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## Applicants Found to Have Reviewed Vendor Bids In A Manner Consistent With Competitive Bidding Requirements

The FCC has granted multiple appeals of decisions by the Universal Service Administrative Company (“USAC”) that had denied requests for E-rate funding. USAC had denied funding to the applicants based on the grounds that the applicants had either failed to consider price as a primary factor in selecting a vendor or had not carefully considered all bids received as a result of their FCC Form 470 posting. The rulings provide valuable insight into the Commission’s interpretation of the rule requiring that price be the principal consideration during the competitive bidding process. The decisions indicate that prior to weighing cost as a factor, an applicant may eliminate non-responsive, non-qualifying, or incomplete bids, and/or bids of vendors that are unable to provide the services requested by the applicant.

In 12 of the appeals, USAC had determined that the applicants had failed to assign price as the highest evaluation criterion during the competitive bidding process. While the Commission agreed with USAC’s determination, the record showed that in all instances the applicants had chosen the lowest cost bid, because the applicants either: (1) had considered multiple bids and chosen the only one that was responsive to the Form 470 postings, or (2) had chosen the only available vendor that qualified for the bid. In one case, the applicant had a choice of two different vendors from a state master contract. As part of its evaluation criteria for the two vendors, the applicant weighted performance at 80 percent and cost at 20 percent. While weighing performance higher than cost violated the Commission’s rules, the Commission found that the applicant had used that evaluation criterion based on previous experience with one of the vendors. When the applicant had chosen that vendor for a previous funding year, it discovered that the vendor’s equipment did not work in its building. Accordingly, it had evaluated performance over price. The Commission granted the applicant’s appeal, because, consistent with the E-rate rules, the applicant could have set up the bidding process in a way that disqualified the offending vendor prior to considering price as a factor. Had it done so, the second vendor would have had the only (and thus the lowest) *de facto* bid.

For two of the appeals, USAC had rejected funding based on a finding that the applicants had not considered all of the bids received as a result of FCC Form 470 posting. The Commission overturned the USAC decision in both instances. In the first case, after reviewing the two bids that it had received, the applicant determined that only one of the bids was complete. Accordingly, it chose the lowest-cost complete bid. In the second case, after following up with one of the two vendors that had submitted a bid, the applicant determined that the vendor could not provide that requested service. The Commission found that the fact that the applicant had only dismissed the bid after it had contacted the vendor to discuss the terms and conditions of its bid indicated that the applicant had carefully considered the vendor’s application. Accordingly, the Commission found that the applicant had evaluated all of the bids consistent with the E-rate program rules.

If you have any questions, contact [Mark Palchick](#) or any member of the firm’s [Communications Law Group](#).

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