

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

In the Matter of)	
)	
Request for Review of a)	
Decision of the)	
Universal Service Administrator by)	
)	
Queen of Peace High School)	File No. SLD-667006
Burbank, IL)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: December 7, 2011

Released: December 7, 2011

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

I. INTRODUCTION

1. In this order, we grant a request for review filed by Queen of Peace High School (Queen of Peace) seeking review of a decision by the Universal Service Administrative Company (USAC) concerning discounted services under the E-rate program (more formally known as the schools and libraries universal service program) for funding year (FY) 2009.^{1 2} We find that Queen of Peace's competitive bidding process was not compromised by its inclusion of a service provider name on its FCC Form 470. We therefore grant its request for review and direct USAC to apply this ruling to all pending appeals and applications. We also clarify that the Commission's competitive bidding rules prohibit applicants from including a particular manufacturer's name, brand, product or service in an FCC Form 470 or request for proposals (RFPs) unless they also use the words "or equivalent" in such a description.

II. BACKGROUND

2. *E-rate Program Rules and Requirements.* Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible services.³ The Commission's rules provide that an eligible school, library, or consortium that includes

¹ See Letter from Irene Halko, Queen of Peace High School, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed July 19, 2010) (regarding FCC Form 471 application number 667006, funding request numbers (FRNs) 1836579, 1821241, 1821272, 1830150) (Request for Review). In this order, we use the term "appeal" to generically refer to the applicant's request for review of USAC's decisions. 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 Request for Review at 1.

³ 47 C.F.R. §§ 54.501-54.502.

eligible schools and libraries must seek competitive bids for all services eligible for support.⁴ In accordance with the Commission's competitive bidding rules, applicants 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 requested 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 A service provider participating in the competitive bidding process cannot be involved in the preparation of the entity's FCC Form 470.⁹

3. After submitting an FCC Form 470, an applicant must wait 28 days before making commitments with the selected service providers.¹⁰ Commission's rules require that an applicant carefully consider all submitted bids prior to entering into a contract, and price must be the primary factor in selecting the winning bid.¹¹ 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.¹² USAC assigns a funding request number (FRN) to each request for discounted services and issues funding commitment decision letters (FCDLs) approving or denying the requests for discounted services.¹³

4. *Queen of Peace's Request for Review.* On November 17, 2008, Queen of Peace submitted an FCC Form 470 to initiate the competitive bidding process for E-rate eligible services.¹⁴ On February 2, 2009, Queen of Peace filed its FY 2009 FCC Form 471 application seeking support for the requested

⁴ 47 C.F.R. § 54.503. The Commission's rules provide one exception to the competitive bidding requirement for existing, binding contracts signed on or before July 10, 1997. See 47 C.F.R. § 54.511(c).

⁵ 47 C.F.R. § 54.503(c).

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) (*Universal Service First Report and Order*) (subsequent history omitted), see 47 C.F.R. §§ 54.503(c).

⁷ See, e.g., *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).

⁸ See FCC Form 470.

⁹ See *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.*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028, 4033 (2000) (*Mastermind Order*).

¹⁰ 47 C.F.R. § 54.503(c). See, e.g., *Request for Review of the Decision of the Universal Service Administrator by Approach Learning and Assessment Center, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 23 FCC Rcd 15510 (2008) (*Approach Learning Order*).

¹¹ 47 C.F.R. § 54.503(c).

¹² See *Schools and Libraries Universal Service, Services Ordered and Certification Form*, OMB 3060-0806 (October 2000) (FCC Form 471); *Schools and Libraries Universal Service, Services Ordered and Certification Form*, OMB 3060-0806 (November 2004) (current FCC Form 471).

¹³ See USAC website, *Schools and Libraries, Funding Commitment Decision Letter*, <http://www.universalservice.org/sl/applicants/step09/funding-commitment-decision-letter.aspx> (last visited Dec. 1, 2011).

¹⁴ FCC Form 470, Queen of Peace High School (posted Nov. 17, 2008).

services.¹⁵ On May 5, 2009, USAC approved Queen of Peace's request for telecommunications services and Internet access.¹⁶ A year later, however, USAC rescinded the funding commitments. USAC found that Queen of Peace had violated the Commission's competitive bidding rules because a service provider name appeared on the FCC Form 470, and the referenced provider was subsequently selected as the service provider for the requested services.¹⁷ Queen of Peace filed a timely appeal with USAC.¹⁸ USAC denied the appeal, stating that the FCC Form 470 contained the name of a service provider, Edline, in the description of requested services, and Queen of Peace had violated the competitive bidding procedures because either it had preselected Edline as the service provider or had the propensity to award it the contract.¹⁹

III. DISCUSSION

5. Section 54.504 of the Commission's rules requires applicants to seek competitive bids for services sought under the E-rate program.²⁰ Applicants must ensure an open and fair competitive bidding process.²¹ In this case, USAC concluded that Queen of Peace violated the competitive bidding process because Queen of Peace's FCC Form 470 contained what it deemed vendor contact information for the same vendor that was ultimately selected to provide service.²²

6. The E-rate program relies on competitive bidding to ensure the best price for applicants and to ensure the efficient use of universal service funds. At the same time, applicants are required to describe the requested services in sufficient detail to enable potential providers to formulate bids. When an applicant includes a manufacturer's name or brand for its description of requested services on the FCC Form 470, there is a risk of compromising the competitive bidding process. An interested bidder could possibly conclude from the FCC Form 470 posting that the applicant has pre-selected the named service

¹⁵ FCC Form 471, Queen of Peace High School (posted Feb. 2, 2009).

¹⁶ Letter from USAC, Schools and Libraries Division, to Irene Halko, Queen of Peace High School (dated May 5, 2009) (Funding Commitment Decision Letters (FCDL)).

¹⁷ Letters from USAC, Schools and Libraries Division, to Irene Halko, Queen of Peace High School (dated Apr. 27, 2010).

¹⁸ Letter from Irene Halko, Queen of Peace High School, to USAC, Schools and Libraries Division (filed May 10, 2010).

¹⁹ Letter from USAC, Schools and Libraries Division, to Irene Halko, Queen of Peace High School (dated June 28, 2010) (Administrator's Decision on Appeal).

²⁰ 47 C.F.R. §§ 54.505(a).

²¹ See USAC website, <http://www.usac.org/sl/applicants/step03/run-open-fair-competition.aspx> (last visited Dec. 1, 2011).

²² We note here that USAC did not properly characterize the alleged competitive bidding violation. The violation cited by USAC was improper inclusion of vendor contact information on the Form 470, which normally indicates that a service provider signed or filed the FCC 470 on behalf of the applicant. See *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.*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028, 4033 (2000) (finding a service provider participating in the competitive bidding process cannot be involved in the preparation of the entity's FCC Form 470). Here, however, the allegations of a compromised bidding process (potential vendor pre-selection) stem from reference to a vendor in the description of requested services, not use of a vendor to file or sign the applicant's FCC Form 470. However, the mischaracterization of the alleged program violation is not relevant to the analysis of the conduct, because the Bureau must conduct a *de novo* review of requests for review of decisions issued by USAC. 47 C.F.R. § 54.723.

provider or that the service provider would be given some sort of preference in the bidding process, and therefore decline to bid on the requested services.²³ Because the Commission had not provided specific instruction on how to reference manufacturers or brands in an FCC Form 470 or a request for proposal, applicants may have reasonably believed that it was permissible to identify desired services using a vendor's name as part of the description.

7. We decline to penalize Queen of Peace, or other applicants who may have engaged in this practice before the release of this order. We have reviewed the specific facts in this case and conclude that the competitive bidding process was not tainted. On the same FCC Form 471 on which Queen of Peace improperly indicated that it sought "Edline" services, it also indicated more generally that it was seeking bids for web-hosting services. In response, several service providers in addition to Edline submitted bids. The descriptions in the Form 470 thus did not prevent other vendors from submitting bids for web-hosting services, and we conclude that the errant description did not undermine the competitive bidding process.²⁴ The record also shows that Queen of Peace selected Edline as its service provider based on price, experience, and technical capabilities. Accordingly, we grant the request for review filed by Queen of Peace and remand its application to USAC for further processing consistent with this order.

8. We conclude, however, that allowing applicants to reference specific vendors in their Form 470 or RFP poses a risk to the competitive bidding process. We therefore clarify that, for Form 470s or RFPs posted for Funding Year 2013 or thereafter, applicants must not include the manufacturer's name or brand on their FCC Form 470 or in their RFPs unless they also use the words "or equivalent" to describe the requested product or service. Such a description ("or equivalent") will prevent the Form 470 or RFPs from being construed as requiring only a specific product or service provider, which could undermine the competitive bidding process by eliminating the opportunity for the applicant to purchase an equivalent or better product that may be less expensive or to choose a less expensive service provider. We therefore require that applicants include "or equivalent" with any description in which they may list a specific manufacturer's name, brand, product or service when seeking bids. For example, an applicant may indicate that it is requesting bids for "XYZ manufacturer's high-speed router model 345J or equivalent." However, a request for "XYZ manufacturer's high-speed router model 345J," without the words "or equivalent," will constitute a violation of the Commission's competitive bidding process for Funding Year 2013 or thereafter because the description could suggest to potential bidders that the specific products and services are predetermined.

9. As required by our rules, applicants must carefully consider all of the bids received before selecting a winning bidder.²⁵ We instruct USAC, if otherwise appropriate, to approve all currently pending applications and appeals in which an applicant failed to state "or equivalent" when listing a specific manufacturer's name, brand, product or service on the FCC Form 470s and to implement the guidance provided herein beginning with FCC Forms 470 or requests for proposals that are posted for Funding Year 2013.

²³ *Universal Service First Report and Order*, 12 FCC Rcd 9078-79, para. 575; see also 47 C.F.R. §§ 54.503(c). See <http://www.usac.org/sl/applicants/step03/run-open-fair-competition.aspx> (providing that the Form 470, RFP, or other solicitation method should be clear about the products, services, and quantities the applicant is seeking and stating that the applicant must avoid using generic or encyclopedic service descriptions on their Form 470.)

²⁴ *Id.*

²⁵ See 47 C.F.R. §§ 54.504(b)(vii) (stating "[a] bids submitted will be carefully considered and the bid selected will be for the most cost-effective service or equipment offering, with price being the primary factor..."). Our rules do not require applicants to select the least expensive option. Applicants may consider other factors in the competitive bidding process, as long as price is the primary factor considered. *Id.*

IV. ORDERING CLAUSES

10. 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, 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, 54.722(a), that the request for review filed by the Queen of Peace High School on July 19, 2010, IS REQUESTED to the extent provided herein.

11. 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 DISCONTINUE its recovery actions against the Queen of Peace High School and its service provider.

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 APPLY this ruling to all of the pending applications and appeals concerning the underlying issue addressed herein.

FEDERAL COMMUNICATIONS COMMISSION

Gina Spade
Deputy Chief
Telecommunications Access Policy Division
Wireline Competition Bureau