



October 7, 2022

Honorable Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Promoting Fair and Open Competitive Bidding in the E-Rate Program
Notice of Proposed Rulemaking – WC Docket No. 21-455 (“Portal NPRM”)

Dear Secretary Dortch:

On August 16, 2022, the Antitrust Division of the Department of Justice (“DOJ”) wrote to the Federal Communications Commission (“FCC” or “Commission”) in support of the mandatory E-rate national bidding portal. Many experienced E-rate practitioners and stakeholders – including the Schools, Health & Libraries Broadband Coalition (“SHLB”), the State E-rate Coordinators’ Alliance (“SECA”) and the Consortium for School Networking (“CoSN”) – filed comments earlier this year explaining why the portal is unnecessary and would be ineffective in mitigating fraud risk in the E-rate program. These stakeholders support the strong existing measures to prevent and punish criminal behavior in the bidding process.

There are several claims in the Portal NPRM, perpetuated in the DOJ letter, which obscure the sufficiency of the current tools used by the program administrator, auditors, the FCC and other law enforcement officials to police and enforce the bidding requirements; and, also overstate the potential for a bidding portal to deter waste, fraud and abuse.

First, the NPRM and DOJ letter repeat GAO’s claim that applicants and service providers self-certify their compliance with the bidding requirements. This assertion, however, does not acknowledge the frequent, extensive pre-funding and post-commitment auditing of underlying bidding documentation to confirm the veracity of these certifications.¹ These certifications are often tested through submission of the bidding documents that are independently evaluated by the program administrator and/or auditors. Accordingly, there already are other procedures in place to verify these “self-certifications” without mandating a national bidding portal.

Second, the NPRM and DOJ letter cite GAO’s concern that USAC does not yet have a data analytics program. But the creation of the data analytics program is well underway. The FCC’s Managing Director and Wireline Competition Bureau Chief jointly directed USAC to

¹ <https://www.usac.org/e-rate/applicant-process/application-review/selective-review/>;
<https://www.usac.org/about/appeals-audits/beneficiary-and-contributor-audit-program-bcap/>;
<https://www.usac.org/wp-content/uploads/e-rate/documents/SL-Documents.pdf>.

undertake this assessment by letter dated March 9, 2021.² In fact, the letter noted that USAC already had retained a contractor to develop a fraud risk framework and will conduct a fraud risk assessment of the E-rate program. Importantly, GAO itself did not recommend the establishment of the mandatory bidding portal. GAO noted the Office of Inspector General's position, but did not adopt this as their own recommendation.³

Third, the NPRM and DOJ letter suggest that the mandatory portal will best preserve source documents and preclude falsification of bidding documents. The DOJ letter referred to a handful of instances of fraud involving falsification of bidding documents. The portal itself will not facilitate the detection of such conduct since in such situations presumably only the falsified document would be submitted to the portal. The portal, unfortunately, will not make such inappropriate conduct more visible. Improper bidding practices can be conducted outside the portal prior to the submission of bid documents. Likewise, the sharing of inside information – another concern raised in the DOJ letter – will not be prohibited by the portal. Information Colluding parties can find other means to behave inappropriately without leaving a digital trail inside the portal.

Fourth, the NPRM and DOJ letter propose to strictly limit communications between consultants, applicants and service providers and to prohibit applicants from opening bids received prior to the bid deadline. These restrictions will reduce the quality of services provided to schools and libraries. Frequently when applicants receive proposals submitted in advance of the bid deadline, upon review they may identify deficiencies in the proposals, communicate these issues to the service provider, and encourage the service provider to resubmit a compliant proposal. Such communications should continue to be permitted because they will facilitate the receipt of more proposals for the applicant to consider. These communications do not discuss other proposals – since other proposals may not yet have been submitted (since the bid deadline has not yet occurred). Communications between applicants, their consultants, and service providers facilitate competition, yet would be prohibited under the rules proposed in the NPRM.

The proposed stringent restriction of communications during the bidding period also would prohibit bidders' conferences and site visits, since these activities involve interaction among applicants, consultants and bidders and would occur outside of the portal. These activities are designed to enable bidders to submit high quality proposals and instill confidence in applicants that the bids are based on a comprehensive understanding of the scope of the procurement.

² <https://www.fcc.gov/sites/default/files/fcc-directive-ltr-gao-erate-fraud-risk-030921.pdf>

³ GAO's three recommendations are set forth on pages 39-40 of Report Number 20-606, entitled, "FCC Should Take Action to Better Manage Persistent Fraud Risks in the Schools and Libraries Program."

Similarly, the NPRM appears to prohibit an applicant or its consultant asking questions of a service provider following the review of a submitted proposal. There appears to be no mechanism to allow for such conversations since the communication would occur outside of the portal, whereas the NPRM states that all communications regarding the procurement must occur inside the portal. Further, these types of follow up questions could result in the submission of a written clarification after the bid deadline, which while allowable under state or local law and regulations, could easily be misconstrued by a USAC reviewer as an inappropriate or prohibited communication leading to a funding denial.

The stringent limitation on communications proposed in the Portal NPRM and in the DOJ letter create a conflict of laws with state and local regulations.⁴ Practices such as holding pre-bidders' conferences; hosting site visits; prescribing the manner of vendors' submission of questions and the applicant's responses thereto; receiving best and final offer proposals as part of a multi-stage procurement; and, requesting and receiving written clarifications of proposals, may be allowable under state and local regulation but are proposed to be prohibited and/or mandated in a specific way that is inconsistent with state and local regulations. Indeed, many state and local regulations prescribe the manner and procedure for submitting bids that are at odds with a national E-rate bid portal.⁵

The portal will not simply be benignly ineffective. It has the real potential to be harmful to applicants who earnestly try to comply with program rules. More bidding rules and more requirements have the potential to increase ministerial and clerical mistakes which will lead to more funding denials and an increase in the improper payments rate. The increased denials, however, will not be due to detecting criminal conduct, but rather, a byproduct of layering yet more regulatory requirements on applicants and service providers whose only fault is failure to fully comprehend the labyrinth of additional bidding requirements.

A national mandatory bidding portal would impose the same "one size fits all" rules on all applicants regardless of the existing state and local procurement requirements they must already follow, and despite the fact that some applicants apply for modest amounts of E-rate funding compared to larger applicants. Not all applicants pose the same amount of risk for waste, fraud and abuse, yet all applicants would be subjected to the same bidding rigors. This

⁴ Notably, the DOJ letter explicitly did not take a position on this issue. The letter states, "The Division is aware that the Commission has received some commentary on the interplay between a bidding portal and state law and takes no position on that issue."

⁵ See, e.g., California K12 High Speed Network Initial Comments, p. 6; Administrator of the Oklahoma Universal Service Fund Initial Comments, pp. 3-4; Illinois Office of Broadband Initial Comments, pp. 3-7; Nebraska Dept Administrative Services, Office of CIO Initial Comments, pp. 2-4; Central Susquehanna Intermediate Unit/PEPPM Technology Purchasing Cooperative (Pennsylvania), pp. 2-4; Utah Education and Telehealth Network Initial Comments, pp. 1-2; Wisconsin Department of Public Instruction Initial Comments, p. 2; WTA - Advocates for Rural Broadband Initial Comments, pp. 2-3.

would be particularly burdensome to smaller and more rural applicants who typically have a lower quantity of bids. Would such applicants be subjected to even more intensive scrutiny and required to justify the dearth of bids received?⁶

Nor is the portal needed to foster competition, as suggested by DOJ.⁷ There already is robust competition in the E-rate program with existing oversight to detect and deter waste, fraud and abuse in the competitive bidding process. When establishing the regulations for the E-rate program in May of 1997, the Commission declined to adopt overarching competitive bidding mandatory procedures that would be superimposed on state and local requirements. The Commission stated in the Universal Service Fund First Report and Order: “Commission action is not required because *many individual schools and libraries operate under state and local procurement rules* designed to achieve those objectives. Thus, *although we do not impose bidding requirements*, neither do we exempt eligible schools or libraries from compliance with any state or local procurement rules, such as competitive bidding specifications, with which they must otherwise comply.”⁸

Likewise in 2014 when the Commission modernized the E-rate program, the Commission explicitly opted to forego requiring the posting of non-winning bids. The Commission found the burden such a requirement would impose on applicants was not justifiable or necessary since applicants were already required to retain all bidding documentation and produce them upon request.⁹

In conclusion, there are numerous compelling reasons to conclude the portal is not in the public interest and should not be adopted. There has been no evidence or rationale offered to justify such a seismic change in the competitive bidding process that has been effective during the past 25 years to enable the nation’s students and library patrons to

⁶ It would not be the first time that USAC’s procedures would have a discriminatory impact on small and rural applicants. For example, smaller, rural schools and libraries typically experience higher prices and have smaller student enrollments and numbers of patrons. They frequently find themselves having to justify the higher prices as part of a pre-funding “excessive cost” review.

⁷ DOJ suggested that the portal was consistent with the “whole-of-government” approach called for in President Biden’s Executive Order on Promoting Competition in the American Economy dated July 9, 2021. That Executive Order did call on the FCC to further promote competition and itemized five specific initiatives, none of which relate to the E-rate program. Indeed, the E-rate data show that competition is robust and growing over time. Funds For Learning analyzed public data and found that during the five year period 2017-2021, the average count of bids received has increased 26% from 2.57 to 3.23. <https://www.fcc.gov/ecfs/document/1033037873929/1> .

⁸ Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Red 8776, 9029 (1997) (emphasis added). “These objectives” included, for example: a request for the FCC to mandate bids be submitted on an unbundled basis; a request that the FCC mandate that bids be limited to a single round of sealed bids; and a request that the FCC mandate vendors provide their qualifications when bidding.

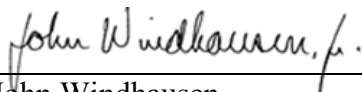
⁹ Modernizing the E-rate Program for Schools and Libraries, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 14-99 (corrected), WC Docket No. 14-184, Order released July 23, 2014 at para. 165.

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benefit from faster internet at lower prices. SHLB and SECA respectfully request the FCC to decline to mandate the establishment of a national bidding portal and associated restrictive bidding procedures.

Respectfully submitted,

SCHOOLS, HEALTH & LIBRARIES
BROADBAND COALITION



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