

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Request for Review of a)	
Decision of the)	
Universal Service Administrator by)	
)	
Birmingham City Schools)	File No. SLD-294199
Birmingham, Alabama)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: June 12, 2012

Released: June 12, 2012

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

1. Consistent with precedent,¹ we grant in part and deny in part an appeal of a decision by the Universal Service Administrative Company (USAC) filed by Birmingham City Schools (Birmingham) denying funding under the E-rate program (more formally known as the schools and libraries universal service support program).² USAC denied three of Birmingham's funding requests on

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) (subsequent history omitted); *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 et. al., Report and Order and Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5452-53, para. 233 (1997); *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734 (1997) (*Tennessee Order*); *Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202 (2003); *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*); *Request for Review by Brooklyn Public Library, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., File No. SLD-149423*, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 18598, 18606, n.23 (2000) (*Brooklyn Order*) (stating that the "30-percent policy" is not a Commission rule, but rather is an internal USAC benchmark utilized during its application review process, to enable USAC to approve funding requests for eligible services without having to spend an excessive amount of time working with an applicant that for the most part is requesting funding of ineligible services). In 2003, the Commission codified USAC's 30 percent processing procedure. See *Schools and Libraries Universal Service Support Mechanism*, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202 (2003); 47 C.F.R. § 54.504(d) (2003), amended by 47 C.F.R. § 54.504(b) (2011).

² See Letter from Dr. Wayman B. Shiver, Superintendent, Birmingham City Schools, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Feb. 25, 2004) (regarding funding year (FY) 2002 FCC Form 471 application number 294199, funding request numbers (FRNs) 772747, 755102, and 755104) (Request for Review). In this order, we use the term "appeal" to generically refer to Birmingham's request (continued...)

the grounds that the requests violated the Commission's competitive bidding requirements and E-rate program rules concerning the eligibility of services.³ We find that USAC improperly denied funding for two of Birmingham's funding request numbers (FRNs) and therefore remand these FRNs to USAC for further consideration consistent with the terms of this order. With regard to the remaining FRN, we find that Birmingham violated the Commission's competitive bidding rules. To ensure that the remanded funding requests are resolved expeditiously, we direct USAC to complete its review of each funding request and issue a decision based on a complete review and analysis no later than 90 calendar days from the release date of this order.⁴

2. *Request for Review.* In FY 2002, Birmingham submitted an FCC Form 470 application to USAC to initiate the competitive bidding process for E-rate eligible services.⁵ Birmingham subsequently entered into service contracts and filed its FCC Form 471 application with USAC for FY 2002.⁶ USAC denied three FRNs contained in Birmingham's application. For funding associated with FRN 755102, USAC found that more than 30 percent of Birmingham's funding request included ineligible services, and Birmingham failed to include certain services in its RFP in violation of the 28-day posting requirement. For funding associated with FRN 772747, USAC concluded that price was not the primary factor in Birmingham's vendor selection process. For funding associated with FRN 755104, USAC concluded that Birmingham signed a service contract prior to the expiration of the 28-day posting period.⁷ USAC later affirmed its decisions on appeal,⁸ and Birmingham filed the instant request for review with the Commission.⁹

(Continued from previous page)

for review of USAC's decision. 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).

³ See Request for Review.

⁴ In performing a complete review and analysis of the underlying funding requests, USAC shall either grant the underlying funding requests before it, or, if denying the funding requests, provide the applicant with any and all grounds for denial.

⁵ See FCC Form 470, Birmingham City Schools (posted Nov. 20, 2001) (Birmingham FCC Form 470).

⁶ See FCC Form 471, Birmingham City Schools (filed Jan. 16, 2002) (Birmingham FCC Form 471).

⁷ Letter from USAC, Schools and Libraries Division, to Kenneth Wasmund, Superintendent, Birmingham City Schools (dated Mar. 24, 2003). USAC selects some applicants for selective review to ensure that they are following certain Commission E-rate program rules. Applicants are asked to provide the following information to USAC covering all of the applicant's FCC Forms 471 for that given funding year: (1) documentation regarding their competitive bidding and vendor selection process, (2) documentation of their ability to pay their share of the cost of the products and services eligible for schools and libraries program support, and (3) proof that they have obtained the (ineligible) hardware, software, professional development, electrical capacity or other retrofitting, and maintenance necessary to make effective use of the requested discounts. See USAC website, Schools and Libraries, Application Review, <http://www.usac.org/sl/applicants/step05/selective-review.aspx> (regarding the Selective Review process) (last visited June 7, 2012).

⁸ Letter from USAC, Schools and Libraries Division, to Kenneth Wasmund, Birmingham City Schools (dated Dec. 22, 2003) (USAC Decision on Appeal).

⁹ See Request for Review.

3. *Discussion.* Having reviewed the record,¹⁰ we grant in part and deny in part Birmingham's appeal of USAC's decision denying funding on the grounds that three of Birmingham's funding requests violated the Commission's competitive bidding requirements and E-rate program rules concerning the eligibility of services.¹¹ We find that USAC improperly denied funding for some of the services identified in FRN 755102, but properly denied requests for other services. We also find that no competitive bidding violations occurred in the bidding process for FRN 772747. We therefore remand those two FRNs as part of Birmingham's FY 2002 application to USAC for further consideration consistent with this order.¹² In remanding these FRNs to USAC, we make no finding as to the ultimate eligibility of the services requested therein. For the remaining funding request, FRN 755104, we find that Birmingham violated the Commission's competitive bidding rules and, therefore, uphold USAC's decision on that funding request as part of Birmingham's funding year 2002 application. We consider each FRN separately below.

4. *FRN 755102.* For FY 2002, Birmingham requested discounts for the following services: Cyberpatrol License Renewal, McAfee Netshield, server maintenance, Novell Netware, installation and relocation of equipment for eligible services, hub, and switches (i.e., installation), and repair replacement of hub and switches (i.e., repair replacement).¹³ USAC denied Birmingham's funding request for Cyberpatrol License Renewal and McAfee Netshield because it found that these products were ineligible for funding under E-rate program rules.¹⁴ In addition, USAC found that Birmingham's request for support for server maintenance included charges associated with the second and third years of such maintenance.¹⁵ USAC thus determined that the second and third years of server maintenance were ineligible for support because they would be delivered outside of the funding year.¹⁶ Although USAC removed the charges associated with years two and three of server maintenance, it denied funding for the first year of server maintenance on the basis that more than 30 percent of the entire FRN was ineligible.¹⁷ USAC also denied funding for Novell Netware for violating its 30 percent processing benchmark.¹⁸ Lastly, USAC found that Birmingham did not include installation and repair replacement services in its

¹⁰ 47 C.F.R. § 54.723 (requiring the Wireline Competition Bureau to conduct a *de novo* review of appeals of decisions made by USAC).

¹¹ See 47 C.F.R. §§ 54.504, 54.511 (2002), amended by 47 C.F.R. §§ 54.503, 54.504, 54.511 (2011).

¹² We estimate that the appeal granted in this order involves funding requests for approximately \$1.9 million in funding for FY 2002. We note that USAC has already reserved sufficient funds to address outstanding appeals. See, e.g., Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the First Quarter 2012 (Dec. 29, 2011). We thus determine that the action we take today should have minimal impact on the universal service fund as a whole.

¹³ See Birmingham FCC Form 471.

¹⁴ See USAC Decision on Appeal at 2-3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See USAC Decision on Appeal at 2-3.

RFP and therefore violated the Commission rule that applicants post for 28 days the services for which they are seeking bids.¹⁹

5. In its request for review, Birmingham does not contest the denial of funding for Cyberpatrol License Renewal and McAfee Netshield.²⁰ With regard to server maintenance, Birmingham asserts that the service was competitively bid and that the selected vendor offered better pricing over a three-year period as opposed to a one-year period.²¹ Birmingham acknowledges, however, that E-rate program rules limit funding to a one-year period and, therefore, appeals USAC's denial of funding for server maintenance support for one year.²² Additionally, Birmingham renews its request for Novell Netware support and states that the amount requested would cover the labor needed to install or upgrade the software on servers across the school district.²³ Finally, Birmingham argues that the cost for installation and repair replacement services was based on past experience and anticipated needs, and that it intended to use the hourly rates of the vendor to perform these tasks only as required with the funding.²⁴

6. After reviewing the record, we find that USAC correctly denied Birmingham's request for support for Cyberpatrol License Renewal and McAfee Netshield because neither service is eligible for E-rate funding.²⁵ We find, however, that USAC erred in denying support for server maintenance and Novell Netware on the ground that 30 percent or more of FRN 755102 did not comply with E-rate program rules.²⁶ Under USAC's 30 percent processing procedure utilized during application review at that time, if 30 percent or more of a request for discounts made in an FCC Form 471 was for ineligible services, USAC would deny the entire request.²⁷ Based on our review of the record, FRN 755102 contained requests totaling approximately \$1,126,000 for six different products or services, including two ineligible services: Cyberpatrol License Renewal and McAfee Netshield, totaling approximately \$126,000.²⁸ The remaining services included in the FRN, which total approximately \$1.1 million, were denied funding for reasons other than eligibility.²⁹ Even under USAC's policy at the time, the first year of server

¹⁹ *Id.*; 47 C.F.R. § 54.504 (2002), amended by 47 C.F.R. § 54.503 (2011).

²⁰ Request for Review at 3.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ See USAC website, Schools and Libraries, Eligible Services List (dated Oct. 18, 2002), http://www.usac.org/res/documents/sl/pdf/ESL_archive/EligibleServicesList_101802.pdf (last visited June 7, 2012).

²⁶ See USAC Decision on Appeal at 2-3.

²⁷ See *Brooklyn Order*.

²⁸ See Birmingham FCC Form 471.

²⁹ Birmingham requested approximately \$500,000 for installation, \$340,000 for repair replacement; \$233,000 for one year server maintenance; and \$133,000 for Novell Netware. As discussed above, USAC denied funding for the second and third years of server maintenance because the services would be delivered outside of the funding year. USAC denied funding for installation and repair replacement services because Birmingham did not seek competitive bids for the services. USAC also denied funding for Novell Netware services because it violated the 30 percent processing benchmark. See *supra* para. 4; Request for Review at 2-4.

maintenance and Novell Netware should not have been denied because the ineligible services did not amount to 30 percent or more of the entire funding request.³⁰ Moreover, at this time, we find no evidence in the record of waste, fraud or abuse, or misuse of funds, or a failure to adhere to core program requirements with regard to these services. We therefore remand FRN 777102, as it relates to funding for the first year of server maintenance and Novell Netware, to USAC for further consideration in accordance with the terms of this order.

7. As for Birmingham's funding request for installation and repair replacement services, we find that these services were not subject to a competitive bidding process.³¹ The record shows that Birmingham developed an RFP in which it sought competitive bids for data equipment, Cyberpatrol License Renewal, McAfee Netshield, server maintenance, and Novell Netware.³² After receiving bids for the requested services, it appears that Birmingham submitted its FCC Form 471 application seeking support for those services as well as for installation and repair replacement services.³³ As noted above, an applicant must describe the services for which it seeks support on the FCC Form 470 or indicate on the form that it has an RFP available providing detail about the requested services.³⁴ The E-rate program rules require applicants to describe the desired services with sufficient specificity to enable potential service providers to submit bids for such services.³⁵ Based on our review of the record, however, installation and repair and replacement services were not included in Birmingham's RFP and thus were not subject to a competitive bidding process in accordance with the Commission's rules. We therefore deny Birmingham's request for review with regard to these services.³⁶

8. FRN 772747. USAC denied funding for FRN 772747 because it found that Birmingham did not use price as *the* primary factor in the vendor selection process,³⁷ as required by the Commission's 2003 *Ysleta Order*,³⁸ but instead used price only as one of several important considerations. The record shows that Birmingham initiated its vendor selection process before the release of the *Ysleta Order*.³⁹

³⁰ In addition, the Commission has since directed USAC to allow applicants the opportunity to remove ineligible services from the funding request. *Requests for Review of the Decisions of the Universal Service Administrator by Aiken County Public Schools, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 22 FCC Rcd 8735 (2007).

³¹ See 47 C.F.R. § 54.504 (2002), amended by 47 C.F.R. § 54.503 (2011).

³² Request for Review at 1-2; Birmingham City Schools, Request for Proposal, No. 12-01-201-19 (dated Dec. 19, 2001) (Birmingham RFP).

³³ See Birmingham FCC Form 471; Request for Review at 2.

³⁴ See Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (current FCC Form 470).

³⁵ 47 C.F.R. § 54.504 (2002), amended by 47 C.F.R. § 54.503 (2011).

³⁶ See Birmingham RFP.

³⁷ See USAC Decision on Appeal at 4-5.

³⁸ See *Ysleta Order*, 18 FCC Rcd 26407.

³⁹ Birmingham initiated its vendor selection process by posting its FCC Form 470 on November 20, 2001. See FCC Form 470, Birmingham City Schools (posted Nov. 20, 2001). The *Ysleta Order* was released on December 8, 2003. See *Ysleta Order*, 18 FCC Rcd 26407.

Thus, USAC should have applied the standard then in effect from the *Tennessee Order*, which required that price be a primary factor in the vendor selection process, not that price be given the greatest weight during bid evaluations.⁴⁰ Because the record shows that Birmingham satisfied the standards under the *Tennessee Order*,⁴¹ we find that its competitive bidding process did not violate the Commission's competitive bidding rules in effect at that time.⁴² In addition, there is no evidence in the record of waste, fraud or abuse, or misuse of funds, or a failure to adhere to core program requirements at this time. We therefore grant Birmingham's request for review with regard to FRN 772747 and remand this FRN as part of application number 294199 to USAC for further consideration in accordance with the terms of this order.

9. *FRN 755104*. USAC denied FRN 755104 after determining that Birmingham signed a contract for private branch exchange (PBX) maintenance prior to the expiration of the 28-day posting period.⁴³ In its request for review, Birmingham states that it initiated the vendor selection process to maintain the support of the existing vendor, BellSouth.⁴⁴ Birmingham maintains that it informed BellSouth that any contract would be contingent on E-rate funding being received.⁴⁵ Upon review of the record, we find that the allowable contract date for FRN 755104 was December 18, 2001.⁴⁶ The record shows, however, that Birmingham signed a contract for the underlying services on September 27, 2001, almost three months before the allowable contract date.⁴⁷ The record also contains a purchase order for these services dated October 1, 2001.⁴⁸ Birmingham has not presented any additional evidence demonstrating that USAC erred in its decision. We therefore deny its request for review with regard to this FRN.

10. We remand the underlying application to USAC for further action consistent with this order. To ensure that the underlying application is resolved expeditiously, we direct USAC to complete its review of the underlying application and issue an award or a denial based on a complete review and analysis no later than 90 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 or the petitioner's application.

11. 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 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 the request for review filed by Birmingham City Schools on February 25,

⁴⁰ See *Tennessee Order*, 14 FCC Rcd at 13737-39, paras. 7-9.

⁴¹ See Request for Review at 6.

⁴² See 47 C.F.R. §§ 54.504, 54.511 (2002), amended by 47 C.F.R. §§ 54.503, 54.511 (2011).

⁴³ See USAC Decision on Appeal at 4.

⁴⁴ See Request for Review at 4.

⁴⁵ *Id.*

⁴⁶ Birmingham FCC Form 470.

⁴⁷ See Birmingham Public Schools, Agreement Number 97A002965 (dated Sept. 27, 2001).

⁴⁸ See Purchase Requisition, Board of Education City of Birmingham, Purchase Order No. 02000488 (dated Oct. 1, 2001).

2004 is GRANTED IN PART, DENIED IN PART and REMANDED to USAC for further consideration in accordance with the terms of this order.

12. 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 COMPLETE its review of the remanded funding requests and SHALL ISSUE an award or a denial based on a complete review and analysis no later than 90 calendar days from the release date of this order.

FEDERAL COMMUNICATIONS COMMISSION

Trent B. Harkrader
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau