

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Promoting Fair and Open Competitive Bidding in) WC Docket No. 21-455
the E-Rate Program)
)

COMMENTS OF INCOMPAS

INCOMPAS submits these comments in response to the Federal Communications Commission’s (“Commission”) *Notice of Proposed Rulemaking* proposing to establish a bidding portal to facilitate the competitive bidding process and reduce the risk of waste, fraud, and abuse in the E-Rate program.¹

I. INTRODUCTION & SUMMARY

INCOMPAS, the Internet and competitive networks association, represents companies that provide competitive residential broadband Internet access service (“BIAS”), as well as other mass-market services, such as video programming distribution and voice services in urban, suburban, and rural areas. Our members include small fiber providers that are building more fiber than and are offering services that are competitive to large incumbents. We also represent companies that are providing business broadband services to schools, libraries, hospitals and clinics, and businesses of all sizes. We have wireless and satellite members that are offering services to residential and business customers. Finally, we represent transit and backbone providers that carry broadband and Internet traffic, and online content and video distributors

¹ *Promoting the Fair and Open Competitive Bidding in the E-Rate Program*, Notice of Proposed Rulemaking, WC Docket No. 21-455, FCC 21-124 (rel. Dec. 16, 2021) (“*Notice*” or “*NPRM*”).

(“OVDs”) that offer various content and communications services and video programming over BIAS to consumers.

INCOMPAS commends the Commission for its continued diligence in examining the Universal Service Fund (“USF”) programs to ensure that they are protected from the risk of waste, fraud, and abuse. Given their regular participation in the program as vendors, our members appreciate the Commission’s efforts to maintain “good stewardship” of the E-Rate program.² Under the current framework, the E-Rate program has successfully delivered support from the USF to schools and libraries for over two decades and the robust competitive bidding process has ensured that all broadband providers enjoy the same opportunity to compete for program funding. As the Commission is aware, in a competitive communications marketplace, generally, consumers will be better off and providers will be more inclined to invest in and deploy next-generation networks. Robust participation in the E-Rate program means that providers will compete to produce the lowest price for the E-Rate fund and local taxpayers. Furthermore, applicants have used the competitive bidding process to achieve better service for schools and libraries and ensure that their selected provider can deliver higher speeds and bandwidth as demand increases. A competitive E-Rate program ensures that schools, libraries, and consortia continue to receive E-Rate supported services that best meet their needs. Fortunately, the current system has encouraged significant competition in the E-Rate program resulting in lower prices and increased bandwidth for program participants.

In this proceeding, the Commission proposes to augment the current competitive bidding process by establishing “a central document repository through which service providers would be required to submit bids” to the Universal Service Administrative Company (“USAC”), which

² *Notice* at para. 2.

serves as the E-Rate program administrator. As advocates for competition policy and vendors in the E-Rate program, INCOMPAS and its members are concerned that the Commission's proposal to create an online portal at USAC for competitive bidding in the E-Rate program will unnecessarily disrupt the E-Rate provider selection process and that implementing the portal across the industry and for schools, libraries, and consortia will far outweigh any potential benefits or ability to better address waste, fraud, and abuse. These comments address those concerns and urge the Commission to ultimately abandon its proposals to change the current competitive bidding process.

II. THE COMMISSION'S PROPOSED BIDDING PORTAL WOULD BE DIFFICULT AND COSTLY TO IMPLEMENT, INTRODUCE INEFFICIENCIES THAT DELAY FUNDING, AND AFFECT COMPETITION IN THE PROGRAM.

According to the *Notice*, the development and implementation of a bidding portal hosted by USAC is intended to address concerns that the Commission does not have a "proactive way to monitor the bidding information."³ However, it is not clear that a bidding portal is necessary to address the risk of fraud that the Commission identifies in the *Notice*. First, in addition to state and local competitive bidding requirements that applicants are required to follow, the Commission already has sufficient competitive bidding safeguards in place. The Commission's rules require that applicants conduct a fair and open competitive bidding process, give service providers a sufficient amount of time to respond to bid requests, and use price as the primary factor in reviewing all bids.⁴ These requirements ensure that the applicant and the program receive the best value for funding. Second, if there are concerns about the manner in which a selection process was conducted, USAC already has in place a robust audit process that acts as a

³ *Notice* at para. 11.

⁴ 47 C.F.R. § 54.503.

compelling deterrent to fraud in the program. While the 2020 GAO E-Rate Report identifies examples of improper payments (likely discovered through the USAC audit process)⁵ as well as one particular example of waste, fraud, and abuse, perpetrated against the program by “a number of E-rate program applicants, service providers, and consultants” in February 2020,⁶ it is not clear that abuse in the program is otherwise widespread or could not be addressed through the existing audit and enforcement process.

As indicated in the *Notice*, the E-Rate program has provided a support mechanism for broadband to schools and libraries for over two decades,⁷ and our members have expressed concern that the change to a bidding portal may also introduce unnecessary inefficiencies and delays into the system. For example, the proposed 28-day bid holding period may lead to a longer selection process. While a bidding window may “level the playing field” for service providers in some situations,⁸ it immediately impacts the ability of schools, libraries, and consortia to start the review and selection process as bids are submitted. Since extending the review and selection process will lead to further delays for funding for selected providers, INCOMPAS posits that the benefits to competition do not outweigh the costs associated with such a change. Furthermore, our members indicate that implementation of a portal would be time-consuming and expensive for schools, libraries, and providers to implement.⁹ The effects

⁵ GAO, *Telecommunications: FCC Should Take Action to Better Manage Persistent Fraud Risks in the E-rate Program*, GAO-20-606, 2 (Sept. 16, 2020) (“2020 GAO E-Rate Report”).

⁶ 2020 GAO E-Rate Report at 26.

⁷ *Notice* at para. 1.

⁸ *Notice* at para. 15 (citing the 2017 OIG Report).

⁹ The cost for developing and implementing a bidding portal would likely be borne by the USF. This would increase operational costs for the program, which are ultimately borne by USF

of a global pandemic have been significant for schools and libraries and service providers. There are limited resources and staff to implement the changes contemplated by the institution of a single bidding portal and for smaller schools, libraries, and service providers, INCOMPAS has significant concerns that the implementation of such a portal will be disruptive to the program's mission and be especially difficult for these entities to successfully transition to using.

Another concern related to the efficiency of the Commission's proposed bidding portal relates to the ability of bidders to cure their proposals. The FCC seeks comment on limiting bidders from reviewing bids as they are received.¹⁰ One potential negative outcome to prohibiting these early reviews is that under the current framework, service providers can be alerted and given an opportunity to correct their application if their bid is missing a key element that would disqualify them and take them out of the bidding process altogether. As a result, limiting the current review process would mean that interested, lower-cost providers that have not had a chance to cure their proposal and correct their bid may be eliminated from contention, which could raise the costs of service for the E-rate program and local taxpayers.

In addition to the concerns that implementing the new bidding portal will be overly burdensome for smaller schools, libraries, and service providers as indicated above, INCOMPAS is particularly troubled that these proposals may skew the competitive playing field to the benefit of larger providers over smaller ones. Primarily, this proposed change could impact schools and libraries exercising their own choice of provider. The implementation of a single USAC-controlled portal would place USAC in the position of potentially taking away local choice from schools, libraries, and educational consortia. This is concerning to INCOMPAS members that

contributors and consumers, at a time when the USF contribution factor is already increasing exponentially.

¹⁰ *Notice* at para. 16.

are regional and local competitive providers that regularly compete with larger providers and incumbents.

A new bidding portal and bidding window may introduce additional hurdles that local schools and library applicants must clear—such as having to provide additional justifications through the procurement process that a local or regional provider can offer service, knows the customer, and can deliver a level of support over normal expectations, if the selection is determined solely on price without past performance being part of the process. This would lead to additional expenses for the applicant and could potentially increase local taxpayer expenses and lead to higher USF costs as well.

The Commission must continue to rely on the applicants to make the most cost-effective decision for their situation, and permitting USAC to influence these decisions may inadvertently discourage local providers from submitting bids for the program. As our members have indicated, removing local choice will not eliminate fraud. In fact, it could introduce fraud if local providers are disadvantaged or potentially removed from the process and the selected provider is not previously known or immediately available to the applicant.

III. A BIDDING PORTAL WILL LIKELY CONFLICT WITH STATE AND LOCAL PROCUREMENT LAWS AS WELL AS CURRENT BIDDING PRACTICES OF STATES AND CONSORTIA.

In the *Notice*, the Commission indicates that program applicants are required to comply with all applicable state and local procurement rules in addition to the E-Rate competitive bidding rules. The Commission seeks comment on whether the creation of a bidding portal would conflict with these requirements.¹¹ Based on a review by our members of the states in which they deliver service, the creation and use of a bidding portal and bidding window will

¹¹ *Notice* at para. 20.

likely create conflicts with these state and local procurement laws and current bidding practices of states and consortia.

For example, one member has described how the state contract in Mississippi has been the primary tool for E-Rate procurement for a majority of the state's schools and libraries since the program started over 20 years ago. The entity issuing and managing the RFP process for the state contract is the primary technology procurement entity for all technology related procurements for state agencies and universities, and therefore has decades of experience with the execution of the procurement process and the subsequent contract management process. The state contract is competitively bid and stringently managed around state procurement laws. There are also several key components of state contracts that provide protections to schools and libraries that they do not typically get through their own procurements. In

Mississippi:

- The state requires service level agreements for performance and support that exceed the typical standard service level guarantees provide by carriers to any single entity.
- The state contract is typically a long-term contract, which simplifies the filing process for applicants and provides consistency in products names, specifications, and pricing statewide.
- The state contract provides state E-Rate coordination resources to assist with process and contract questions.
- Because the state contract is a long-term contract, there are mechanisms built into the contract to ensure pricing and products stay competitive with the most current market products and related market pricing.
- The state contract is backed by the state and its procurement experts and legal teams support the contract related to USAC questions, reviews, or audits for the schools and libraries.
- The state and schools and libraries all benefit from the discounted pricing in the state contract due to the volume generated by use of the state contract by state agencies,

universities, community colleges, local government in addition to the schools and libraries that use it for E-rate eligible services.

These protections, which may exist in other states, may conflict with the Commission's proposals.

It should also be noted that consortiums that engage in the procurement and selection process on behalf of multiple E-Rate-eligible entities benefit from some of the same value introduced by state contracts related to volume, but just on a smaller scale. As with schools and libraries, forcing a modification to how these consortiums work in order to comply with a new USAC portal likely will cost local taxpayers and USF more money.

If the Commission elects to implement its proposal for a bidding portal, INCOMPAS suggests that it be developed to enhance the current bidding process. First, applicants should only be required to upload service provider bids once the selection process has been completed. Second, the Commission must clarify that it is preserving the current procurement process at the state and local level and that the bidding portal will in no way interfere with the current protections assigned to E-Rate program applicants under state law. Finally, the Commission should also use the bidding portal to allow schools, libraries, and consortia to comply with the ten-year documentation and record-keeping requirements. Uploading the necessary documentation to memorialize the selection process and to ensure that they have complied with the program's rules on selecting the most cost-effective bidder should relieve applicants of the obligation to maintain the documents themselves.

IV. CONCLUSION

For the reasons stated herein, INCOMPAS urges the Commission to consider the recommendations in its comments as it examines the issues raised in the *Notice*.

Respectfully submitted,

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