IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

SYRINGA NETWORKS, LLC, an Idaho limited liability company,

Plaintiff,

vs.

IDAHO DEPARTMENT OF ADMINISTRATION, J. MICHAEL "MIKE" GWARTNEY, in his personal and official capacity as Director and Chief Information Officer of the Idaho Department of Administration; Department of Administration; JACK G. "GREG" ZICKAU, in his personal and official capacity as Chief Technology Officer and Administrator of the Office of the CIO; EDUCATION NETWORKS OF AMERICA, Inc., a Delaware corporation; QWEST COMMUNICATIONS COMPANY, LLC, a Delaware limited liability company;

Defendants.

Case No. CV-OC-09-23757

MEMORANDUM DECISION AND ORDER RE:

1) MOTION TO AMEND COMPLAINT AND

2) MOTION TO RENAME COUNT THREE AND TO AMEND PARAGRAPH 94.

On January 14, 2014, the Court heard argument on Syringa Networks, LLC's ("Syringa") April 18, 2013 Motion to Amend Complaint and Syringa's December 2, 2013 Motion to Rename Count Three and to Amend Paragraph 94. Syringa was represented by David R. Lombardi, Givens Pursley, LLP. The Idaho Department of Administration ("DOA"), J. Michael Gwartney ("Gwartney") and Jack G. Zickau ("Zickau") were represented by Steven F. Schossberger,

Hawley Troxell Ennis & Hawley, LLP. The Court took the matters under advisement. For the reasons set forth below, the Court will deny the Motion to Amend Complaint, and the Court will grant the Motion to Rename Count Three and to Amend Paragraph 94.

Background and Prior Proceedings

As detailed in *Syringa Networks, LLC v. Idaho Department of Administration*, 155 Idaho 55, 305 P.3d 499 (2013), Syringa filed this action challenging the bidding process which excluded Syringa from providing technical network services for the Idaho Education Network ("IEN"), a statewide coordinated and funded high-bandwidth education network.

Syringa's Verified Complaint asserted numerous causes of action against the DOA, Gwartney[1], DOA's Director during the bid process, Zickau, Chief Technology Officer and Administrator of DOA's Office of the Chief Information Officer, Qwest Communications Company, LLC ("Qwest") and ENA Services, LLC ("ENA"), a division of Education Networks of America, Inc. In Count One of the Complaint, Syringa alleged that DOA breached contract obligations by awarding the work proposed for Syringa to Qwest. In Count Two, Syringa sought a declaratory judgment that the award of work to Qwest was a violation of Idaho Code § 67-5726.[2] In Count Three, Syringa sought declaratory judgment that the award of work to Qwest

[1] Gwartney has retired since the commencement of this action.

[2] "1) No contract or order or any interest therein shall be transferred by the contractor or vendor to whom such contract or order is given to any other party, without the approval in writing of the administrator. Transfer of a contract without approval shall cause the annulment of the contract so transferred, at the option of the state. All rights of action, however, for any breach of such contract by the contracting parties are reserved to the state. No member of the legislature or any officer or employee of any branch of the state government shall directly, himself, or by any other person in trust for him or for his use or benefit or on his account, undertake, execute, hold or enjoy, in whole or in part, any contract or agreement made or entered into by or on behalf of the state of Idaho, if made by, through, or on behalf of the department in which he is an officer or employee; or if made by, through or on behalf of any other department unless the same is made after competitive bids.
(2) Except as provided by section 67-5718, Idaho Code, no officer or employee shall influence or attempt to influence the award of a contract to a particular vendor, or to deprive or attempt to deprive any vendor of an acquisition contract.

was a violation of Idaho Code § 67-5718A.[3] In Count Four, Syringa alleged that the conduct of the DOA, Gwartney, Zickau and Qwest constituted tortious interference with Syringa's "teaming agreement" with ENA. In Count Five, Syringa asserted that Qwest's conduct constituted tortious interference with Syringa's prospective arrangement with ENA. In Count Six, Syringa alleged that ENA breached its obligations under the teaming agreement.

In earlier decisions, this Court granted summary judgment against Syringa on all counts and, on March 8, 2011, entered judgment in favor of the Defendants. Syringa appealed this judgment. In its decision, the Supreme Court determined that this court erred in dismissing Count Three of the complaint. The Supreme Court affirmed the dismissal of all other counts.

To better understand the context of the pending motions, the Court will summarize the relevant facts. In December, 2008, DOA issued a Request for Proposals to provide goods and

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(3) No officer or employee shall conspire with a vendor or its agent, and no vendor or its agent shall conspire with an officer or employee, to influence or attempt to influence the award of a contract, or to deprive or attempt to deprive a vendor of an acquisition award.
(4) No officer or employee shall fail to utilize an open contract without justifiable cause for such action. No officer or employee shall accept property which he knows does not meet specifications or substantially meet the original performance test results.
(5) Deprivation, influence or attempts thereat shall not include written reports, based upon substantial evidence, sent to the administrator of the division of purchasing concerning matters relating to the responsibility of vendors.
(6) No vendor or related party, or subsidiary, or affiliate of a vendor may submit a bid to obtain a contract to provide property to the state, if the vendor or related party, or affiliate or subsidiary was paid for services utilized in preparing the bid specifications or if the services influenced the procurement process." Idaho Code § 67-5726.

[3] "1) Notwithstanding any provision of this chapter to the contrary, the administrator of the division of purchasing may make an award of a contract to two (2) or more bidders to furnish the same or similar property where more than one (1) contractor is necessary:
(a) To furnish the types of property and quantities required by state agencies;
(b) To provide expeditious and cost-efficient acquisition of property for state agencies; or
(c) To enable state agencies to acquire property which is compatible with property previously acquired.
(2) No award of a contract to multiple bidders shall be made under this section unless the administrator of the division of purchasing makes a written determination showing that multiple awards satisfy one (1) or more of the criteria set forth in this section.
(3) Where a contract for property has been awarded to two (2) or more bidders in accordance with this section, a state agency shall make purchases from the contractor whose terms and conditions regarding price, availability, support services and delivery are most advantageous to the agency.
(4) A multiple award of a contract for property under this section shall not be made when a single bidder can reasonably serve the acquisition needs of state agencies. A multiple award of a contract shall only be made to the number of bidders necessary to serve the acquisition needs of state agencies." Idaho Code § 67-5718A.

technical services for the first phase of implementing the IEN, which included connecting every Idaho public high school with a high speed network connection. In broad terms, the first phase would involve two main aspects: 1) providing the network "backbone" connectivity, and 2) providing statewide E-rate[4] services. ENA submitted a proposal in which ENA would be responsible for E-rate services. ENA proposed to use Syringa to provide the backbone. Qwest also submitted a proposal in which Qwest proposed to provide both backbone and E-rate services. On January 28, 2009, DOA issued two (2) nearly identical contract awards for the first phase implementation of the IEN, one to ENA, and the other to Qwest. On February 26, 2009, DOA issued change orders to each contract. The effect of the change orders was to make Qwest the exclusive provider of backbone services, and to make ENA the exclusive provider of E-rate services.

In Count Three of the Complaint, Syringa alleged that the multiple awards violated Idaho Code § 67-5718A. Syringa claimed that DOA should have made only one award: to ENA/Syringa. Syringa sought a ruling that the award to Qwest violated Idaho Code § 67-5718A by making two awards. Syringa sought an order vacating the original award to Qwest. In granting summary judgment against Syringa on Count Three, this Court determined that Syringa was barred from pursuing a judicial challenge to the bidding process because Syringa did not pursue any administrative remedy.

In its Opinion, the Supreme Court reversed the ruling that Syringa failed to exhaust its administrative remedies, finding that there was no administrative remedy for Syringa to pursue.[5]

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[4] E-rate is a reference to the Schools and Libraries Program of the Universal Service Fund. *See* February 9, 2011 Memorandum Decision and Order re: Motions for Summary Judgment at p2-3.

[5] On appeal, Syringa abandoned the argument that the multiple awards violated Idaho Code § 67-5718A. In fact, Syringa conceded that the original awards to ENA and Qwest "complied with Idaho Code § 67-5718A." *See*

However, rather than simply reverse on this point and remand, the Supreme Court also analyzed the manner in which DOA made these awards. The Supreme Court found that the contract amendments making ENA the E-rate service provider and making Qwest the backbone provider constituted a material variation from the terms of the RFP in that ENA and Qwest were no longer providing the same or similar goods and services in violation of Idaho Code § 67-5718(2)[6] and IDAPA 38.05.01.052[7] The Supreme Court ruled that the amended contracts did not conform to the RFP's description of the property to be acquired because the RFP did not seek one bid for the backbone and a separate bid for the E-rate services. The Supreme Court stated: "[a]ll contracts made in violation of [Idaho Code § 67-5718] are void and any money advanced by the State in consideration of such contracts must be repaid." *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 155 Idaho 55, ____, 305 P.3d 499, 504 (2013). The Supreme Court opinion indicated that multiple awards that do not require the same or similar property would also constitute a violation of Idaho Code § 67-5718A.

In its Conclusion, the Supreme Court stated:

> We remand [count three] for further proceedings that are consistent with this opinion. We reverse Qwest's award of attorney fees against Syringa. We remand to the trial court the determination of whether any of the State Defendants are entitled to an award of attorney fees against Syringa for proceedings in the district court.

Id. at 512.

Plaintiff's/Appellants Opening Brief at p. 16 (Supreme Court Docket No. 38735-2011). Instead, Syringa argued that DOA violated Idaho Code § 67-5718A by making multiple awards for dissimilar services. *Id.* at p. 16.

[6] "Notice shall be posted of all acquisitions of property, unless otherwise excepted by rules of the division. The notice may be posted electronically. The administrator shall also cause all invitations to bid and requests for proposals to be posted manually in a conspicuous place in the office. The notice shall describe the property to be acquired in sufficient detail to apprise a bidder of the exact nature or functionality of the property required; and shall set forth the bid opening date, time and location." Idaho Code § 67-5718 (2).

[7] "An invitation to bid or request for proposals may be changed by the buyer through issuance of a written addendum, provided the change is issued in writing prior to the bid opening date and is made available to all vendors receiving the original solicitation. . . ." IDAPA 38.05.01.052

In his concurring opinion, Justice J. Jones made the following statement:

> Because the teaming agreement was insufficient for enforcement, Syringa's claim against Mr. Gwartney for tortious interference with contract is not sustainable. That claim was alleged specifically against Gwartney, the Department of Administration, Zickau and Qwest. The tortious interference with prospective economic advantage claim was alleged only against Qwest. That claim did not depend upon the existence of an enforceable contract. Had it been alleged against Gwartney, I would have found sufficient evidence and inferences in the record to allow the matter to go trial. . . . In all, there was sufficient evidence to have sustained a cause of action for tortious interference with prospective advantage as against Gwartney, had one been pleaded against him. However, it was not.

Syringa Networks, LLC v. Idaho Dep't of Admin., 155 Idaho 55, ____, 305 P.3d 499, 512 (2013). Justice Horton concurred with this assessment.

The Remittitur was entered on September 8, 2013. It orders the Court to comply with the directive of the Supreme Court's Opinion.

A short time after the Supreme Court Opinion was entered, and prior to the entry of the Remittitur, Syringa filed a motion to amend the complaint pursuant to I.R.C.P. 60(b)(6) and 15(a). In the motion, Syringa seeks to set aside the Court's March 18, 2011 Judgment to permit Syringa to allege a new claim against Gwartney and Zickau for tortious interference with prospective economic advantage with ENA. The motion was supported by an affidavit of counsel, and later, a supporting memorandum. On December 2, 2013, Syringa filed a motion to amend the remanded Count Three to include a new claim seeking a declaration that the award to ENA was void. Syringa filed a supporting memorandum. On January 7, 2014, DOA, Gwartney and Zickau filed an opposition to the initial motion to amend. On January 7, 2014, DOA filed a separate opposition to the second motion to amend. On January 10, 2014, Syringa filed a combined reply to the oppositions.

Discussion

A. The motion to amend re: Gwartney and Zickau.

The motion to set aside the judgment is based upon I.R.C.P. 60(b)(6) which provides that: "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment . . . for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment." It is settled that to obtain relief under Rule 60(b)(6): "[t]he party making a Rule 60(b)(6) motion must demonstrate unique and compelling circumstances justifying relief." *In re Estate of Bagley,* 117 Idaho 1091, 1093, 793 P.2d 1263, 1265 (Ct. App. 1990). While a court has broad discretion to grant or deny a Rule 60(b) motion, the court's discretion is limited under Rule 60(b)(6) in the sense that the court must find circumstances that are unique and compelling. *Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 449, 283 P.3d 757, 766 (2012).

Syringa points to its July 9, 2009 tort claim notice in which Syringa alleged upon information and belief that Syringa had a claim for tortious interference with prospective economic advantage against DOA's employees. However, Syringa's complaint did not include this claim against Gwartney or Zickau. Syringa asserts that it did not develop facts that would support the claim of tortious interference with prospective economic advantage against DOA employees until it was able to take a number of depositions in late 2010. Syringa also asserts that it would have been futile to file a motion to amend to state these claims after the Court issued its summary judgment ruling on February 11, 2011 in which the Court indicated that the failure to exhaust administrative remedies would bar a claim of tortious interference based upon non-compliance with a bidding statute, i.e. making a multiple award. *See* February 9, 2011 Memorandum Decision and Order re: Motions for Summary Judgment at pp. 2-3.

As an exercise of discretion, the Court does not find that these circumstances demonstrate unique and compelling circumstances. Syringa filed this complaint on December 15, 2009. It did

not allege a claim of interference with prospective economic advantage against Gwartney or Zickau. The trial of this matter was scheduled to begin on April 11, 2011. Syringa has no explanation why it did not conduct discovery into this issue early on, or why it did not file a motion to amend prior to entry of summary judgment. In the Court's view, because Syringa could have developed facts and presented this issue prior to the entry of summary judgment, Syringa has failed to demonstrate unique and compelling circumstances.

The Court first addressed the failure to pursue an administrative remedy in its **Substitute** Memorandum Decision and Order entered on July 23, 2010. In this decision, the Court ruled that Syringa had an administrative remedy under Idaho Code § 67-5733 and that Syringa was barred from pursuing the challenge to the RFP awards in Count Two and Count Three of the complaint. Since the breach of contract claim in Count One was based upon the claim that DOA improperly made a multiple award, the Court ruled that Syringa was barred from pursuing the contract claim in Count One. The Court also stated that the failure to exhaust administrative remedies was not fatal to the tortious interference with contract claim ruled that because it did not appear that the tortious interference claim was based upon DOA's decision to make multiple awards.

The Court also addressed the exhaustion of administrative remedy in its Memorandum Decision and Order re: Motions for Summary Judgment entered February 9, 2011. DOA, Gwartney and Zickau moved for summary judgment on the claim in Count Four that the Gwartney and Zickau wrongfully interfered with the teaming agreement between ENA and Syringa. In its opposition, Syringa asserted that Gwartney and Zickau argued that the wrongful act, in part, was the issuance of the amendments that were not for the same or similar property in violation of Idaho Code § 67-5718A. *See* January 4, 2011 Supplemental Brief in Opposition to State Defendants' Motion for Summary Judgment and Qwest Communications Company LLC's Motion for Partial Summary Judgment at p. 7. In its decision, the Court held that the tortious

interference claim was barred to the extent that it relied on non-compliance with the bidding statute.

While the Court agrees that Syringa likely was justified in failing to pursue the claim for interference with prospective economic advantage after the February 9, 2011 decision, Syringa certainly had more than a year after the filing of the complaint to pursue this claim. In the Court's view, failing to do so does not present a unique or compelling circumstance. Accordingly, as an exercise of its discretion, the Court will deny the motion to set aside the judgment against Gwartney and Zickau to permit Syringa to file new claims against them.

B. The motion to amend re: ENA

In the December 2, 2013 motion to amend Count Three, Syringa proposes: 1) to add specific references to Idaho Code § 67-5718; 2) to make specific reference to the amended awards to Qwest and ENA; and 3) to seek a ruling: a) that the awards to Qwest and ENA are void as a matter of law; and b) enjoining DOA from using Qwest and ENA as contractors for the IEN RFP. DOA argues that the motion should be denied because granting the motion would exceed the scope of the Remittitur. DOA argues that the court lacks jurisdiction to permit an amendment to the complaint that is beyond the scope of the Remittitur. DOA also argues that Syringa is estopped from asserting that the original RFP awards were unlawful.

In this case, the Supreme Court has ruled that in amending the awards, DOA violated Idaho Code § 67-5718. The Supreme Court was clear on this matter:

> By amending the contracts so that Qwest and ENA were no longer furnishing the same or similar property, the State has, in effect, changed the RFP after the bids had been opened in violation of Idaho Code § 67-5718 and IDAPA 38.05.01.052.

Syringa, 305 P.3d at 506. In the original complaint, Syringa did not seek to invalidate the award to ENA. Count Three was specific to Qwest. The Remittitur requires this Court to comply with

the directive of the Supreme Court Opinion. The Opinion remands Count Three for further proceedings consistent with the Opinion. The Supreme Court has ruled that DOA violated Idaho Code § 67-5718 in making the amended awards to Qwest and ENA. In the Court's view, the proposed amendment to Count Three is consistent with the Opinion of the Supreme Court. Accordingly, the Court will find there is good cause to grant the motion to amend Count Three.

Conclusion

As explained above, the Court will deny the motion to set aside the judgment so that new claims can be asserted against Zickau and Gwartney, and the Court will grant the motion to rename and amend Count Three.

IT IS SO ORDERED.

Dated this 25 day of February, 2014.

Patrick H. Owen
District Judge

CERTIFICATE OF MAILING

I, Christopher D. Rich, the undersigned authority, do hereby certify that I have mailed, by United States Mail, a true and correct copy of the within instrument as notice pursuant to Rule 77(d) I.R.C.P. to each of the attorneys of record in this cause in envelopes addressed as follows:

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By _____ Deputy Clerk