STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| CITY OF QUINCY, d/b/a NETQUINCY, | ) | |
| Petitioner, | ) | |
| vs. | ) | Case No. 03-0322BID |
| GADSDEN COUNTY SCHOOL BOARD, | ) | |
| Respondent, | ) | |
| and | ) | |
| TDS TELECOM, | ) | |
| Intervenor. | ) | |

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 24-25, 2003, in Tallahassee, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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For Respondent: Stephen C. Emmanuel, Esquire
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## STATEMENT OF THE ISSUE

Whether the Respondent, the Gadsden County School Board (Respondent or Board), acted illegally, arbitrarily, fraudulently, or dishonestly in rejecting all proposals for telecommunications services as set forth in its E-Rate application for the school year 2003-2004 (the sixth year).

## PRELIMINARY STATEMENT

On or about October 25, 2002, the Respondent issued a revised notice that sought vendors for its E-Rate application for the 2003-2004 school year. This Request for Proposal (RFP) specified a deadline of noon, December 2, 2002, for proposals to be submitted. The Petitioner, City of Quincy, d/b/a NetQuincy (Petitioner or City) and the Intervenor, TDS Telecom/Quincy Telephone (Intervenor or TDS), timely filed responses to the revised notice.

Subsequently, the Respondent issued a statement thanking all those who had submitted proposals in response to the RFP but rejecting all responses. The Petitioner timely filed a Notice of Intent to Protest on December 12, 2002. The Petitioner also filed a Formal Notice of Protest/Petition for Administrative

Hearing executed on December 23, 2002. The Petitioner subsequently filed an Amended Formal Notice of Protest/Petition for Administrative Hearing on February 18, 2003. As the amended protest dates back to the initial filing, it has been deemed timely filed.

The matter was forwarded to the Division of Administrative Hearings on January 29, 2003. In accordance with Section 120.57(3), Florida Statutes, the matter was scheduled for hearing. Additionally, the parties filed a Pre-Hearing Stipulation on February 20, 2003.

At the hearing the Petitioner presented testimony from Claude Shipley; Randy Bryant; Peggy Sue Outlaw; Sterling Dupont; Debra Kay Smith (without objection a portion of the witness' deposition was read into the record), Jack Mclean, Jr.; Isaac Simmons, Jr.; and Robert J. Washington. Petitioner's Exhibits 1-7, 9-14, 16, 18, 19, 21-24, and 26 were admitted into evidence. The Board presented testimony from Kay Young. Respondent's Exhibit 1 was admitted into evidence. The Parties' Joint Exhibits 1-10 have also been received in evidence and considered in this cause.

The transcript of the proceeding was filed with the Division of Administrative Hearings on March 12, 2003. Thereafter, the parties timely submitted Proposed Recommended Orders that have been fully considered.

## FINDINGS OF FACT

1. The Petitioner is a municipal corporation operating under authority of law. NetQuincy is the utility/entity through which the City sought to provide "information technology resources" as requested by the Board's RFP. NetQuincy is capable of providing internet access and related telecommunication services.

2. "T1" is a specific type of information technology that identifies internet access. It is undisputed that the Petitioner sought to provide such service in connection with the RFP at issue.

3. On October 9, 2002, the Respondent posted a Form 470 requesting various telecommunication services to be provided during the 2003-2004 school year (the sixth year). T1 service was among the requested technological services identified. Form 470 is required pursuant to E-rate guidelines.

4. In connection with the Form 470, the Board also posted the RFP that is the subject of the instant dispute. The original RFP was amended and reposted on October 25, 2002. T1 service for all eligible school sites was specifically noted on the revised RFP.

5. A vendor's meeting regarding the revised RFP was conducted on October 31, 2002. The Petitioner's representative attended the vendor's meeting.

6. On December 2, 2002, three vendors timely submitted responses to the RFP: the Petitioner, the Intervenor, and Trillion (not a party herein). None of the submittals was evaluated.

7. Instead, the Respondent posted a notice on December 6, 2002, that rejected all responses. More specifically, the notice provided in connection with the service in dispute in this cause:

> **We would like to thank all those who submitted quotes for this section of our RFP, however, during the 28 day period of the bidding process, the School District learned that the Florida Learning Alliance will be providing this service for us. Since this means zero costs for the School District, we will NOT be filling [sic] for E-rate discounts for this service for the 2003-2004 (Year Six) time period.

8. The rejection notice did not contain the language set forth in Section 120.57(3), Florida Statutes.

9. Nevertheless, the City filed a Notice of Intent to Protest the decision to reject all responses. The timeliness of the Notice of Intent to Protest or the Petition for Administrative Hearing has not been challenged.

10. On December 16, 2002, the Florida Learning Alliance (FLA) filed an RFP requesting vendors for the same services identified in the Respondent's revised request. That is, T1

service for all eligible school sites for E-rate (the sixth year).

11. The deadline for submittals to FLA's RFP was January 16, 2003. No decision on FLA's RFP was rendered as the instant action was initiated on December 23, 2002. The parties contend that by operation of law the bid solicitation process for both RFPs (the Board's and FLA's) was suspended. Thus it is uncertain whether the Respondent will be able to participate in the E-rate program for the sixth year.

12. The E-rate program has existed since the 1998-1999 school year. It provides funding to enable schools to obtain internet access and services. The Schools and Libraries Division (SLD) administers the program and offers funding to eligible school districts computed as a "discount." The level of discount is determined by the level of poverty within the population to be served.

13. The Respondent has participated in the E-rate program for several years. Depending on the school to be served, the Respondent's discount is 86 or 87 percent. The remaining amount, the "undiscounted portion" is not paid by the SLD.

14. Participants in the E-rate program are entitled to apply in two ways: individually (as the Respondent has done) or through a consortium. In this case, the FLA is an alliance through which the Respondent may receive E-rate services.

15. FLA is comprised of three educational consortia covering 34 small rural school districts. The Panhandle Area Educational Consortium (PAEC) encompasses the geographical area within which the Respondent is located. As a member of PAEC, the Respondent is entitled to participate with FLA.

16. By virtue of FLA's Technology Innovation Challenge Grant rural schools may receive T1 lines such as requested herein. More important, however, is FLA's ability to provide the undiscounted portion of the E-rate.

17. That means FLA will provide the 13 or 14 percent not covered by the SLD. In order to benefit in this manner, the Form 470 for the services requested must be filed through the FLA.

18. In this case, the Respondent confirmed this potential benefit of receiving the services at no cost only after its Form 470 and RFP had been posted. When they elected to withdraw their own RFP (to allow FLA to pursue the matter in their behalf) the instant protest followed. The Petitioner did file a response to FLA's RFP in order to be considered for the sixth year E-rate.

19. The issue related to the sixth year is complicated by the fact that unbeknownst to the Respondent FLA acted on behalf of the Board for Year 5 T1 connectivity. As to Year 5, when no vendor replied to the FLA's RFP for T1 service, the Intervenor

was selected as the "carrier of last resort." No contract was required or signed in connection with Year 5.

20. The Intervenor was selected for Year 5 because TDS provided service in the areas designated for T1 service E-rate Year 5. That is how it was deemed "carrier of last resort." Other vendors provided services in other areas where they were similarly deemed the "carrier of last resort."

21. In fact it was not until October 2002 that the Year 5 funding was made available. During the discussions over the Year 5 services (and with the deadline for filing the application for the sixth year fast approaching) Respondent filed Form 470 without knowing how or if FLA would participate in the sixth year process. When it later confirmed FLA would be available to administer the sixth year E-rate, the Respondent elected to abandon its revised RFP related to T1 service (thereby hoping to save the 13 or 14 percent not covered by the SLD funding).

22. The revised RFP contained the following information:

> For Year 6 (July 1, 2003-June 30, 2004), the school district is planning to seek the services listed below. Any company that desires to submit a proposal for these services must meet the following criteria:
>
> * * *
>
> 3. Be willing to enter into an agreement contingent upon E-Rate funding award. In other words, if the District is not successful in obtaining E-Rate funding

> on the particular service, the agreement will become invalid.
>
> 4. Be willing to accept payment of only the non-discounted portion of the service from the school district and bill the SLD for the remaining portion. (this averages to be 86%)

23. When a vendor is selected to provide E-rate services, SLD requires Form 471 to identify the provider and to complete the requisition started by the process (Form 470). The deadline for filing a Form 471 pertinent to this case (the sixth year) was February 6, 2003. Neither the Respondent nor FLA filed a Form 471 for the T1 services at issue.

24. When the deadline for filing Form 471 passes, the opportunity to receive E-rate funding closes. As of the time of hearing in this cause the possibility of the Respondent receiving E-rate funding was slim to none. No entity filed a Form 471 for T1 services for the sixth year.

25. The Respondent has not selected any vendor to provide E-rate services for the sixth year.

26. The Respondent did not direct FLA to submit the Form 471 with the Intervenor as the provider for T1 during the E-rate sixth year. FLA has not submitted such form.

27. The Respondent did not reject all bids for the purpose of avoiding the procurement process.

28. The Respondent does not have a contract with the Intervenor for T1 services for E-rate, Year 6.

29. The Respondent has not attempted to circumvent policies, rules, laws or statutes governing competitive procurement.

30. The T1 services for the sixth year E-rate are "information technology resources" as defined in Section 282.303(13), Florida Statutes. As such they are not subject to any provision requiring competitive procurement.

## CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Sections 120.569 and 120.57, Florida Statutes.

32. Section 120.57(3)(f), provides:

> (f) In a competitive-procurement protest, no submissions made after the bid or proposal opening amending or supplementing the bid or proposal shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. In any bid-protest proceeding contesting an intended agency action to reject all bids, the standard of review by an administrative law

> judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

33. Based upon the foregoing, the Petitioner bears the burden of proof in this cause to establish that the Respondent, by its action to reject all proposals, acted illegally, arbitrarily, dishonestly or fraudulently. It has failed to meet that burden.

34. In this case the record demonstrates that the Respondent chose to reject all bids in order to save the undiscounted portion of the E-rate funding. That is, to save the 13 or 14 percent amount, the Respondent chose to allow FLA to attempt procurement of the T1 service. The Petitioner submitted a proposal to FLA in response to the RFP. Had the instant action not ensued, the Petitioner, as well as any other vendor submitting a timely proposal, would have been considered for the T1 sixth year E-rate services. As it currently stands the chances are remote that any E-rate funding for the sixth year T1 services will be available to the Respondent.

35. The Petitioner's theory of the case rests with the assumption that a series of e-mails document that the provider for sixth year T1 services has already been designated. Such assumption is not accurate and is not supported by the weight of the credible evidence.

36. Additionally, the Petitioner alleged that the Intervenor has somehow conspired to extend its Year 5 contract. The Intervenor does not have a Year 5 contract. It has provided services covered by Year 5 funding as the "carrier of last resort." Whether it will continue in the sixth year under the status of "carrier of last resort" is unknown.

37. The Petitioner has also suggested that the Respondent is predisposed not to cooperate with the City. No credible evidence supports such conclusion. To the contrary, the weight of the credible evidence could support the conclusion that the Petitioner, finding it would have to be competitively reviewed with other potential vendors, took measures to ensure that no vendor could be named on a Form 471. The instant action effectively took the Respondent out of sixth year E-rate funding participation.

38. Contrary to the Petitioner's assertions, the Respondent's proposed action to reject all submittals and allow the process to proceed via FLA is supported by fact and logic. The opportunity to save 13 or 14 percent of the funding required for T1 service is a legitimate and noteworthy goal. The Respondent has limited resources and such savings could prove important. That the Respondent's staff did not fully comprehend the FLA system and the benefits to be derived through participation in E-rate procurement through the alliance does

not demonstrate some devious or illegal plan to circumvent the bidding process.

39. Further, if, as the Petitioner suggests, the authorization provided to FLA from Year 5 also covers the sixth year, the Respondent did not need to file the Form 470 and RFP at issue. By effectively stopping the procurement process, the Petitioner has essentially guaranteed that the Intervenor cannot receive sixth year funding through the conventional Form 471 (it was not timely filed).

40. The Petitioner presented no credible evidence to support the claims set forth in the Amended Formal Notice of Protest/Petition for Administrative Hearing.

41. Finally, as to outstanding motions for sanctions filed by the Petitioner and Respondent, such motions are denied. It is determined that neither party fully and completely complied with all discovery requests. It is concluded, however, that such failure was not willful or malicious. Neither party has demonstrated either prejudice or other damage due to incomplete responses such that sanctions should be imposed. Sanctions are not warranted under the circumstances of this case.

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Amended Formal Notice of Protest/Petition for Administrative Hearing be dismissed.

DONE AND ENTERED this 1st day of May, 2003, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of May, 2003.

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## NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.