



April 27, 2022

The Honorable Marlene Dortch, Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: Promoting Fair and Open Competitive Bidding in the E-Rate Program
WC Docket No. 21-455
Initial Comments of the South Dakota Department of Education

Dear Secretary Dortch:

The South Dakota Department of Education (“State” or “Department of Education”) opposes the establishment of a national E-rate bidding portal because it is unnecessary, burdensome and will increase the complexity of, rather than simplify the E-rate program. This portal would conflict with state laws governing the procurements we conduct on behalf of public school districts to interconnect them to a statewide communications network that makes cost-effective internet access service available throughout the state. The State already has more than sufficient statutory and regulatory safeguards and oversight mechanisms to ensure its competitive bidding of E-rate contracts satisfies the fair and open competitive bidding E-rate standard that is also codified in state law. SDCL § 5-18A-42.

Our procurements of data network circuits and internet access service is not just for K12 schools and libraries. We also procure these services for state agencies, local governmental units, and state universities. Due to economies of scale available to K12 institutions through our statewide aggregated purchase, we have realized tremendous savings for the K12 circuits and internet. The State utilizes its purchasing power in its procurement practices.

I. State Bidding Procedures and Requirements already protect against fraud and waste in the following ways.

- ✓ A separate state agency, the Bureau of Information and Telecommunications (BIT), has been established to, among other things, be responsible for purchasing and contracting for communications facilities and services. See SDCL 1-33-43 (3). BIT also is responsible for operating the Digital Dakota Network, the statewide communications network that provides internet and data communications to K-12 schools in the state. SDCL 1-33-35. BIT coordinates the procurements with the South Dakota Department of Education, the

E-rate billed entity that pays these bills. A team made up of employees from both agencies work on E-rate procurements. No single person is responsible for or could exert undue influence over these procurements. In other words, the State already has built-in safeguards to thwart fraud or waste.

- ✓ All procurements utilize the State's online bidding portal established by the Bureau of Administration. See <https://bit.sd.gov/vendor/default.aspx>; <https://boa.sd.gov/central-services/procurement-management/procurement-management-vendorInfo.aspx>. This bidding portal ensures that all submitted bids are considered and reviewed by the evaluation team. It is impossible to ignore or disregard any bids that are submitted, which is another reason raised by the OIG in support of the mandatory national E-rate bidding portal.
- ✓ State law has self-dealing prohibitions in effect that augment the E-rate conflict of interest provisions and gift rule restrictions. See SDCL § 5-18-17. This statute seeks to ensure there is no inappropriate relationship between a member of the bid evaluation team and a bidder. See SDCL § 5-18-17.
- ✓ Procurement documents are available for public review pursuant to the South Dakota open records law. SDCL § 1-27.1. This transparency adds another level of oversight of the State's E-rate contracting process.
- ✓ There are numerous ways in which a contracting irregularity could be detected and resolved in our State. Contract awards may be challenged in any number of ways that include but are not necessarily limited to:
 - An informal protest to the agency or to the State Auditor may be submitted. In the event that the state auditor determines that a contract is illegal, unauthorized or improper, the state auditor has the authority to stop the letting or execution of any contract with a state agency. SDCL § 5-18D-26.
 - A lawsuit against the State can be filed, in which the challenger is required to show there was a procurement impropriety such as favoritism, improvidence, extravagance, fraud or corruption.¹
 - A confidential complaint can be filed with the State Government Accountability Board to allege unlawful conduct regarding the procurement. SDCL § 3-24-1.
 - A confidential complaint to the South Dakota Department of Legislative Audit alleging fraud. <https://legislativeaudit.sd.gov/fraud.aspx>

All of these measures are in addition to the option of filing a confidential whistleblower complaint to USAC.

¹ H & W Contracting, LLC and Jamie Frentz, a Taxpayer and Elector of the City of Watertown v. City of Watertown, Municipal Corporation, et al, 2001 SD 107 (South Dakota Supreme Court) (2001).

- ✓ The Department of Education complies with the minimum 10 year record keeping requirement to retain all bidding documents in connection with E-rate services based on the last day of service. A national bidding portal is not required to ensure that the State will be able to provide all required documents in response to an audit request or payment quality assurance review. Indeed, the State has a history of providing all required documentation in response to post-commitment reviews and has never been cited for failing to provide required documentation.

In conclusion, each concern raised by the OIG, GAO or the FCC already are addressed by the State's existing procurement procedures and document repository. Compelling us to retrofit our current procedures would result in preemption of statutory requirements and are counter to E-rate regulation 47 C.F.R. § 54.503(b) that states, "These [E-rate] competitive bid requirements apply in addition to state and local competitive bid requirements *and are not intended to preempt such state or local requirements.* (Emphasis added).

- Using the inter-agency team approach for conducting E-rate procurements, there is no one person who is at the helm and could commit bidding improprieties that would go undetected. The bidding team has access to all the same information and are jointly responsible for the procurement.
- The State already has an online bidding portal to receive all proposals and where bid documents issued by the State are posted in addition to posting them in the Form 470 portal.
- The State's bidding portal precludes the State from disregarding or ignoring a bid submitted in response to the RFP.
- The State already retains all documents in connection with E-rate procurements in compliance with E-rate regulations and provides them to USAC and the FCC upon request, both during PIA review and post commitment reviews.
- There are likewise ample ways in place for disappointed bidders or other interested parties to challenge a contract award if there is an allegation of wrongdoing.

II. State Law and Regulations Will be Preempted in the Following Areas If the FCC Proceeds with the National E-rate Bidders' Portal.

The NPRM states that proposals would have to be submitted only through the E-rate portal. This would prevent the State from using its existing online bidders' portal or posting links to the procurement documents on the Department of Education's web site.

- The State's E-rate RFPs prescribe a specific process and timeline for receipt of and responses to vendor questions per state procedures. Yet the FCC proposes in paragraph 30 of the NPRM that vendors should be permitted to submit anonymous questions in the portal and the State's answers would also have to be posted there.

This process is in conflict with the state procedures in place and would be unnecessarily burdensome. We already are required to submit responses to all vendor inquiries in the existing E-rate Form 470 portal. Further, the proposal raises the prospect that we would have to respond to duplicate questions; not be allowed to establish a deadline for questions; and, cedes our management of the procurement schedule to vendors.

In the past we have dealt with PIA inquiries challenging the veracity of our bidding process when we have uploaded RFP documents to EPC within 28 days of the deadline for proposals deadline for questions. PIA reviewers assumed that any document uploaded required the bidding clock to be re-set even when the document did not make any cardinal change to the RFP. We can only imagine how difficult it will be to bring a procurement to an end if vendors are continually permitted to submit questions and we are required to respond to all inquiries.

- When the State receives and reviews proposals per the RFP document we may schedule vendor meetings to discuss our questions. These meetings would now be preempted. The proposed regulation, 54.503(c)(5) states, "No communication between service providers and applicants related to the competitive bid or the competitive bidding process is permitted outside of the bidding portal during the competitive bidding process." Further the State may pose vendor-specific questions arising from these meetings. If required to submit these questions in the portal, they could be discovered by other bidders and distort the bid evaluation process.
- All proposals and other bidding documents are confidential and exempt from public disclosure during the bidding process and until a contract is executed. Likewise, financial and proprietary information that bidders may include in their proposals may be exempt from public disclosure under state law even after the contract is executed. The bidding portal NPRM does not address how this would be handled if bids are publicly available automatically once the 28 day bidding period expires. These concerns lead to two more areas where the portal may run afoul of state law.
- The State also uses the Best and Final Offer (BAFO) process to obtain the most cost effective prices. We do not understand how we would be able to access those documents on a timely basis if bidders are required to upload them to the national E-rate portal. Also, our RFP documents reserve the right to use a multi-tier bid evaluation process, which has been approved by the FCC, and select a subset of bidders for BAFOs. This sentence in proposed § 54.503(c)(5) raises the concern that the BAFO process may no longer be permitted. It states, "All potential program bidders and service providers must have access to the same information and must be treated in the

same manner *throughout* the procurement process.” (emphasis added). The BAFO process and/or multi-tiered evaluation process may result in selecting certain bidders and excluding others from the last round of bidding. This violates the requirement that all bidders be treated in the same manner throughout the procurement process.

III. Conclusion

The South Dakota Department of Education has identified compelling reasons why the establishment of a national E-rate bidding portal is not in the public interest. When the E-rate program was modernized in 2014, one of the performance goals was to simplify the program and improve the efficient administration of the program. The bidding portal will exacerbate the complexity of the program and will invite reviewers without any qualifications or expertise in our state laws to review, second-guess and challenge our compliance with these laws.

We are concerned that misinterpretation and misapplication of state laws will result in challenges to our bidding procedures and funding denials which will lead to more appeals and delays in receipt of E-rate funding. There is no history of competitive bidding improprieties or fraud concerning our E-rate procurements. There is no history of our state not providing all competitive bidding documents upon request. There is no history of ignoring bids.

We respectfully request the FCC to conclude that the bidding portal should not be implemented and there is no need to micromanage our procurements of E-rate funded services.

Respectfully submitted,

DocuSigned by:
 04/27/2022

982ASUBABS74FL
Lisa D. Rae
Deputy Director
Division of Finance and Management
South Dakota Department of Education
800 Governors Drive
Pierre, SD 57501
(605) 773-3248
Lisa.d.rae@sd.state.us