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Nonprofit
Employment
Administrative
Occupational Licensing

October 21, 2019

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

North Carolina State Board of Education

c/o Eric A. Snider

State Board of Education Attorney / Agent for Service of Process

301 N. Wilmington St., Room 212

6302 Mail Service Center

Raleigh, NC 27699-6302

RE: Petition for Rulemaking to North Carolina State Board of Education

Dear Mr. Snider:

Our law firm represents the U.S. Educational Technology Purchasing Alliance (USETPA) with regard to the enclosed Request for Declaratory Ruling and Petition for Rulemaking to the North Carolina State Board of Education, submitted pursuant to N.C. Gen. Stat. §§ 150B-4 and 150B-20, respectively.

We look forward to receiving the Board's response.

Sincerely yours,



Christina D. Cress

Encs.

U.S. EDUCATIONAL TECHNOLOGY PURCHASING ALLIANCE
PETITION FOR RULEMAKING AND REQUEST FOR DECLARATORY RULING
TO
NORTH CAROLINA STATE BOARD OF EDUCATION

I. Introduction

Petitioner U.S. Educational Technology Purchasing Alliance (“Petitioner” or “USETPA”) is a non-profit purchasing organization and consortium formed on behalf of schools, libraries, and local government entities. Petitioner has created a series of contracts for technology goods and services that, by aggregating demand, Petitioner often is able to offer at discounted prices while ensuring compliance with applicable procurement laws and regulations. Petitioner qualifies as a competitive bidding group purchasing program under N.C. Gen. Stat. § 143-129(e)(3).

II. Petition for Rulemaking

Respondent North Carolina State Board of Education (“Agency” or “SBE”) is a State government entity created under Article IX, Section 4 of the North Carolina Constitution to supervise and administer the public school systems of this State. Article IX, Section 5 of the North Carolina Constitution further provides that the SBE “shall supervise and administer the free public school system and educational funds provided for its support,” with the exception of certain funds identified in Article IX, Section 7, “and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.” Indeed, the Agency has confirmed in a prior related actions involving Petitioner that the SBE is in fact the Agency with rulemaking authority regarding the issues raised in this Petition, by confirming that the Agency exerts its authority in

[e]ngaging in rulemaking, responding to petitions for rulemaking...and determining positions on legal matters are activities that accord with the SBE’s constitutionally based authority

to generally supervise and administer North Carolina's system for public education. *See also* N.C. Gen. Stat. § 115C-12; 15 NCAC 1A .0006; State Board of Education Policy SBOP-002 ('Policy on State Board of Education Policy-Making Process'); State Board of Education Policy SBOP-008 ('Definition of State Board Education Policy').

SBE's June 3, 2019 Order Denying Petition for Rulemaking. *See also* SBE's March 18, 2019 Order Denying Request for Declaratory Ruling (advising in part that "[t]hese Petitions are properly directed to [SBE]"). Moreover, a court likewise has made a Finding of Fact that the petitions at issue here and as previously litigated between the instant parties are properly directed to SBE. *See* Para. 14, Order of Superior Court Judge Paul Ridgeway, in the matter of *U.S. Educational Technology Purchasing Alliance v. North Carolina State Board of Education and North Carolina Department of Public Instruction*, 19 CVS 004351 (Sep. 6, 2019).

Pursuant to N.C. Gen. Stat. § 150B-20, the undersigned Petitioner hereby petitions and requests that the N.C. State Board of Education (hereinafter referred to as the "Agency") adopt the attached proposed Rule; or, in the alternative, that the Agency grant the Petition for Rulemaking and initiate the rule-making proceedings pursuant to N.C. Gen. Stat. § 150B-20(c). In addition, Petitioner contends that the procedures set forth in the text of the proposed rule, or any other procedures followed by the Agency with regard to procurement of technology services and the use of cooperative purchasing agreements should be considered a "rule," as defined by N. C. Gen. Stat. § 150B-2(8a).

III. Documentation Submitted in Support of Petitioner's Petition for Rulemaking and Request for Declaratory Ruling

Since the Agency has allowed its former rules regarding Petitions for Rulemaking and Requests for Declaratory Ruling to expire, Petitioner submits the following information and

documentation in order to comply with applicable statutory requirements governing such petitions and requests:

- (1) the text of the proposed rule for adoption or amendment (which is incorporated by reference herein and attached as “Exhibit A”);
- (2) affidavit of John W. Hughes, IV (which is incorporated by reference herein and attached as “Exhibit B”), including a policy memorandum circulated by the Agency (which is incorporated by reference herein and attached as “Exhibit B.1.”);
- (3) a statement of the reasons for adoption or amendment of the proposed rule(s), or the repeal of an existing rule;
- (4) explanation of Petitioner’s standing and status as an aggrieved party;
- (5) a statement of the effect on existing rules or orders; and
- (6) the name(s) and address(es) of the petitioner(s).

IV. Request for Declaratory Ruling

Petitioner additionally contends that it qualifies as an aggrieved party whose rights are affected by the Agency’s decisions and, therefore, submits this Request for Declaratory Ruling pursuant to N.C. Gen. Stat. § 150B-4. In support of this Request, Petitioner submits that the Board should issue a declaratory ruling resolving the issue of whether the Agency’s written and/or unwritten policies with respect to School Connectivity Initiative funds and decisions should be considered a “rule” as defined by N.C. Gen. Stat. § 150B-2(8a), and such rule should be promulgated as a rule in accordance with Article 2A of the North Carolina Administrative Procedure Act. Petitioner further requests that the Agency make a determination regarding the validity of the procedures currently being used and which have likewise been used in the past when they have not been adopted as a “rule” in accordance with Article 2A of the North Carolina Administrative Procedure Act.

V. Aggrieved Party Status

Petitioner is a non-profit purchasing organization and consortium formed on behalf of schools, libraries, and local government entities. Petitioner has created a series of contracts for

technology goods and services that, by aggregating demand, enables Petitioner to offer such goods and services at discounted prices while ensuring compliance with applicable procurement laws and regulations. Petitioner qualifies as a competitive bidding group purchasing program under N.C. Gen. Stat. § 143-129(e)(3). The Agency has established policies, an example of which is attached as an Exhibit hereto, regarding disbursement of the State funds associated with the School Connectivity Initiative and regarding contracts with Local Educational Agencies (LEAs) to spend these funds. Based on such policies and/or their application, LEAs have been precluded from entering into contracts using Petitioner's Master Contracts that would have been funded with State funds through the School Connectivity Initiative. Petitioner's contracts are otherwise eligible, and LEAs could and should be a recipient of these State funds, using Petitioner's contract, as administered and disbursed by the Agency pursuant to the School Connectivity Initiative. Because of such policies, Petitioner has not been awarded contracts using said State funds in the past, even though Petitioner's contracts could have provided the goods and services purchased at a lower price.

Moreover, upon information and belief, the Agency's current contracts will expire in or about March 2020 and the Agency plans to issue a Request for Proposals to create an updated contract in or about November 2019. Use of such new contracts, upon information and belief, will be mandatory for all entities wishing to obtain matching funds from the State. Accordingly, Petitioner's contracts stand to gain or lose a significant amount of State matching funds depending on whether the State continues to follow its improper policies which previously have significantly hindered Petitioner's meaningful participation in the School Connectivity Initiative.

The Agency has distributed funds pursuant to the School Connectivity Initiative, but it has not promulgated any rules to govern the process for awarding these funds, as is required by Article

2A of the North Carolina Administrative Procedure Act. Instead, Respondents have violated the rulemaking requirements set forth in the North Carolina Administrative Procedure Act by establishing informal and/or internal policies or procedures regarding the use and distribution of the funds to be disbursed pursuant to the School Connectivity Initiative. *See* Ex. 1 to Affidavit of John W. Hughes, IV, which is a December 4, 2015 Memo from Michael Nicolaidis to NC Superintendents entitled “PRC 160 – STATE FUNDS FOR E-RATE WIRELESS AND INTERNAL CONNECTIONS.” As a result, the Agency effective has made and continues to make unilateral funding decisions which, thus far, have been to the detriment of Petitioner.

VI. Reasons for Adoption of the Proposed Rule

Since 2007, the North Carolina General Assembly has required the Agency to distribute federal and state funds to Local Educational Agencies (LEAs) in order for those LEAs then to use such funds to purchase internet connectivity, data circuits, and wireless equipment pursuant to the School Connectivity Initiative, enacted as S.L. 2007-323 (House Bill 1473). Petitioner specifically alleges that the Agency has made funding decisions and distributed funds accordingly. While the Agency has awarded and/or distributed funds pursuant to the School Connectivity Initiative, the Agency has not promulgated any rules to govern the process for awarding and distributing the funds. Petitioner, therefore, contends that such failure of the SBE to promulgate said rules is contrary to the requirements of Article 2A of Chapter 150B of the North Carolina General Statutes.

Accordingly, it is clear that a rule should be promulgated here, even if it is not the proposed rule attached to this Petition. Petitioner contends that this specifically violates N.C. Gen. Stat. § 150B-18, which provides in relevant part that

[a]n agency shall not seek to implement or enforce against any person a policy, guidelines, or other interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the

policy, guidelines, or other interpretive statement has not been adopted as a rule in accordance with this Article.

Indeed, the December 4, 2015 Memo is only one such example of an instance in which the Agency has established – improperly and without promulgating rules, as is required by the North Carolina Administrative Procedure Act – policies regarding the disbursement of State funds associated with the School Connectivity Initiative regarding contracts with Local Educational Agencies (“LEAs”) to spend these funds. Based on the December 4, 2015 Memo and other such policies and/or the Agency’s application of such policies, Petitioner has been precluded from entering into contracts with LEAs that would be funded with State funds through the School Connectivity Initiative. Petitioner is otherwise eligible to enter into such contracts, and should and could be a recipient of State funds administered and disbursed pursuant to the School Connectivity Initiative. Because of the December 4, 2015 Memo and other such policies, Petitioner has not been a recipient of said State funds in the past, even though Petitioner could have provided the goods and services purchased at a lower price.

VII. Statement of the Effect of the Proposed Rule on Existing Rules

Since the Agency has not adopted any Rules, policies or procedures related to the School Connectivity Initiative, Petitioner submits that there is no effect on existing rules. If, on the other hand, the Agency contends that the proposed Rule would have an effect on existing rules, policies or procedures, then Petitioner requests that the Agency also make a determination of the validity of those affected rules, policies, or procedures when they have not been adopted pursuant to the rulemaking procedures set forth in Article 2A of the N.C. Administrative Procedure Act.

In addition, Petitioner contends that the procedures set forth in the text of the proposed rule, or any other procedures followed by the Agency with regard to procurement of technology

services and the use of cooperative purchasing agreements should be considered a “rule,” as defined by N. C. Gen. Stat. § 150B-2(8a).

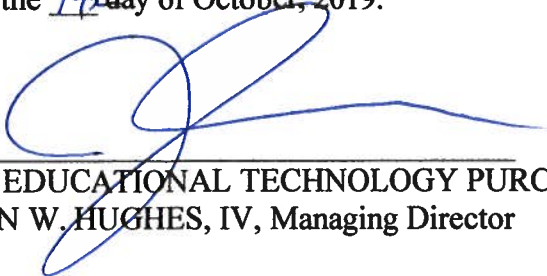
VIII. Name & Address of the Petitioner

U.S. Educational Technology Purchasing Alliance
44387 Glenscape Ln SE
Southport, NC 28461
(919) 391-9558

Petitioner has existing contracts with numerous Local Educational Agencies (LEAs) and also contracts with other local government entities. Therefore, Petitioner's contractual and legal rights or interests, or its rights or interests properly attributable to Petitioner in a cognizable representative capacity, are both directly and indirectly at issue in the requested rulemaking proceeding.

Petitioner U.S. Educational Technology Purchasing Alliance submits this Petition for Rulemaking and Request for Declaratory Ruling through its Managing Director, John W. Hughes IV.

This the 14th day of October, 2019.



U.S. EDUCATIONAL TECHNOLOGY PURCHASING ALLIANCE
JOHN W. HUGHES, IV, Managing Director

PROPOSED RULE FOR FUNDING OF SCHOOL CONNECTIVITY INITIATIVE

(a) In order to provide an allocation of funds to a Local Education Agency (LEA) or Charter school proposing to use School Connectivity Initiative funds to purchase Internet Access, wide area data circuits, wireless equipment, wireless networking hardware, or other related internal connection hardware, the North Carolina State Board of Education (BOE) shall:

1. Receive from the Department of Administration, Division of Purchase and Contract, written confirmation that DPI followed competitive procurement procedures in the service provider selected by the LEA;
2. Receive from the N.C. Department of Information Technology written confirmation that any funding for E-Rate Wireless and Internal Connections is in compliance with FCC requirements; and
3. Receive a competitive bid proposal from the service provider that was approved and accepted by the LEA.

(b) The LEA shall have sole discretion in its choice of the service provider, so long as said provider agrees to honor the most competitive pricing obtained through the BOE's Request for Proposal process.



STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2019 AUG 26 19-CVS-004851

U.S. EDUCATIONAL TECHNOLOGY
PURCHASING ALLIANCE,

WAKE CO. C.S.C.

Petitioner,

BY

v.

AFFIDAVIT OF JOHN W. HUGHES, IV

NORTH CAROLINA STATE
BOARD OF EDUCATION and
NORTH CAROLINA DEPARTMENT OF
PUBLIC INSTRUCTION,

Respondents.

I, John W. Hughes, IV, being first duly sworn, hereby depose and say as follows:

1. I am an adult over eighteen years of age and do not suffer from any physical or mental conditions affecting my competency.

2. I am the Managing Director of Petitioner, U.S. Educational Technology Purchasing Alliance ("USETPA" or "Petitioner") in the above-captioned matter.

3. Petitioner is a non-profit purchasing organization and consortium formed on behalf of schools, libraries, and local government entities.

4. Petitioner has created a series of contracts for technology goods and services that, by aggregating demand, enables Petitioner to offer such goods and services at discounted prices while ensuring compliance with applicable procurement laws and regulations.

5. Petitioner qualifies as a competitive bidding group purchasing program under N.C. Gen. Stat. § 143 129(e)(3).



Affidavit of John W. Hughes, IV

U.S. Educational Technology Purchasing Alliance v. N.C. State Board of Education and N.C.

Department of Public Instruction

19-CVS 004351

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6. Both the State Board of Education (“BOE”) and the N.C. Department of Public Instruction (“DPI”) have established policies -- whether written or unwritten -- regarding the disbursement of the State funds associated with the School Connectivity Initiative and regarding contracts with Local Educational Agencies (“LEAs”) to spend these funds.

7. A copy of one of the policy memos regarding this policy is attached as Exhibit 1.

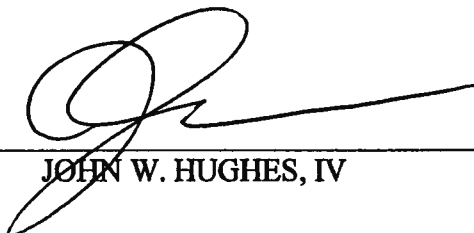
8. Based on these policies and/or their application, Petitioner has been precluded from entering into contracts with LEAs that would be funded with State funds through the School Connectivity Initiative.

9. Petitioner is otherwise eligible, could and should be a recipient of State funds administered and disbursed pursuant to the School Connectivity Initiative.

10. Because of this policy, Petitioner has not been a recipient of said state funds in the past, even though Petitioner could have provided the goods and services purchased at a lower price.

Further the Affiant sayeth not.

This the 23 day of August, 2019.



JOHN W. HUGHES, IV

STATE OF NORTH CAROLINA

WAKE COUNTY

I, KAREN M. MILLER, a Notary Public for the aforesaid County and State, do hereby certify that **JOHN W. HUGHES, IV** appeared before me this day and acknowledged the due execution of the foregoing Affidavit.

Sworn and subscribed before me, this the 23 day of August, 2019.

Karen M. Miller
Notary Public

KAREN M. MILLER
Printed Name

My Commission Expires: 08.19.23

KAREN M MILLER
NOTARY PUBLIC
BRUNSWICK COUNTY, NC
My Commission Expires 8-19-2023

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing AFFIDAVIT OF JOHN W. HUGHES, IV was duly served on all parties by depositing the same in the U.S. Mail, postage prepaid, addressed as follows:

Tiffany Y. Lucas
Special Deputy Attorney General

Stephanie C. Lloyd
Assistant Attorney General
P.O. Box 629
Raleigh, NC 27602
Attorneys for N.C. Department of Public Instruction Process Agent for N.C. State Board of Education

This the 20th day of August, 2019.

NICHOLS, CHOI & LEE, PLLC

By 

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Counsel for Petitioner



PUBLIC SCHOOLS OF NORTH CAROLINA

DEPARTMENT OF PUBLIC INSTRUCTION | June St. Clair Atkinson, Ed.D., *State Superintendent*

WWW.NCPUBLICSCHOOLS.ORG

TO NC Superintendents

FROM Michael Nicolaides

DATE December 4, 2015

PRC 160 - STATE FUNDS FOR E-RATE WIRELESS AND INTERNAL CONNECTIONS

In 2014, the FCC's E-rate program established a budget of \$150 per student, per instructional building, over five years, for the purchase of wireless networking hardware, related internal connection hardware, and installation services, referred to as E-Rate Category 2.

In the spring of 2015, NCDPI managed a statewide procurement of E-rate eligible Category 2 equipment and services. The procurement resulted in the award of 12 contracts and over \$42M in eligible purchases across 61 LEAs. NCDPI disbursed over \$9M from RttT funds to the 61 LEAs to cover the local share of the costs, while E-Rate paid for the remaining costs.

We are pleased to share that the NC Legislature has responded positively to the NCDPI budget expansion request for the School Connectivity Initiative by including \$2M in the current fiscal year (FY16) and \$12M recurring beginning with the next fiscal year (FY17). A primary goal of this funding is to enhance the deployment of wireless infrastructure in the classroom. In support of this goal, NCDPI is adding funds from past year's E-rate reimbursements to NCDPI for this project. For E-rate funding year 2016 (FY16 and FY17), at least \$16M will be available to help fund the local portion of Wi-Fi Category 2 for LEAs and Charter Schools. These funds will be available beginning April 1, 2016 and must be spent by May 31, 2017.

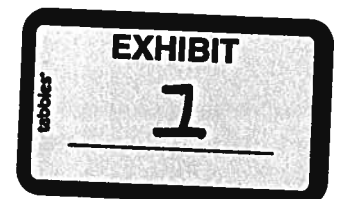
LEAs and Charter Schools must pre-register for state funds by December 31, 2015, in order for NCDPI to accurately estimate the level of demand and determine the allocations. If more than the available funds is requested, an allocation prioritization method will be used to distribute funding in a fair manner, and we will recommend funding the excess requests in the following fiscal year. Funds will be distributed through PRC 160 after receipt of the E-rate Funding Commitment Decision Letter (FCDL) confirming eligible purchases against NCDPI 2015 Wireless RFP/Form-470 contracts. Your Technology Director and E-rate staff will be receiving the process details for fulfilling this requirement.

Please note that we have been able to achieve additional discounts over last year's pricing from several qualified vendors under these contracts. By utilizing these contracts, your staff is freed from the burdens of the RFP process while maintaining compliance with state procurement law.

The attached FAQ provides additional information and the link to pre-register.

MN/msr

Attachment: PRC 160 State Funds for E-rate Wireless and Internal Connections FAQ



TECHNOLOGY SERVICES

Michael Nicolaides, *Chief Information Officer* | Michael.Nicolaides@dpi.nc.gov
6301 Mail Service Center, Raleigh, North Carolina 27699-6316 | (919) 807-3606 | Fax (919) 807-3445
AN EQUAL OPPORTUNITY/AFFIRMATIVE ACTION EMPLOYER

PRC 160 State Funds for E-rate Wireless and Internal Connections FAQ

Q: How does my LEA/Charter pre-register for PRC 160 state funds for E-rate Wireless and Internal Connections?

A: Please have your Technology Director pre-register by **December 31, 2015**, by going to this URL: <http://tinyurl.com/NCDPI-2015-PRC160>. It will ask for technical information on your wireless deployment plans. It also includes the link for updated vendor pricing information.

Q: How much state funding will each LEA or Charter receive? What is the allocation plan?

A: The amount each LEA or Charter receives will be determined based upon the results of the pre-registration process. This information will enable School Connectivity staff to determine the level of demand, the level of need, and develop an allocation plan as early as possible in order to notify applicants of their allocation amounts.

Q: I have instructional facilities that need more than the \$150/student budget in order to meet objectives. What should I do?

A: Contact NCDPI School Connectivity staff (connectivity@dpi.nc.gov) who can help look at your situation. No additional funding is permitted above the budget, but we may be able to help identify a more cost-effective solution.

Q: Can I use the NCDPI RFP vendors to make non-E-rate purchases?

A: Yes. While intended to be used with the E-rate program, all vendors have agreed to honor the pricing for purchases outside of the E-rate program.

Q: Why is the use of NCDPI RFP vendors required in order to receive state funds?

A: The Request for Proposal process is intended to benefit the purchaser with the best possible pricing while giving the selected vendor(s) the benefit of exclusivity. NCDPI sought the best pricing and offered not only exclusivity, but also funding for the initial year and anticipated funding for remaining years, in an effort to attract the best vendors and the best pricing. To permit state funds to be used on vendors outside of the RFP would not be fair, would be clearly outside the intent and purpose of the RFP, and would undermine the state's RFP process.

TECHNOLOGY SERVICES

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