

2009

TELECOMMUNICATIONS
(UNIVERSAL SERVICE FUND) REGULATIONS

S.R.O 34

COMMONWEALTH OF DOMINICA

ARRANGEMENT OF REGULATIONS

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2009 TELECOMMUNICATIONS (UNIVERSAL SERVICE FUND) REGULATIONS S.R.O 34

COMMONWEALTH OF DOMINICA

STATUTORY RULES AND ORDERS No. 34 OF 2009

REGULATIONS

Made by the Minister under section 74 of the Telecommunications Act, 2000 (Act No. 8 of 2000).

(Gazetted 30th July, 2009.)

PART I

PRELIMINARY

1. These Regulations may be cited as the - Short title.

TELECOMMUNICATIONS (UNIVERSAL SERVICE FUND) REGULATIONS 2009.

2. (1) In these Regulations unless the context otherwise requires – Interpretation.

“Act” means the Telecommunications Act; Act No. 8 of 2000.

“bid bond” means a guarantee to ensure that a bid will remain valid during the period stated in the bidding document;

“contract bond” means a bond to secure the performance of a Fund Project;

“contractor” means a telecommunications provider who is awarded a contract in accordance with regulation 31;

“financial year” means the financial year of the Commission;

“Fund” means the Universal Service Fund established under section 44 of the Act;

“Fund Administrator” means a person appointed under regulation 9;

“Fund Operating Plan” means a document outlining proposals for Fund operations for a given year;

“Fund Project” means a project financed from the Fund;

“Guidelines” means a document of policy and procedures issued by ECTEL under regulation 7 for the effective carrying out of these Regulations;

“restricted bidding” means the direct solicitation of a limited number of potential bids where there is reason to believe that the service required is available from a limited number of potential contractors;

“sole source procurement” means the procurement method in which Fund Project implementation contracts are awarded to a telecommunications provider after negotiation without using a bidding procedure;

“universal service” includes the provision of -

- (a) public voice telephony;
- (b) internet access;
- (c) telecommunications services to schools, hospitals and similar institutions, and the physically challenged; or
- (d) other service by which people access efficient, affordable and modern telecommunications.

(2) Terms used in these Regulations have the meanings assigned to them under the Act

Scope

3. The aim of these Regulations is to provide for the management of the Universal Service Fund.

PART II
UNIVERSAL SERVICE FUND

4. (1) In accordance with section 44 of the Act, there shall The Fund.
be established a Universal Service Fund.

(2) The Fund shall be managed by the Commission which shall-

- (a) collect and disburse monies accruing to the Fund;
and
- (b) make all relevant decisions with respect to the Fund consistent with the Act and these Regulations.

(3) The Fund shall consist of -

- (a) contributions by telecommunications providers as specified under the Act and by Order of the Minister;
- (b) any funds that may be directly appropriated by Parliament for purposes of the Fund; and
- (c) official grants, donations, bequests or other contributions, or transfers granted by an individual or other legal entity.

(4) The Commission may refuse any bequest, donation, grant or other contribution if the Commission considers it inconsistent with the best interest of the Fund.

5. (1) The Fund shall be used by the Commission to Objectives.
compensate any telecommunications provider who is required to provide universal service or to otherwise promote universal service pursuant to section 45 of the Act.

(2) In using the Fund to promote universal service the Commission shall-

-
- (a) encourage efficient access to and use of telecommunication networks and services throughout Dominica, with special focus on rural, under-served and maritime areas, with a goal to help promote social, educational and economic development;
 - (b) ensure the reasonable availability and affordability of basic and advanced telecommunications services, including voice telephony and Internet access, as well as broadband connectivity at the community, household and individual levels, particularly where the commercial telecommunications market may be unable to deliver such services in a financially viable manner independently, as well as to the physically challenged, elderly, and indigent communities;
 - (c) provide support for the introduction and expansion of telecommunications services to schools, health facilities and other organizations serving public needs;
 - (d) promote technological innovation in the telecommunications sector.

Role of the Commission.

6. The Commission, in carrying out its obligations under the Act and these Regulations, shall -

- (a) develop appropriate indicators of telecommunications access within Dominica;
- (b) identify appropriate targets for moving toward universal service nationwide within a reasonable time frame;
- (c) determine, in consultation with ECTEL and the public and industry stakeholders, appropriate socio-economic criteria to identify the geographic areas, population groups, institutions and organizations that may be eligible to benefit from Fund Projects;

- (d) establish mechanisms for proper management of the Fund;
- (e) approve the application, qualification, and competitive bidding conditions for the award of funds under designated projects;
- (f) evaluate and define the scope and terms of potential Fund Projects;
- (g) monitor Fund Projects and enforce the terms of Fund Project contracts;
- (h) monitor and enforce the mechanism for the assessment, collection and recovery of the required contributions to the Fund;
- (i) liaise and consult with the Minister and ECTEL to promote consistency between the operation of the Fund and national and regional telecommunications policies and take into account the policy of Government when determining which fund projects would receive funding in any financial year;
- (j) liaise and consult with telecommunications providers and other industry stakeholders on the status of telecommunications industry technologies, markets, and other relevant developments;
- (k) determine in consultation with ECTEL, whether sole source procurement can be used.
- (l) adopt the Guidelines for the effective carrying out of these Regulations; and
- (m) implement the Guidelines for the operation of the Fund.

Role of ECTEL.

7. (1) ECTEL shall provide assistance to the Commission in relation to the performance of technical tasks associated with the management of the Fund.

(2) Without limiting the generality of sub-regulation (1) ECTEL may contribute financial, accounting, technical and legal expertise in any or all of the following -

- (a) maintenance of Fund accounts;
- (b) telecommunications market analysis and review of Fund goals and objectives;
- (c) identification of prospective Fund Projects;
- (d) conduct of project appraisals for short-listed projects;
- (e) development of documents and other materials for the competitive bidding process, including bidding documents;
- (f) evaluation of bidder eligibility and technical and financial proposals;
- (g) evaluation of bids;
- (h) preparation of annual reports, project reviews and monitoring; and
- (i) reviewing and monitoring Fund Projects.

(3) ECTEL shall recommend to the Commission whether sole source procurement may be used where the Commission determines that sole source procurement is the method to be used to award a contract to implement a Fund Project.

(4) ECTEL shall issue guidelines for the effective carrying out of these Regulations.

Allocation of funds.

8. (1) The Commission shall take into account the objectives outlined in regulation 5 when allocating funds for Fund Projects.

(2) In identifying projects for fund allocation the Commission -

- (a) shall promote the establishment of efficient, self-sustaining entities, which may continue to expand access to telecommunications on their own initiative, requiring the minimum amounts of Fund resources possible;
- (b) may use the Fund to support projects that may not be economically feasible without Fund support;
- (c) may use the Fund to finance projects to the extent necessary to create adequate economic incentives for investors.

PART III

FUND ADMINISTRATION

9. (1) There shall be a Fund Administrator who shall be appointed by the Commission. Fund Administrator.

(2) In appointing the Fund Administrator, the Commission shall consider candidates who -

- (a) are graduates of an accredited university, or a chartered or certified institute;
- (b) are knowledgeable and experience in one or more of the following:
 - (i) management;
 - (ii) finance;
 - (iii) accounting;
 - (iv) telecommunications; or
 - (v) any other related field to ensure adequate performance of the requirements of the position; and

(c) satisfy the Commission that they do not have a conflict of interest with regard to the principal functions of the Fund.

(3) A candidate shall satisfy the Commission that he does not have a conflict of interest with regard to the principal functions of the Fund

(4) A person who fails to disclose a conflict of interest to the Commission shall be liable to have his appointment as Fund Administrator summarily terminated without compensation.

(5) Subject to sub-regulation (5) the Fund Administrator shall be appointed on such terms and conditions as shall be set out in the contract of employment.

(6) The fund administrator shall report to the administrative head of the secretariat of the commission for all personnel and administrative matters.

(7) The Fund Administrator shall submit his recommendations for Fund Project decisions to -

(a) the administrative head of the secretariat of the Commission; and

(b) the Chairman of the Commission.

Duties of the Fund Administrator.

10. (1) Subject to the direction of the Commission, the Fund Administrator shall do all things necessary and incidental to the proper functioning of the Fund.

(2) The Fund Administrator's duties include -

(a) assisting the Commission in identifying potential projects for Fund support;

-
- (b) defining, preparing and distributing Bidding Documents and other documentation for projects approved for Fund financing and implementation;
 - (c) supervising and monitoring Fund Projects;
 - (d) participating in the selection of consultants to support Fund Project implementation;
 - (e) sensitizing the public of Universal Service Fund matters;
 - (f) supervising the preparation and monitoring of the Fund's Operating budget;
 - (g) preparing progress reports on Fund Projects and overall Fund operations, and prepare or cause to be prepared the financial statements of the Fund for the approval of the Commission; and
 - (h) requesting and receiving project proposals;
 - (i) preparing bid evaluation reports.

11. (1) The Fund Administrator is deemed to have a conflict of interest for the purposes of these Regulations, where he, or anyone in his immediate family has or acquires any pecuniary or other personal interest with respect to any Fund Project.

Conflict of interest.

(2) Where at any time the Fund Administrator has a conflict of interest in relation to any matter with respect to the Fund, the Fund Administrator shall immediately disclose the conflict of interest to the Commission and refrain from taking part, or any further part, in the matter.

(3) In such instances as described in sub- regulation (2), the Commission may appoint a temporary or interim person to carry out the functions of Fund Administrator in relation to the relevant Fund Project.

(4) Upon the Commission becoming aware of any conflict of interest, it shall take steps to ensure that the Fund Administrator does not participate in any decisions and actions relative to the

matter giving rise to the conflict, and to modify its procedures accordingly with respect to that matter.

PART IV
ACCOUNTING REQUIREMENTS

Fund bank accounts.

12. (1) Any monies accruing to the Fund shall be kept in one or more accounts, separate and independent from the other operating accounts of the Commission.

(2) Any monies accruing to the Fund shall be initially deposited in a designated Fund bank account and shall be disbursed upon authorization of the Commission for specific Fund related activities in accordance with the Guidelines.

Budget.

13. (1) The Commission shall prepare and keep separate budgets for the Fund Projects and Operations through accounting allocations.

(2) The Operating Budget shall be used for operating the Fund and administrative expenses charged to the Fund shall not exceed 10% of the annual budget of the Fund.

(3) The Fund Project Budget shall be allocated to Fund Projects that have been selected and approved for financing in accordance with these Regulations.

(4) Before the end of the financial year, the Commission shall prepare budget forecasts for the Fund for the following financial year, subject to the Fund Operating Plan, in accordance with the Guidelines.

Accounts and Financial Audit.

14. (1) The Commission shall keep books of accounts and maintain proper records of the operations of the Fund in accordance with International Accounting Standards.

(2) The accounts of the Fund may at any time and shall, at the end of each financial year, be audited by an independent auditor appointed by the Commission on such terms and conditions as the Commission may determine.

15. The Commission shall include in its Annual Report - Annual Report.

- (a) the audited Financial Statements of the Fund;
- (b) details of activities supported by the Fund; and
- (c) details of awards of contracts.

PART V

FUND PROJECTS

16. (1) A person may submit a proposal for a Fund project, according to procedures and formats to be set forth in the Guidelines. proposals for funds projects.

(2) The Fund Administrator shall request and receive project proposals for review.

17. (1) The Commission shall establish criteria, in accordance with the Guidelines for determining the scope and nature of projects that may be eligible for Fund support in any given financial year. Defining fund projects.

(2) The Commission shall determine which proposed projects shall receive financial support from the Fund in any given financial year.

(3) A determination in accordance with sub-regulation (2) shall be based upon clear and transparent procedures, which may also include public consultations.

(4) Fund Project Bidding Documents shall not unduly favour any particular bidder.

18. (1) Any project to be financed from the Fund shall be developed with regard to the economic evaluation of the costs and benefits to the country and the targeted populations, in accordance with the Guidelines. Financial Analysis principles and methods.

(2) The Commission shall seek to support projects that can be self-sustaining beyond the Fund support.

(3) The Commission shall consult with ECTEL when conducting financial and market analysis to evaluate factors that may influence a project's viability.

(4) In all financial and economic analysis, the Commission and ECTEL shall incorporate forward-looking estimates of costs and revenues, based upon realistic projections and verifiable sources of information concerning market trends.

Compensation for fund projects.

19. (1) In accordance with section 45 of the Act, the Fund shall compensate a telecommunication provider who is required to provide universal service.

(2) For the purposes of section 45 of the Act actual cost means the net present value of net economic deficits that would be incurred by the telecommunications provider undertaking the full cost of the project on its own.

(3) Net economic deficit shall be calculated as the costs the provider would have avoided by not providing the service (including capital expenditures, operating expense, and a reasonable rate of return) less any revenues derived from providing the service.

PART VI PROCUREMENT

Eligibility.

20. (1) Notwithstanding the terms of its licence, a telecommunications provider is eligible to bid for any Fund Project.

(2) A potential bidder is not eligible to bid for Fund Projects where that bidder has been barred from participation in the procurement process in accordance with the procedure set out in the guidelines.

21. (1) Subject to sub regulation (2) Fund project implementation contracts shall be awarded on the basis of an open competitive bidding procedure. Procurement.

(2) Notwithstanding subregulation (1), where the Commission considers appropriate, Fund Project implementation contracts may be awarded on the basis of a restricted bidding procedure, a sole source procurement procedure or an emergency procurement procedure.

(3) The Commission shall determine which method of procurement is appropriate in the circumstances and manage the procurement process in accordance with the requirements and procedures set out in the Guidelines.

(4) Where the Commission intends to use a method of procurement other than open competitive bidding, it shall notify the public of its intention to do so and the grounds for the choice of the procurement method to be used.

22. Where the Commission determines that open competitive bidding is appropriate in the circumstances, it shall prepare Bidding Documents and publicly invite eligible interested parties to submit open competitive bids. Open competitive bidding.

23. Restricted bidding may be used where the estimated cost of the project is less than EC\$250,000. Restricted bidding.

24. Where the Commission determines, in consultation with ECTEL that there is only one economically feasible source to undertake a particular Fund project the Commission may use sole source procurement. Sole source procurement.

25. (1) The Commission may make emergency procurements for a Fund Project without bidding or prior notice when there exists a threat to public health or public safety, or when immediate expenditure is necessary to prevent or minimize serious disruption in services. Emergency procurement.

(2) Emergency procurements for a given year pursuant to sub-regulation (1) shall not exceed 15% of the Fund Project budget of any operating year.

Bid bond.

26. (1) The Commission may, where applicable and in such a manner as outlined in the Guidelines, include in the Bidding Documents a requirement for a bid bond.

(2) Forfeiture of a bid bond shall be imposed by the Commission only in the event of -

- (a) a modification or withdrawal of a bid after the deadline for the submission of bids during its period of validity;
- (b) refusal by a bidder to accept a correction of an error appearing on the face of the bid;
- (c) failure by a successful bidder to sign a contract in accordance with the terms set forth in the Bidding Documents;
- (d) failure by a successful bidder to provide a contract bond for the performance of the contract as required by the Commission.

Bid opening.

27. The Commission shall include in the Bidding Documents the date, time, details and procedure for the opening of bids.

Bid evaluation.

28. (1) The Commission may co-opt independent evaluators to examine and evaluate the bids.

(2) On completion of the evaluation, the Fund Administrator shall prepare a written report detailing the examination and evaluation of bids and identifying the winning bidder.

Notice.

29. The Commission shall notify bidders of the results of the bidding process within twenty eight days of the bid opening.

30. (1) The Commission may reject all bids within twenty one days of the bid opening where the Commission considers that the bids received are not substantially responsive to the requirements of the Bidding Documents or that the bid prices are higher than the project budget and shall inform the bidders of the rejection by written notice.

Rejection of all bids.

(2) Where the Commission rejects all bids because the lowest evaluated responsive bid exceeds the project budget, the Commission may -

(a) enter into negotiations within seven days of the notice referred to in regulation 29 with the lowest evaluated bidder to try and obtain a satisfactory contract; or

(b) repeat the invitation for bids.

(3) Where the Commission rejects all bids because the bids are not substantially responsive to the requirements of the Bidding Documents the Commission shall review the causes justifying the rejection and consider making revisions to the Bidding Documents before repeating the invitation for bids.

31. (1) Where open competitive bidding or restricted bidding is used the Commission shall award the contract within twenty-one days of the bidder whose bid best meets the requirements and criteria set out in the Fund Project bidding documents by written notice to the successful bidder.

Award.

(2) On selection of the successful bidder, the Commission shall cause the results to be published in a newspaper of wide circulation in Dominica and posted on the Commission's website.

(3) After the award of the contract, the Commission shall cause the evaluation report to be opened to public inspection.

(4) Where sole source or emergency procurements are used, the Commission shall award the contract within fourteen days of successful negotiation of the contract.

(5) The award of a contract is subject to the grant of a licence.

(6) The Commission may require a contractor to give a contract bond guaranteeing complete execution of the Fund Project as required by the contract.

Disputes and protests.

32. The Commission shall give consideration to disputes and protests relating to -

- (a) Bidding Documents;
- (b) contract award;
- (c) debarment of contractors; and
- (d) other Fund Project related matters

in accordance with the Guidelines.

Cancellation of invitations for bids.

33. (1) The Commission may cancel without penalty to bidders an invitation for bids or any other solicitation where it is in the best interest of the Fund.

(2) The Commission shall notify bidders of the reasons for cancellation.

(3) The Commission shall publish the reasons for cancellation on its website.

(4) Where an invitation for bids is cancelled, the Commission shall return within seven days in full any bid bond that was deposited with it to all bidders who were required to deposit a bid bond.

PART VII

PROJECT IMPLEMENTATION

Project implementation and follow-up.

34. (1) The Commission shall ensure that all Fund Projects are implemented in accordance with the terms and conditions of the contract.

(2) A contractor shall provide periodic reports to the Commission, detailing its progress in fulfilling contractual requirements and timetables, and explaining any delays.

(3) The Commission may in cases it considers appropriate provide an advance payment of no greater than 20% of the total Fund Project, subject to reimbursement or a lien against equipment purchased in cases of non-compliance in accordance with regulation 32.

35. (1) A contractor that receives Fund financing shall maintain separate books of account for each Fund Project and shall make these accounts available for review by the Commission within twenty one days of a request from the Commission.

Project accounts.

(2) Accounts kept under sub-regulation (1) shall include detailed records of all revenue and expenditure associated with the project, including calculation of the net costs of the project.

36. (1) A contractor Fund financing shall maintain books and records relating to the performance of the contract for a period of seven years from the date of final payment under the contract or completion of the contract, whichever is later.

Right to audit records.

(2) A contractor shall maintain all books and records required under sub- regulation (1) for review and audit by the Commission or anyone designated by the Commission.

(3) The Commission shall audit or cause to be audited a Fund Project at least once per year for each year that a Fund Project contract is in force, and at the end of the contract period, and the telecommunications provider shall cooperate fully with all audits.

37. (1) Where a contractor fails to complete or comply with the requirements of a Fund Project contract, the Commission may require -

Sanctions for non-compliance.

-
- (a) the contractor to compensate it up to the amount of funds paid, plus any administrative and legal costs incurred; or
- (b) the contractor to, where a contract bond was given by the contractor to secure the repayment of sums advanced by the Commission to execute a Fund Project -
- (i) pay or satisfy any claim or entitlement to payment of damages, compensation or other financial relief; or
- (ii) pay or satisfy such claim or entitlement up to the Bond Amount or at the Commission's option to perform or execute the contract or any other contractual obligation relating to the Fund Project.
- (2) The Commission shall not require compensation under sub-regulation (1) until dispute resolution provisions under the contract have been exhausted.

Made this 17th day of July, 2009.

HON. REGINALD AUSTRIE
Minister for Telecommunications

DOMINICA

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