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

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

INITIAL COMMENTS OF THE STATE E-RATE COORDINATORS' ALLIANCE

I. Introduction and Summary

The State E-rate Coordinators' Alliance (SECA)[1] submits these initial comments in opposition to the Federal Communications Commission (FCC or Commission) Notice of Proposed Rulemaking (NPRM) "Promoting Fair and Open Competitive Bidding in the E-rate Program".[2] There appear to be two primary motivations for the portal recommendation: (1) FCC's Office of Inspector General's belief that the portal will reduce fraud and improve the ability to detect bidding violations; and (2) the FCC's belief that the portal will reduce the improper payments percentage by reducing bidding violations. Upon analyzing how the portal

[1] SECA is composed of State E-rate Coordinator members representing 44 states and two territories. SECA members provide year-round training, assistance and helpdesk support to school, library and consortium applicants and assist E-rate service providers to facilitate their success with obtaining E-rate funding and complying with program rules. State E-rate Coordinators also serve as an interface with USAC and verify the eligibility of schools and libraries and other data points as necessary to ensure program compliance. Many SECA members are also responsible for procuring the contract services and filing statewide or large regional Form 471 applications for state or large regional wide area network services.

[2] NPRM Promoting Fair and Open Competitive Bidding in the E-rate Program, (released December 16, 2021, WC Docket No. 21-455 ("NPRM").

would operate, combined with the 25-year historical experience with the existing competitive bidding procedures, SECA explains herein that the bidding portal is unnecessary and duplicative of existing requirements; will neither prevent or reduce potential bidding improprieties nor facilitate better compliance; and will not elicit additional competitive bids for applicants and reduce costs. Just as the Commission admits the complexity of the existing program and is seeking ways to simplify the E-rate program, SECA posits that the proposed bidding portal undoubtedly and unnecessarily will increase program complexity for stakeholders; will encourage the administrator to serve as a super-reviewer of each applicant's competitive bidding process; will delay issuance of funding commitment decision letters; and will not identify or weed out bidding improprieties.

Before proceeding to share our analysis, SECA is very concerned that the bidding portal is already under development and is a *fait accompli.* In the Semi-Annual Report to Congress for the period April 2020 through September 2020, the FCC Office of Inspector General stated that on May 19, 2020, they learned that the FCC directed USAC to move forward with planning and developing a competitive bidding portal for the E-rate Program. This was eighteen (18) months *prior* to the release of the NPRM. While very concerning, we are not aware of any formal or binding directive issued by the Commission, and therefore we anticipate that any instructions given to USAC to proceed with the portal are non-binding. We encourage the FCC to issue a stop-work directive to USAC if that has not yet happened. We also encourage the Commission to carefully consider and analyze the record evidence that is amassed from interested stakeholders before making its final decision.

To be clear, SECA strongly condemns any attempts to defraud the program. Just as important, it is essential that the FCC recognize the difference between overt efforts to defraud

the E-rate program through deliberate unscrupulous and illegal bidding schemes, and inadvertent technical errors that are identified as competitive bidding violations. ***Not all competitive bidding violations are evidence of waste, fraud or abuse***. Grouping fraud and inadvertent technical errors together -- as the NPRM does when it refers to both fraud risks and improper payment findings -- does a great disservice to the overwhelming majority of well-intentioned applicants that have been subjected to a finding of non-compliance with the bidding rules. These applicants unknowingly and unintentionally made technical bidding errors not because they tried to defraud the program but because they did not know any better. These applicants may experience the adverse consequences of funding denials, commitment adjustment decisions and/or recovery of improperly disbursed fundings; but, by no means should their behavior be classified as criminal, intentional or fraudulent. These applicants' missteps should be considered on their own merit without regard to other applicants who have been found to have engaged in criminal behavior and have been and should be prosecuted.

The unfortunate truth is that bad actors who want to commit fraud in the E-rate program will find ways to do so with or without a bidding portal. The portal will not serve as a deterrent or make it easier for fraud to be uncovered. Bad actors will figure out ways to game the system no matter what the system is and how the system may evolve.

Meanwhile, the vast majority of applicants who have committed no wrongdoing will be saddled with yet more "gotchas" – technical mistakes ministerial in nature that result in funding denials or rescissions brought about from the complexities of an online portal and associated requirements. Indeed, experience has shown that the more regulatory requirements that are imposed on applicants, the more opportunities for applicants to falter, which will, in turn, result in more denials and non-compliance findings.

Implementing a portal is not as simple as the FCC Office of Inspector General (OIG) recommended in its report that the FCC cited in the NPRM.[3] The complex, multi-faceted competitive bidding requirements amassed over E-rate's 25-year history do not lend themselves to be retrofitted within a bidding portal. Consequently, state officials and applicants alike have many concerns about the onerous burden that the portal would pose.

As explained below, the bidding portal raises many new questions and layers an entirely new set of procedural requirements on top of the many existing local, state and E-rate bidding requirements. The already vastly complex program will become extraordinarily more difficult to navigate and will create a new set of reasons for funding denials due to technical, but not intentional, non-compliance. This is quite a contrast from the Commission's goal to simplify the E-rate program that was outlined and strongly supported by all Commissioners in its 2014 Modernization Orders.[4] Further, we note that paragraph three in this NPRM states the Commission's portal proposal fulfills several goals including "streamlining program requirements for applicants and service providers...." We find no aspect of program simplification in any of these proposals.

The primary culprit for applicants' bidding mishaps is the existing complexity of the Form 470 and its associated rules and bidding procedures. The vast majority of bidding infractions are due to inadvertent mistakes made in an earnest and good faith effort to comply with the program's extensive requirements.

---

[3] DOC-360844A1.pdf.

[4] Modernizing the E-rate Program for Schools and Libraries, *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 13-184, FCC 14-99 (released July 23, 2014); *Second Report and Order and Order on Reconsideration*, FCC 14-189 (released December 19, 2014).

Applicants that do not contract with an E-rate consultant are often district business officials, support staff or technical supervisors who have difficulty keeping up with program expectations because of their immediate obligations to the students and staff of their schools. The coronavirus pandemic has affected the education workforce by accelerating retirements and limiting available labor, which has often resulted in E-rate responsibilities being thrust upon whoever in the entity is the newest hire or most available. It is important for E-rate policymakers and staff to remember that every year is the first year to E-rate for many individuals even if the entity they represent has participated in E-rate in prior years.

The most effective way to reduce improper payment findings related to competitive bidding is to explicitly articulate the bidding requirements in plain language and create a single repository for all of the requirements, revise the Form 470 to resolve the problem areas that continue to confuse applicants and create chronic and widespread "gotcha" errors, and revise the competitive bidding rules to stay current with the broadband needs of schools and remove barriers that exist when bidding some broadband options.

Unless and until the FCC makes these modifications, applicants will continue to be unknowingly tripped up and unaware that they are making bidding errors that contribute to the improper payment percentage. We do not see how a bidding portal will alleviate these unintentional, inadvertent errors.

In addition to the various policy reasons why the portal is not in the public interest, SECA also explains herein that the proposal is legally defective because it will have the effect of preempting state and local bidding regulations when it is not necessary to do so.

In conclusion, there is no sound policy or legal basis that justifies mandating a national

bidding portal and the proposal should be rejected.

II. The One-Size-Fits-All Competitive Bidding Portal Would Be Disproportionately Onerous for Smaller Applicants and Does Not Consider the Existing Review Mechanisms Already Available to Ensure Bidding Compliance.

The genesis for mandating a nationwide bidding portal and the associated NPRM originated with the FCC's Office of Inspector General (OIG) recommendation in its March 31, 2017 Semi-Annual Report to Congress.[5] The OIG stated that the lack of upfront collection of E-rate competitive bids has hindered the detection and deterrence of fraud, waste, and abuse during the competitive bidding process. The report also stated that service providers should have to submit their bids in the portal and the bids would be released to applicants only after the expiration of the required 28-day bidding period. OIG then posits that online bidding ***may*** impose minimal administrative costs on E-rate Program participants, but that these costs would be outweighed by the benefits. As explained below, just the opposite is true: the detriments exceed any potential benefit.

USAC and the FCC already have authority to require applicants to produce all competitive bidding documentation. Applicants currently are mandated to retain all E-rate documentation for a minimum of 10 years from the last date of service. Applicants routinely are required to provide these documents to USAC during pre-funding review by Program Integrity Assurance (PIA), and during post-commitment reviews, such as during a special compliance investigations, Beneficiary Contributor Audit Program (BCAP) audits or Payment Quality

[5] DOC-360844A1.pdf. In the NPRM, the FCC also mentioned the September 2020 GAO report recommending that the FCC conduct an E-rate fraud risk assessment While GAO referred to the portal, the report did ***not*** formally make a recommendation to establish the bidding portal.

Assurance (PQA) assessments.

While the PIA, PQA and BCAP procedures are confidential, based on our observations, the applicants subject to review appear to be chosen based on a stratified or deliberate selection multitude of factors including, but not limited to, magnitude of funding requests, history of past bidding issues and/or based on a whistleblower complaint. Higher value contracts and funding requests are typically subjected to more scrutiny because of the higher risk of mistakenly approving funding or making an improper payment. Smaller dollar funding requests and procurements may not be subjected to the same intense review as higher value contracts. This makes a great deal of sense and has facilitated program efficiencies without imposing undue burden on smaller applicants and compromising protections against waste, fraud and abuse.

The national one-size-fits all mandatory bidding portal would subject *all* applicants, regardless of the magnitude of their funding requests, to the same requirements, even though smaller applicants – measured by their smaller approved funding amounts – inherently pose a lower fraud risk than larger applicants with larger funding approvals. This would disproportionally impact smaller applicants that have far fewer staff resources to address the added program complexities that will result from implementing this bidding portal proposal. Indeed, this portal will undoubtedly drive more applicants to outsource E-rate to consultants because applicants will be unable to comply with yet another new set of regulatory requirements.

III. There is No Evidence that the Bidding Portal Will Thwart or Detect Fraudulent Conduct.

A review of E-rate criminal prosecutions on record indicates that collusion among two or more individuals to engage in intentional wrongdoing and to violate program rules is a common

element of fraud.[6] Unfortunately, if two individuals want to concoct a scheme to defraud the E-rate program, a bidding portal will not prevent these occurrences. These transactions will occur without electronic fingerprints in the portal as the bad actors will simply adapt their behavior.

The example provided by the OIG, where an applicant might open bids prior to the close of the bidding period and then inform the favored vendor of the price to beat, is a case in point. Even if bids were held until the end of the bidding period, an applicant and service provider could collude and allow the vendor to submit a later updated bid inside the bidding portal so as to comply with the requirement that all bids are submitted in the portal. The later bid could explain the initial bid was erroneously submitted or provide some other plausible rationale.

Similarly, the legitimate bidding practice known as the "Best and Final Offer" process[7] could be contorted to allow for fraudulent conduct. An ill-intentioned applicant could collude with the preferred vendor and share pricing information from the original proposals submitted by bidders that the that the colluding bidder could use to its benefit in submitting the BAFO bid.

In both these scenarios, even if the bids are submitted via an online portal, this collusion could still arise without this being reflected in any documents or bids uploaded to the portal. This is because overt violations of the fair and open competitive bidding regulations – bid rigging or collusion -- typically involve improper communications between at least two individuals which could and would simply be conducted outside of the portal. Forcing all parties to communicate through a neutral and confidential channel will not prevent colluding parties from using confidential communications of their own.

---

[6] See https://www.fcc.gov/inspector-general/reports/other

[7] The BAFO process is widely recognized as a legitimate practice to obtain the most competitive prices possible. See, e.g., https://www.acquisition.gov/far/15.307 in which the Federal Acquisition Regulations provide for final proposals. Further, the FCC has approved the use of the BAFO process in an appeal decision. Appeal of Baltimore City School District, CC Docket No. 02-6, DA 11-1368, (released August 8, 2011).

Document alteration is another concern raised by OIG in support of the need for the bidding portal.[8] The example cited by OIG suggested that bids could be altered to appear compliant but in fact an earlier version of the bid may reflect a bidding violation such as a vendor's offer to pay the applicant's non-discounted share.[9]

Drawing an incorrect conclusion or assuming that all bid revisions reflect nefarious motives may result in a "guilty until proven innocent" mentality and PIA reviewers will start with the point of view that applicants and vendors have bad motives. Yet, there may be a host of legitimate reasons why an applicant may accept and consider a revised bid from a vendor. SECA members' own experiences in conducting statewide network procurements, as well as the experiences of the applicants they assist, is that after the bid submission deadline, applicants may have questions for bidders that require responses.[10] The responses may take the form of a revised proposal that incorporates the requested clarifications. While these communications and activities are legitimate and consistent with fair and open bidding, applicants would now be at risk for accusations of bidding improprieties if a PIA reviewer, auditor or the OIG subjectively decided that the revised bids were impermissible or tainted in some manner. Applicants would run the risk of being second-guessed by PIA reviewers on all these nuanced details of their procurements.

---

[8] OIG Report, p. 14.

[9] We believe that such instances of vendors offering – even verbally – to pay the non-discounted share are unheard of in recent years.

[10] For example, applicants are required to use "or equivalent" language when completing a form 470 and requesting a specific make/model of equipment. When vendors submit bids for an "or equivalent" make/model, applicants often need to request additional information and documentation regarding whether the product truly is "equivalent." The bidding portal requirements could hamper this need to contact bidders to ensure bid is actually competitive and suits the needs of the applicant.

OIG also mentioned improper contract modifications and alterations could occur in the absence of a bidding portal. However, applicants already must provide basic information about their contract awards in the Contract Record, and if they do not upload a copy of the signed contract at the time of the Contract Record creation, PIA requires that the document be supplied during their review. In other words, providing a signed contract is universally enforced as a requirement during PIA review in order to receive funding approval. It would be completely redundant and unnecessary for applicants to be required to upload contract documents in the proposed bidding portal. Likewise, applicants already must identify the number of bids they received when creating a contract record in EPC, and upon request, they must provide copies of those bids to USAC or auditors.

In conclusion, SECA believes that the online bidding portal will do little to weed out waste, fraud and abuse, is duplicative of existing requirements, and will add to the complexity of the E-rate program. Contrary to the OIG's March 2017 Report, these detriments far outweigh any potential benefits and show that the portal is not in the public interest.

IV. Clear Delineation of Current Bidding Rules is the Best Way to Reduce Bidding Infractions, Not Mandating a National Bidding Portal.

Mandating a national bidding portal is an extraordinarily complex, expensive, and ineffective means to try to reduce bidding errors. As we noted above, improper payments must be distinguished from fraudulent bidding conduct. They are **not** the same.[11] Bidding issues that result in an improper payment finding typically arise from innocent mistakes.[12] Time and again,

[11] GAO 20-606, n. 4: "While improper payments may be caused by unintentional error, fraud involves obtaining something of value through willful misrepresentation. Whether an act is fraudulent is determined through the judicial or other adjudicative system."

[12] It may be that the PIA bidding review found the applicant to be compliant with E-rate regulations – including competitive bidding requirements - but later during a PQA assessment a different reviewer may have drawn a

these technical infractions are due to confusing forms and rules, lack of clarity concerning certain bidding requirements, or other inadvertent and unintentional errors.

A review of Commission streamlined decisions for the most recent 12-month period, April 2021 through March 2022 shows little fraud or abuse of the E-rate program. In fact, most funding denials were overturned or decisions upheld on technicalities. During this time period there were 115 decisions related to competitive bidding. Ninety-five (95) decisions approved the appeal or request for waiver and were remanded to USAC. The other 20 appeals/waivers were denied, of which two cases were related to conflict-of-interest violations due to improper service provider involvement in the bidding process. The remaining 18 denials reflected technical bidding violations that could not be rectified.

These errors ***would not*** be prevented by a mandatory national bidding portal and will continue unless and until the FCC provides the needed clarity and fixes the Form 470 and Form 471. For example, none of the following bidding issues would be detected and avoided with an online bidding portal:

- Failure to post Form 470 in exact alignment with the specific service category, subtype, or equipment included on the Form 471. These types of mistakes include such items as requesting a different bandwidth speed (usually lower) than the transmission speed submitted by the winning bidder; not requesting maintenance service on the Form 470 Category 2 service request but requesting maintenance funding in the Form 471; incorrectly requesting the specific subtype of internet access on the Form 470 compared to the contract award; including a service location in the contract that was not included in the Form 470 or RFP.
- Failure to choose the correct internet service request option on the Form 470. The earlier version of the Form 470 baffled applicants and they unknowingly selected the incorrect option to request internet service delivered over fiber facilities. In recognition of this confusion the Commission issued instructions to USAC to not deny any applications due to an applicant's incorrect selection of the wrong internet service option. The current version of the Form 470 attempts to resolve this

different conclusion. In other instances, the bidding requirements continually evolve and a PQA assessment may apply current regulations rather than rely on the then applicable requirements.

confusion but still does not provide plain language, intuitive choices for applicants to request internet service.

- Modification of an RFP document later determined by PIA or an auditor to be a cardinal change yet the bid response deadline was not extended by 28 days from the date of the cardinal change.[13] Despite requesting definitive rulings for multiple specific examples of the types of modifications to procurement documents that would be considered cardinal changes, the FCC and USAC have yet to provide the needed guidance. Unless and until the guidance is provided, applicants will continue to be at risk for competitive bidding denials due to not extending the bidding period when a cardinal change is made.[14]
- Bid evaluation did not consider price of E-rate eligible services/equipment to be the primary or most heavily weighted factor. The bid evaluation is performed by the applicant after the bidding period closes, and applicants already are required to provide their evaluation documentation upon request.
- Applicants who requested funding for two internet services due to expanding need found to be duplicative service.
- Unintentionally not listing the words "or equivalent" on their RFP documents.
- Minor modification of contracts to expand transmission speeds or internet quantities when the establishing Form 470 did not request the increased service levels and/or the parties' contract does not contain the prices for the increased service levels.

The most effective ways to reduce improper payment findings and audit findings related to competitive bidding are to address and resolve the vague, burdensome and confusing requirements that lead to inadvertent, but not necessarily fraudulent, competitive bidding

[13] Notably this requirement is not contained in any FCC order or regulation. A search of the USAC web site reveals that "cardinal change" as it pertains to procurements was first discussed in a USAC News Brief dated September 4, 2015. https://apps.usac.org/sl/tools/news-briefs/preview.aspx?id=641 "You can make certain changes to your form after it is certified. However, if your changes would significantly affect the scope, locations, or other aspects of the project (changes that in general are considered "cardinal" changes), you should post a new FCC Form 470." This guidance has changed and evolved over time. In its January 10, 2020 News Brief, USAC stated: "If you make a cardinal change to the scope of your project and/or the services you are requesting by adding one or more RFP documents to your existing form, you must restart your 28-day clock. In this case, you must count the 28 days yourself – EPC does not calculate a new ACD [Allowable Contract Date] for you." As will be discussed herein, there is no other substantive information available as to the definition of cardinal change.

[14] This is also an area of great confusion during PIA reviews. If a document has been uploaded to the Form 470 portal less than 28 days from the bidding deadline, PIA reviewers often will assume the uploaded document automatically constitutes a cardinal change and activates the requirement to extend the bid due date to be 28 days from the date of the uploaded document. The document may or may not be a cardinal change, however. Consider, for example, when an applicant responds to vendor inquiries, and the responses contain no additional or new information at all, or is not significant new information, then the cardinal change rule does not govern.

violations. The Commission should undertake the following actions to achieve this result:

1. Explicitly articulate the bidding requirements in plain language and create a single repository for all of the requirements. USAC has created a visually-pleasing website, but it is no substitution for a comprehensive list of bidding rules and requirements. For reasons we do not understand, the Form 470 instructions are no longer submitted with the Form 470 for approval by OMB, leaving applicants to fend for themselves in the vast sea of E-rate bidding rules that are hidden in USAC news briefs, training slides, online videos, webinars and FCC Orders.

2. Revise the Form 470 to resolve the problem areas that continue to confuse applicants and create chronic and widespread "gotcha" errors. In spite of the FCC's well-meaning efforts to simplify and streamline the Form 470 application to make it easier for applicants to complete the form and for service providers to understand the nature of the service requests, there still are instances where an applicant is confused and inadvertently selects a service request that does not correlate to the intended procurement, or the applicant may be unsure of the services that they may want to procure. SECA has outlined these problem areas in multiple previous filings.[15]

3. Remove the additional bidding rule layers for applicants seeking leased dark or self-provisioned fiber. While we understand why the Commission imposed additional requirements when these services were first made eligible, these technologies are now mainstream and most often just as or more cost effective than traditional leased lit fiber services. Applicants should not have to jump through additional hoops – and face the extreme penalties for inadvertent non-compliance – simply because they want to select one broadband technology over another. One of the hallmarks of E-rate is technology neutrality, but that is not the case with cost-effective fiber solutions.

---

[15] Remove the subcategory service requests of internal connections, maintenance of internal connections and managed internal broadband services on the Form 470. Applicants that fail to include a service request for a particular subcategory on their Form 470 are precluded from requesting funding for the subcategory on their Form 471. The different subcategories, however, overlap and the boundary lines blur. They are a holdover from the pre-modernization rules that limited funding of internal connections to two out of every five years, but allowed an exception of annual requests for basic maintenance of internal connections. Now that the Category 2 program is based on five-year budgets, it should not matter whether the applicant chooses to use their budget to pay for maintenance or to pay for internal connections or managed internal broadband services.

For example, some vendors bundle right to use licenses with software updates. The right to use license is considered an internal connection but the software updates are considered maintenance. At the time of form 470 filing, the applicant has no clue whether the requested licenses will be deemed as internal connections or as basic maintenance of internal connections (or a combination of the two). In the Form 471, applicants are expected to allocate the costs between the two different subcategories and create two different funding requests. Complicating matters further, the applicant is permitted to apply for funding for the total cost of a multi-year prepaid license but must limit their maintenance request to the annual costs, even if prepaid for several years.[15] Years ago the Commission collapsed the Category 1 subcategories on the FCC Form 470, and it should follow this precedent for Category 2.

4. Permit applicants to upgrade internet and infrastructure bandwidths mid-year. The current E-rate bidding and upgrade rules were developed more than a decade ago and have not kept pace with the current needs of schools and libraries. The E-rate rules should be updated to reflect that technology and broadband needs are growing at a much faster rate than the E-rate application cycle can accommodate and thus should permit applicants to upgrade bandwidths in real-time. It is a shame that antiquated E-rate upgrade rules prevent schools and libraries from obtaining the bandwidths they need, when they need them, to meet their educational and administrative needs.

5. Either clearly define cardinal changes to an RFP and Form 470 that activate the requirement to extend the bidding deadline by 28 days from the cardinal change, or remove the cardinal change requirement altogether as it is too difficult to administer with any level of consistency. If state procurement laws allow schools and libraries to modify their service requests without extending a bid deadline, why should E-rate rules impose such a harsh requirement?

6. Create the same rules for prepaid multi-year maintenance that govern multi-year prepaid right-to-use licenses. These prepaid items should be eligible for funding in the first year of the maintenance service, which is the same approach currently used for multi-year prepaid licenses.

7. Rescind the Macomb decision to allow applicants to contract with multiple providers to obtain the bandwidths they need to support their education and library functions, even if selected in the same procurement, as long as all service is needed, is being used and the funding requests are cost-effective.

8. Clarify that automated bids submitted in response to a Form 470 that do not address the requirements of the Form 470 and do not contain firm price proposals may be disqualified and excluded from the bid evaluation.

9. Clarify that bids received after the latter of the deadline for bids identified in the Form 470 or the allowable contract date are not required to be considered or evaluated unless otherwise stated in the FCC Form 470 and/or RFP.

V. The National Mandatory E-rate Bidding Portal Will Conflict With and Preempt State and Local Procurement Requirements.

The Commission requests comment on inherent conflicts with public procurement law and local procurement regulation.[16] There are several areas where state and local procurement procedures are irreconcilable with a national E-rate bidding portal. This would place an undue

[16] NPRM at 20

nationwide burden on administrations, school boards, and potentially even state legislatures, forcing them to alter their established procurement requirements or force their applicants to withdraw their participation from the E-rate program due to the inability to comply with local, state and federal procurement rules.

First, numerous E-rate applicants are required to utilize a statewide or local bidding portal to receive bids. The NPRM would seem to preclude the use of these portals and require the exclusive use of the E-rate portal. Even if the Commission allows for simultaneous use of an E-rate bidding portal and a local bidding portal, how would this work when a vendor submits a proposal in one portal and not another?

Second, numerous E-rate applicants are required by state and local laws to receive printed, signed, and sealed bids. Some require notarized signatures to be lawful. Paper bids copies would be precluded by the portal.

Third, some applicants are required by state and local laws to hold public bid openings. This too would appear to be precluded by the bidding portal.

Fourth, many applicants with large procurements, particularly structured cabling procurements for in-building wiring, require a bid bond to be submitted. How would the bidding portal ever accept such bid bonds? And what happens when a bid is uploaded into the bidding portal without a required document or bid bond – would the proposal be automatically disqualified? Many applicants' state laws and local regulations allow for waiver of minor bid defects. Imagine the bid protests that would happen at the local level if vendors bids were disqualified because of an E-rate regulation that prohibited the supplemental submissions to cure minor defects.

Fifth, many applicants reserve the right to require vendor meetings to discuss the applicant's and vendor's questions. It is unclear whether such meetings would be permitted since the NPRM prescribes that all communications must be uploaded to the bidding portal. Vendor meetings are incompatible with the bidding portal.[17]

VI. The Bidding Portal is Incompatible with Some Existing Bidding Procedures Already Approved by the FCC.

The NPRM also requested commentors to address multi-tiered bid solicitations.[18] The Commission allows multi-tiered bid solicitations, codified in the Baltimore decision.[19] Complex solicitations often contain provisions for negotiations with one or more bidders and acceptance of Best and Final Offer (BAFO) bids. In some cases, only a subset of bidders is selected to negotiate or submit BAFO bids. Further, many BAFO bids are subject to a shorter interval than the 28-day bidding period that governs the original Form 470 and RFP. Applicants could face the very real possibility of funding denials because a PIA reviewer concludes that the BAFO deadline was required to be 28 days.

The NPRM also seeks comment to address State Master Contract solicitation and subsequent use by applicants through the "mini-bid" process.[20] State Master Contracts are popular for public school and library applicants for economical and efficient acquisition of goods and services. Commission mini-bid procedures (which are not codified but appear on the USAC E-rate website) require applicants to solicit bids from all master contract holders and evaluate

---

[17] Applicants often require or offer the option for vendors to conduct site visits (also known as "walkthroughs") to ensure accuracy of their bids. It is unclear how the bidding portal will allow or require such necessary site visits by vendors.
[18] NPRM at 32
[19] Baltimore City School District, DA 11-1368, Released August 8, 2011, CC Docket Number 02-6
[20] NPRM at 22

responses in accordance with Commission eligible price-as-the-primary-consideration regulations. When submitting funding requests on Forms 471 applicants will cite the state Form 470 – not a locally generated Form 470. There is no provision in the NPRM for EPC to accept bids for mini-bid solicitations. Further, if the E-rate rules were modified to require all mini-bid procurements to be done in EPC, how would EPC ever determine which vendors submitting bids were authorized to do so from the state contract? It would be completely impractical to require applicants to utilize EPC to solicit bids from state master contract holders.

VII. The Online Portal Will Also Cause Other Problems and Confusion in Competitive Bidding.

SECA is also concerned a bid portal or repository would increase the problem of "spam" bids. An increasing number of vendors respond to every Form 470 posted with identical encyclopedic bids that do not address applicant's specific needs and do not constitute firm offers or bids. In some cases, these vendors aggressively seek to intimidate applicants. In News Briefs and training sessions USAC has stated that such spam bids can be ignored. As such, they would not be included in local bid evaluations or kept on file as bids received. Using a bid repository reviewers may insist such bids be evaluated with legitimate bids or deny funding when spam bids are not considered. While denials may be overturned on appeal this just adds to the complexity and inefficiency of the program and would inevitably substantially increase the amount of time it takes to receive a positive funding commitment.

Likewise, we believe that by requiring vendors' questions to be submitted anonymously, vendors and bad actors will submit frivolous questions that will require already overburdened applicant staff to reply, simply so USAC cannot deny them for not answering every question

asked (even if repetitive of other questions asked and answered or questions that could be answered by simply reviewing the content of the procurement documents). Likewise, we can easily envision regular situations where a new staff member will not be signed up in EPC and will not receive notice of a pending vendor question and will not reply. The vendor then is free to submit an anonymous whistleblower complaint to USAC, causing the application to be denied or held in purgatory for months or years. Submission of anonymous questions simply cannot be permitted.

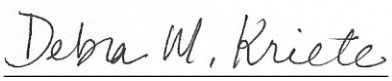
VIII. Conclusion

Existing tools targeted to patterns of potential abuse combined with whistleblower reports, PIA bidding reviews and post-commitment compliance review and audits effectively detect and punish waste, fraud and abuse. A complete revamping of the EPC system to add a bid portal or repository is not an effective way to improve fraud prosecutions or reduce competitive bidding improper payment findings.

Instead, the Commission should devote its resources to modifying competitive bidding rules that are confusing, burdensome, or vague that lead to inadvertent, but not necessarily fraudulent, competitive bidding violations. Any system development resources should be applied to making the current online filing system more user-friendly especially for larger entities that have complex applications.

For the reasons stated above, the Commission should refrain from imposing a national E-rate bidding portal.

Respectfully submitted,



Debra M. Kriete, Esq.
Chairperson, State E-rate Coordinators' Alliance
1300 Bent Creek Blvd, Ste 102
Mechanicsburg, PA 17050
717 232 0222
dmkriete@comcast.net

Dated: April 27, 2022