



February 19, 2008

The FCC has issued a limited waiver of the requirement that a service contract must be submitted at the time funding is requested for the Schools and Libraries Universal Service Support Mechanism (the “E-rate program”). The waiver was issued under particular circumstances presented by the Franklin-McKinney School District of San Jose, California and addressed both substantive and procedural aspects.

The E-rate program is essentially a two-step procedure. First, the FCC posts an applicant’s Form 470 requesting discounted services on the website of the Universal Service Administrative Company (USAC) for a minimum of 28 days to permit competitive bids. Then an applicant can file Form 471, but only after signing a contract for eligible services. The instructions to the form specifically state that all services must be covered by either a signed contract or a “legally binding agreement.”

USAC had rescinded its funding commitment on the ground that Franklin-McKinney had failed to demonstrate that it had a signed contract with its service provider at the time it filed its Form 471. However, the Commission found that prior to filing the Form 471 Franklin-McKinney had a signed bid form which stated that the parties “proposed and agreed to enter into a Contract.” Months later, Franklin-McKinney submitted a new contract with its service provider that recited that the parties had been in a binding contractual arrangement. On those grounds, the Commission found that Franklin-McKinney had satisfied the requirement that a contract already exist upon filing a Form 471. The Commission generally noted that a limited waiver of the requirement of submitting a contract with the Form 471 was appropriate in situations where a school system could demonstrate the existence of a legally binding agreement.

The Commission further noted that Franklin-McKinney had filed its appeal of USAC’s rejection of its funding request more than the required 60 days after the date of the USAC’s notification letter. The Commission noted that USAC itself had no authority to waive filing deadlines of this type, but the Commission stepped in to do so itself. Although the Commission tends to be quite strict with timing requirements in other areas of its jurisdiction, it has tended toward leniency in situations where a school system proceeds in good faith and presents a reasonable explanation for the delay. Here, Franklin-McKinney had claimed that the responsible person was out of the office handling serious family illnesses during the period when the appeal was to have been filed, and only learned of the USAC’s decision upon returning, at which point an appeal was promptly submitted. The Commission found that this comprised good cause to waive the filing deadline.

While Franklin-McKinney ultimately obtained the funding it had sought for 2005, it is important to strictly comply with both the substantive and procedural filing requirements for the E-rate program in order to obtain timely funding and to avoid the expense and uncertainty of pursuing an appeal of rejection by the USAC.

Please contact Mark Palchick (202/857-4411) or Peter Gutmann (202/857-4532) if you have any questions regarding this advisory.

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