Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Request for Review of the	)	
Decision of the	)	
Universal Service Administrator by	)	
	)	
Ysleta Independent School District El Paso, Texas	)	SLD No. 321479
	)	
International Business Machines, Inc. on behalf of Ysleta Independent School District El Paso, Texas	)	SLD No. 321479
	)	
Donna Independent School District Donna, Texas	)	SLD Nos. 317242, 317016, 311465, 317452, 315364, 309005, 317363
	)	
International Business Machines, Inc. on behalf of Donna Independent School District Donna, Texas	)	SLD Nos. 317242, 317016, 311465, 317452, 315364, 309005, 317363
	)	
Galena Park Independent School District Houston, Texas	)	SLD Nos. 314879, 305340
	)	
International Business Machines, Inc. on behalf of Galena Park Independent School District Houston, Texas	)	SLD Nos. 314879, 305340
	)	
Oklahoma City School District I-89 Oklahoma City, Oklahoma	)	SLD No. 315578
	)	
International Business Machines, Inc. on behalf of Oklahoma City School District I-89 Oklahoma City, Oklahoma	)	SLD No. 315578
	)	
El Paso Independent School District El Paso, Texas	)	SLD Nos. 318522, 315768
	)	
International Business Machines, Inc. on behalf of El Paso Independent School District El Paso, Texas	)	SLD Nos. 318522, 315678

Navajo Education Technology Consortium Gallup, New Mexico	)	SLD No. 306050
Memphis City School District Memphis, Tennessee	)	SLD No. 331487
International Business Machines, Inc. on behalf of Memphis City School District Memphis, Tennessee	)	SLD No. 331487
Albuquerque School District Albuquerque, New Mexico	)	SLD No. 320461
International Business Machines, Inc. on behalf of Albuquerque School District Albuquerque, New Mexico	)	SLD No. 320461
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
Changes to the Board of Directors of the National Exchange Carrier Association, Inc.	)	CC Docket No. 97-21

ORDER

Adopted: December 4, 2003 **Released: December 8, 2003**

By the Commission:

I. INTRODUCTION AND OVERVIEW

1. Before the Commission is a Request for Review by the Ysleta Independent School District (Ysleta), El Paso, Texas, and similar Requests for Review filed by seven other schools set forth in the caption.[1] As noted in the caption, International Business Machines, Inc. (IBM) also files a Request for Review in most of the appeals.[2] The schools and IBM seek review of decisions of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator), denying $250,977,707.08 in schools and libraries universal service

[1] *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District,* CC Docket Nos. 96-45 and 97-21, Request for Review, filed January 30, 2003 (Ysleta Request for Review). Relevant citations for the other appeals are contained in the Appendix.

[2] *See, e.g., Request for Review of the Decision of the Universal Service Administrator by International Business Machines, Inc. on behalf of Ysleta Independent School District,* CC Docket Nos. 96-45 and 97-21, Request for Review, filed January 30, 2003 (IBM Request for Review).

support mechanism discounts to the schools for Funding Year 2002.[3] Because each appeal raises very similar issues, we consolidate our review here.[4] For the reasons set forth below, we affirm SLD's decisions and deny the Requests for Review. Under the terms set forth below, however, we waive the filing window for Funding Year 2002 to permit the above-captioned schools to resubmit requests for eligible products and services for Funding Year 2002 under the terms set forth below.[5]

2. The Commission is deeply concerned about a number of practices that undermine the framework of the competitive bidding process established by the Commission's *Universal Service Order* of May 8, 1997. If allowed to persist, the practices that we address in this Order could suppress fair and open competitive bidding, and ultimately thwart the goal of effective, efficient, and equitable distribution of universal service support to eligible schools and libraries. The Commission has directed program applicants to take full advantage of the competitive market to obtain cost-effective services and to minimize waste, fraud, and abuse. Reliance on competitive markets also assures that program funds can be distributed as widely and as equitably as possible among the applicants. To enhance competitive-market processes, the Commission has developed a process in which applicants first develop detailed technology plans that describe their technology needs and goals in a manner consistent with their educational or informational objectives. Having determined the services for which they would seek E-rate discounts,[6] applicants would then submit for posting on the Administrator's website an FCC Form 470, listing the desired services, consistent with the technology plan, with sufficient specificity to enable potential bidders to submit bids for E-rate eligible services. Applicants could indicate on the FCC Form 470 if they also had a Request for Proposal (RFP) providing additional detail on the services sought. Once an applicant received bids with specific prices quoted for eligible services, it would select the most cost-effective services, with price as the primary factor. Where consistent with these practices, applicants would rely on state and local procurement processes. This is the foundation upon which the Commission's rules and orders are based.[7]

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[3] *See* Appendix A. *See* Request for Review; Letter from Schools and Libraries Division, Universal Service Administrative Company, to Richard L. Duncan, Ysleta Independent School District, dated December 3, 2002 (Funding Commitment Decision Letter); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Richard L. Duncan, Ysleta Independent School District, dated December 3, 2002 (Further Explanation). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

[4] For ease of discussion, our analysis in this Order will focus on the facts presented in the Ysleta appeal. We provide additional information about the eight other appeals in Appendix B.

[5] There are additional appeals before SLD that are factually similar in nature to the appeals discussed herein. SLD shall address those appeals in accordance with the terms of this Order.

[6] "E-rate" is the colloquial term by which the schools and libraries support mechanism is widely known.

[7] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9076-80, paras. 570-80 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *Universal Service First Report and Order* in part and reversing and remanding on unrelated grounds), *cert. denied, Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000),

3. The procurement processes presented in the instant Requests for Review thwart the Commission's competitive bidding policies. The factual scenarios of the different applicants vary to some degree, but all present troubling conduct or outcomes that are inconsistent with the competitive bidding procedures required by our rules and orders. Most of the above-captioned applicants selected a Systems Integrator to provide millions of dollars worth of services, but chose the Systems Integrator without seeking bids on any of the prices of the specific E-rate-funded services sought. Most of the applicants also submitted FCC Forms 470 expressing interest in purchasing a catalogue of virtually every eligible service, rather than developing a list of services actually desired, based on their technology plans, with sufficient specificity to enable bidders to submit realistic bids with prices for specified services. Some applicants also stated on their FCC Forms 470 that they did not have an RFP relating to the E-rate eligible services, and then subsequently released such an RFP just a few days later.

4. These practices are contrary to our rules and policies and create conditions for considerable waste of funds intended to promote access to telecommunications and information services. Such waste harms individual applicants that do not receive the most cost-effective services. If allowed to continue, the practices identified here would harm other applicants who may be under-funded because funds needlessly have been diverted to these excessive program expenditures. Further, it would damage the integrity of the program, which to date has successfully provided discounts enabling millions of school children and library patrons, including those in many of the nation's poorest and most isolated communities, to obtain access to modern telecommunications and information services for educational purposes, consistent with the statute.

III. BACKGROUND

A. Communications Act and Commission Rules

5. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts for eligible telecommunications services, Internet access, and internal connections.[8] Section 254(h)(1)(B) of the Act provides, "All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to [schools and libraries] for educational purposes at rates less than the amounts charged for similar services to other parties . . . ."[9] The Commission elaborated on the meaning of "bona fide" in the *Universal Service Order*, where it stated that Congress "intended to require accountability on the part of schools and libraries," which should therefore be required to "(1) conduct internal assessments of the components necessary to use effectively the discounted services they order;

cert. denied, AT&T Corp. v. Cincinnati Bell Tel. Co., 120 S. Ct. 2237 (June 5, 2000*), cert. dismissed, GTE Service Corp. v. FCC*, 121 S. Ct. 423 (November 2, 2000).

[8] 47 C.F.R. §§ 54.502, 54.503.

[9] 47 U.S.C. § 254(h)(1)(B) (emphasis added).

(2) submit a complete description of services they seek so that it may be posted for competing providers to evaluate; and (3) certify to certain criteria under perjury."[10]

6. In the *Universal Service Order*, the Commission designed the program application structure to encourage competitive bidding on specific eligible products and services. Our rules provide explicit requirements for applicants to develop technology plans based on the reasonable needs and resources of the applicant, setting forth in detail how the applicant will use certain technologies in the near term and into the future, and how they plan to integrate the use of the technologies into their curriculum.[11] At the time of the FCC Form 470 filing, applicants must certify whether their technology plans have been approved, and that they recognize that support is conditional upon securing access "to all of the resources, including computers, training, software, maintenance, and electrical connections necessary to use the services purchased effectively."[12] This requirement limits waste in the program by ensuring that products and services for which discounts are sought have been carefully selected to complement an applicant's educational and information goals, consistent with available resources. The Commission specifically required that technology plans be independently approved, to ensure that the plans are based on the "reasonable needs . . . of the applicants and are consistent with the goals of the program."[13]

7. The Commission's rules state that "an eligible school or library shall seek competitive bids . . . for all services eligible for support . . . ."[14] Under our rules, the competitive bidding process involves the use of an FCC Form 470 describing services being sought. An eligible school, library, or consortium seeking to receive discounts for eligible services must submit to the Administrator a complete FCC Form 470, which must include certain information such as information about the computer equipment, software, and internal connections available or budgeted for purchase, and staff experience.[15] As explained in the *Universal Service Order*, the Form 470 must "describe the services that the schools and libraries seek to purchase in sufficient detail to enable potential providers to formulate bids. . . ."[16] Each

[10] *Universal Service Order*, 12 FCC Rcd at 9076, para. 570.

[11] *See Universal Service Order*, at 9077, para. 572-74.

[12] *Id.* In a recent Further Notice of Proposed Rulemaking, the Commission sought comment on whether to change our rules so that applicants may certify that their technology plans will be approved by the time that E-rate supported services begin. *See Schools and Libraries Universal Service Support Mechanism,* CC Docket No. 02-6, Second Report and Order and Further Notice of Rulemaking, FCC 03-101 at paras 99-100 *(rel. April 30, 2003) (Second Order and FNPRM).*

[13] *Universal Service Order*, 12 FCC Rcd at 9077, paras. 573-74.

[14] 47 C.F.R. § 54.504(a).

[15] 47 C.F.R. § 54.504(b).

[16] *Universal Service* Order, 12 FCC Rcd at 9078, para. 575 (emphasis added).

applicant must certify in its FCC Form 470 that it has developed a technology plan that has been approved by an authorized entity.[17]

8. The Administrator must post each applicant's Form 470 on SLD's website, allowing review by all potential competing service providers.[18] After waiting at least four weeks so that competing providers may consider submitting competitive bids for services, the eligible school, library, or consortium seeking discounts may then enter into a contract with the chosen service provider. The applicant then submits a completed FCC Form 471 application to the Administrator, indicating the selected service provider and services for which discounts are sought.[19] SLD reviews the FCC Forms 471 that it receives and issues funding commitment decisions in accordance with the Commission's rules. Applications that are received outside of this filing window are subject to separate funding priorities under the Commission's rules, and typically do not receive funding.[20]

9. Under our rules, applicants must select the most cost-effective bids.[21] The Commission's rules state, "These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements."[22]

B. Ysleta

10. Ysleta initially developed a technology plan in 1993, then revised it in 1998, partly to comply with the Commission's newly adopted rules governing the new schools and libraries support mechanism.[23] Ysleta modified its technology plan again in May 2001.[24] Ysleta's

[17] 47 U.S.C. § 54.504(b)(2)(vii). An applicant must certify that its technology plan has been "certified by its state, the Administrator, or an independent entity approved by the Commission." *Id.* Technology plans must establish the connections between the information technology and the professional development strategies, curriculum initiatives, and objectives that will lead to improved education or library services. They must (1) establish clear goals and a realistic strategy for using telecommunications and information technology to improve education or library services; (2) include a professional development strategy to ensure adequate use of the technology; (3) include an assessment of the telecommunications services, hardware, software, or other services needed; (4) provide for a sufficient budget; and (5) include an evaluation process to monitor progress and make mid-course corrections. *See Universal Service Order*, 12 FCC Rcd at 9077-78, paras. 572-74; SLD web site, Frequently Asked Questions About Technology Planning, <http://www.sl.universalservice.org/reference/TechnologyPlanningFAQ.asp>.

[18] 47 C.F.R. § 54.504(b); *Universal Service Order,* 12 FCC Rcd at 9078, para. 575.

[19] 47 C.F.R. § 54.504(b), (c); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (FCC Form 471). The FCC Form 471 notifies SLD of the services that have been ordered and indicates the amount of discounts sought. *Id.*

[20] 47 C.F.R. § 54.507(g).

[21] *Universal Service Order*, 12 FCC Rcd at 9029-30, para. 481.

[22] 47 C.F.R. § 54.504(a).

[23] *See* Ysleta Appendix I, Tab 3, Ysleta Long-Range Technology Plan, History, Overview at 1. Consistent with our rules, Ysleta's technology plan was approved by the State of Texas. *See* Ysleta Request for Review at 8; FCC Form 470, Ysleta Independent School District, posted October 12, 2001 (Ysleta Form 470).

Funding Year 2002 FCC Form 470 was posted on SLD's website on October 12, 2001.[25] In its FCC Form 470, Ysleta indicated that it was seeking virtually every product and service eligible for discounts under the support mechanism.[26] It also stated that it was "seeking a Technology Implementation and Systems Integration Partner."[27] In Blocks 8, 9, and 10 of the form, Ysleta checked the box for, respectively, telecommunications services, Internet access, and internal connections, indicating in each instance "No, I do not have an RFP [Request for Proposal] for these services."[28]

11. On October 17, 2001, five days after the posting of the FCC Form 470, Ysleta released an RFP, the substantive requirements of which comprised only six pages.[29] The RFP stated that Ysleta was seeking a "Technology Implementation and Systems Implementation Partner" to "assist the District in preparing applications on the District's behalf for E-rate funding and applying technology to improve student achievement and administrative practices in support of teaching and learning."[30] The Systems Integrator would "implement, refine and support a state-of-the-art technology infrastructure . . ." and the scope of the project would "include all E-rate funded projects."[31] Significantly, however, such projects were not identified in the RFP. The Systems Integrator would "serve as the prime contractor for any projects funded through E-rate, and all E-rate applications will be submitted using the successful

[24] Ysleta Request for Review at 8.

[25] *See* Ysleta Form 470.

[26] Ysleta indicated that it was seeking the following services or functions for "63 locations": (Telecommunications Services): Basic Telephone Service (POTS, Centrex); Long Distance; High Bandwidth Service (56K, ISDN, DSL, Frame Relay, Fractional T1, DS1, DS3, OC3, ATM, Satellite, MAN, WAN, LAN Interconnect); Wireless Service (Cellular, PCS, Paging, LAN, WAN); Video Service, Interactive TV, Distance Learning; Maintenance/Installation (Inside Wire Maintenance); Homework Hotline Service; (Internet Access): Internet Access; Wireless Service (LAN, WAN); High Bandwidth Service (56k, ISDN, DSL, Frame Relay, Fractional T1, DS1, DS3, OC3, ATM, Satellite, MAN, WAN, LAN Interconnect); Maintenance/Installation; (Internal Connections): Wiring (CAT5, COAX, Fiber, Conduit, wiring accessories); Routers, Servers, Switches, HUBS, Upgrades; PBX, KSU, ARS, Console, Components and Upgrades; Video CODEC, MCU, MPEG encoder, Multimedia Kit, PVBX, Video Group and Desktop Equipment, EMMI; Maintenance/Installation, Onsite Technical Support, Documentation; Wireless Service (WAN, LAN); Video Equipment (Broadband Amplifier, Cable Box and Modem); ATM Equipment (Edge Device, EMMI); Hardware and Upgrades for Internal Connections (CSU/DSU, Antenna, DAT, Line Sharing Device, Media Converter, Modem, Monitor, Multiplexing, Satellite Dish, TA, Terminal Server, UPS, Zip Drive); Internal Connections Components (Backup Power Supply and Batteries, Cabinets, Power Strips, Circuit Card, Eithernet [sic] Cards, Graphics Card, Harddisk Array Controllers, RAID, MAU, NIC, SNMP Module); Operational Software and Upgrades, E-Mail Software. *See* Ysleta Form 470.

[27] *Id.*

[28] *See* Ysleta Form 470.

[29] *See* Ysleta Independent School District, Request for Proposal 22-1113-016RFP, released October 17, 2001 (Ysleta RFP).

[30] *Id*. at 1.

[31] *Id.*

bidder's single SPIN number (Service Provider Identification Number)."[32] The successful bidder would be identified based on points awarded for availability and quality of resources, staff development and training, project management/systems integration, technology solutions, commitment to K-12 education, District funding considerations, pricing model and cost assurances, and other vendor attributes.[33]

12. The RFP did not seek pricing information from bidders concerning products and services for which discounts under the support mechanism would be sought, nor did it require the successful bidder to provide such information as part of its bid.[34] Prospective bidders were required to provide a proposed pricing model that would demonstrate throughout the life of the contract that costs would be within normal and customary charges, would be simple to administer, meet all statutory requirements for recordkeeping and auditing, adhere to district purchasing policy, and be flexible within established budgets.[35]

13. The deadline for responses to the RFP was November 15, 2001.[36] Five vendors submitted bids: IBM, Avnet Enterprise Solutions, Compaq Computer Corp., I-Next, Inc., and SBC-Southwestern Bell.[37] IBM submitted a 147-page response that addressed each category in the RFP, describing in general terms IBM's experience and resources.[38] Under the "Pricing Model and Cost Assurances" category, IBM stated that "the only inputs necessary to determine a price are: length of project, number and type of project resources required, and determination of IBM's risk assumption."[39] The only actual prices quoted by IBM were part of a schedule of hourly rates strictly for Systems Integration, ranging from $394 per hour for a Project Executive to $49 per hour for a Project Administrator.[40]

14. Ysleta Technology Department and Purchasing Department officials reviewed the bids and recommended that IBM be selected.[41] On December 12, 2001, the Ysleta Board of

[32] RFP at 3.6. The SPIN is a number issued by SLD to identify service providers for purposes of the program.

[33] *Id.* at 3.7.

[34] *See generally* RFP.

[35] *Id.*

[36] Ysleta Request for Review at 9.

[37] *Id.*

[38] *See* IBM Response to Ysleta Request for Proposal, Ysleta Request for Review at Appendix II Tab 6 (IBM Bid).

[39] *Id.* at 77.

[40] *Id.* at 79-80.

[41] *See* Ysleta Request for Review at 9.

Trustees selected IBM "as the putative awardee . . . if a final contract (including pricing) was successfully negotiated and finalized . . . ."[42]

15. Only after Ysleta chose IBM as the putative awardee did Ysleta begin negotiating the scope of work and cost of the actual products and services for Funding Year 2002 that would be eligible for discounts under the support mechanism.[43] The contract that IBM and Ysleta ultimately entered into set forth five Statements of Work, each with detailed specifications, prices, and terms: Cabling Services ($2,090,400),[44] Network Electronics ($965,500),[45] Network File and Web Servers ($3,945,320),[46] Basic Unbundled Internet Access ($968,600),[47] and Technical Support Services ($12,409,811).[48] This last Statement of Work covered: "IBM Project Management of the Technical Support Office; network infrastructure support; Local Area Network technical support, including network hardware; technical support procedures supporting networking systems and maintenance, including design, installation, implementation, and customization of network functions; and dedicated technical resources for network technical support on a time and materials basis."[49]

16. As negotiated, the contract provided for a one-year term, and could be terminated by Ysleta upon thirty days notice.[50] The contract also entitled Ysleta to review IBM's pricing of products, and to direct IBM to contract with particular vendors for specific products specified in a Statement of Work, provided that IBM approved the selection based on its standards for vendor quality.[51] Ysleta contends that in negotiations with IBM prior to signing the contract, it refused a request from IBM to add another project, and that it negotiated substantial changes in pricing with IBM, totaling "many millions of dollars."[52]

17. On January 17, 2002, the final day of the filing window for Funding Year 2002 applications for discounts, Ysleta completed negotiations with IBM, signed the contract, and

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[42] *Id.*

[43] *See* IBM Request for Review at 7.

[44] *See* Ysleta Appendix II, Tab 7 (General Contract), IBM Statement of Work for Cabling Services at 13.

[45] *See* General Contract, IBM Statement of Work for Network Electronics at 13.

[46] *See* General Contract, IBM Statement of Work for Network File and Web Servers at 20.

[47] *See* General Contract, IBM Statement of Work for Basic Unbundled Internet Access at 11.

[48] *See* General Contract IBM Statement of Work for Technical Support Services at 22.

[49] *Id.* at 7.

[50] *Id.* at 11; *See* General Contract at 1.01, 10.01.

[51] *See* General Contract at 10.01.

[52] Ysleta Request for Review at 10.

also filed its FCC Form 471 application.[53] Subsequently, on or about May 13, 2002, Ysleta received an Item 25 Selective Review Information Request from SLD, to which it responded with various information on June 3, 2002.[54] Ysleta and SLD thereafter exchanged further correspondence.[55] On December 3, 2002, SLD issued a decision denying Ysleta discounts, and also issued a Further Explanation providing greater detail for the reasons of the denial.[56]

18. In the Further Explanation, SLD enumerated a number of reasons for denying the pending requests. SLD concluded that Ysleta violated our rules by failing to note on its FCC Form 470 that it had issued an RFP.[57] SLD also noted that the Form 470 process was circumvented because Ysleta's RFP did not require bidders to submit proposals for specific services with a definite price, but required only general information regarding the bidders' approach, qualifications, and experience as a Systems Integrator.[58] SLD determined that Ysleta violated the Commission's rules by selecting IBM without establishing that it was the most cost-effective provider of the services for which Ysleta was seeking discounts. SLD observed that even if Ysleta complied with state and local procurement rules, Ysleta failed to comply with the Commission's competitive bidding rules, with which applicants must comply in addition to state and local rules.[59] SLD concluded that IBM's proposal and the resulting contract included "a vast array of ineligible services" such as teacher and administrative personnel training, project management services, consulting services, and assistance in filling out program forms.[60] SLD stated that the record reflected that the overall goal of the IBM-

[53] *See* SLD web site, <http://www.sl.universalservice.org/whatsnew/2002/012002.asp#011002b>; FCC Form 471, Ysleta Independent School District, filed January 17, 2002 (Ysleta Form 471).

[54] *See* Ysleta Request for Review at 12. Item 25 of the FCC Form 471 requires applicants to certify that they had secured access "to all of the resources, including computers, training, software, maintenance, and electrical connections necessary to make effective use of the services purchased as well as to pay the discounted charges for eligible services." *See* FCC Form 471 at Item 25. SLD may review the accuracy of applicants' certifications regarding necessary resources, in order to ensure compliance with statutory requirements and Commission rules. *See Request for Review of the Decision of the Universal Service Administrator by United Talmudical Academy*, *Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.,* CC Docket Nos. 96-45, 97-21, Order, 15 FCC Rcd 423 (2000) (*United Talmudical Academy Order)*. These certifications and other requirements are critical to curbing waste, fraud, and abuse in the schools and libraries universal service mechanism.

[55] *See* Ysleta Request for Review at 12.

[56] *See* Letter from Schools and Libraries Division, Universal Service Administrative Company, to Richard L. Duncan, Ysleta Independent School District, dated December 3, 2002 (Further Explanation). The same letter was sent to IBM. *See* Letter from Schools and Libraries Division, Universal Service Administrative Company, to John Policastro, IBM Corporation, dated December 3, 2002. As set forth in the Appendix, SLD issued decisions relating to the other schools on March 10 and March 24, 2003.

[57] *Id.* at 4.

[58] *Id.* at 4-5.

[59] *Id.* at 6-7.

[60] *Id.* at 8.

Ysleta relationship was to maximize SLD funding, rather than promoting educational goals that were clearly defined in a technology plan.[61] SLD also stated that after reviewing numerous RFPs issued by applicants that had relationships with IBM, it had found strikingly similar, and sometimes identical, language in the RFPs, indicating that IBM may have unduly influenced the selection process in IBM's favor.[62] On January 30, 2003, Ysleta and IBM filed their Requests for Review with the Commission.[63]

19. Under our rules, the Commission considers requests for review of decisions by the Administrator that involve novel questions of fact, law, or policy.[64] We conclude that the instant appeals meet this standard, and we engage below in *de novo* review of SLD's denials, as provided in our rules.[65]

III. DISCUSSION

20. We have reviewed the records in the above-captioned Requests for Review. Upon careful review, and for the reasons discussed below, we conclude that Ysleta and the similarly situated applicants set forth in the caption violated our rules regarding competitive bidding, our requirements governing the weighting of price in selecting bidders, and the requirement that applicants submit bona fide requests for services.[66] In light of the circumstances presented, however, we conclude that waiving our filing deadlines in order to permit Ysleta and similarly situated applicants that have appealed SLD's denial of funding to re-bid for services for Funding Year 2002 is in the public interest.[67]

21. Competitive Bidding Violations. Ysleta and IBM argue that Ysleta did not violate any Commission competitive bidding rules.[68] They argue that Ysleta did competitively bid for services, by filing an FCC Form 470 in accordance with program rules that listed eligible services sought, and which indicated that Ysleta was seeking a partnership with a Systems Integrator.[69] They also note that Ysleta thereafter published an RFP seeking the services of a

[61] *Id.* at 9-10.

[62] *Id* at 10.

[63] *See* Ysleta Request for Review; IBM Request for Review. As set forth in the Appendix, the eight other schools also timely filed Requests for Review. All of the Requests for Review involve schools that applied as eligible for 90 percent discounts under our discount matrix.

[64] *See* 47 C.F.R. § 54.723.

[65] *Id.*

[66] The factual situations of the similarly situated applicants are set out in the Appendix. *See* Appendix B, *infra*.

[67] *See* section IV, *infra.* To the extent an applicant proceeded to take service, particularly telecommunications services or Internet access, notwithstanding SLD's denial of discounts, we do not and will not provide funding to pay for such services. *See* para. 75, *infra.*

[68] *See* Ysleta Request for Review at 13-32; IBM Request for Review at 11-32.

[69] *See* Ysleta Request for Review at 13-17; IBM Request for Review at 11.

Systems Integrator, and received five competing bids for those services.[70] We are not persuaded by these arguments, however, because the competitive bidding in which Ysleta engaged was carried out without regard to the products and services eligible for discounts, such that the prices of actual services were never compared.

22. We conclude that the type of procurement practiced by each school in these cases violates our competitive bidding rules, because it effectively eliminates competitive bidding for the products and services eligible for discounts under the support mechanism. Section 54.504(a) of the Commission's rules specifically states that "an eligible school or library shall seek competitive bids . . . for all services eligible for support . . . ."[71] As the Commission has previously observed:

> Competitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed about all of the choices available to them. Absent competitive bidding, prices charged to schools and libraries may be needlessly high, with the result that fewer eligible schools and libraries would be able to participate in the program or the demand on universal service support mechanisms would be needlessly great.[72]

Competitive bidding for services eligible for discount is a cornerstone of the E-rate program, vital to limiting waste, ensuring program integrity, and assisting schools and libraries in receiving the best value for their limited funds.[73]

23. Ysleta engaged in a two-step procurement process, but only the first step, at which it selected the service provider, involved competitive bidding, and only in a limited fashion.[74] First, Ysleta sought competitive bids for a Systems Integrator without regard to costs for specific projects funded by the schools and libraries support mechanism.[75] Second, Ysleta negotiated with the Systems Integrator it had selected regarding the scope and prices of E-rate eligible products and services, but it never sought competing bids for those products and services, as required by our rules.[76] Thus, Ysleta never received a single competing bid for the

[70] *See* Ysleta Request for Review at 9; IBM Request for Review at 16.

[71] 47 C.F.R. § 54.504(a).

[72] *Universal Service Order*, 12 FCC Rcd at 9029, para. 480.

[73] *Id.*; *see also Federal-State Joint Board on Universal Service*, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, and 95-72, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, ____ para. 185 (1997) (*Fourth Order on Reconsideration*) ("The competitive bidding process is a key component of the Commission's effort to ensure that universal service funds support services that satisfy the precise needs of an institution, and that the services are provided at the lowest possible rates.").

[74] Ysleta Request for Review at 27; IBM Request for Review at 5.

[75] *See generally* RFP.

[76] 47 C.F.R. § 54.504(a).

$2,090,400 in Cabling Services, $965,500 in Network Electronics, $3,945,320 in Network File and Web Servers, $968,600 in Basic Unbundled Internet Access, or $12,409,811 it requested in Technical Support Services. Instead, the only dollar figures that Ysleta compared in its determination of cost effectiveness were the hourly rates of IBM employees (*e.g.,* $394 per hour for a Project Executive, with no estimate of the number of hours projected to complete specific projects) versus the hourly rates of competitors' employees.[77] These hourly rates are so unrepresentative of and unrelated to the large amounts of E-rate funding requested by Ysleta as to render the application of competitive bidding under the program virtually meaningless.[78]

24. The Commission's rules and orders require competitive bidding on the actual products and services supported by the program, rather than merely on the basis of a vendor's hourly rates, reputation and experience. The Commission's orders state that "an eligible school [or] library . . . shall seek competitive bids . . . for *all services eligible for support* . . . ."[79] Ysleta did not seek competitive bids for such services. Furthermore, in the *Universal Service Order*, the Commission directed that applicants must "submit a *complete* description of services they seek so that it may be posted for competing providers to evaluate."[80] Our rules therefore contemplate that applicants will compare different providers' prices for actual services eligible for support. Only by doing so can applicants ensure that, in accordance with our rules, they are receiving the most cost-effective services. As the Commission stated in its 1999 *Tennessee Order*, "We certainly expect that schools will evaluate the actual dollar cost proposed by a bidder . . ."[81] The context of that statement makes clear that the Commission expected schools to evaluate the actual dollar amount of eligible services during the bidding process.[82] From the evidence before us, we find that Ysleta did not comply with this requirement.

25. Because Ysleta failed to seek competitive bids for specific eligible services, it violated section 54.504(a) of our rules. Moreover, we cannot find Ysleta satisfied this requirement through the posting of its FCC Form 470. Although the posting of a FCC Form 470 will generally satisfy section 54.504(a), Ysleta's does not here because Ysleta made clear through its RFP, which was released almost simultaneously with its FCC Form 470, that Ysleta was actually seeking bids for a vendor to serve as the Systems Integrator in a two-step

[77] *See* IBM Bid at 79-80.

[78] Our review of the record of the other appellants reveals an identical approach. *See* Appendix B, *infra*.

[79] 47 C.F.R. § 54.504(a) (emphasis added).

[80] *Universal Service Order*, 12 FCC Rcd at 9076, para. 570 (emphasis added).

[81] *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service*, *Changes to the Board of Directors of the National Exchange Carrier Association, Inc*., CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734, 13740, para. 13 (1999) (*Tennessee Order*).

[82] *Id.*, 14 FCC Rcd at 13740, para. 13.

procurement process and was not seeking bids for all of the services outlined on its FCC Form 470. [83]

26. Although we do not hold that the FCC Form 470 presented here violated our competitive bidding rules, in light of the actions of Ysleta and the other similarly situated applicants, we reiterate the importance of the FCC Form 470 to the competitive bidding process. The applicant's FCC Form 470, based on the applicant's technology plan, puts potential bidders on notice of the applicant's specific needs to encourage competitive bids, so that the applicant may avail itself of the growing competitive marketplaces for telecommunications and information services.[84] The fact that these certifications on the FCC Form 470, all of which relate to the actual products and services for which the applicant will seek discounts, are required on the FCC Form 470, indicates that the Commission's rules and procedures contemplate that providers will bid on the cost of the specific products and services eligible for discounts, based on the applicant's technology plan.[85] Our rules and procedures do not contemplate that potential providers will bid solely on Systems Integration services, with the expectation that the applicant will decide on specific products and services *after* the applicant has selected a provider.

27. We are troubled that Ysleta submitted an FCC Form 470 listing virtually every possible product and service for which it could conceivably seek discounts. Rather than representing the outgrowth of a carefully designed technology plan as required under our rules, offering potential bidders specific information on which to submit bids, Ysleta's FCC Form 470 failed to "describe the services that the schools and libraries seek to purchase *in sufficient detail to enable potential providers to formulate bids*. . . ."[86]

28. An applicant's FCC Form 470 must be based upon its carefully thought-out technology plan and must detail specific services sought in a manner that would allow bidders

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[83] The record reflects that Ysleta developed a "tentative projects list" which served as the basis for negotiations regarding the eligible products and services Ysleta actually intended to seek. *See* Letter from Richard Duncan, Ysleta Independent School District, to Schools and Libraries Division, Universal Service Administrative Company, dated June 21, 2002 ("After IBM's response to the RFP/FCC Form 470 posting was determined to be the most responsive, and recommended for contract award, the tentative projects list was shared with IBM; it was then asked to assist in the definition of each item's (each IBM [Funding Request Number]) scope of work. This activity resulted in a shortened list comprised of individual FRNs, ultimately submitted for possible funding."). The fact that Ysleta discussed with IBM a specific tentative projects list that differed significantly from the overbroad list it submitted on its FCC Form 470 reinforces our view that Ysleta's FCC Form 470 was a paper exercise, and the RFP process effectively supplanted the FCC Form 470 posting.

[84] *See Universal Service Order*, 12 FCC Rcd at 9078 para. 575 (requirements to provide sufficient detail in the FCC Form 470), and at 9077 paras. 572-74 (technology plan requirements).

[85] *See supra* note 26. Ysleta states that no bids were received in response to its FCC Form 470, and that all bids received were for Systems Integration services in response to its RFP. *See* Ysleta Request for Review at 17. Given that Ysleta released its formal RFP only days after the posting of the FCC Form 470, it is not surprising that providers responded to the RFP but not the FCC Form 470. Not every FCC Form 470 will result in bids, but the requirement that applicants seek bids through the FCC Form 470 ensures that providers are notified of bidding opportunities.

[86] *Universal Service Order,* 12 FCC Rcd at 9078, para. 575 (emphasis added).

to understand the specific technologies that the applicant is seeking. [87] Thus, a Form 470 that sets out virtually all elements that are on the eligible services list would not allow a bidder to determine what specific services the applicant was seeking. The Form 470 should not serve as a planning device for applicants trying to determine what is available or what possible solutions might meet the applicant's specified curriculum goals. A Form 470 should not be a general, open-ended solicitation for all services available on the eligible services list, with the hope that bidders will present more concrete proposals. The research and planning for technology needs should take place when the applicant drafts its technology plan, with the applicant taking the initiative and responsibility for determining its needs.[88] The applicant should not post a broad Form 470 and expect bidders to do the "planning" for its technological needs.

29. Some applicants have simple, straightforward requests, such as discounts on telephone lines to each of their classrooms or dial-up Internet access for several computers in a library. Other applicants seek discounts on highly complex and substantial systems that span multiple sites and utilize highly advanced equipment and services. The FCC Forms 470 developed from an applicant's technology plans should mirror the level of complexity of the services and products for which discounts are being sought.

30. The Commission has recognized that the applicant is the best entity to determine what technologies are most suited to meet the applicant's specific educational goals. The applicant's specific goals and technology plans are therefore unique to the applicant.[89] While we recognize that some states may, for valid reasons, want all applicants to have some level of uniformity in technological development, in cases where the Administrator finds "carbon copy" technology plans and Forms 470 across a series of applications, especially where the services and products requested are complex or substantial, and when the same service provider is involved, it is appropriate for the administrator to subject such applications to more searching

[87] *Universal Service Order*, 12 FCC Rcd at 9077-80, paras. 572-579 (describing sequence of designing detailed technology plan and subsequently submitting detailed description of services sought); 47 C.F.R. § 54.504.

[88] For instance, in this case, Ysleta indicated on its FCC Form 470 that it sought the following types of high-bandwidth services for 63 sites: 56K, ISDN, DSL, Frame Relay, Fractional T1, DS1, DS3, OC3, ATM. Satellite, MAN, WAN, and LAN Interconnect. It is beyond dispute that 56K service is not functionally equivalent to a DS1. A properly-designed FCC Form 470 would identify the specific services sought, based on a realistic assessment of the most cost-effective way to meet the bandwidth needs of the specific schools to be served. For instance, in advance of posting its FCC Form 470, Ysleta should have been able to determine for each of the 63 sites the anticipated number of channels desired, based on the numbers of computers and students in each location, and thus should have specified how many sites were seeking DSL service versus a DS1 or a DS3 or whatever. We recognize that depending on the demographics within a school district, a district may choose to deploy a higher capacity pipe in, for instance, a high school serving 2000 students than an elementary school serving 300 students. But we do expect the applicant to determine in advance of posting its FCC Form 470 what tier or tiers of capacity it is seeking.

[89] Some might argue that applicants have similar goals and therefore it is not unreasonable for applicants to have similar or identical technology plans and Forms 470. At a high level, it is true that all schools have the same educational goal – to educate their students. For purposes of receiving discounts under the E-rate, however, we would expect some variation in how schools choose to meet their technology needs.

scrutiny to ensure there has been no improper service provider involvement in the competitive bidding process.[90]

31. On appeal, IBM raises several arguments concerning the Administrator's findings about the Ysleta FCC Form 470. As we have explained above, our decision here does not rely on Ysleta's FCC Form 470. Instead we are clarifying on a going forward basis how an applicant's FCC Form 470 must be based upon its technology plan and must detail specific services sought in a manner that allows bidders to understand the specific technologies that the applicant is seeking. Thus, for purposes of this appeal, IBM's arguments concerning the Form 470 are inapposite. In the interest of clarity, however, we respond to its arguments so that applicants will understand more completely the Commission's requirements as they relate to the FCC Form 470.

32. IBM argues that the fact that five providers bid on Systems Integration services demonstrates that there was sufficient information to enable service providers to prepare bids for the provision of products and services eligible for discounts.[91] Just as an FCC Form 470 may fail to provide sufficient information to potential bidders by not listing all the services for which the applicant may seek discounts, an applicant's FCC Form 470 may fail to provide sufficient information by virtue of its overbreadth, with so many services listed that it fails to indicate which services the applicant is likely to pursue.[92] Potential vendors of specific services are less likely to respond to an all-inclusive FCC Form 470, concluding that the applicant does not realistically intend to order all services listed, and being unable to determine which services are actually being sought.

33. Similarly, IBM argues that interested providers may contact an applicant with a comprehensive FCC Form 470 to obtain additional information that would explain what the applicant seeks.[93] But the purpose of the FCC Form 470 is not to allow an applicant to indicate its interest in E-rate services generally, with the burden being on potential bidders to find out whether the services they offer might be among those sought by an applicant. Otherwise, the FCC Form 470 would merely need to include a single box that an applicant could check if it anticipated receiving E-rate services, and there would be no need to list or describe those services. Rather, the FCC Form 470 is intended "to allow providers to reasonably evaluate the requests and submit bids."[94] Ysleta's FCC Form 470, even if considered in conjunction with its

[90] While we do expect some variation among individual applicants, we stress that we are not prohibiting a state or school district from seeking uniformity in technological development, *i.e.*, through the use of statewide technology plans or requiring applicants to seek the same level or types of service.

[91] *See* IBM Request for Review at 16.

[92] *See infra* note 101 (regarding Commission's prohibition on duplicative services).

[93] *See* IBM Request for Review at 14-15.

[94] *Universal Service Order*, 12 FCC Rcd at 9078, para. 575.

RFP for Systems Integration, fails to provide the specificity necessary to place potential bidders on notice of the services actually sought by Ysleta.[95]

34. IBM argues that Ysleta's FCC Form 470 contained sufficient information for potential service providers to identify potential customers.[96] But in this instance, Ysleta's FCC Form 470 is simply too broad to provide useful guidance to any potential service provider. The fact that there may have been "nothing in the Form 470 that discouraged or prevented any potential services provider from using the contact information in the Form 470 to contact Ysleta regarding the subset of E-rate services Ysleta sought to procure" is irrelevant.[97] Applicants must submit a "complete" description of services sought "for competing providers to evaluate."[98] Service providers thus must have sufficient information to evaluate the services sought in order to formulate bids. Similarly, if an applicant on its FCC Form 470 refers potential bidders to an RFP it has released or will release, the applicant's RFP must provide sufficiently detailed and specific information that potential bidders may evaluate the E-rate eligible services sought in order to formulate bids.

35. We recognize that some past practices arguably could be construed as permitting broad FCC Forms 470.[99] Although we acknowledge that SLD has approved other funding requests in the past that utilized all-inclusive FCC Forms 470 similar to that submitted by Ysleta,[100] we are concerned about the use of such broad listings of services. We also recognize that SLD cautioned applicants in the past to be expansive in listing services on an FCC Form 470, to provide applicants with greater flexibility to make service substitutions post-commitment. But our consideration of the facts of this case lead us to conclude such practices should not be permitted on a going-forward basis.

36. We therefore clarify prospectively that the requirement for a *bona fide* request means that applicants must submit a list of specified services for which they anticipate they are likely

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[95] *See* Ysleta Request for Review at 19.

[96] *See* IBM Request for Review at 14.

[97] *Id.* at 15.

[98] *Universal Service Order*, 12 FCC Rcd at 9076, para. 570.

[99] In a footnote in the Commission's *Brooklyn Order*, for example, the Commission stated that an applicant "is required to provide only general information about the services for which it seeks discounts, *e.g.,* the number of phones that require service, number of dial-up connections necessary, as well as an assessment of the applicant's existing technology that may be necessary for the effective use of eligible services. *See Request for Review by Brooklyn Public Library, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.,* File No. SLD-149423, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 17931, 18598 n.4 (2000) (*Brooklyn Order*). However, that statement should not be read as authorizing applicants to prepare FCC Forms 470 that list every eligible service under the E-rate program.

[100] A number of appellants point to other FCC Forms 470 with similarities to those in appellants' cases, which were approved by SLD. *See, e.g.,* El Paso Request for Review at 20-21; IBM (Albuquerque) Request for Review at 3-4; Winston-Salem Request for Review at 9-11. These applications, however, differ from the applications at issue here in that they did not contain the elements underlying our finding of competitive bidding violations, such as a two-step procurement process, or a failure to consider price as a primary factor in the vendor selection.

to seek discounts consistent with their technology plans, in order to provide potential bidders with sufficient information on the FCC Form 470, or on an RFP cited in the FCC Form 470, to enable bidders to reasonably determine the needs of the applicant. An applicant may, in certain circumstances, list multiple services on its FCC Form 470, knowing that it intends to choose one over another. However, all products and services listed on the FCC Form 470 must be linked in a reasonable way to the applicant's technology plan and not request duplicative services.[101] The Commission has previously stated that we expect applicants to "do their homework" in determining which products and services they require, consistent with their approved technology plan.[102] We clarify prospectively that requests for service on the FCC Form 470 that list all services eligible for funding under the E-rate program do not comply with the statutory mandate that applicants submit "bona fide requests for services."[103]

37. We do not expect that this prospective clarification will affect the manner in which the vast majority of applicants complete their FCC Forms 470. For some applicants, however, it will require more careful consideration of their actual technology needs. We expect that this clarification will ensure that the integrity the program and the purposes of our competitive bidding rules are met, while limiting waste, fraud, and abuse. Furthermore, we stress that our prospective clarification that "encyclopedic" FCC Forms 470 will not meet the requirements for a *bona fide* request for services does not alter our finding that Ysleta violated our competitive bidding requirement, because Yselta's all-inclusive FCC Form 470 was accompanied by a RFP that sought bids for a systems integrator, which, based on the facts before us, functionally supplanted the FCC Form 470.

38. We also take this opportunity to clarify the wording on the FCC Form 470 regarding RFPs that provide more detailed solicitations for bidders than the FCC Form 470. Blocks 8, 9, and 10 of the form ask the applicant, "Do you have a Request for Proposal (RFP) that specifies the services you are seeking?"[104] If so, the applicant checks a box marked "Yes, I have an RFP" and indicates the Web site on which the RFP can be found, or the contact person from

[101] As the Commission recently stated, the E-rate program does not fund requests for duplicative services, because such requests cannot comply with our longstanding requirement that services be cost-effective. *See Second Order and FNPRM*, FCC 03-101, at paras. 22-24. An FCC Form 470 that asks for all eligible services would necessarily seek duplicative services, because different products and technologies provide equivalent functionality for the same population in the same location during the same period of time. *Id.* at para. 24. An applicant may request duplicative services on the FCC Form 470 only if the technology plan reasonably indicates, for example, that the applicant is willing to consider alternative types of services to provide a given functionality. However, an applicant that simply lists every eligible service on the FCC Form 470 fails to base that request on its technology plan, and thus improperly seeks duplicative services.

[102] *Universal Service Order*, 12 FCC Rcd at 9077, para. 573.

[103] 47 U.S.C. § 254(h)(1)(B).

[104] *See* Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (May 2003) at 9-11 (FCC Form 470).

whom an applicant may obtain the RFP.[105] If an applicant does not have an RFP, it selects the box identified as, "No, I do not have an RFP for these services."[106]

39. Ysleta checked the boxes indicating it did "not have" an RFP.[107] Five days later, it released a detailed RFP for Systems Integrator services. SLD found that Ysleta's statement that it did not "have" an RFP was misleading, because the fact that it released one less than a week later suggested that it did "have" an RFP at the time it submitted its FCC Form 470. Ysleta contends that it did not "have" the completed RFP until it was ready for release five days later. We recognize that due to the wording of that question, some applicants may have been unsure how to portray the fact that they had not yet released an RFP but intended to do so. On the other hand, the intent of the FCC Form 470 is to provide potential bidders with as much information as possible in order to maximize competition for applicant's contracts. We direct the Wireline Competition Bureau (WCB) to clarify on a revised FCC Form 470, before the start of Funding Year 2004, that an applicant shall certify either, "Yes, I have released or intend to release an RFP for these services" or "No, I have not released and do not intend to release an RFP for these services." We anticipate that applicants will know at the time that they submit their FCC Form 470 whether they intend to release an RFP relating to the services listed on the FCC Form 470. To the extent that the applicant also relies on an RFP as the basis of its vendor selection, that RFP must also be available to bidders for 28 days. This clarification will help to fulfill the purposes of the FCC Form 470 by informing potential bidders if there is, or is likely to be, an RFP relating to particular services indicated on the form.[108]

40. State and Local Procurement Rules and Competitive Bidding. Ysleta and IBM argue that because Ysleta complied with state and local procurement processes, the Commission must approve its selection of IBM.[109] Ysleta states that the Commission has four competitive bidding requirements: the applicant must post an FCC Form 470, comply with state and local procurement laws, wait at least 28 days after posting the FCC Form 470 before signing a contract, and "possibly" consider price as the primary consideration.[110] Ysleta argues that the requirement that applicants comply with state and local procurement laws "is the most important element."[111] IBM contends that in the *Fourth Order on Reconsideration*, the

[105] *Id.*

[106] *Id.*

[107] *See* Ysleta Form 470.

[108] We note that IBM argues that Ysleta made a good faith effort on the FCC Form 470 to indicate that it was seeking a Technology Implementation and Systems Integration Partner. *See* IBM Request for Review at 13-14. Although Ysleta did so indicate, that is irrelevant, as the RFP did not present an adequate description of the underlying eligible services it was seeking.

[109] *See* Ysleta Request for Review at 15, 26; IBM Request for Review at 17-20.

[110] Ysleta Request for Review at 15.

[111] *Id.*

Commission "confirmed the supremacy of state and local procurement rules" [112] when it stated that it would look to state or local procurement laws to determine whether a contract modification was "minor," and that only where state procurement law was silent would the Commission apply a federal standard.[113] Ysleta and IBM argue that our rules forbid us from preempting state and local procurement laws, and that because Ysleta's selection of IBM was consistent with Texas law, we must approve that selection.[114] In addition, they argue that the fact that none of the other bidders filed complaints indicates that the bidding process was fair and open.[115]

41. Although compliance with any applicable state and local procurement laws is one of the minimum requirements for selecting services under the E-rate program, there are also certain specific FCC requirements with which all E-rate applicants must comply, regardless of state and local law. Section 54.504(a) of the Commission's rules specifically states that the Commission's "competitive bid requirements apply in addition to state and local competitive bidding requirements . . . ."[116] For example, program rules require the posting of an FCC Form 470 and Form 471 in order to obtain funding under the program, and these constitute federal requirements that apply in all circumstances, regardless of state and local law. Similarly, even though a state or local procurement law may permit an applicant to forego competitive bidding for products and services under a certain dollar threshold, the Commission's rules require that applicants for E-rate services seek competitive bids on all such services, to the extent that the services covered by the state law are eligible for discounts from the federal universal service fund.[117]

42. Even if we assume that Ysleta's selection of IBM did not violate applicable state and local procurement law, such compliance would not automatically ensure compliance with our rules governing the selection of bidders in the E-rate program. The Commission has never recognized "the supremacy" of state and local laws over our competitive bidding requirements.[118] The Commission's examination of state and local procurement laws to determine whether a proposed contract modification was minor has no bearing on our

[112] IBM Request for Review at 18.

[113] IBM Request for Review at 19.

[114] *See* IBM Request for Review at 18-19.

[115] *See* Ysleta Request for Review at 19-21; IBM Request for Review at 16.

[116] 47 C.F.R. § 54.504(a).

[117] For example, Louisiana does not require competitive bidding for services of $10,000 or less. *See* La. Rev. Stat. § 2211A(10); La. Rev. Stat. § 2212.1A(1)(a); *See also* www.ebrschools.com/n.businessaffairs/purchasing/bidlaws.eona (summary of current Louisiana bid laws and policy prepared by East Baton Rouge Parish School System). To the extent this state law could apply to any services obtained through the e-rate mechanism, applicants would nevertheless still be required to comply with the Commission's competitive bidding requirements.

[118] IBM Request for Review at 18.

competitive bidding requirements.[119] Such determinations regarding contractual interpretations are well within the purview of state and local procurement laws, where applicable. But we cannot rely solely upon state and local laws to effectuate our goals of ensuring support is provided without waste, fraud and abuse. The fact that there were four other bidders in this case and that none of them registered protests does not demonstrate that Ysleta's selection process met the requirements of our rules.[120] Nor did the other bidders, all of whom were bidding for Systems Integration services, have any incentive to assert that this procurement process did not comply with our rules, because all stood to gain from being awarded the Systems Integration contract, either by Ysleta or in another case. Similarly, other bidders would appear unlikely to challenge the Systems Integration approach because in doing so they would run the risk of losing both the Systems Integration contract with a school, and also the likelihood of being picked by the successfully bidding Systems Integrator to serve as a subcontractor.

43. Nor has the Commission ever held that compliance with state and local laws is "the most important element" in our competitive bidding rules.[121] The four steps cited by Ysleta, and other Commission-imposed requirements such as the approval of a technology plan, are designed to work in concert to promote competitive bidding and assist schools and libraries in procuring the most cost-effective and appropriate services under the program. Compliance with state and local procurement rules is necessary, but not to the exclusion of compliance with other Commission requirements.

44. Ysleta and IBM also misread the Commission's rules and orders to assume that any state or local procurement process complies with the Commission's rules. In the *Tennessee Order*, the Commission stated that it would "generally rely on local and/or state procurement processes *that include a competitive bid requirement* as a means to ensure compliance with our competitive bid requirements."[122] The two-step approach Ysleta utilized in procuring services fails to include a competitive bidding requirement for selecting specific E-rate eligible services. Therefore, it does not constitute a "state or local competitive bidding requirement" under our rules, even if such an approach may be a valid means of procurement under Texas law. Furthermore, as discussed below, while Texas law may permit competitive bidding, Texas law does not impose a competitive bidding requirement on eligible schools and libraries as was the case in the *Tennessee Order*.[123] Our rules state that "an eligible school . . . shall seek

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[119] *Id*.

[120] *See* Ysleta Request for Review at 20-21; IBM Request for Review at 16.

[121] Ysleta Request for Review at 15. Because our rules and orders have been consistent in the consideration of the role of state and local competitive bidding rules, enforcing our minimum competitive bidding requirements does not, as alleged by IBM, represent a departure from Commission precedent requiring only prospective application. *See* IBM (Memphis) Request for Review at 9-10 (citing *Request for Review by Williamsburg-James City County Public Schools*, Order, 14 FCC Rcd 20152 (1999) (granting waiver where applicant submitted application violating Commission rules before rules were adopted)).

[122] *Tennessee Order*, 14 FCC Rcd at 13739, para 10.

[123] *See infra* para 45, note 123.

competitive bids . . . *for all services*" and such services must be noticed with specificity.[124] Although Ysleta sought competitive bids for the service of Systems Integration, its procurement process did not include an effective competitive bidding requirement with respect to the actual services eligible for funding, and therefore, under both section 54.504 and the *Tennessee Order*, Ysleta's procurement policies, even if consistent with state and/or local law, were not adequate to meet our requirements.

45. We find unconvincing IBM's argument that because our rules state that our competitive bidding requirements "apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements," if Texas law permits this two-step bidder selection and negotiation approach, then requiring competitive bidding of services under our program would constitute a federal preemption of state and local requirements in contravention of our rules.[125] Texas law does not forbid E-rate applicants from complying with our minimal competitive bidding requirements. Section 44.031 of the Texas Code, which governs school district purchasing contracts, explicitly permits school districts to make contracts subject to competitive bidding.[126] Texas law therefore does not preclude compliance with our threshold federal requirements.[127]

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[124] 47 C.F.R. § 54.504.

[125] IBM Request for Review at 28.

[126] *See* Tex. Code Ann. § 44.031(a); White Paper, Review of Federal, State of Texas, and FCC E-rate Procurement Laws and Regulations, filed on behalf of IBM on April 24, 2003 (IBM White Paper) at 15. Section 44.031 states that a school district may, at its option, contract for professional services rendered by a financial consultant or a technology consultant in the manner provided by Texas Code Section 2254.003, which states that a governmental entity may not select a provider of professional services on the basis of competitive bids, but shall make the selection (1) on the basis of demonstrated competence and qualifications to perform the services; and (2) for a fair and reasonable price. *See* Tex. Code Ann. §§ 44.031, 2254.003. It is not clear that section 2254.003 authorizes a two-step selection process such as that engaged in by Ysleta, where the school district first selects the most highly qualified provider and then negotiates price. Such a process is described in a different section relating to contracts for "Professional Services of Architect, Engineer, or Surveyor." 2254.004. Nor is it clear that IBM's services in this case as a Systems Integrator would constitute those of an engineer under Texas law. *See* Texas Engineering Practice Act (stating that a "professional engineer" shall mean "a person who has been duly licensed by the Texas Board of Professional Engineers to engage in the practice of engineering."). Tex. Rev. Civ. Stat. Ann. Art. 3271(a), Section 2(3). Furthermore, it is not clear whether "professional services" as defined in the Texas law encompasses any eligible services provided through the e-rate mechanism. But the fact remains that Texas law expressly permits school districts to engage in competitive bidding.

[127] *See Louisiana Public Service Commission v. FCC*, 476 US 355, 368-69 (1986) ("Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation." Because Ysleta may, consistent with state law, comply with our rules, there is no "outright or actual" conflict between Texas law and our rules. It is certainly possible for Texas school districts to comply with our requirements.

46. Although we do not believe that preemption of state or local rules is necessary here, we note that the Commission has previously recognized that there may be circumstances where our requirements could preempt state or local competitive bidding requirements if schools or libraries wish to receive E-rate discounts. In the *Tennessee Order*, the Commission provided guidance regarding section 54.504(a) by stating that it would only "generally" rely on state and/or local procurement processes, giving notice that there may be circumstances where the Commission will not rely on such processes.[128] The Commission stated that it did not need "in this instance" to make a separate finding of compliance with its competitive bidding requirements, because state and local "rules and practices will generally consider price to be a primary factor . . . and select the most cost-effective bid."[129] But where the Commission determines from the specific circumstances that Commission rules were not met, *e.g.*, specific services were not subject to proper competitive bidding, the Commission need not and should not rely solely on state and/or local procurement processes to ensure compliance with our established regulatory framework. The Commission's responsibility to combat potential waste, fraud, and abuse in the Commission's program, while promoting goals such as having schools and libraries obtain the most cost-effective services, commands that the limited rules we impose regarding competitive bidding constitute a floor or minimum set of requirements. We will generally rely on state and/or local procurement processes, but there may be circumstances such as those presented here that require us to look beyond those processes to ensure that our threshold requirements are met.

47. Violations of Requirements of Cost-effectiveness and Price as the Primary Factor. The procurement process used by Ysleta also violates Commission requirements regarding the role of price in an applicant's determination of cost-effectiveness when evaluating bids. Applicants must select the most cost-effective offerings, and price must be the primary factor in determining whether a particular vendor is the most cost-effective.[130] Price need not be the exclusive factor in determining cost-effectiveness, however, so that schools and libraries selecting a provider of eligible services "shall carefully consider all bids submitted and may consider relevant factors other than the pre-discount prices submitted by providers."[131]

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[128] *Tennessee Order*, 14 FCC Rcd at 13739, para. 10.

[129] *Id.*

[130] *See Universal Service* Order, 12 FCC Rcd at 9029-30, para. 481; 47 C.F.R. § 54.511(a). Ysleta suggests in a footnote that because the requirement that price be considered the primary factor is set forth in a Commission order rather than in our rules, it is subject to challenge, particularly because it conflicts with sections 54.504 and 54.511 of our rules. *See* Ysleta Request for Review at 15 n.5. We cannot agree that this language conflict with sections 54.504 or 54.511. Although we believe this requirement was sufficiently noticed, consistent with the Administrative Procedures Act, it is, at a minimum, a further explanation of sections 54.504 and 54.511 of the Commission's rules. Ysleta also suggests that SLD adopted its own rules and policies at issue here "without a formal rulemaking as provided by law." Ysleta Request for Review at 15 n.5. Ysleta misunderstands the ministerial role of SLD. The Commission, not SLD, establishes rules and policies governing the schools and libraries support mechanism through rulemakings and adjudicatory decisions. Pursuant to our rules, SLD administers the application process and implements procedures to ensure compliance with our rules. *See* 47 C.F.R. § 54.705(a).

[131] 47 C.F.R. § 54.511(a).

48. In the *Universal Service Order*, the Commission stated that "price should be the primary factor in selecting a bid," adding that other factors, particularly "prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives" could "form a reasonable basis on which to evaluate whether an offering is cost-effective."[132] In *Tennessee*, the Commission provided additional "useful guidance with regard to our competitive bid requirements and factors that may be considered in evaluating competitive bids."[133] The Commission specifically emphasized the significance of price of services as a factor in selecting bids. The Commission stated:

> . . . [A] school should have the flexibility to select different levels of services, to the extent such flexibility is consistent with that school's technology plan and ability to pay for such services, but when selecting among comparable services, however, this does not mean that the lowest bid must be selected. Price, however, should be carefully considered at this point to ensure that any considerations between price and technical excellence (or other factors) are reasonable.[134]

49. In discussing the role of state and local procurement processes, however, the Commission stated that price would be "a primary factor" rather than "the primary factor."[135] However, in discussing the *Fourth Reconsideration Order*, the Commission stated that price would be "the primary factor" rather than "a primary factor."

50. We acknowledge that the Commission's use of varying phraseology in the same decision created some ambiguity on this issue. To strengthen the consideration of price as "the primary factor" in the competitive bidding process, we hereby depart from past Commission decisions to the contrary[136] and clarify that that the proper reading of our rule, in light of the Commission's longstanding policy to ensure the provision of discounts on cost-effective services, is that price must be the primary factor in considering bids.[137] Applicants may also take other factors into consideration, but in selecting the winning bid, price must be given more

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[132] *Universal Service Order*, 12 FCC Rcd at 9029-30, para. 481.

[133] *Tennessee Order*, 14 FCC Rcd at 13739, para. 9.

[134] *Id.* This view of price as the primary factor, where other factors are taken into consideration as well and balanced to determine cost-effectiveness, appears generally consistent with the "best value" concept cited in the Federal Acquisition Regulations. *See* 10 U.S.C. § 2305(a)(2); 48 C.F.R. § 2.101; IBM White Paper at 23-31.

[135] *Tennessee Order*, 14 FCC Rcd at 13739-40, paras. 10-11.

[136] *Id.*

[137] The Commission stated that a comparison of price was not determinative of a cost-effective bid in the factual scenario presented in the *Tennessee Order* only because it found that the differences in the services that were bid were such that the applicant could reasonably prefer one offering over another. This factual finding was consistent with the Commission's statement that any consideration between price and other factors must be reasonable. *Id,* 14 FCC Rcd at 13739, para 9; .*see also Universal Service Order*, 12 FCC Rcd at 9029-30, para. 48. Here, the petitioners failed to demonstrate that the price of E-rate eligible services was a consideration at all in the first stage of the procurement process, much less the primary factor.

weight than any other single factor.[138] When balancing the need for applicants to have flexibility to select the most cost-effective services and the limited resources of the program, we conclude that requiring price to be the single most important factor is a rational, reasonable, and justified requirement that will maximize the benefits of the E-rate discount mechanism, while limiting waste, fraud, and abuse.

51. Ysleta and IBM offer a number of arguments supporting their position that, consistent with our rules, Ysleta selected the most cost-effective services with price as the primary factor with its "two-step" selection process. They argue that the bid responses by the five bidders for Systems Integration services "included substantial information regarding the bidders' experience and track record for efficient, successful performance of similar services."[139] They further aver that the prices of eligible services were determined through careful negotiations with IBM during the second step of the selection process, after IBM had been "recommended" by the Ysleta Board of Trustees over the other four bids, but before Ysleta "selected" IBM by signing the contract."[140] During this negotiating phase, IBM argues, price was the "sole and exclusive factor that determined whether IBM would ultimately be selected as the service provider."[141] Furthermore, IBM states, the RFP provided that if Ysleta could not negotiate "a fair and reasonable price with the offeror judged most highly qualified, negotiations will be made with the offeror judged next most highly qualified until a contract is entered into."[142] Thus, before signing the contract, Ysleta could cease negotiations with IBM and start over with another provider. Additionally, under the contract Ysleta retained the right to review pricing on an on-going basis, to obtain IBM's own pricing information, to direct IBM to particular product vendors and require that products be acquired in accordance with Texas procurement law, and to modify or delete projects after funding was awarded.[143] Ysleta and IBM argue that the emphasis on price in these provisions cumulatively reflect that Ysleta complied with the Commission's requirements in selecting the most cost-effective offering with price as the primary factor, in accordance with Texas "best value" practices.[144] They contend that because Ysleta must contribute significant costs in order to receive E-rate discounts, it had a strong incentive to select the most cost-effective services.[145]

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[138] For example, if in selecting bids an applicant assigns 10 points for reputation, 10 points to past experience, and 10 points to timing considerations, it must assign at least 11 points to price. This is how SLD has interpreted our requirements, which we find to be a reasonable administrative implementation of our rules.

[139] *See* IBM Request for Review at 29.

[140] *See* IBM Request for Review at 7, 30;

[141] *Id.* at 30.

[142] IBM Request for Review at 30; RFP § 1.12.

[143] Ysleta Request for Review at 29; General Contract § 10.01; IBM Request for Review at 32-33.

[144] IBM Request for Review at 32; IBM White Paper at 20; Ysleta Request for Review at 25-32.

[145] IBM Request for Review at 31-32; Ysleta Request for Review at 30.

52. We first address IBM's argument that the November 15, 2001 bid responses for Systems Integration services "included substantial information regarding the bidders' experience and track record for efficient, successful performance of similar services."[146] Despite listing other E-rate projects it had completed, IBM's bid offered no specific pricing information regarding those projects to demonstrate to Ysleta that it had provided cost-effective services.[147] IBM's bid offered only general assurances relating to pricing, such as an explanation that IBM's profit margins "are consistent with our competitors," and the statement, "You are assured that IBM prices will always be market driven, competitive with other consulting firms of similar profile and skill levels, and within normal and customary charges for the type of services provided."[148] But the prices relevant for our competitive bidding requirements are those of eligible services, rather than the hourly rate for Systems Integration services. While non-price-specific information that goes to a bidder's experience and reputation can be important for determining cost-effectiveness, our past decisions require that actual price be considered in conjunction with these non-price factors to ensure that any considerations between price and technical excellence or other factors are reasonable.[149] As noted above, the Commission stated in the *Tennessee Order* that it "certainly expect[s] that schools will evaluate the actual dollar amount proposed by a bidder . . ." for eligible services during the bidding process.[150] Yet the only specific pricing information proposed by IBM or the other bidders was an hourly rate schedule for various individuals' services. Ysleta fails to demonstrate that both price and non-price factors were reasonably considered at this point.

53. Ysleta and IBM argue that Ysleta did not "select" IBM until it signed the contract, following extensive negotiations where Ysleta asserts it relied on its extensive expertise and its knowledge of information technology and contracting to ensure that pricing would be fair and reasonable.[151] They argue that Ysleta could obtain cost-effective services both by negotiating price before signing the contract, and by exerting pricing pressure thereafter through its contractual right to review IBM's prices and direct IBM to select particular vendors, and modify or delete particular projects.[152] They assert that Ysleta could abandon negotiations with IBM before signing the contract, and even after signing the contract would continue to exert pressure

[146] *See* IBM Request for Review at 29.

[147] *See* IBM Bid at 3.7.6.

[148] IBM Bid at 3.7.7.

[149] *See Tennessee Order*, 14 FCC Rcd 13734, 13739, para 9. ("Price, however, should be carefully considered at this point [*i.e.,* when selecting among comparable services] to ensure that any considerations between price and technical excellence (or other factors) are reasonable.").

[150] *Id.,*14 FCC Rcd at 13740, para 13; *see supra* para. 24. IBM also states that it gave a "significant concession" to Ysleta by agreeing to maximum "not to exceed" prices for services, and argues that this helps to demonstrate that Ysleta acquired the most cost-effective services. *See* IBM Request for Review at 25. The fact that IBM agreed to capped prices in its contract does not strike us as a significant concession, nor does it demonstrate that Ysleta obtained the most cost-effective services.

[151] *See* Ysleta Request for Review at 28-29; IBM Request for Review at 31.

[152] Ysleta Request for Review at 29; IBM Request for Review at 32-33.

thereafter to keep prices reasonable, which helped result in cost-effective services. However, the Commission has determined that seeking competitive bids for eligible services is the most efficient means for ensuring that eligible schools and libraries are fully informed of their choices and are most likely to receive cost-effective services.[153] In a situation where several entities in fact are potentially interested in providing eligible services, we expect the applicant to make some effort to ascertain the proposed prices for the eligible services for each bidder. We do not think our goals of limiting waste are well served when an applicant merely compares the prices of one bidder against its internal assessment of what a "reasonable" price would be.

54. Even if an applicant receives only one bid in response to an FCC Form 470 and/or RFP, it is not exempt from our requirement that applicants select cost-effective services. The Commission has not, to date, enunciated bright-line standards for determining when particular services are priced so high as to be considered not cost-effective under our rules. There may be situations, however, where the price of services is so exorbitant that it cannot, on its face, be cost-effective. For instance, a proposal to sell routers at prices two or three times greater than the prices available from commercial vendors would not be cost effective, absent extenuating circumstances. We caution applicants and service providers that we will enforce our rules governing cost-effectiveness in order to limit waste in the program. [154]

55. As for Ysleta and IBM's argument that E-rate applicants have sufficient incentive to select the most cost-effective services because they must contribute a portion of the costs, the Commission stated previously in the *Tennessee Order* that because an applicant must contribute its share, the Administrator "generally" need not make a separate finding that a school has selected the most cost-effective bid, even where schools do not have established competitive bidding processes.[155] It anticipated that a particular case may present evidence that even though an applicant followed state and local rules, the applicant did not select the most cost-effective services.[156] Our de novo review standard provides an ample basis for examining the facts more closely when, as here, there are indications that the applicants did not contract for the most cost-effective services.

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[153] *See Universal Service Order*, 12 FCC Rcd at 9029, para. 480. Ysleta also argues that the Commission should not require that price be the primary factor given that "it is difficult for pricing to be the primary consideration in the technology area" because "pricing changes dramatically . . . and hardware quickly becomes obsolete." Ysleta Request for Review at 26-27. We note, however, that Ysleta signed a one-year contract with IBM, and it is not unreasonable to expect applicants to anticipate price changes within a given year. Moreover, Ysleta's FCC Form 470 was posted on October 12, 2001, whereas IBM signed a contract with firm pricing only three months later on January 12, 2002. *See* Ysleta Form 470, Ysleta Request for Review at 11.

[154] It is illustrative of our concerns that Ysleta School Board President Wayne Belisle, quoted in the *El Paso Times*, termed the $12.4 million for the technology help center "a huge waste of money." Corrie MacLaggan, *El Paso Times*, December 13, 2002. "YISD Denied Tech Funds."

[155] *Tennessee Order*, 14 FCC Rcd at 13739, para. 10.

[156] *Id.* ("Absent evidence to the contrary in a particular case, we believe that this incentive [to reduce costs] is generally sufficient to support a conclusion that a school has selected the most cost-effective bid for requested services.").

56. Violation of *Bona Fide* Requirement. Section 254(h)(1)(B) of the Telecommunications Act of 1934, as amended, states that E-rate applicants must submit a "*bona fide* request" for services.[157] The Commission has stated that the *bona fide* requirement means that applicants must conduct internal assessments of the components necessary to use effectively the discounted services they order, submit a complete description of services they seek so that it may be posted for competing providers to evaluate, and certify to certain criteria under perjury.[158] Further, applicants may violate the statutory *bona fide* requirement through conduct that undermines the fair and open competitive bidding process. In the *Mastermind Order*, the Commission found that a violation of its competitive bidding rules had occurred where a service provider listed as the contact person on the Form 470 also participated in the competitive bidding process as a bidder.[159] The Commission concluded that, even in the absence of a rule explicitly prohibiting such conduct, under such circumstances, a fair and open competitive bidding process had not occurred, and thus the requirement that an applicant make a *bona fide* request for services had been violated.[160]

57. We conclude that Ysleta violated the statutory requirement that applicants submit a "*bona fide* request" for services under the E-rate program by using a two-step Systems Integration approach and by failing to use price of the actual services being sought as the primary factor in selecting IBM. Ysleta released an RFP in conjunction with its FCC Form 470, making it clear that it was seeking bids for a systems integrator, and not bids for the specific services listed in the FCC Form 470.[161] As discussed above, the two-step Systems Integration approach is inconsistent with our competitive bidding requirements. Moreover, as discussed above, this procurement process violated Commission requirements regarding the role of price in determining the most cost-effective bid.[162] Because Ysleta violated our competitive bidding requirements and failed to demonstrate that it selected IBM with price as the primary factor, we conclude that it also violated section 254's mandate that applicants submit a *bona fide* request for services.[163]

58. Retroactive Application of New Rules. We reject the contention that the denial of discounts for the procurement practices utilized in these cases represents a retroactive

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[157] 47 U.S.C. § 254(h)(1)(B).

[158] *Universal Service Order*, 12 FCC Rcd at 9076, para. 570. *See supra* para. 5.

[159] *See Request for Review of the Decision of the Universal Service Administrator by Mastermind Internet Services, Inc., Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028, 4033, para. 10 (2000) (*Mastermind Order).*

[160] *Id.* 16 FCC Rcd at 4032-33, paras. 10-11.

[161] *See supra* para. 33.

[162] *See supra* paras. 47-53.

[163] For future purposes, parties should also remember that, as clarified above, the requirement for a *bona fide* request also means that applicants must submit a list of specified services for which they seek discounts, consistent with their technology plans, in order to provide potential bidders with sufficient information on the FCC Form 470 to enable bidders to reasonably determine the needs of the applicant. *See supra* para. 35.

application of new rules and procedures.[164] Our rules cannot, and need not, address with specificity every conceivable factual scenario.[165] As stated above, our rules require applicants to seek competitive bids on eligible services, and to consider price as the primary factor. These rules are not new. Rather, we are applying them to the facts at hand, as is appropriate in an adjudicatory context. The fact that in prior years, USAC did not disapprove applications that utilized the procurement processes at issue in no way limits our discretion to apply our existing rules.[166]

59. Other Rule Violations. Because we conclude that Ysleta violated our rules regarding competitive bidding, the requirement that price be the primary factor in selecting bidders, and the requirement that it make a *bona fide* request for services, we need not address SLD's conclusions that Ysleta and/or IBM violated other rules. However, because we are remanding the instant appeals to SLD and permitting similarly situated applicants that have appealed to re-bid, we take this opportunity to provide specific guidance regarding practices that are inconsistent with our rules to provide greater clarity to those applicants re-bidding services and future applicants. We emphasize that we will remain vigilant to prevent waste, fraud, and abuse in this program to ensure that the statutory goals of section 254 are met.

60. We emphasize that applicants and service providers are prohibited from using the schools and libraries support mechanism to subsidize the procurement of ineligible or unrequested products and services, or from participating in arrangements that have the effect of providing a discount level to applicants greater than that to which applicants are entitled. The Administrator has implemented this Commission requirement by requiring that: (1) the value of all price reductions, promotional offers, and "free" products or services be deducted from the pre-discount cost of services indicated in funding requests; (2) costs, trade-in allowances, and discounts be fairly and appropriately derived, so that, for example, the cost for eligible components is not inflated in order to compensate for discounts of other components not included in funding requests; and (3) contract prices be allocated proportionately between eligible and ineligible components.[167] We also stress that direct involvement in an application process by a service provider would thwart the competitive bidding process. These requirements are necessary to ensure that program funds are allocated properly, consistent with section 254.

61. We also emphasize that applicants may not contract for ineligible services to be funded through discounts under the E-rate program. In its response to Ysleta's RFP, IBM

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[164] *See* IBM Request for Review at 40-41; Ysleta Request for Review at 40.

[165] *See, e.g., Mastermind Order*, 16 FCC Rcd at 4032-33, para. 10 (finding violation of our rules even though rules did not specifically prohibit conduct at issue).

[166] *See, e.g., Request for Review by School for Language and Communication Development*, Order, 17 FCC Rcd 15166, 15169, para. 9 (Wireline Comp. Bur. 2002) (citing precedent and noting that failure to detect violations in prior funding years does not preclude SLD or the Commission from requiring compliance with the Commission's rules in subsequent years.).

[167] 47 C.F.R. §§ 54.502 – 54.503. *See also* SLD web site, Free Services Advisory, <<http://www.sl.universalservice.org/reference/freeservices.asp>>

offered to provide as Ysleta's "Technology Partner" many apparently ineligible services, such as teacher and administrative personnel training, consulting services, and assistance in filling out forms.[168] IBM and Ysleta assert that to the extent such services were proposed in IBM's bid, they were merely "generic descriptions of the global set of services the company is capable of providing" and were not included in the final contract.[169] When Ysleta rebids for services, we direct SLD to carefully scrutinize the requests to ensure no funding is committed for ineligible services.

62. An analysis of Ysleta's application suggests that it sought support for "Help Desk" services, as part of the Technical Support Statement of Work.[170] A computer Help Desk accepts support calls from end users, and initiates action to resolve the problem. This action might involve initial diagnostics, creation of a Trouble Ticket, logging the support call, and alerting other personnel that a problem exists.

63. As a result of the complex and evolving nature of the E-rate program and the technologies it supports, our rules do not codify a precise list of products and services that are eligible. Instead, SLD has developed a generalized list of eligible services in an effort to provide clarity to applicants of which services are eligible under governing rules.[171] Among other things, the Funding Year 2002 Eligible Services list defined as eligible: "Technical Support is the assistance of a vendor-provided technician. This support may include the installation, maintenance and changes to various services and equipment under contract. Technical support is only eligible if it is a component of a maintenance agreement or contract for an eligible service or product, and it must specifically identify the eligible services or products covered by the contract."[172] The Eligible Services List thus implemented the Commission's holding in the *Universal Service Order* that support may be provided for "basic maintenance services" that are "necessary to the operation of the internal connections network."[173]

64. When confronted with products or services that contain both eligible and ineligible functions, SLD in the past has utilized cost allocation to determine what portion of the product price may receive discounts.[174] We generally endorse this practice as a reasonable means of addressing mixed use products and services. When SLD reviews the applications that are submitted after the rebidding occurs, it should ensure that discounts are provided only for "basic maintenance" and not for technical support that falls outside the scope of that deemed eligible in the *Universal Service Order*. For instance, calls from end-users may involve problems with

[168] *See, e.g.,* IBM Bid at 3.7.2, 3.7.4, 3.7.6.

[169] *See* IBM Request for Review at 34-35.

[170] *See* Ysleta FCC Form 471.

[171] *See* Funding Year 2002 Eligible Services List.

[172] *See id*.

[173] *Universal Service Order*, 12 FCC Rcd at 9021-22, para. 460.

[174] *See* <<www.sl.universalservice.org/reference/costallocationguide.asp>>

end-user workstation operating systems and hardware, and Help Desks typically field questions about the operation and configuration of end-user software. Such end-user support is not eligible for E-rate funding. Even if the actual correction of a problem involves non-contractor personnel, and is therefore not reimbursed with E-rate funds, the routing and logging function of the comprehensive Help Desk activities would effectively support ineligible services, and therefore is ineligible for discounts.

65. We expect that following the re-bidding of contracts described below, SLD will carefully scrutinize applications to ensure that discounts are provided only for eligible services.[175] For example, SLD will examine applications to ensure that if they include project management costs for Systems Integrators or others, such costs do not include the cost of ineligible consulting services.[176] Our mandate is to ensure that the statutory goals of section 254 are met without waste, fraud, and abuse. We emphasize that competitive bidding is a key component of our effort to ensure that applicants receive the most cost-effective services based on their specific needs, while minimizing waste in the program. The various procurement practices described above (and described in the attached appendix) represent a significant departure from the competitive bidding practices envisioned by the Commission, which were designed to best fulfill the goals of section 254. Although aspects of particular approaches utilized by individual applicants may, taken out of context, appear not to constitute a significant violation of our rules, the practices in each of the above-captioned Requests for Review weaken, undercut, or even subvert the Commission's competitive bidding requirements. We clarify our rules concerning these competitive bidding requirements where such clarification is appropriate, and, as detailed below, allow for re-bidding of services because some applicants may have relied on past approval by the Administrator of some of these practices. Fundamentally, however, this Order confirms the competitive bidding framework the Commission established in the *Universal Service Order* and which has been clarified and upheld in subsequent Orders.

IV. RE-BIDDING OF SERVICES FOR FUNDING YEAR 2002

66. Although we conclude that the practices followed in these cases are not consistent with our rules, we find that there is good cause for a waiver of our rules regarding the filing window for Funding Year 2002. Under the unique circumstances presented here, we find that good cause exists to direct SLD to re-open the filing window for Funding Year 2002 in order to permit Ysleta, and similarly situated applicants listed in the caption who appealed SLD's denial of their funding requests, to re-bid for services, to the extent such services have not already been provided.

67. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.[177] In addition, the Commission may take into account considerations of

[175] Furthermore, our rules provide that if 30 percent or more of a request for discounts made in an FCC Form 471 is for ineligible services, the request shall be denied in its entirety. *See* 47 C.F.R. § 54.504(c)(1).

[176] Initial planning activities, such as design of technology architecture, determination of project scope, and evaluation of what technologies and products to utilize, constitute consulting services and are ineligible for discounts under the program. *See* Funding Year 2002 Eligible Services List.

[177] *Northeast Cellular*, 897 F.2d 1164, 1166 (DC Cir. 1990).

hardship, equity, or effective implementation of overall policy on an individual basis.[178] In sum, a waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.[179]

68. Although we affirm SLD's denial for the reasons set out above, we find that these applicants should be allowed to re-bid services in accordance with the terms set forth below. We exercise our discretion in this matter for the following reasons.

69. SLD could reasonably have been construed as sanctioning the two-step Systems Integration process by approving the El Paso Independent School District's application for the previous year, Funding Year 2001. Although the record is unclear, there are indications that other applicants may have engaged in similar procurement practices even prior to El Paso's Funding Year 2001 application.[180] IBM marketed its success with the El Paso contract, as one approved by SLD.[181] In its bid for Systems Integration services for Ysleta, IBM explained that the El Paso school district had received less than $2 million in E-rate funding in Funding Year 2000, but that after El Paso selected IBM as a Systems Integrator for Funding Year 2001, El Paso received over $70 million in funding under the program.[182]

70. Ysleta maintains that it was strongly influenced by SLD's prior approval of the two-step Systems Integration approach used by El Paso to select IBM. As Ysleta states,

> [Ysleta] was well aware of the large program funding award to [El Paso] for [Funding Year 2001], through the local media and conversations with [El Paso] officials. Consequently, [Ysleta] was under the impression that [El Paso's] model of selection of a service provider was a more effective method in light of the large award, and that [Ysleta] has been unduly restrictive on its requests. [Ysleta] had no reason to believe that there was any actual or alleged problem with [El Paso's] methodology, since the SLD had approved the [El Paso] model for large [Funding Year 2001] funding. [Ysleta] requested the form of the request proposal directly from [El Paso], and made appropriate changes thereon, culminating in the Request for Proposal.

[178] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (DC Cir. 1969).

[179] *Northeast Cellular*, 897 F.2d at 1166.

[180] *See* IBM Bid at 71-76 (citing IBM's prior success with other applicants, reflecting similarities to Ysleta's practices).

[181] *See* IBM Bid at 71.

[182] *See* IBM Bid at 71.

71. Similarly, a number of applicants point to SLD's past approval of funding requests that utilized all-inclusive FCC Forms 470.[183] These applicants observe that the approved funding requests are similar or identical to that submitted by Ysleta.[184]

72. We recognize that in certain instances, our rules and past decisions did not expressly address the circumstances presented here. That, however, does not preclude a finding that there has been a violation of our competitive bidding rules.[185] In considering how to remedy this violation, we seek to enforce our rules to prevent waste, fraud and abuse, while also considering factors of hardship, fairness, and equity. For the reasons described below, we find that waiver of our rules to permit applicants to rebid services in accordance with the terms below is in the public interest in light of the uncertain application of our rules to the novel situation presented, and the substantial and widespread reliance on prior SLD approval.

73. The Commission has previously granted a waiver of its rules where one factor that it took into account was confusion caused by the application of a new rule.[186] We anticipate that we will rarely find good cause to grant a waiver of our rules based on confusion among applicants in applying them. We think that it is appropriate to consider this factor with regard to the instant appeals, however, as they involve the application of our rules to a unique situation, namely the two-step System Integration approach and related practices. The exercise of our discretion to grant such a waiver in this instance is also informed by the extent to which applicants relied upon the fact that other applicants that utilized this approach previously were approved for funding. We have previously considered an applicant's good faith reliance in deciding whether to grant a waiver of our rules.[187] Here, we think that such consideration is appropriate because enforcement of these rules in these circumstances would impose an unfair hardship on these applicants.[188] Accordingly, in light of all these factors, we find that it is in the public interest to grant a waiver of our rules in the novel situation posed by the instant case.

74. We therefore direct the Administrator to re-open the Funding Year 2002 filing window for all of the applicants set forth in the caption.[189] Applicants will have sixty days from

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[183] *See supra* note 100.

[184] *Id.*

[185] *Id*.

[186] *Request for Review by Naperville Community Unit School District 203,* Order, 16 FCC Rcd 5032 (2001) (*Naperville*) (noting confusion among a number of applicants based on the redesign of the FCC Form 471 and where specific request was new to the application); *see also Request for Review by Eastern Lebanon County School District*, Order, 18 FCC Rcd 5466 (2003).

[187] *See Request for Review by Edumaster.Net, DBA Mastermind Learning Center, or Mastermind Internet Services, Year 3 Filing Window,*, Order, 15 FCC Rcd 15281, 15284-85, paras. 9-11 (2000) (*Mastermind Filing Window Order*).

[188] *See* IBM Request for Review at 41.

[189] Commission precedent exists for re-opening the filing window where the Commission deemed it appropriate following competitive bidding violations. *See Mastermind Filing Window Order,* 15 FCC Rcd at 15285, para.11.

the date of release of this Order to resubmit their FCC Forms 470. In order to receive full consideration as in-window applicants for Funding Year 2002, the affected applicants must comply with all stages of the original application process. Specifically, applicants must seek competitive bids for all services eligible for discounts, and submit to the Administrator completed FCC Forms 470 on or before February 6, 2004. The Administrator will post the FCC Forms 470 to its web site, and once the FCC Forms 470 have been posted for 28 days and the applicant has signed a contract for eligible services with a service provider, the applicants must then submit their FCC Forms 471. In all cases, the applicants must file their completed FCC Forms 471 on or before April 23, 2004.

75. In accordance with this Order, applicants will be required to submit FCC Forms 470 that set forth in sufficient detail the services requested, or that reference RFPs that do so. Applicants must seek competitive bids for eligible services, requiring potential bidders to submit proposed prices for specified services. Applicants may select a Systems Integrator for project management, but not without seeking bids from potential Systems Integrators that specify prices to be charged by the Systems Integrator for eligible services. Nothing in this Order prevents IBM from submitting new bids for services.

76. Re-submitted applications shall be capped at the amount of pre-discount funding that applicants originally sought. We direct the Administrator to ensure that no applicant receives funding in excess of the amount for which the applicant originally applied for each individual funding request. However, because many of the contracts at issue in the instant appeals may not have been the most cost-effective offerings for obtaining eligible services, we fully anticipate that applicants will obtain substantial savings over their original applications once they have re-bid for actual E-rate eligible services. As noted above, we direct the Administrator not to approve requests for discounts on maintenance costs that are not cost-effective.

77. To the extent an applicant proceeded to take service, particularly telecommunications services or Internet access, notwithstanding SLD's denial of discounts, we do not and will not provide funding to pay for such services. We therefore do not grant a waiver of the filing window with respect to any requests for services that have already been provided as of the date of this Order. We do not believe that such a conclusion is overly harsh, since applicants proceeded at their own risk to take service, and we would be remiss to permit discounts in a situation where parties assumed the risk of proceeding in the face of SLD's denial. The loss of discounts for such services is a fair and appropriate consequence of the actions of these applicants.

78. Applicants that sought funding in Funding Year 2003 for internal connections products or services for which SLD denied discounts in Funding Year 2002 for competitive bidding violations may not receive discounts for the identical products or services in both Funding Year 2002 and Funding Year 2003. After rebidding, if applicants receive funding commitments in both 2002 and 2003 for identical products and services, they must cancel the funding requests for one of the two years.

79. Although each application under the E-rate program is unique to some degree, we conclude that all of the appellants listed in the attached appendix demonstrate factual circumstances sufficiently similar to those in the instant appeal as to merit a denial and right to

re-bid in accordance with the terms of this Order. Applicants who were denied by SLD under similar factual circumstances, but who elected not to file appeals with SLD or the Commission, may not re-bid, because they failed to preserve their rights on appeal.

80. The Commission remains staunchly committed to limiting waste, fraud, and abuse in the program. The Administrator's diligence in finding and addressing the problems cited in the instant Order for Funding Year 2002 are a reflection of that commitment. We direct the Administrator to carefully scrutinize the applications submitted following the re-bidding process, to ensure full compliance with all of our rules.

V. ORDERING CLAUSES

81. ACCORDINGLY, IT IS ORDERED, pursuant to section 54.722(a) of the Commission's rules, 47 C.F.R. §54.722(a), that the following Requests for Review ARE DENIED: Request for Review filed by Ysleta Independent School District, El Paso, Texas, on January 30, 2003; Request for Review filed by International Business Machines, Inc., on behalf of Ysleta Independent School District, El Paso, Texas, filed on January 30, 2003; Request for Review of Donna Independent School District, Donna, Texas, filed on May 6, 2003; Request for Review of International Business Machines, Inc., on behalf of Donna Independent School District, Donna, Texas, filed May 9, 2003; Request for Review of Galena Park Independent School District, Houston, Texas, filed April 28, 2003; Request for Review of International Business Machines, Inc., on behalf of Galena Park Independent School District, Houston, Texas, filed May 9, 2003; Request for Review of Oklahoma City School District I-89, Oklahoma City, Oklahoma, filed May 8, 2003; Request for Review of International Business Machines, Inc., on behalf of Oklahoma City School District I-89, Oklahoma City, Oklahoma, filed May 9, 2003; Request for Review of El Paso Independent School District, El Paso, Texas, filed May 8, 2003; Request for Review of International Business Machines, Inc., on behalf of El Paso Independent School District, El Paso, Texas, filed May 9, 2003; Request for Review of Navajo Education Technology Consortium, Gallup, New Mexico, filed April 22, 2003; Request for Review of Memphis City School District, Memphis, Tennessee, filed May 27, 2003; Request for Review of International Business Machines, Inc., on behalf of Memphis City School District, Memphis, Tennessee, filed May 23, 2003; Request for Review of Albuquerque School District, Albuquerque, New Mexico, filed May 23, 2003; and Request for Review of International Business Machines, Inc., on behalf of Albuquerque School District, Albuquerque, New Mexico, filed May 23, 2003.

82. IT IS FURTHER ORDERED, pursuant to sections 1-4, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54 and 254, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that the Funding Year 2002 filing window deadline established by the Schools and Libraries Division of the Universal Service Administrative Company pursuant to section 54.507(c) of the Commission's rules IS WAIVED for the affected applicants listed in the Appendix of this Order, and the Schools and Libraries Division shall take the steps outlined above to effectuate this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Requests Denied (amount in dollars)			
Entity Name	**Telecommunications Services**	**Internet Access**	**Internal Connections**
Ysleta Independent School District		**871,740.04**	**17,469,927.90**
Donna Independent School District			**28,641,208.95**
Galena Park Independent School District		**9,006.00**	**23,893,555.50**
Oklahoma City School District I-89	**561,480.39**	**3,216,360.00**	**40,770,145.80**
El Paso Independent School District	**46,800.00**	**3,088,074.03**	**41,639,602.13**
Navajo Education Technology Consortium			**41,305,747.50**
Memphis City School District	**5,891,241.25**	**25,377.96**	**19,902,043.07**
Albuquerque School District			**37,355,476.23**
TOTALS	**6,499,521.64**	**7,210,558.03**	**250,977,707.08**

APPENDIX B

1. Although the specific circumstances of each of the following applicants vary, the record reflects that the following applicants engaged in competitive bidding practices substantially similar to those practiced by Ysleta in Funding Year 2002. We describe below the factual circumstances of each applicant, and incorporate by reference our discussion in this Order regarding Ysleta's practices. As with Ysleta, the procurement process of each of the following applicants violates our competitive bidding rules and undermines the goals of the program. For the reasons discussed in the Order, however, we find that good cause exists to waive our rules governing the filing window for Funding Year 2002, and permit these applicants to re-bid for services for Funding Year 2002 in accordance with our rules.

Donna Independent School District (DISD)

2. On October 1, 2001, DISD's Funding Year 2002 FCC Form 470 was posted on SLD's website.[190] DISD indicated on its FCC Form 470 that it was seeking services for virtually every product and service eligible for discounts under the support mechanism.[191] Moreover, in Blocks 8, 9, and 10 of FCC Form 470, DISD checked the box for, respectively, telecommunications services, Internet access, and internal connections. In each instance, DISD checked the box stating, "No, I do not have an RFP [Request for Proposal] for these services."[192]

3. Twenty-five days after the posting of the FCC Form 470, DISD released a Request for Information (RFI) on October 21, 2001 which generally sought a strategic technology partner to assist it with the E-rate program.[193] DISD's RFI did not specify projects for which it sought funding, and did not seek pricing information from bidders concerning products and services for which discounts under the support mechanism would be sought.[194]

4. DISD subsequently received bids.[195] In its bid submitted to DISD, IBM did not list any prices except for a listing of hourly rates for its employees.[196] After negotiations were conducted, on January 15, 2002, DISD signed an agreement with IBM to provide its requested

[190] *See* Donna Independent School District (DISD) FCC Form 470.

[191] *See* DISD Form 470; *supra* para. 10.

[192] *See* DISD FCC Form 470. Although DISD checked the box indicating no RFP had been released, it did state in Box 15(f) of its FCC Form 470 "Request RFP for Internal Connections" *See* DISD FCC Form 470; *supra* para. 10

[193] *See* DISD RFI at 1.

[194] *See* DISD RFI at § 4(g); *supra* para. 12.

[195] DISD Request for Review filed by IBM at 8-9. Although IBM indicates DISD received multiple bids, IBM does not specify the actual number of bids that DISD received, or the identity of the other bidders. *See id.*

[196] *See* IBM Response to Donna Independent School District Request for Information at Section 4G; *supra* para 13.

services.[197] On January 16, 2002, DISD filed its FCC Form 471 application.[198] On March 10, 2003, SLD issued a decision denying DISD's discounts.[199] Similar to SLD's denial for Ysleta, SLD denied discounts finding: (1) the price of services was not a factor in vendor selection; (2) the price of services was set after vendor selection; (3) the vendor was selected by RFP instead of an FCC Form 470; (4) the FCC Form 470 did not reference an RFP; and (5) the services for which funding was sought were not defined when the vendor was selected.[200]

5. As with Ysleta's appeal, we conclude that DISD's two-step procurement process violated program rules. First, DISD's competitive bidding for a Systems Integrator without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission's rules requiring that "an eligible school or library shall seek competitive bids . . . for all services eligible for support."[201] Further, as with the bidding process employed by Ysleta, DISD failed to seek actual pricing information from bidders, and selected IBM without consideration of specific pricing information relating to the actual E-rate eligible services to be provided.[202] We therefore find that DISD did not consider price as the primary factor in selecting IBM. DISD neither sought to ascertain the proposed prices for the eligible services for each bidder, nor compared different providers' prices for actual services eligible for support.[203] As a final matter, we also find that because DISD violated our competitive bidding rules and failed to demonstrate that it selected IBM with price as the primary factor, DISD violated section 254's mandate that applicants submit a *bona fide* request for services.[204]

[197] DISD Request for Review filed by IBM at 4; DISD Request for Review at 4. IBM submitted a bid response on November 8th. *See generally* IBM Response to Donna Independent School District Request for Information.

[198] DISD FCC Form 471.

[199] SLD Funding Commitment Decision Letter for Donna Independent School District at 6.

[200] *See id*.

[201] 47 C.F.R. § 54.504(a); *supra* paras. 22-26.

[202] *Supra* para. 24.

[203] *See* 47 C.F.R. § 54.511(a); *Universal Service Order*, 12 FCC Rcd at 9029-30, para. 481; *supra* paras. 24.47, 48, 53.

[204] *Supra* paras. 54-55.

Galena Park Independent School District (Galena Park)

6. Galena Park's initial Funding Year 2002 FCC Form 470 was posted on September 10, 2001.[205] In its FCC Form 470, Galena Park indicated it did not have an RFP for the services for which it was seeking discounts.[206] On October 4, 2001, Galena Park released an RFP.[207] Galena Park's RFP did not seek bids for specific services eligible for support.[208] Its RFP stated that Galena Park was seeking an "E-rate Program Architect" to serve as a Systems Integrator.[209] Galena Park's RFP did not seek pricing information from bidders concerning products and services for which discounts under the support mechanism would be sought.[210]

7. IBM submitted a bid response on October 19, 2001.[211] IBM did not list any prices except for a listing of hourly rates for its employees.[212] On November 9, 2001, Galena Park filed another FCC Form 470 which added E-mail to services for which it sought discounts.[213] In its second FCC Form 470, Galena Park indicated that it was seeking services for virtually every product and service eligible for discounts under the support mechanism.[214] Despite the fact that Galena Park had released its RFP a month earlier, in Blocks 8, 9, and 10 of FCC Form 470, Galena Park checked the box for, respectively, telecommunications services, Internet access, and internal connections, indicating in each instance "No, I do not have an RFP [Request for Proposal] for theses services."[215]

8. Galena Park did not receive any bid other than IBM's.[216] After conducting negotiations with IBM, on January 16, 2002 Galena Park signed a contract with IBM and filed an FCC Form 471.[217] On March 10, 2003, SLD issued a decision denying DISD's discounts.[218]

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[205] *See* Galena Park Request for Review filed by IBM at 2.

[206] *See id.*

[207] *See generally* Galena Park RFP.

[208] *See id.; supra* para. 12

[209] *See* Galena Park RFP at § 1(a). Specifically, the RFP sought a consultant that could "advise and assist the district in all aspects of the e-rate program." *Id*.

[210] *See* Galena Park RFP at § 5(e).

[211] *See* IBM Response to Galena Park Independent School District Request for Proposal.

[212] *See* IBM Response to Request for Proposal at 32-33; *supra* para. 13.

[213] *See* Galena Park FCC Form 470; Galena Park Request for Review filed by IBM at 3.

[214] *See* Galena Park FCC Form 470; *supra* para. 10.

[215] *See* Galena Park FCC Form 470.

[216] *See* IBM Request for Review (Galena Park) at 9.

[217] *See* Galena Park Request for Review filed by IBM at 3, 8-9; Galena Park FCC Form 471.

SLD denied discounts finding: (1) the price of services was not a factor in vendor selection; (2) the price of services was set after vendor selection; (3) the vendor was selected by RFP instead of an FCC Form 470; (4) the FCC Form 470 did not reference an RFP; and (5) the services for which funding was sought were not defined when the vendor was selected.[219]

9. We conclude, similar to our findings concerning Ysleta's appeal, that Galena Park's two-step procurement process violated program rules. By checking the box on its second FCC Form 470 to indicate that it did not have an RFP, even though it had previously released an RFP, Galena Park provided incorrect and misleading information on its FCC Form 470. Further, Galena Park's competitive bidding for a systems integrator without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that "an eligible school or library shall seek competitive bids . . . for all services eligible for support," and violated section 254's mandate that applicants submit a *bona fide* request for services.[220]

Oklahoma City Public Schools (OCPS)

10. OCPS's Funding Year 2002 FCC Form 470 was posted on SLD's website on October 16, 2001.[221] In its FCC Form 470, OCPS indicated that it was seeking services for virtually every product and service eligible for discounts under the support mechanism.[222] Moreover, in Blocks 8, 9, and 10 of the form, OCPS checked the box for, respectively, telecommunications services, Internet access, and internal connections, indicating in each instance "No, I do not have an RFP [Request for Proposal] for these services."[223]

11. Some time in mid to late October, 2001, OCPS released an RFP.[224] The RFP stated that OCPS was seeking a "Strategic Technology Solution Provider" for a four-year term to, among other things, "assist the District with all aspects of the E-rate process."[225] The Solution

[218] SLD Funding Commitment Decision Letter for Galena Park Independent School District at 6-7.

[219] *See id*. at 6-7.

[220] 47 C.F.R. § 54.504(a); *supra* paras. 22-26; paras. 54-55.

[221] *See* OCPS Form 470.

[222] *See* OCPS Form 470; *supra* para. 10.

[223] *See* OCPS Form 470.

[224] *See* OCPS RFP. The RFP has a cover page dated October 15, 2001. However, the text of the RFP is date-stamped October 24, 2001, indicating that the RFP was released after October 15, 2001. *See also* OCPS Request for Review at n.1.

[225] Oklahoma City Public School District, Request for Proposal, Quotation # 8839, dated October 15, 2001 (RFP) at 1.

Provider would "assist [OCPS] in effectively infusing technology throughout the District."[226] The specified technology requirements were not identified in the RFP.

12. OCPS's RFP did not seek pricing information from bidders concerning products and services for which discounts under the support mechanism would be sought.[227] The RFP stated, "Prospective bidders should note that this RFP does not require a firm fixed price, a cost plus proposal, or any other specific cost information with the exceptions of: a cost schedule for services and costs for Specialized Services for funding assistance."[228]

13. Eight vendors submitted bids in response to the OCPS proposal.[229] On December 17, 2001, the Oklahoma City Board of Education unanimously approved IBM as the District's Solution Provider.[230] Only after OCPS chose IBM as the awardee, and prior to submitting its FCC Form 471, did OCPS begin specifically identifying the scope of work and cost of the actual products and services for Funding Year 2002 that would be eligible for discounts under the support mechanism.[231] On January 17, 2002, the final day of the filing window for Funding Year 2002 applications for discounts, OCPS filed its FCC Form 471 application.[232]

14. On March 10, 2003, SLD issued a decision denying OCPS's discounts.[233] SLD denied discounts finding: (1) the price of services was not a factor in vendor selection; (2) the price of services was set after vendor selection; (3) the vendor was selected by RFP instead of an FCC Form 470; (4) the FCC Form 470 did not reference an RFP; and (5) the services for which funding was sought were not defined when the vendor was selected.[234]

15. We conclude, consistent with our findings concerning Ysleta's appeal, that OCPS's two-step procurement process violated program rules. First, OCPS' competitive bidding for a Systems Integrator without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that "an eligible school or library shall seek competitive bids . . . for all services eligible for support."[235] As with the bidding process employed by Ysleta, OCPS failed to seek actual

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[226] *Id.*

[227] *See generally* OCPS RFP; *supra* para. 12.

[228] *Id.*

[229] *Id.*

[230] OCPS Request for Review at 4.

[231] *See* IBM Request for Review at 7.

[232] *See* OCPS Form 471.

[233] SLD Funding Commitment Decision Letter for Oklahoma City School District I-89 at 6-9.

[234] *Id.*

[235] 47 C.F.R. § 54.504(a); *supra* paras. 22-26.

pricing information from bidders, and selected IBM over other bidders without consideration of specific pricing information relating to the actual E-rate eligible services to be provided.[236] We therefore find that OCPS did not consider price as the primary factor in selecting IBM. OCPS neither sought to ascertain the proposed prices for the eligible services for each bidder, nor compared different providers' prices for actual services eligible for support.[237] As a final matter, we also find that because OCPS violated our competitive bidding rules and failed to demonstrate that it selected IBM with price as the primary factor, it violated section 254's mandate that applicants submit a *bona fide* request for services.[238]

El Paso Independent School District (EPISD)

16. EPISD's Funding Year 2002 FCC Form 470 was posted on SLD's website on November 26, 2001.[239] In its FCC Form 470, EPISD indicated that it was seeking services for virtually every product and service eligible for discounts under the support mechanism.[240] Like Ysleta, in Blocks 8, 9, and 10 of the form, EPISD checked the box for, respectively, telecommunications services, Internet access, and internal connections, indicating in each instance "No, I do not have an RFP [Request for Proposal] for these services."[241]

17. In the previous Funding Year (Funding Year 2001), IBM had been selected by EPISD as its service provider pursuant to a contract entered into by IBM and EPISD on January 18, 2001.[242] This contract was based upon an RFP dated December 1, 2000.[243] El Paso selected IBM over seven other bidders, in a two-step process similar to Ysleta's that did not compare proposed prices for specified E-rate eligible services during the bidding process.[244] Prices and service terms were negotiated with IBM post-selection in the second step of this two-step process.[245] The 2000 RFP and the subsequent contract, similar to Ysleta's Funding Year 2002 arrangements, formed a "Strategic Technology Solution Provider" relationship between IBM and EPISD for a four-year term to, among other things, "assist the District with all aspects of the E-rate process." Similar to Ysleta, the exact technology requirements were not identified

[236] *Supra* para. 24.

[237] *See* 47 C.F.R. § 54.511(a); *Universal Service Order*, 12 FCC Rcd at 9029-30 para. 481; *supra* paras. 47, 48, 53, 24.

[238] *Supra* paras. 54-55.

[239] *See* EPISD FY 2002 Form 470.

[240] *See* EPISD FY 2002 Form 470; *supra* para. 10.

[241] EPISD FY 2002 Form 470 at Blocks 8, 9, 10.

[242] EPISD Request for Review at Exhibit 8 (2001 Contract).

[243] EPISD Request for Review at Exhibit 6 (2001 Request for Proposal).

[244] EPISD Request for Review at 10.

[245] *Id.*

in the December 2000 RFP.[246] The RFP also did not seek pricing information from bidders concerning products and services for which discounts under the support mechanism would be sought.[247]

18. EPISD states that it "did not issue a[n RFP] for Funding Year 2002 . . ." but instead "renewed its pre-existing contract with IBM as a service provider."[248] EPISD states that even though it was not required to post a Form 470 in Funding Year 2002, it did so because it wanted to "inquire as to interest from other possible vendors, in an effort to determine whether or not renewal was cost-effective and should take place."[249] EPISD states that no inquiries were received from vendors other than IBM in response to the Funding Year 2002 Form 470 "sufficient to convince EPISD not to renew its existing contract with IBM."[250]

19. On March 10, 2003, SLD issued a decision denying EPISD's discounts for internal connections and Internet access from IBM.[251] Similar to SLD's denial for Ysleta, SLD denied discounts finding: (1) the price of services was not a factor in vendor selection; (2) the price of services was set after vendor selection; (3) the vendor was selected by RFP instead of an FCC Form 470; (4) the FCC Form 470 did not reference an RFP; and (5) the services for which funding was sought were not defined when the vendor was selected.[252]

20. We find that EPISD's Funding Year 2001 procurement process for internal connections and Internet access, which was the foundation for its renewal of its contract with IBM, contains significant similarities to Ysleta's procurement process and violates program rules. EPISD argues that its decision to select IBM for Funding Year 2002 was based not on its Funding Year 2002 FCC Form 470, but rather on its Funding Year 2001 RFP.[253] EPISD maintains that the Commission may not address the propriety of EPISD's Funding Year 2001 RFP, because doing so "is an improper collateral attack."[254] That position is without merit, as nothing precludes the Commission from examining the circumstances of a previous funding decision.[255] EPISD's competitive bidding in Funding Year 2001 for a Systems Integrator

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[246] *Id.*

[247] *Id.*

[248] EPISD Request for Review at 15.

[249] EPISD Request for Review at 12.

[250] *Id.*

[251] Funding Commitment Decision Letter for El Paso Independent School District at ---.

[252] *Id.*

[253] *See* EPISD Request for Review at 15-19.

[254] EPISD Request for Review at 16.

[255] *See, e.g., Request for Review by School for Language and Communication Development* , Order, 17 FCC Rcd 15166 (Wireline Comp. Bur. rel. August 6, 2002) (citing precedent and noting that failure to detect violations in

without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that "an eligible school or library shall seek competitive bids . . . for all services eligible for support."[256]

21. As with the bidding process employed by Ysleta, EPISD did not seek actual pricing information from bidders for its Internet access and internal connections services, and selected IBM over other bidders without consideration of specific pricing information relating to the actual E-rate eligible services to be provided.[257] We therefore find that EPISD did not consider price as the primary factor in selecting IBM. EPISD neither sought to ascertain the proposed prices for the eligible services for each bidder, nor compared different providers' prices for actual services eligible for support.[258] As a final matter, we also find that because EPISD violated our competitive bidding rules and failed to demonstrate that it selected IBM with price as the primary factor, it violated section 254's mandate that applicants submit a *bona fide* request for services.[259]

22. We note that SLD also denied a Funding Year 2002 funding request from EPISD for telecommunications services, to be provided by AT&T.[260] This funding request was denied for the same reasons that the funding requests for Internet access and internal connections from IBM were denied.[261] Although EPISD also challenges SLD's denial of funding for this funding request in its Request for Review, we do not make a decision on that funding request in this Order. Rather, since this funding request was part of a separate Form 471 and Funding Commitment Decision Letter and thus requires a separate factual assessment, we will defer a ruling on this portion of EPISD's Request for Review to a later decision.

Navajo Education Technology Consortium (NETC)

23. NETC's Funding Year 2002 FCC Form 470 was posted on SLD's website on October 31, 2001.[262] NETC indicated in its FCC Form 470 that it was seeking services for virtually every product and service eligible for discounts under the support mechanism.[263]

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prior funding years does not preclude SLD or the Commission from requiring compliance with the Commission's rules in subsequent years.).

[256] 47 C.F.R. § 54.504(a); *supra* paras 22-26.

[257] *Supra* para. 24.

[258] *See* 47 C.F.R. § 54.511(a); *Universal Service Order*, 12 FCC Rcd at 9029-30 para. 481; *supra* paras. 47, 48, 53, 24.

[259] *Supra* paras. 54-55.

[260] Letter from SLD to Jack Johnston, El Paso Independent School District dated March 10, 2003 at 6, FRN No. 832243.

[261] *Id.*

[262] *See* NETC Form 470.

[263] *Id.*; *supra* para. 10.

Moreover, like Ysleta, in Blocks 8, 9, and 10 of FCC Form 470, NETC checked the box for, respectively, telecommunications services, Internet access, and internal connections, indicating in each instance "No, I do not have an RFP [Request for Proposal] for theses services."[264] Unlike in Ysleta, however, in its FCC Form 470, NETC did not indicate that it was seeking a technology implementation and Systems Integration partner.[265]

24. Unlike Ysleta, NETC did not release a subsequent RFP. Rather, NETC states that it determined the size of its project through an "E-Rate 5 Planning" process in which the scope of funding and services needed by NETC was developed and the schools and buildings for which funding was required were identified.[266] NETC also states that it relied on a state-approved Educational Technology Plan as a model to determine the parameters of its project.[267] NETC subsequently received 12 bids, and states that it contacted each vendor by phone and explained the scope and size of the proposed project.[268] NETC points to certain "quotes" by vendors as evidence that price was considered prior to the selection of IBM.[269] These "quotes," however, do not by any means match the scope of the services outlined in NETC's FCC Form 470, nor do they compare in any way to the IBM "Statement of Work" dated January 11, 2002, which apparently formed the basis for the approximately $41 million in services from IBM that NETC sought in its FCC Form 471[270]

25. On January 17, 2002, NETC filed its FCC Form 471 application.[271] On March 10, 2003, SLD issued a decision denying NETC's discounts.[272] Similar to SLD's denial for Ysleta, SLD denied discounts finding: (1) the price of services was not a factor in vendor selection; (2) the price of services was set after vendor selection; and (3) the services for which funding was sought were not defined when the vendor was selected.[273]

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[264] *Id.* at Blocks 8, 9, 10.

[265] *Id.*

[266] NETC Request for Review at 4.

[267] *Id.*

[268] NETC Request for Review at Attachment 13.

[269] NETC Request for Review at Attachment 17.

[270] NETC Request for Review at Attachment 17. For example, NETC provides a copy of a quote from Tamsco Communications for "satellite internet services" at $14,579 per site and monthly service costs between $1,107 and $2,769 per month. Tamsco also quoted $149,291 for LAN maintenance services. None of these quotes compare to the "E-rate eligible" prices quoted by IBM for NETC ($5.7 million for Network Electronics, $25.9 million for Video Equipment, and $14.9 million for Technical Support Services Solution charges).

[271] *See* NETC Form 471.

[272] Funding Commitment Decision Letter for Navajo Educational Technology Consortium.

[273] *See id*.

26. We find that NETC's Funding Year 2002 procurement process contains significant similarities to Ysleta's procurement process and violates program rules. Its competitive bidding without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that "an eligible school or library shall seek competitive bids . . . for all services eligible for support."[274] As with the bidding process employed by Ysleta, NETC failed to seek actual pricing information from bidders for comparable service packages, and selected IBM over other bidders without consideration of specific pricing information relating to the actual E-rate eligible services to be provided.[275] Furthermore, according to the record, the price of IBM's services was far in excess of any other quote received by NETC. We therefore find that NETC did not consider price as the primary factor in selecting IBM. NETC neither sought to ascertain the proposed prices for the eligible services for each bidder, nor compared different providers' prices for actual services eligible for support.[276] As a final matter, we also find that because NETC violated our competitive bidding rules and failed to demonstrate that it selected IBM with price as the primary factor, it violated section 254's mandate that applicants submit a *bona fide* request for services.[277]

Memphis City School District

27. The FCC Form 470 for Memphis City Schools (Memphis) was posted on August 10, 2001.[278] Unlike the other entities discussed in this Order, Memphis indicated in Blocks 8, 9, and 10 on its FCC Form 470 that it had a Request for Qualifications (RFQ) for, respectively, telecommunications services, Internet access, and internal connections, and that the RFQ was available on its website.[279] Because it indicated that it had an RFQ,[280] Memphis was not required under SLD's procedures to list the eligible services it sought on the FCC Form 470.[281] On the same day as the posting of Memphis's FCC Form 470, Memphis released the related RFQ. In its RFQ, Memphis indicated it was seeking a "Technology Business Partnership" with a "Qualified Provider" with whom to enter into a multi-year master contract for "a comprehensive program."[282] This program included management services, telecommunications services, Internet access, hardware/software, infrastructure services, other technology-related

[274] 47 C.F.R. § 54.504(a); *supra* paras. 22-26.

[275] *Supra* para. 24.

[276] *See* 47 C.F.R. § 54.511(a); *Universal Service Order*, 12 FCC Rcd at 9029-30 para. 481; *supra* paras. 47, 48, 53, 24.

[277] *Supra* paras. 54-55.

[278] *See* FCC Form 470, Memphis City Schools, filed August 10, 2001.

[279] *Id.*

[280] The term "Request for Qualifications" as used by Memphis appears to be synonymous with the term "RFP" as used elsewhere in this Order and in the *Ysleta* Order.

[281] *See* FCC Form 470 Instructions.

[282] *See* Memphis RFQ.

services, application and systems support services, and customer support services.[283] Bids were due one month later on September 10, 2001.[284]

28. Memphis's RFQ outlined a two-step procurement process. In the first step, bidders would submit bids that would be evaluated on the basis of (1) experience and background; (2) total capabilities; (3) project implementation; (4) minority/women business enterprise participation; (5) legal agreement; and (6) on-going support program.[285] After selecting the most qualified bidder based on these criteria, Memphis would then engage in contract negotiations.[286] The chosen firm would have fifteen days to submit a proposed contract, and if, within thirty days of the date of selection, Memphis and the provider had not concluded successful negotiations (including the price of services), the next highest-ranked bidder would be contacted.[287]

29. Memphis received only one bid, however, from IBM.[288] Consequently, it immediately entered into contract negotiations with IBM.[289] Memphis and IBM signed a contract on December 19, 2002. As with Ysleta, the contract included language that offered Memphis certain price protections.[290] On March 24, 2003, SLD denied Memphis's request for discounts, stating, "Services for which funding [were] sought [were] not defined when vendors selected; price of services [was] not a factor in vendor selection; [and] price of services [was] set after vendor selection."[291]

30. We conclude, consistent with our findings concerning Ysleta's appeal, that Memphis' use of a two-step procurement process violated program rules. In particular, Memphis' competitive bidding for a Systems Integrator without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission's rules requiring that "an eligible school or library shall seek competitive bids . . . for all services eligible for support." [292] As with the bidding process employed by Ysleta, Memphis failed to seek actual pricing information from bidders for E-rate eligible services. Moreover, we find that because Memphis violated our competitive bidding rules through the use

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] Memphis Request for Review at 2.

[289] Memphis Request for Review at 2-3.

[290] *See* Memphis Request for Review at 3..

[291] Memphis Funding Commitment Decision Letter.

[292] 47 C.F.R. § 54.504(a); supra para. 22-26.

of a two-step procurement process, it also violated section 254's mandate that applicants submit a bona fide request for services. [293]

31. That only one bidder responded to the RFQ does not alter our conclusion that Memphis' two-step procurement process failed to comply with program rules. Indeed, this case illustrates how an imperfect competitive bidding process may well stifle competition among service providers. We find it unusual that only one entity would bid on the opportunity to provide services and products eligible for discounts under the schools and libraries support mechanism, given the size of the Memphis School District and the scope of its proposed project. In a major city like Memphis, we would expect to see more robust competition.

Albuquerque School District (Albuquerque)

32. Unlike Ysleta, Albuquerque states that it relied on a purchasing alliance as equivalent to an RFP when it selected IBM.[294] In 1999, the Western States Contracting Alliance (WCSA) set out an RFP to select computer vendors for several Western states. After a competitive bidding process, the WCSA selected five computer companies with whom to enter into price agreements, effective from September 3, 1999 through September 2, 2004: Compaq, CompUSA, Dell, Gateway, and IBM.[295] Price was factored into the selection of the five companies in a limited manner, as each vendor submitted bids with prices for three computer configurations: a server, a desktop computer, and a laptop computer.[296] The resulting price agreements included various pricing protections for Albuquerque and the other members of WCSA, such as predetermined discount percentages that would apply to purchases after certain volume "trigger points" were reached.[297]

33. Albuquerque's FCC Form 470 was posted on December 10, 2001.[298] Similar to Ysleta's FCC Form 470, Albuquerque indicated in its FCC Form 470 that it was seeking services for virtually every product and service eligible for discounts under the support mechanism.[299] Subsequently, Albuquerque began negotiating Statements of Work (SOWs) with IBM. IBM proposed five SOWs: maintenance, servers, network electronics, video systems, and web-based community interaction.[300] Albuquerque contracted with IBM to

[293] *Supra* paras. 54-55.

[294] *See* Albuquerque Request for Review at 7-10.

[295] *Id.* at 8-9.

[296] *See* Western States Contracting Alliance, RFP dated June 16, 1999 at 56-59.

[297] Albuquerque Request for Review at 9.

[298] *See* FCC Form 470, Albuquerque School District, posted December 10, 2001.

[299] *Id.*

[300] Affidavit of Maureen Davidson, Albuquerque School District, dated May 21, 2003 at 3.

provide services based on three SOWs—maintenance, servers, and network electronics (without cabling).[301]

34. On March 24, 2003, SLD denied Albuquerque's request on the grounds that Albuquerque "did not identify the specific services sought—either clearly on the 470 or in the RFP—to encourage full competition on major initiatives."[302] Albuquerque maintains that it competitively bid for eligible services, because the 1999 WSCA RFP served as the RFP for its Funding Year 2002 selection of IBM.[303] Albuquerque also suggests that its agreement with IBM that stemmed from the WSCA RFP constituted a master contract, which is permissible under our rules.[304]

35. Although Albuquerque maintains that it relied on a master contract, and therefore did not need to submit an FCC Form 470, the WSCA contract with IBM does not meet our requirements for a master contract, negotiated by third parties, that has been competitively bid.[305] Master contracts subject to competitive bidding must bear a reasonable connection to the products or services for which discounts are sought.[306] We conclude that in this instance, the WSCA contract did not have such a connection. The record does not reflect that IBM's bid on the cost of a server, a laptop, and a desktop in its 1999 bid was reasonably related to the extensive costs for maintenance and network electronics for which Albuquerque sought discounts in Funding Year 2002.[307] Although Albuquerque argues that the 1999 master contract includes "maintenance and support services," we are not persuaded that the type of maintenance and support services sought in 2002 in the 1999 RFP are sufficiently similar to the extensive maintenance and support services to relieve Albuquerque of its obligation to

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[301] *Id.*

[302] *See* Letter from Schools and Libraries Division, Universal Service Administrative Company to Maureen Davidson, Albuquerque School District, dated March 24, 2003 (Albuquerque Funding Commitment Decision Letter). We note also that Albuquerque argues that it is confused by SLD's language citing "major new initiatives," and that SLD representatives told Albuquerque that this term was based on the Commission's *Brooklyn* Order. *See* Albuquerque Request for Review at 4-6; *Request for Review by Brooklyn Public Library*, *Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-149423, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 17931 (2000). Other applicants stated this as well. *See, e.g.*, Winston-Salem Request for Review at 7-8. The reasoning of the Commission's *Brooklyn* Order does not appear to pertain to the facts at issue in these cases. We do not base our conclusions on the reasoning contained in that Order or on the question of whether these services comprised "major new initiatives."

[303] *See* Albuquerque Request for Review at 6-11.

[304] *Id.* at 9; *Fourth Order on Reconsideration,* 13 FCC Rcd at 5452 para. 232.

[305] *See Fourth Order on Reconsideration*, 13 FCC Rcd at 5452 paras. 233-34.

[306] *Id.* For example, a master contract to purchase photocopy machines and other office equipment could not be used as a substitute for competitive bidding for internal connections under the E-rate program.

[307] Indeed, laptops and desktop computers themselves are only eligible for discounts under the program if used solely as servers. *See* Funding Year 2002 Eligible Services List.

competitively bid those services in Funding Year 2002.[308] We therefore conclude that Albuquerque's reliance on the WSCA contract in lieu of an FCC Form 470 was misplaced.

36. Albuquerque's competitive bidding without regard to costs for specific projects funded by the schools and libraries support mechanism violated section 54.504(a) of the Commission rules requiring that "an eligible school or library shall seek competitive bids . . . for all services eligible for support."[309] We also find that because Albuquerque violated our competitive bidding rules, it violated section 254's mandate that applicants submit a *bona fide* request for services.[310]

[308] *Ex parte* letter from Arthur D. Melendres, Counsel, Albuquerque Public School District, to Marlene H. Dortch, Secretary, FCC, dated August 15, 2003.

[309] 47 C.F.R. § 54.504(a); *supra* paras. 22-26.

[310] *Supra* paras.54-55.