all internal connections for which you are requesting discounts (e.g., 2-year plan to get computers for all network drops)
 - Do they have software to run on the computers?
 - Staff trained on how to use the technology?
 - Is there sufficient electrical capacity?
 - Can the applicant maintain all of the equipment ?

Paying Non-Discount Share

- All E-rate applicants must pay their non-discount share
- Service providers cannot give the money (directly or indirectly) to pay for the non-discount share
 - Non-discount share cannot be a charitable donation from the provider or an entity with which the selected service provider has a relationship.
 - Funds cannot come from the service provider or an entity controlled by the service provider
 - Service provider bills can't be ignored or waived.
 - If applicant can't show proof of payment during invoice review, invoice may be denied.

Payment Plans

- **Are NOT Allowed**
- Applicants are required to pay their share at the same time that USAC pays the discount amount
 - Service Provider certifies that the invoices they submit are for services that “have been billed to service provider’s customers.”
 - Deferred payment plans that allow the applicant to pay after USAC has paid will jeopardize a funding request.
 - FCC Rules include a presumption that the non-discount share will be paid within 90 days.

Gifts

- Receipt or solicitation of gifts by applicants from service providers (and vice versa) and potential service providers is a competitive bidding violation.
- Service providers may not offer or provide any gifts or thing of value to applicant personnel involved in E-rate.
- Gift prohibitions are always applicable, not just during the competitive bidding process.
- Must always follow FCC rules. May also have to follow state/local rules.
- Counted per funding year

Gift Rule Exceptions

- “Modest refreshments not offered as part of a meal, items with little intrinsic value intended for presentation, and items worth \$20 or less, including meals, may be offered or provided , and accepted by any individuals or entities subject to this rule, if the value of these items received by any individual does not exceed \$50 from one service provider per funding year.” See 47 C.F.R. § 54.503(d)(1).
- Single source = all employees, officers, representatives, agents, contractors, or directors of the service provider.

Gift Rule Exceptions Examples

- A service provider has offered a school district employee lunch at a local sandwich shop three times during the course of the year. The value of the school district employee's meal is \$9 each time. The total value of the gifts is \$27. No other gifts are received by this employee from this provider. The meals fall in the \$20 per instance and \$50 per year exception and there is no rule violation.

Gift Rule Exceptions Examples

- A library employee and his spouse are invited by a service provider to attend a play, tickets to which have a face value of \$30 each. The aggregate market value of the gifts offered on this single occasion is \$60, \$40 more than the \$20 amounts that may be accepted for a single event or presentation. The employee may not accept the gift of the evening of entertainment. He and his spouse may attend the play only if he pays the full \$60 value of the two tickets.

Gift Rule Exceptions

- Gifts to family and friends when those gifts are made using personal funds of the donor (without reimbursement from the employer) and are not related to a business transaction or business relationship are exempt. See 47 C.F.R. § 54.503(d)(3).
- Gift rules are not intended to discourage companies from making charitable contributions, as long as those contributions are not directly or indirectly related to an E-rate procurement. See 47 C.F.R. § 54.503(d)(4).

Gift Rule Exceptions Examples

- A service provider's spouse is the town librarian. The service provider employee may give the librarian a birthday gift exceeding \$20, as long as it is not reimbursed by the company, and is being given based on their personal relationship.
- Three service provider employees invite a tech director to join them at a golf tournament at their company's expense. The entry fee is \$500 per foursome. The tech director cannot accept the gift even though he has an amicable relationship with the service provider employees. Since the fees are paid by the company, it is the business relationship, not the personal relationship that is the motivation behind the gift.

Curing Violations

- Promptly return any tangible item to the donor, or pay the donor its market value, or, if perishable, the item may be given to an appropriate charity or shared within the office or destroyed. See CFR 2635.205(a).
 - To avoid public embarrassment to the seminar sponsor and E-rate service provider, the Superintendent did not decline a barometer worth \$200 given at the conclusion of her speech on the district's education initiatives. The Superintendent must either return the barometer or promptly reimburse the provider \$200 to cure the violation.

Curing Violations Examples

- With approval from the recipient's supervisor, a floral arrangement sent by a service provider may be placed in the office's reception area.
- A district employee wishes to attend a charitable event to which he has been offered a \$300 ticket by a service provider. Although his attendance is not in the interest of the district, he may attend if he promptly reimburses the donor the \$300 face value of the ticket.

Charitable Contributions

- Gift rules are not intended to discourage charitable donations as long as the donations:
 - Are not directly or indirectly related to E-rate procurement activities or decisions, and
 - Are not given with the intention of circumventing competitive bidding or other FCC rules

Allowable Charitable Contributions

- Paid-for-exchange services at market rates, such as the purchase of advertising space, is neither a gift nor a charitable donation as long as it is not intended to influence the competitive bidding process.
 - For example, service providers purchasing advertising space on the high school football score board, for which they pay market rates, would not cause any violations.

Potentially Allowable Charitable Contributions

- Cash, equipment, including sporting, musical or playground equipment, *may* be permissible if they benefit the school or library as a whole and broadly serve an educational purpose.
 - For example, a donation of books for a literacy campaign, given to a school by an E-rate service provider, would be acceptable donation that benefits the school and broadly serves an educational purpose.

Unallowable Charitable Contributions

- Donations given for the purpose of influencing the competitive bidding process are rule violations if the donation comes directly from the service provider or is solicited and/or accepted indirectly through a non-profit organization.

Gifts solicited or accepted indirectly

- “A gift which is solicited or accepted indirectly includes a gift:
(1) Given with the employee’s knowledge and acquiescence to his parent, sibling, spouse, child, or dependent relative because of that person’s relationship to the employee, or (2) Given to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee except as permitted for the disposition of perishable items or payments made to charitable organizations in lieu of honoraria.” See 5 C.F.R. § 2635.203(f).

Gifts solicited or accepted indirectly

- Donations made indirectly through a third party, such as a non-profit, would be prohibited if the organization is used as a shell to disguise a directed gift.
 - A service provider directing its foundation to provide a cash donation equal to the value of the applicant's non-discount share is a prohibited donation.
- Service provider cannot direct the donation and must relinquish control of the gift once provided to a non-profit.

Gifts solicited or accepted indirectly

- Example:
 - An employee who must decline a gift of a personal computer pursuant to this rule may not suggest that the gift be given instead to one of five charitable organizations, whose names are provided by the employee.
 - A service provider cannot donate computers to raffle with the caveat that they go to E-rate recipients, or specific individuals or schools, or a subset of schools and libraries.

Unallowable Charitable Contributions

- Service providers cannot offer special equipment discounts or equipment with service arrangements to E-rate recipients that are not currently available to some other class of subscribers or segment of the public.
 - Free cell phone with purchase of service contract must be available to non-E-rate customers as well
- Donations to cover the applicant's non-discount share

Unallowable Charitable Contributions

- Travel expenses such as airfare, meals, lodging, etc. unless the meal falls below the \$20/\$50 thresholds.
- Example:
 - A service provider offers to pick up the travel and lodging costs for an applicant to attend a customer appreciation event in another state. This gift is not allowable under the gift rules.

Unallowable Charitable Contributions

- Equipment for a specific individual or group of individuals associated with or employed by an E-rate participant.
 - Service provider may not give a gift to a teacher who helps draft a district's technology plan, even if that teacher does not ultimately help select the E-rate service provider.

Prizes at Conferences and Training Sessions

- Raffle tickets, prizes, or door prizes that have a retail value of over \$20 violate the gift rules unless the event is open to the public.
 - “Open to the Public” means the event is free of charge and that members of the public at large typically attend such a gathering.
 - State Fair would qualify
 - State District IT Directors meeting would not qualify

Widely Attended Gatherings

- “Widely attended gatherings” allow for free attendance and meals or refreshments at that event. See 5 C.F.R. § 2635.203(g)
 - Gathering is widely attended if:
 - Employee’s attendance must be in the interest of the agency (i.e. school or library) and further its programs and operations, and
 - It is expected that a large number of persons will attend, and
 - Persons with a diversity of views or interests will be present.

Conferences – Permissible Actions

- Food, refreshments, instruction and documents given to all attendees at Widely Attended Gatherings are permissible.
- Trainings offered by state, regional or local government bodies or non-profits or trade associations that include those bodies are not considered vendor promotional training
 - Vendor promotional training means training provided by any person for the purpose of promoting its products or services.
See 5 C.F.R. § 2635.203(g)

Conferences – Permissible Actions

- Service providers can host, sponsor, or conduct E-rate training, as long as they do not provide any gift that exceeds the gift exceptions
 - Service providers cannot help with preparation or completion of forms, or determining the services listed on the FCC Form 470 and/or RFP.

Conferences – Impermissible Actions

- Training or conference regarding one or few vendors services would not meet the definition of a Widely Attended Event even if many people attended.
 - Travel expenses, lodging, meals, and entertainment associated with the event would be considered gifts and therefore violations.
 - Free attendance when it would otherwise cost to attend is also a violation.
- Meals at a Widely Attended Gatherings not provided to all attendees would be subject to gift limits

Conferences – Registration Fees

- Service providers can offer an “educational discount” on the attendance fee to a Widely Attended Event as long as it is available to **all** employees of schools and libraries.
- Applicants cannot accept free attendance, paid by a service provider, even if the school or library has assigned the employee to attend the event.
- A Service provider cannot pay for or reimburse expenses for an applicant to speak at a conference on behalf of that service provider, or in any other setting, e.g. newspaper or magazine.

Representation on Boards

- Employees who are required by law to sit on the governing board of a governmental agency that acts as a service provider do not violate the gift rules when they accept meals or travel expenses required to execute their official position and duties on that board.
- Service providers may sit on a school's fundraising board, as long as that does not unduly influence the competitive bidding process or provide them with inside information.

Timelines for Compliance

- Requirement for fair and open competitive bidding has always been in effect.
- Rules from 6th Report and Order went into effect January 3, 2011.
- New applicants, or applicants that are applying for the first time for a category of service, must be in compliance with rules six months prior to the posting of their first FCC Form 470.
- Dollar limits of \$20/\$50 are calculated per funding year

Service Provider Annual Certification

- Service Providers certify that:
 - For SPIs, services have been billed to customers on behalf of eligible entities and for eligible services, and exclude charges already invoiced
 - SPs, if asked, must provide detailed cost breakouts of services to applicants
 - They may be audited
 - Prices were arrived at independently, without communicating with other bidders regarding pricing, intent to bid and how you determined your pricing
 - Their prices won't be disclosed to another bidder before the bid opening

Document Retention Timeframes

- 5 years from **last date to receive service**
 - FY 2012: this is at least **June 30, 2018**
- Any document from a prior year that supports current year must be kept until 5 years from last date to receive service as well
 - E.g., Contract from 2006 for recurring services, used to support FY 2012 FRNs, must be kept until at least **June 30, 2018**
- Documents may be retained in electronic format or paper

Service Providers must retain

- Copies of your bids
- Contracts signed with applicants
- Correspondence with applicants regarding bidding process
- Proof of delivery of the service
- Documentation of any service down time
- Logs of maintenance performed

Questions?