



Commission Issues Additional Universal Service Fund Decisions

March, 2007

The Commission recently released two decisions regarding the application of its e-rate rules. Following is a summary of those decisions:

Conflict of Interest

In *Send Technologies, LLC*, the Commission denied an appeal of commitment adjustment recovery actions. The actions were initiated to recover monies disbursed to Send and Union Parish, Louisiana following an Investigative Audit Report issued by Louisiana's Office of the Legislative Auditor finding a conflict of interest existed between Send and Union Parish.

The designated contact person for Union Parish (FCC Form 470), a Parish employee, owned a 15% interest in Send. USAC determined that this interest violated the Commission's competitive bidding requirements. Send argued that Louisiana procurement law holds that an ownership interest is not deemed to be attributable until it reaches 25%. It argued that the Parish employee's 15% ownership interest should have been deemed a minority interest, insufficient to create a conflict of interest.

Relying on its *Mastermind* decision, the Commission easily found the existence of a conflict of interest. In *Mastermind*, the Commission had "determined that a contact person that has a relationship with a prospective service provider may influence the competitive process in two ways: either other prospective bidders may not bid, or the contact person may not provide information to other bidders of the same type and quality that the contact person retains for its own use as a bidder." Based upon the Investigative Audit Report's findings that the employee had participated in the contract process by preparing the request for bid and an analysis of bids submitted to Union Parish board members, the Commission rejected Send's

contention that the employee was isolated from the process.

The Commission also relied on the Investigative Audit Report's determinations that:

- potential bidders were severely restricted in the time they had to respond;
- potential bidders were not afforded the opportunity to clarify or discuss any of the proposed specifications before the bid; and
- the competing bidder was not given ample time to prepare questions and received no information regarding its inquiries.

These were precisely the concerns underlying the holding in *Mastermind*.

The Commission also found that the relationship violated not only the letter of the law, but its spirit and intent as well. While compliance with state and local procurement laws is mandated, the rules make it clear that compliance with the Commission's competitive bidding rules apply in addition to state and local requirements. Thus, any Louisiana finding that the 15% ownership interest did not violate Louisiana law was not controlling. Also influencing the Commission's decision was the Investigative Audit Report's finding of other irregularities, specifically:

- that the competitive bidding process was flawed;
- contracts were entered into without the approval of the school board members;
- the school board paid for services that were either not allowed or not provided;
- payments were issued to Send in violation of the state constitution; and
- the school board paid for enhanced services that were never provided.

The Commission also denied Send's assertion that USAC exceeded its authority when it commenced the recovery action at issue. It found that USAC, as the administrator of the schools and libraries support mechanism, is required to commence recovery actions when made aware of a violation of the Commission's rules.

Competitive Bidding Rules

With one limited exception for existing, binding contracts, the Commission's rules require that competitive bids must be sought for all services eligible for support. In its 1999 *Tennessee Order*, the Commission had determined that a competitive bidding process complies with program rules if price is taken into account during bid selection and the contract is awarded to the most cost-effective bidder, though prior experience, personnel qualifications, and management capability may also form a reasonable basis on which to evaluate whether an offering is cost-effective.

However, the Commission later concluded in its 2003 *Ysleta Order* that price must be the primary factor in selecting a winning bid. Under *Ysleta*, when evaluating bids the price category must be given more weight than any other category.

In the case at issue, USAC denied funding because of the applicants' failure to give more weight to price in the competitive bidding process than to any other factor. Each of the applicants, however, filed their applications and initiated their competitive bidding process prior to the conclusion of Funding Year 2003, i.e., prior to issuance of the *Ysleta Order*. The Commission found that because the *Ysleta Order* was issued subsequent to completion of the Petitioners' competitive bidding processes, the use of price as one primary factor rather than the sole factor, as required by *Ysleta*, was consistent with the rules.

Please contact Mark Palchick (202/857-4411) or Howard Barr (202/857-4506) if you have any questions regarding this advisory.