

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter Of)	
)	
Promoting Fair and Open Competitive)	WC Docket No. 21-455
Bidding in the E-rate Program)	
)	

**COMMENTS OF THE
SCHOOLS, HEALTH & LIBRARIES BROADBAND (SHLB) COALITION**

The Schools, Health & Libraries Broadband (SHLB) Coalition¹ appreciates this opportunity to submit comments in response to the Commission’s notice of proposed rulemaking on competitive bidding in the schools and libraries universal service support mechanism, known as the E-rate program.² The SHLB Coalition’s mission is to promote open, affordable, high-quality broadband for anchor institutions and their communities, and the continuation of a robust and well-functioning E-rate program is essential to achieving these objectives.

SHLB supports the Commission’s goals set out in the *NPRM* of streamlining program requirements for applicants and service providers, strengthening program integrity, preventing improper payments, and decreasing the risk of fraud, waste, and abuse.³ Unfortunately, the proposed changes to the competitive bidding requirements, including establishing a new E-rate bidding portal, are not the correct methods by which to achieve them. The proposals will be overly burdensome to implement, conflict with existing state and local procurement processes, hinder competition and participation in the program, and will not address any well-identified or

¹ The SHLB Coalition is a broad-based public interest coalition of more than 300 organizations that share the goal of promoting open, affordable, high-quality broadband for anchor institutions and their communities. SHLB Coalition members include representatives of schools, libraries, health care providers and telehealth networks, state broadband offices, private sector companies, state and national research and education networks, consulting firms and consumer organizations. *See* <http://shlb.org/about/coalition-members> for a current list of SHLB Coalition members.

² *Promoting Fair and Open Competitive Bidding in the E-Rate Program*, WC Docket No. 21-455, Notice of Proposed Rulemaking, FCC 21-124 (Dec. 16, 2021) (*NPRM*).

³ *Id.* at ¶ 3.

quantified fraudulent practices. In short, the contemplated rule changes are unnecessary, unwieldy, and unwise.

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I. INTRODUCTION

Through its proposed revisions to the E-rate competitive bidding rules, the Commission purports to address an issue raised by the Government Accountability Office (GAO) in a 2020 report on the E-rate program.⁴ Specifically, “[GAO] identified opportunities to misrepresent compliance with competitive bidding requirements as an underlying fraud risk for the E-Rate program.”⁵ The Commission also cites to a report from the Commission’s Office of Inspector General (OIG) from 2017 recommending the creation of a central repository for competitive bidding documents and a holding period before applicants would be allowed to review bids.⁶

In response, the Commission proposes to require the creation and use of a new competitive bidding portal, to be managed by USAC, in which every bid for E-rate services would be uploaded.⁷ Service providers would be required to navigate this new system, and the Commission seeks comment on requiring USAC to withhold these bids from E-rate applicants for some period of time. The Commission also seeks comment on requiring applicants to submit additional bidding documentation to USAC before receiving E-rate support.⁸

Establishing a new federal bidding portal which may increase processing delays and mandating the submission of even more documentation than currently is required would be overly burdensome and complicated and would introduce myriad opportunities for mistakes and errors into an already complex process. Mandating the use of a federal bidding portal will

⁴ *Telecommunications: FCC Should Take Action to Better Manage Persistent Fraud Risks in the E-rate Program*, GAO-20-606 (Sept. 16, 2020) (2020 GAO E-Rate Report).

⁵ *NPRM*, FCC 21-124 at ¶ 2.

⁶ *Id.*

⁷ *Id.* at ¶ 10.

⁸ *Id.*

conflict with and needlessly complicate state and local procurement processes, with which applicants and bidders must still comply. Smaller providers and applicants will be the least able to adapt to and absorb the cost of these new requirements, making it more likely that they will refrain from participating in the program, thereby decreasing competition and diversity in the E-rate program. And this excessively burdensome approach is unwarranted given the small number of competitive bidding problems identified by GAO and OIG.

II. THE SCOPE OF THE PROBLEM IDENTIFIED DOES NOT WARRANT SUCH A DRACONIAN CHANGE

The Commission is proposing to mandate the creation of a new online bidding portal that would be required to handle the uploading of tens of thousands of bid responses each year. The Commission is also seeking comment on requiring applicants to upload all of their competitive bidding related documentation when they request E-rate support. Enacting these changes would be an enormous undertaking that would be expensive to execute – taking money out of the universal service fund – and that would take a significant amount of time to implement. In return, these changes are meant to address the potential for fraud in the E-rate competitive bidding process. However, this potential for fraud has not been quantified and there is no evidence to suggest that the costs of creating a complex, expensive, burdensome bidding portal and document collection requirement are justified.

In its report examining fraud risk in the E-rate program, GAO cited an increase in improper payments between 2014 and 2019.⁹ GAO noted that the existence of improper payments “could suggest that a program may also be vulnerable to fraud,”¹⁰ but it also could be completely unrelated to fraud of any kind. As GAO acknowledges, an improper payment is “any

⁹ 2020 GAO E-Rate Report at 2.

¹⁰ *Id.*

payment that should not have been made or that was made in an incorrect amount (including overpayments and underpayments) under statutory, contractual, administrative, or other legally applicable requirements.”¹¹ They are simply errors that happen in administration of the program, some of which may be due to USAC’s systems or actions. Simply put, they are not a measurement of fraud and implementation of a competitive bidding portal will not eliminate improper payments.

OIG also has recommended the creation of a bidding portal, but information from OIG’s own website shows that competitive bidding fraud happens infrequently in the E-rate program. OIG has listed fraud cases related to the Universal Service Fund since 2011, and in that period of more than a decade, only a handful relate to E-rate competitive bidding.¹² These cases generally involve collusion between the service provider and the E-rate applicant, which would not be identified or stopped by the use of a bidding portal or additional reporting requirements. Furthermore, the amount of money recovered from prosecution of all E-rate fraud cases listed on OIG’s website, including those that are unrelated to competitive bidding, comprise a miniscule percentage of total E-rate commitments.¹³ The cost of creating the bidding portal far outweighs the benefit of prevention in this case.

Furthermore, the current E-rate competitive bidding process is working well, as demonstrated by the increase in the number of bids E-rate applicants are receiving. Funds for

¹¹ *Id.* n.4.

¹² FCC, Office of Inspector General, Investigation Documents, <https://www.fcc.gov/inspector-general/reports/other> (last visited Apr. 20, 2022).

¹³ Since the inception of the program in 1998, more than \$56 billion has been committed in E-rate funding. *Universal Service Monitoring Report*, Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45 *et al.*, 50, Table 4-2 (2021) (\$56,227,618,000 in E-rate funding committed through June 30, 2021). The E-rate cases listed on OIG’s website reported approximately \$89 million in fines and restitution paid as a result of fraud convictions. This represents less than 0.16% of E-rate committed funding.

Learning reports that, in the past five years, the average number of bids received per E-rate request for services increased 26 percent, and the percentage of E-rate contracts that received only one or no bids decreased from 41 percent to 25 percent.¹⁴ And prices for E-rate services are declining by large margins as well.¹⁵ The data confirms that competition is increasing and prices are dropping so there is no need for costly and disruptive changes to the E-rate competitive bidding rules at this time, to combat a very low level of fraud.

III. COMPLIANCE WITH THE PROPOSED REQUIREMENTS WOULD BE EXCESSIVELY BURDENSOME FOR PROGRAM PARTICIPANTS

Although one of the Commission’s goals in the *NPRM* is “streamlining program requirements for applicants and service providers,”¹⁶ its proposals would have the complete opposite effect. In addition to introducing further complicated processes and increasing burdens on applicants and service providers, the bidding portal will be difficult, if not impossible, to reconcile with existing state and local procurement processes.

A. Mandating Use of a USAC Bidding Portal Conflicts with Existing State and Local Procurement Regulations

The Commission’s proposal to require service providers to upload all bids to USAC through a bidding portal would conflict with state and local procurement requirements. State and localities have their own procurement processes that have been in place for many years and with which bidders must comply. Adding a requirement to submit bids to USAC would at best duplicate these efforts with little to no benefit, and at worst would violate state and local procurement laws and regulations.

¹⁴ Impact of Modernization on the E-rate Competitive Bidding Process: Funding Years 2017 to 2021, Funds for Learning, 2 (Mar. 30, 2022) (Funds for Learning Report).

¹⁵ *Id.* (finding a 71% decrease in the median price per megabit paid by K-12 schools and a 49% decrease in the average price per wireless access point).

¹⁶ *NPRM*, FCC 21-124 at ¶ 3.

For example, in California, Section 12102 of the Public Contract Code governs state information technology acquisitions and mandates competitive bidding in most circumstances.¹⁷ Section 12102.2 sets forth certain solicitation requirements including sealed cost proposals, evaluation criteria for such bids, and protest procedures.¹⁸ Section 12103 provides multiple scenarios for bidding processes, such as price negotiation, assessment of system or equipment component performance and availability, assessment to obtain a contractual guarantee of a level of performance, and bond requirements.¹⁹ It is unclear, and unlikely, that the E-rate bidding portal would be capable of allowing for and administering these differing bidding scenarios. In addition, in some cases bidding in California involves a two-step process in which the cost portion of the bid is separately sealed and cannot be reviewed until after review of the technical portion is completed.²⁰ Again, it is unclear how a USAC-administered bidding portal would accommodate this process.

Similarly, San Diego County has strict procurement processes.²¹ The bidding portal may impact the county's ability to comply with the Notice of Procurement requirements in the event that proposal updates or other information on the project needs to be communicated to vendors

¹⁷ CA Pub Cont Code § 12102.

¹⁸ *Id.* § 12102.2.

¹⁹ *Id.* § 12103.

²⁰ *Id.* § 12102(b)(2) (“Evaluation of all criteria, other than cost, shall be completed prior to the time designated for public opening of cost proposals, and the results of the completed evaluation shall be published immediately before the opening of cost proposals. The state’s contact person for administration of the solicitation shall be identified in the solicitation for bids and proposals, and that person shall execute a certificate under penalty of perjury, which shall be made a permanent part of the official contract file, that all cost proposals received by the state have been maintained sealed and under lock and key until the time cost proposals are opened.”).

²¹ County Of San Diego, California Board Of Supervisors Policy, A-087, <http://www.amlegal.com/pdffiles/SanDiegoCo/BoardPolicy/A-087.pdf> (last visited Apr. 22, 2022).

during the competitive bidding window.²² And the city of San Diego has its own procurement processes.²³ Regulations there require sealed bids for goods and services contracts over \$150,000 in value,²⁴ so requiring bidders to share bids with USAC through the portal would conflict with this provision.

Mississippi state procurement law strictly prohibits the requirement that bids be submitted electronically.²⁵ The state expressly exempts small counties and municipalities from any requirement to implement electronic bidding processes and forbids the requirement of electronic bidding to ensure that service providers in rural areas of the state that lack adequate broadband capabilities are not precluded from bidding. The state took these actions because electronic bidding disadvantages smaller entities in the state that do not have the staff, knowledge and technology available to participate using this method.

Adoption of an E-rate bidding portal will conflict with these processes and will impose additional duplicative requirements on service providers and applicants, with little upside.

B. The Commission’s Proposals Will Impose Excessive Administrative Burdens on Schools and Libraries and Service Providers

The Commission’s proposal would require service providers to upload all E-rate bid responses, which average nearly 85,000 documents per year,²⁶ to a portal created and managed by USAC. USAC would control when applicants could access these bids to begin the review process. The Commission further asks whether applicants should be required to upload all of their competitive bidding review documentation when they file their Forms 471 requesting

²² *Id.* at page 6, section 4.

²³ San Diego Municipal Code, Art. 2, Div. 32.

²⁴ *Id.* § 22.3203(c); *see also* City of San Diego Procurement Manual, page 19, https://www.sandiego.gov/sites/default/files/sd_procurement_manual.pdf (last visited Apr. 22, 2022).

²⁵ Miss. Code Ann. § 31-7-13(c)(5).

²⁶ Funds for Learning Report at 7.

funding. These proposed requirements would introduce needless delay and complication into an already complex process.

First, the bidding portal proposal would preclude or hinder many steps E-rate applicants take in their procurements that lead to better results. For example, if applicants are able to review proposals as they are submitted, they can identify proposals that are deficient and allow bidders to address any issues with their proposals as soon as possible, providing applicants with more complete responses from which to select E-rate services. This would not be possible if applicants do not have access to proposals with sufficient time before the application window closes. And requiring USAC to withhold proposals from applicants for some period of time would needlessly extend the bidding process. Adding steps and time to the already lengthy process will require applicants to start their competitive bidding processes even earlier than they do now. Already, school districts have to enter into contracts with service providers months before the services are scheduled to begin, just to comply with the E-rate application deadline. Some even have to do so before their budgets for the next school year are finalized. Additional competitive bidding requirements and processes will only exacerbate this problem.

Applicants also conduct walkthroughs and site visits with prospective bidders, allowing them to view and examine sites for which services are requested. This is an extremely useful part of the process, as it allows service providers to offer more detailed proposals tailored to the specific needs of schools and libraries. Similarly, for more complex service requests, including special construction of facilities, applicants often conduct bidder conferences in which applicants can discuss service needs with potential bidders and answer any questions bidders may have. Requiring that all communications between applicants and service providers be conducted through a bidding portal would hinder or cause applicants to discontinue these beneficial practices altogether, which in turn will reduce the quality of E-rate bids and services.

In some cases, schools and libraries, particularly smaller ones, maintain their records in paper format. Imposing a requirement for applicants to upload all competitive bidding documents to USAC would impose significant costs on these applicants, who would have to expend resources to digitize all of their documentation. Requiring all E-rate applicants to upload mountains of data with their Forms 471 will cause enormous logistical problems and make it difficult for applicants to gather and submit that data by the Form 471 filing deadline. And the requirement is unnecessary because USAC currently can and does request these documents from applicants as warranted during its review processes.

Requiring the submission of all bids to a portal would also impose new and potentially significant costs on service providers as well. Larger providers could have significant numbers of responses to upload. And smaller service providers that do not receive a large portion of their revenue from the E-rate program may choose to forego participation if they are forced to comply with a complex new bidding portal system. Particularly in rural areas, schools and libraries often face challenges receiving any bids at all, but if the program is further complicated by the inclusion of new bid reporting requirements, smaller service providers may be even less likely to bid in these areas. Imposing additional costs related to bidding, coupled with the additional delay in reimbursement an extended bidding period would entail will cause smaller providers to avoid the E-rate program entirely.

For instance, based on information from USAC's Open Data, slightly more than 5,000 service providers won E-rate bids in 2019 through 2021. Of these providers, the majority were awarded bids for only one or two Funding Request Numbers (FRNs) per year.²⁷ Eighty-five

²⁷ Of the 5,323 service providers awarded bids in these years, 869 were awarded bids for two FRNs per year and 2,208 were awarded a bid for a single FRN per year.

percent of service providers won bids for 10 or fewer FRNs per year.²⁸ One-third of providers received less than \$10,000 in E-rate support for providing these services.²⁹ Given the small number of FRNs and low amount of funding available to many providers participating in the E-rate program, it is likely that many will choose to forego participation if new onerous bidding burdens are imposed.

In addition, the creation of a bidding portal could allow some service providers to overbid by submitting bids in response to a broad range of proposals even when they do not provide the requested services. An increase in these “spam” bids would make it more difficult for procurement officials to navigate their options and waste time and resources reviewing unqualified bids.

Finally, such a significant amount of data coming in at the same time from so many E-rate bidders and applicants is likely to cause problems for any online system. And failure of either the bidding portal or the competitive bid document intake system at or near the end of the filing window would be disastrous for program participants. As Funds for Learning reports, most E-rate participants find USAC’s existing online portal, the E-rate Productivity Center (EPC), difficult to navigate.³⁰ As Funds for Learning states, “Even without managing the competitive bidding process, the current EPC system receives poor marks [from E-rate applicants]. Despite the investment of millions of dollars and years of development time, most applicants do not find the EPC system helpful or easy to use.”³¹ USAC does not have a good

²⁸ Of the 5,323 service providers, 4,500 won bids for 10 or fewer FRNs per year.

²⁹ Of those same 5,323 providers, 1,805 were awarded an average of below \$10,000 in support per year.

³⁰ *Id.* at 12-13.

³¹ *Id.* at 12; *see also* Appendices A and B (detailing the history of problems with EPC and survey responses providing feedback on the system).

track record with respect to developing and implementing new user systems.³² It is illogical to believe that creation of a new online bidding portal and intake system for all E-rate competitive bidding documentation would be implemented more successfully. This will only serve to complicate the E-rate process, introduce the opportunity for errors and technical malfunctions, and frustrate program participants.

In fact, EPC has resulted in less functionality in certain circumstances than existed in the previous system. For example, USAC used to be able to issue commitments for partial months for services turned up or disconnected during the month, but now it will only fund services for an entire month. Schools and libraries then lose funding that they are eligible for when they transition to a new carrier or new services on any day other than the first of the month. USAC has never fixed this issue since adopting EPC seven years ago.

IV. IMPLEMENTATION OF THE COMMISSION’S PROPOSALS WILL NOT REDUCE WASTE, FRAUD, AND ABUSE

The Commission proposes to create and mandate the use of a new bidding portal as a way to address fraud risk in the E-rate program. Specifically, the Commission is responding to GAO’s statement that E-rate applicants have “[o]pportunities to misrepresent compliance with competitive-bidding requirements, such as competitive-bidding rules and processes.”³³ GAO claims that “[s]uch an opportunity exists because neither [the FCC nor USAC] has visibility into the competitive bids that the applicant says it receives.”³⁴ Creation of a bidding portal, however,

³² See, e.g., *Promoting Telehealth in Rural America*, WC Docket No. 17-310, *Further Notice of Proposed Rulemaking*, FCC 22-15, ¶ 15 (Feb. 22, 2022) (*Further Notice*) (seeking comment on overhauling the Rural Health Care Telecom Program’s Rates Database); Letter from John Windhausen, Jr., SHLB, to Marlene H. Dortch, FCC, WC Docket Nos. 02-60 and 17-310 (Feb. 28, 2022) (seeking an extension of the Rural Health Care application filing window due, in part, to issues applicants have in using USAC’s new Form 462 entry portal).

³³ 2020 GAO E-Rate Report at 19.

³⁴ *Id.*

would not address the example of competitive bidding fraud that GAO provides in its report. In that example from 2015, GAO cites a service provider offering grants through an affiliated company to pay for the applicant's non-discounted portion of the E-rate services.³⁵ The activity found to be fraudulent was conducted through a separate entity, presumably to hide it from detection, and would therefore not have been included in the bid the service provider submitted.

There is no indication that submission of thousands upon thousands of E-rate bid responses will materially deter or allow USAC and the Commission to detect instances of competitive bidding problems. As the example from the GAO report and the cases listed on OIG's website illustrate,³⁶ a bidding portal will not prevent collusion if bidders and applicants choose to violate the rules. Instead, the current system of certification combined with selective review and the audit process works well to identify and root out waste, fraud and abuse where it may occur.

USAC has neither the ability nor the expertise to review all of the bids and associated documentation that would be uploaded to the portal. The level of scrutiny that USAC would have to provide to review the documents would be equivalent to and duplicative of the review that applicants themselves undertake, and USAC is unlikely to possess the knowledge or context of the underlying bids to fully understand what they are reviewing without seeking additional information from applicants and bidders. Requiring such a review would introduce immeasurable delay into the E-rate funding process. Lacking this step, however, the mere existence of a portal full of documents does not serve to achieve the Commission's goal of decreasing the risk of waste, fraud and abuse. Similarly, requiring applicants to submit all of their E-rate competitive bidding documentation without a commitment from USAC to timely and

³⁵ *Id.*

³⁶ *See* note 12, *supra*.

accurately review these documents will only increase delay and costs with little to no corresponding benefit.

V. THE COMMISSION SHOULD FOLLOW GAO’S RECOMMENDATIONS TO IMPLEMENT FRAUD RISK ASSESSMENT PLANS AND USE DATA ANALYTICS

In place of creating a costly and burdensome new online portal, the Commission should consider implementing other recommendations from the GAO report. Specifically, GAO stated that both the Commission and USAC should implement fraud risk assessment plans.³⁷

Conducting fraud risk assessments would allow the Commission to better determine whether and where waste, fraud and abuse may exist in the E-rate program and allow it to better tailor changes to reflect these areas.

GAO also recommended that the Commission and USAC make better use of data analytics to identify potential sources of fraud.³⁸ In particular, GAO found that USAC’s E-rate databases are unclear and difficult to use. The E-rate application processing program contains more than 10,000 data fields, but there is no clear definition of what data those fields contain.³⁹ This has precluded both the Commission staff and OIG from effectively using the data. In its response to the GAO Report, the Commission acknowledges the flaws in the USAC data fields and states that it is “working toward a future iteration of its data analytics platform to enable predictive analytics, using fraud detection patterns and anomaly recognition to help prevent future instances of fraud.”⁴⁰ The Commission should focus its efforts on fixing the issues with

³⁷ 2020 GAO E-Rate Report at 27-34.

³⁸ *Id.* at 34-38.

³⁹ *Id.* at 36.

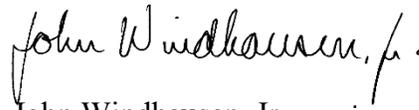
⁴⁰ *Id.* at Appendix 1, at 2.

the data that is already collected and implementing the data analytics processes mentioned in its response to GAO before mandating an entirely new database and document collection.

VI. CONCLUSION

As discussed above, the Commission should not adopt its proposed changes to the E-rate competitive bidding requirements, including mandating the creation and use of a new bidding portal and requiring the submission of all E-rate competitive bidding documentation. As detailed above, this would impose unnecessary burdens and costs on applicants, while the need for such drastic measures has not been demonstrated. Instead, the Commission should implement a fraud risk assessment plan and improve its data analytics capabilities to identify where waste, fraud and abuse may exist before requiring burdensome and unproductive changes.

Respectfully submitted,



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