



Beware of Promises That Sound Too Good To Be True: Ninth Circuit Affirms Criminal Conviction of E-Rate Consultant

With the increasing strain on school district budgets due to the State's current fiscal crisis, school districts are looking for ways to obtain funding for infrastructure improvement projects. One method for school districts to obtain federal funding for telecommunication upgrades at schools is through the Federal Communications Commission program that funds technology projects at eligible schools and libraries. This FCC program is administered through the Schools and Libraries Division of the Universal Service Administrative Company ("USAC"), which is charged with distributing the funds, also known as "E-Rate" funds, to eligible school districts. Under the E-Rate program, a school district can obtain funding for up to 90 percent of the costs of eligible services. Due to the fiscal difficulties school districts are facing, this funding is attractive but not without its risks as demonstrated by a recent criminal conviction of a school district's E-Rate consultant in U.S. v. Green, __ F.3d __ [2010 WL 200280].

E-Rate funding is requested under four different categories of service: (1) telecommunications service; (2) internet access; (3) internal connections, and (4) basic maintenance of internal connections. In order to qualify for the receipt of federal E-Rate funds for telecommunication projects, a school district must go through a cumbersome application process with USAC, which requires that a district prepare a technology plan and engage in a competitive bidding process to obtain bids for services and products that are eligible for E-Rate funding. Moreover, once a district has received a Funding Commitment Decision Letter from USAC, it must still submit various forms to USAC to receive the funds to pay the E-Rate contractor.

Due to the complexity and time commitment involved in applying for and receiving E-Rate funding, many school districts hire consultants to assist with the application process and the administration of the E-Rate funds. Unfortunately, Green documents a case where one such consultant was found guilty of defrauding the federal government and engaging in bid rigging based on a fraudulent scheme to help school districts obtain E-Rate funding for technology projects.

In its decision, the Ninth Circuit explains how the consultant instructed school districts to tell USAC that the district would be paying its share of the project's costs, even though it would not, and went so far as to alter school budget information that was submitted to USAC to falsely show that the districts could afford to pay any remaining costs for projects when it could not. For this reason and others, the consultant was found guilty of fraud because she concealed material facts from the federal government to induce it to supply funding in connection with E-Rate projects at eleven school districts across the country.

Additionally, the consultant approached potential contractors to submit bids to her specifications and then instructed the district to select that contractor's bid even though the bid was sometimes three to four times higher than the other bids. The consultant's chosen contractors had inflated their bids to cover the costs of extra equipment and services the consultant required the contractors to provide. The consultant was able to do this because with the competitive process required by USAC, price is the primary, but not the only, factor in selecting the most "cost-effective provider." By arranging for bids in advance, the court

confirmed that the consultant prevented an open and fair competitive bidding process and affirmed the conviction of bid rigging.

The Ninth Circuit decision illustrates the importance of hiring trusted consultants and ensuring that forms requesting state or federal funds are completed correctly and honestly by district staff and consultants. Even though the school districts were not charged with any wrong doing, they still had to cooperate in what was likely a lengthy and expensive criminal investigation and the funds they received from the E-Rate program were placed in jeopardy. Because a school district contracts directly with the contractor providing the telecommunication upgrades, any problems with the E-Rate funding leaves a district liable for any unpaid work done by the contractor. Thus, we strongly advise school districts to choose their consultants carefully and remember that if something sounds too good to be true, then it probably is.

If you have any questions concerning the E-Rate program or need assistance with contracts relating to E-Rate funding, please contact one of our five offices.

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