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; ENA SERVICES, LLC, a Division of EDUCATION NETWORKS OF AMERICA, INC., a Delaware corporation; QWEST COMMUNICATIONS, LLC, a Delaware limited liability company;

Defendants.

Case No. CV-OC-2009-23757

MEMORANDUM DECISION AND ORDER RE: MOTIONS TO RECONSIDER

Background and Prior Proceedings

In response to legislation creating the Idaho Education Network ("IEN") as a high-bandwidth telecommunications distribution network for every public school in Idaho,[1] on December 15, 2008, the State of Idaho issued Request for Proposal ("RFP") 02160 for the design and implementation of the IEN. The RFP contemplated a five (5) year contract, with

[1] 2008 Sess. Laws, Ch. 260, § 3, codified at Idaho Code § 67-5745D.

three (3) five (5) year extensions. RFP at § 5.3.[2] The scope of the project was the entire design, construction and implementation of the IEN. RFP at § 3.2.[3]

The RFP also contained a "Public Agency Clause" as follows:

> Contract prices shall be extended to other "Public Agencies" as defined in Section 67-2327 of the Idaho Code, which reads: "Public Agency" means any city or political subdivision of this state, including, but not limited to counties; school districts; highway districts; port authorities; instrumentalities of counties; cities or any political subdivision created under the laws of the State of Idaho. It will be the responsibility of the Public Agency to independently contract with the CONTRACTOR and/or comply with any other applicable provisions of Idaho Code governing public contracts.

RFP at § 5.5.[4]

The Idaho Department of Administration ("DOA") received three (3) responsive proposals: (1) ENA Services, LLC, a Division of Education Networks of America, Inc., ("ENA"); (2) Qwest Communications, LLC ("Qwest"); and (3) Verizon Business Network Services, Inc. ENA's proposal was submitted with a "teaming agreement" in which ENA proposed that the IEN work would be divided between ENA and ENA's proposed partner Syringa Networks, LLC ("Syringa").

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[2] The RFP and related information and documentation have been attached to numerous pleadings in this case. In addition, these documents are available and can be reviewed at: http://purchasing.idaho.gov/pdf/contracts/IdahoEducationNetwork/SBPO1309.pdf and http://purchasing.idaho.gov/pdf/contracts/IdahoEducationNetwork/SBPO1308.pdf.

[3] The project also included migration of existing state telecommunication networks to the new IEN network backbone. RFP at §§ 3.2.1, 7.0 to 7.4.

[4] Under Idaho Code § 67-5717(9), the Administrator of DOA's Division of Purchasing may enter into "open" contracts for the acquisition of property commonly used by public agencies. *See also* Idaho Code § 67-5716(20). Idaho Code § 67-5726(4) provides in part "No officer or employee shall fail to utilize an open contract without justifiable cause for such action."

On January 28, 2009, DOA issued contract awards in the form of Statewide Blanket Purchase Order ("SBPO") 1308 to Qwest and SBPO 1309 to ENA.[5] Each SBPO had the identical scope of work: the entirety of the IEN RFP. Each SBPO had a Public Agency Clause, permitting other public entities to acquire property from ENA and Qwest that was not part of the IEN project. DOA's website identifies SBPOs 1308 and 1309 as open contracts. *See* http://purchasing.idaho.gov/statewide_contracts.html#I.

On February 26, 2009, DOA issued Amendment One to SBPO 1308 and Amendment One to SBPO 1309.[6] By virtue of Amendment One to SBPO 1308 (Qwest), Qwest became the exclusive IEN contractor for all network services, i.e. the "backbone." In doing so, DOA made Qwest the exclusive provider of all of the services Syringa would have provided to ENA. By virtue of Amendment One to SBPO 1309 (ENA), ENA became the exclusive IEN contractor for E-rate services. As a result of the Amendments, Qwest and ENA would not be providing the same or similar services for the IEN project.

On December 15, 2009, Syringa filed this action. In a series of earlier rulings, this Court granted summary judgment against Syringa on all of its six claims.[7] In Count Three of

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[5] Copies are attached as Exhibits J and H to the March 10, 2010 Affidavit of Mark Little.
[6] Copies are attached as Exhibits K and L to the March 10, 2010 Affidavit of Mark Little.
[7] Syringa's Verified Complaint asserted numerous causes of action against the DOA, DOA's Director, DOA's Chief Technology Officer, Qwest and ENA. 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. In Count Three, Syringa sought declaratory judgment that the award of work to Qwest was a violation of Idaho Code § 67-5718A. 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.

the Complaint, Syringa challenged DOA's award of work to Qwest, and asserted that all of the work should have been awarded to ENA/Syringa. This Court dismissed this claim finding that Syringa had failed to exhaust administrative remedies. Syringa appealed the dismissal of its claims to the Idaho Supreme Court. As to the claim in Count Three that DOA should not have made any award to Qwest, Syringa challenged the manner in which DOA divided the scope work, but did not challenge the multiple award.

The Supreme Court issued its decision on March 29, 2013. *Syringa Networks v. Idaho Dep't of Admin.,* 155 Idaho 55, 305 P.3d 499 (2013) (hereinafter *Syringa Networks*). The Supreme Court affirmed dismissal of five of the six counts. However, the Supreme Court reversed the granting of summary judgment as to Count Three in which Syringa challenged DOA's award to Qwest. The Supreme Court remanded the case to the district court on September 9, 2013 after denying DOA's request for reconsideration.

Following remand from the Supreme Court, the Court permitted Syringa to amend its post-appeal complaint to include a challenge to the work awarded to ENA. *See* February 25, 2014 Memorandum Decision and Order Re: Motions to Amend. *See also* June 24, 2014 Memorandum Decision and Order Re: Motion To Reconsider. The Court also required Syringa to make ENA a party to these proceedings. June 24, 2014 Decision at pp. 13-15.

In a decision entered November 10, 2014, the Court granted summary judgment to Syringa that DOA's award of the IEN work to Qwest and ENA violated state procurement law, and for that reason, SBPO 1308 and SBPO 1309, as amended by Amendments One, were void. Syringa filed a proposed form of judgment on November 18, 2014. DOA and Qwest filed

objections to the Proposed Judgment on November 18, 2014. ENA filed its objections to the Proposed Judgment on November 19, 2014.

On November 18, 2014, DOA filed a Motion for Reconsideration and/or Clarification of the Court's November 10, 2014 Order. This motion was supported by a memorandum and an affidavit of counsel. On December 9, 2014, Syringa filed its opposition to DOA's motion. The opposition was supported by an affidavit of counsel. On December 17, 2014, DOA filed its reply with an affidavit of counsel.

On November 24, 2014, Qwest filed a Motion for Clarification and/or Reconsideration of the Court's November 10, 2014 Order. This motion was supported by memorandum. On December 23, 2014, Syringa filed its response. On January 14, 2015, Qwest replied.

On December 8, 2014, ENA filed a Motion for Reconsideration of the Court's November 10, 2014 Order. This was supported by memorandum. ENA filed its response in opposition on January 5, 2015. On January 14, 2015, ENA replied.

The Court has taken these matters under advisement. As an exercise of discretion, the Court has determined that it will decide these motions without further hearing.

Legal Standard

A party may file a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B), which states:

> A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order; provided, there shall be

> no motion for reconsideration of an order of the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59.1, 60(a), 60(b).

I.R.C.P. 11(a)(2)(B).

The Idaho Supreme Court has recognized that "[a] rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact." *Coeur d'Alene Mining Co. v. First Nat'l Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990) (quoting *J.I. Case v. McDonald*, 76 Idaho 223, 229, 280 P.2d 1070, 1073 (1955)). The burden is on the moving party to bring the trial court's attention to the new facts, if any. The trial court is not required to search the record to determine if there is any new information that might change the specification of facts deemed to be established. *Id.* The trial court should consider any new facts presented by the party that bear on the correctness of the order. *Spur Products Corp. v. Stoel Rives LLP*, 143 Idaho 812, 817, 153 P.3d 1158, 1163 (2007). However, a party requesting reconsideration is not required to submit new or additional evidence. *Johnson v. Lambros*, 143 Idaho 468, 472, 147 P.3d 100, 104 (Ct. App. 2006). The trial court may reconsider its orders for legal errors. *Id.*

The trial court's decision to grant or deny a request for reconsideration is a matter of discretion and the decision will not be overturned absent an abuse of discretion. *Spur Products Corp.*, 143 Idaho at 815. Under I.R.C.P (7)(b)(3)(D). Oral argument is not a requirement and it is entirely within the trial court's discretion to hold a hearing prior to making a decision. *Lamm v. State*, 143 Idaho 763, 766, 152 P.3d 634, 637 (Ct. App. 2006); I.R.C.P. 7(b)(3)(D).

Summary of Arguments

A. DOA

DOA requests the Court to clarify and/or reconsider its November 10, 2014 Order to address whether both Amendments One to the SBPOs and the original SBPOs are void. DOA also asks the Court to declare that the voided awards only affect the IEN, not other state agencies who have obtained goods and services through SBPOs 1308 and 1309. Alternatively, if the Court's November 10, 2014 Order voided both Amendments One and the original SBPOs, DOA requests the Court to reconsider. Syringa argues that because the awards as amended violate state purchasing statutes, the awards cannot be used to provide goods and services to other state agencies. Syringa also argues that the decision granting summary judgment was correct and should not be reconsidered.

DOA (and ENA) cite and discuss *Knowlton v. Mudd*, 116 Idaho 262, 775 P.2d 154 (Ct. App. 1989) for the proposition that a void amendment does not nullify an entire contract. DOA argues that finding the original SBPOs void would be against the law of the case because this Court has determined that Syringa is judicially estopped from challenging the original SBPOs. Syringa asserts that the Court, by motion or on its own initiative, may declare the contracts, as amended, void. Furthermore, primarily relying on *Kenai Lumber Co., Inc. v. LeResche*, 646 P.2d 215 (Alaska 1982), Syringa argues that because the amendments were material to a competitively bid public contract, both the amendments and the underlying contract must be void. DOA asserts that Syringa cannot challenge the validity of the original SBPOs and the only relief Syringa may obtain is a ruling that would void Amendments One. DOA also argues

that the public contract cases cited by Syringa do not apply to the present matter, which involves an invalidated amendment and a valid underlying contract.

DOA argues that a severability clause in the State of Idaho Standard Contract Terms and Conditions severs Amendments One and validates the original SBPOs. *See* November 18, 2014 Affidavit of Steven F. Schossberger, Ex. 1, ¶ 36. The severability clause states, in pertinent part: "In the event any term of the Contract is held to be invalid or unenforceable by a court of competent jurisdiction, the remaining terms of the Contract will remain in force." *Id.* Syringa asserts that the clause is boilerplate language that cannot change or undo Idaho's competitive bidding statutes and the opinion of the Supreme Court.

B. Qwest

Qwest joins DOA's motion in whole. For any arguments that overlap with DOA's motion, Syringa stands on and incorporates its arguments in response to DOA's motion for reconsideration.

Qwest also seeks clarification of and expands on the issue of the validity of the SBPOs as they pertain to technical network services to state agencies. Syringa asserts that Amendments One to the SBPOs impacted the entire scope of the original SBPOs, including services to state agencies. Qwest argues that, on their face, Amendments One only refer to the IEN, not services provided to state agencies. Qwest argues that because Amendments One only relate to the IEN, the void SBPOs, as amended, do not impact the technical network services that Qwest and ENA provided to other state agencies. Syringa, in addition to its arguments in

opposition to DOA's motion, argues that Amendments One eliminated competition between Qwest and ENA, including all technical network services provided to state agencies.

Qwest additionally seeks further clarification as to the language and scope of Idaho Code § 67-5725. Specifically, Qwest argues that the word "advanced," as used in Idaho Code § 67-5725, should be defined as something paid in anticipation of the performance of a contract. As such, Qwest argues, DOA has no authority under Idaho Code § 67-5725 to demand the return of any moneys paid with respect to the SBPOs because there have been no "advances." Qwest further argues that the Court does not have the power to order repayment because Idaho Code § 67-5725 entrusts prosecutorial discretion in the executive branch so it would violate the separation of powers doctrine of the Idaho Constitution and would take property in violation of the Constitution's Just Compensation and Due Process clauses. Syringa asserts that the Court did not violate the separation of powers doctrine because the requirements of Idaho Code § 67-5725 are mandatory when a contract is made in violation of Idaho competitive bidding statutes. Syringa agrees that this Court cannot order prosecution of payments but argues the Court can order DOA to discharge its mandatory duty under the statute to demand repayment. In other words, Syringa argues that the Court has proper jurisdiction to declare the contracts illegal. Thus, Syringa asserts that a reading of and the requirements of Idaho Code § 67-5725 are not yet ripe for adjudication. Qwest maintains that the provisions of Idaho Code § 67-5725 apply if and only if DOA, not the Court, has determined that the State of Idaho has advanced money and that repayment should be demanded.

C. ENA

ENA argues that it is not a proper party to this post-appeal proceeding under the law of the case. Specifically, ENA asserts that the Supreme Court entirely dismissed ENA from this action. Syringa argues that the Supreme Court did not dismiss ENA, but only affirmed this Court's ruling as to Count Six of the original complaint. Syringa argues that the Court has an affirmative duty to address illegal contracts. Syringa also asserts that ENA must be a party to implement the Supreme Court's ruling that the IEN contracts, as amended, are void. ENA maintains that a ruling against ENA violates the Supreme Court's holding.

ENA also argues, separately from DOA and Qwest, that the original SBPO 1309 to ENA is still valid because it is separate from the void amendment, is consistent with the law of the case and ENA has only performed its work under the original SBPO 1309. Syringa again argues that Amendments One were material amendments to the original SBPOs that fundamentally changed the IEN contract in violation of Idaho competitive bidding statutes.

ENA asserts that the doctrines of law of the case, *res judicata*, and judicial estoppel prevent Syringa from challenging DOA's award of SBPO 1309. Syringa argues that, even if the Court does not have a duty to void illegal contracts, the Court's decision to permit Syringa to challenge Amendment One to SBPO 1309 is consistent with the remand of the Supreme Court. Syringa asserts that the Supreme Court clearly held that both contracts, as amended, violate the law, that ENA's interests have been implicated by Count Three since the original Complaint and Syringa has obtained no advantage from any change in position. ENA argues that Syringa

has benefitted from the contract and its inconsistent choice of legal theories has substantive consequences.

ENA argues that the Court incorrectly converted its motion to dismiss into a motion for summary judgment and seeks clarification as to the materials the Court considered in aid of its November 10, 2014 Order. Syringa asserts that because the Court relied upon decisions that were based upon facts outside the four corners of the pleadings, the Court properly treated ENA's motion as one for summary judgment. ENA argues that due process requires the Court to give ENA notice and an opportunity to be heard before granting summary judgment against ENA's interests. Syringa argues that ENA was not denied due process because ENA had every opportunity to oppose Syringa's motion but strategically chose not to do so.

Discussion

The procurement policy of the State of Idaho is to expect "open competitive bids" to maximize competition and the value received by the government. Idaho Code § 67-5715. DOA, through its Division of Purchasing, acquires all "property"[8] for the State. Idaho Code § 67-5717(1). Unless an exception applies, all property must be acquired by competitive bid. *Id.* at (2). A request for bids must "describe the property to be acquired in sufficient detail to apprise a bidder of the exact nature or functionality of the property required." Idaho Code § 67-5718(2). "All contracts made in violation of the provisions of [Idaho Code Title 67, chapter 57] shall be void . . . " Idaho Code § 67-5725.

[8] "Property" is defined broadly to include all goods, services, parts, supplies and equipment. Idaho Code § 67-5716(3).

As a general rule, the Division of Purchasing must make an award to the "lowest responsible bidder." Idaho Code § 67-5718(4). However, under some circumstances, the Administrator of the Division of Purchasing may make an award to two (2) or more bidders. Idaho Code § 67-5718A provides as follows:

> (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:
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> (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.
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> (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.
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> (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.
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> (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 Ann. § 67-5718A.

In its decision, the Supreme Court explained that by dividing the scope of work between ENA and Qwest, DOA violated state procurement law in two respects. First, the division of the

scope of work violated Idaho Code § 67-5718(2)[9] and IDAPA 38.05.01.052[10] by awarding contracts which did not conform to the description of the work as set forth in the RFP which, "in effect, changed the RFP after the bids had been opened. . . ." *Id.* at 506. Second, the division of the scope of work violated Idaho Code § 67-5718A which only permits a multiple award if each contractor provides the same or similar property. *Id.* at 505-06. By making Qwest the exclusive provider of the backbone, and by making ENA the exclusive E-rate provider, neither Qwest nor ENA were providing the same or similar services.

In its November 10, 2014 decision, the Court granted summary judgment to Syringa on the amended claim in Count Three that the awards to Qwest and ENA violated state procurement law, and were void. Guided by the controlling analysis and ruling of the Supreme Court in *Syringa Networks*,, this Court found that DOA's award of work to Qwest and ENA, violated Idaho's procurement law in that: 1) the amended awards did not conform to the description of the work in the RFP, and 2) the amended awards impermissibly divided the scope of work so that Qwest and ENA were not providing the same or similar property.

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[9] "(2) 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.

[10] "An invitation to bid or request for proposals may be changed by the buyer through issuance of an 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. Any material information given or provided to a prospective vendor with regard to an invitation to bid or request for proposals shall be made available in writing by the buyer to all vendors receiving the original solicitation. Oral interpretations of specifications or contract terms and conditions shall not be binding on the division unless confirmed in writing by the buyer and acknowledged by the division prior to the date of the opening. Changes to the invitation to bid or request for proposals shall be identified as such and shall require that the vendor acknowledge receipt of all addenda issued. The right is reserved to waive any informality." IDAPA 38.05.01.052.

The Court did not come to its conclusions casually. The Court was well aware that DOA had used these awards to make significant investments in the IEN project since 2009. The Court also was aware that its decision likely would have a number of potential adverse consequences to schools and students. In coming to this decision, the Court carefully considered the Supreme Court's analysis of the award process in this case. The following excerpts contain the analysis which controls:

> 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 I.C. § 67–5718(2) and IDAPA 38.05.01.052. The separate contracts as amended no longer conform to the RFP's description of the property to be acquired. The description of property to be provided by Qwest under its amended contract is not a minor deviation from the property to be provided by the successful bidder under the RFP, nor is the property to be provided by ENA under its amended contract. "[M]ere schemes to evade law, once their true character is established, are impotent for the purpose intended. Courts sweep them aside as so much rubbish." *O'Bryant,* 78 Idaho at 325, 303 P.2d at 678.

Syringa Networks, 155 Idaho at 62, 305 P.3d at 506.

> Idaho Code section 67–5718A(1) allows the State to award contracts to multiple bidders "to furnish the same or similar property" where more than one contractor is necessary for a statutorily specified reason. It is apparent from the record that the State Defendants believed that the statute only controlled the initial award to multiple bidders. If they were initially awarded contracts to furnish the same or similar property, amending those contracts so that the successful bidders were no longer furnishing the same or similar property would not violate the statute. They believed the State could do in two steps what was prohibited in one.
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> . . . . . .
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> That two-step approach is obviously not permissible when considered in light of subsection (3) of the statute, which states, "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." I.C. § 67–5718A(3). Subsection (3) obviously intends, for the benefit of the taxpayers, that the multiple bidders who are awarded contracts will remain as competitors, which will only occur if they are furnishing the same or similar property.

Syringa Networks, 155 Idaho at 61, 305 P.3d at 505. Clearly, DOA erred in dividing the RFP work into separate contracts for dissimilar services. DOA could not make Qwest the exclusive provider of the backbone. Just as clearly, DOA could not make ENA the exclusive provider for E-rate services.

a. The Court's ruling applies to all work under the awards

Apparently, DOA and Qwest have been providing non-IEN goods and services under SBPO 1308 and SBPO 1309 to other public agencies. In an affidavit filed April 22, 2014, Greg Zickau, the Chief Technology Officer of the State of Idaho and the Chief Information Officer of DOA, explains that both ENA and Qwest have received substantial income from other public agencies for work and services not related to the IEN project. April 22, 2014 Affidavit of Greg Zickau at ¶ 41, Exhibit 4. According to Exhibit 4, in 2013, it appears that ENA utilized SBPO 1309 to receive $1,720,000 from schools and districts for non-IEN services. In the same timeframe, it appears that Qwest received $1,974,000 from other state agencies for non-IEN services.

DOA and Qwest argue that the Court should clarify its ruling and limit its decision to the work performed for the IEN project. In the Court's view, because DOA improperly amended the awards to divide the scope of work, the amended awards are void regardless of whether that work was done for the IEN project or not. There is no basis for differentiating the

non-IEN work from the IEN work. All of the work has been done on the basis of awards that violate state procurement law.

b. SBPO 1308 and SBPO 1309 were awarded as the initial step in a flawed process that violated several provisions of Idaho Code Title 67, Chapter 57

DOA, Qwest and ENA argue that the Court should have gone no further than to invalidate the amendments which divided the scope of work. DOA, Qwest and ENA argue that the proper result would be a ruling that the original awards to Qwest and ENA should be restored, allowing Qwest and ENA to complete the balance of the IEN project under the original awards. The Court does not agree.

The IEN RFP was for the entire IEN project. DOA did not solicit separate RFPs for the "separate contracts that described the property to be acquired in accordance with the amended contracts ultimately awarded." *Syringa Networks* at 62. The award process improperly deprived the State of open competitive bids for the same property, and improperly divided the IEN work between ENA and Qwest.

Idaho Code § 67-5718A(2) requires the Administrator of the Division of Purchasing to issue a written justification at the time of a multiple award. As the Supreme Court noted, no such written justification was made at the time of the original awards, or at the time DOA divided the work between Qwest and ENA. *Syringa Networks* at 60. DOA did not issue a written justification until after DOA received a public records request from Syringa for a copy the written determination. *Id.* The Administrator of the Division Purchasing stated that on December 3, 2008, prior to issuing the IEN RFP, he and the state purchasing manager had a

discussion and agreed that "no one vendor had the capability to service the State of Idaho and its geography to enable the network." *Id.* (quoting from the Administrator's determination.) However, DOA did not divide the work geographically. Instead, after making identical awards to both ENA and Qwest, DOA then improperly divided the work between Qwest and ENA. DOA's written justification, which was not made until after the work was divided, did not, and could not, override state procurement law.

The essential facts are not in dispute. The state solicited bids for the entire IEN project. DOA made a multiple award, but did not make the required written justification. The written justification, which came after the fact, cannot be used to avoid, override or negate procurement law which forbids 1) changing the RFP after the bids were submitted; and 2) making a multiple award that divides the work between competitors who bid for the entire project. As noted by the Supreme Court, the award of the original SBPOs was the first step in a two-step award process that is prohibited by law. The Supreme Court characterized the award process as "scheme to evade law" which the court should "[sweep] aside as so much rubbish." *Syringa Networks* at 62, 305 Idaho at 506. For this reason, the awards as amended violated state law and are void.[11]

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[11] In addition, as a practical matter, ENA likely is no longer able to provide the technical scope of work that was awarded to Qwest, since ENA's bid was based upon the teaming agreement with Syringa for such work ENA admits that it does not provide physical connections to the internet, but purchases such services through companies like Qwest and Syringa. *See* Memorandum in Support of ENA Services, LLC's Motion for Reconsideration Re Memorandum Decision and Order Re Pendinig Dispositive Motions at p. 3.

The Court determined that Syringa is estopped from asserting that the original awards are void because Syringa conceded on appeal that the original SBPOs were lawful. DOA argues that this determination is the law of the case and precludes Syringa from arguing, and the Court from finding, that the original awards are void. Consistent with the Court's estoppel ruling, Syringa modified its summary judgment request for a ruling that the original awards, as amended by the amendments dividing the work, are void. *See* Fourth Amended Notice of Hearing filed August 21, 2014. This is precisely the ruling made by the Court. The problem is that DOA made the original awards as part of a flawed process to divide the work between ENA and Qwest.

Further, as the Court explained in granting summary judgment, "In Idaho, a court has an affirmative duty to raise the issue of illegality at any stage in the litigation, regardless of whether the issue was pleaded by a party." *See* November 121, 1014 Decision at p. 11. (citing *Quiring v. Quiring*, 130 Idaho 560, 566-67, 944 P.2d 695, 701-02 (1997)). This case presents the issue of illegality squarely. As detailed above and in *Syringa Networks*, the bid process employed by DOA does not comport with state procurement law Should any clarification be needed, the Court will find that because the original awards were part of the process DOA used to violate procurement law, those original awards as amended are void.

Citing *Knowlton v. Mudd*, 116 Idaho 662, 775 P.2d 154 (Ct. App. 1989), the Defendants argue that where parties enter into a void amendment to an otherwise proper contract, the proper remedy was to ignore the amendment and enforce the contract according to its terms. A

different situation is presented here. In this case, the original awards were part of the process used to make an illegal award.

DOA argues that a severability clause in the original awards requires reinstatement of the original awards. The Court does not agree. DOA's contract language does not supplant Idaho Code Title 67 Chapter 57. Because the original awards were part of a process used to make an illegal award, the process itself was flawed. The severability clause does not override the award process mandated by Idaho Code Title 67, Chapter 57.

c. Except to declare that the awards are void, no other issue under Idaho Code § 67-5725 is before the Court

Idaho Code § 67-5725 provides as follows:

> All contracts or agreements made in violation of the provisions of this chapter shall be void and any sum of money advanced by the state of Idaho in consideration of any such contract or agreement shall be repaid forthwith. In the event of refusal or delay when repayment is demanded by the proper officer of the state of Idaho, under whose authority such contract or agreement shall have been made or entered into, every person so refusing or delaying, together with his surety or sureties, shall be forthwith prosecuted at law for the recovery of such sum of money so advanced."

Idaho Code § 67-5725. The Court has determined that the awards to Qwest and ENA violate several provisions of Idaho Code Title 67, Chapter 57. As a consequence, the awards are void. The statute also has financial consequences. However, any such issues are not presently before the Court.

d. ENA had notice and opportunity to be heard.

The Court rejects ENA's argument that it was not given notice and opportunity to be heard. In a prior ruling, the Court recognized that ENA was a necessary party to Syringa's

summons and a copy of its post-appeal complaint. Syringa served ENA with a summons and a copy of the Second Amended Post Appeal Complaint. *See* July 8, 2014 Affidavit of Service. ENA elected not to file an answer. ENA did not file any response or opposition to Syringa's motion for summary judgment. Instead, ENA filed a motion to dismiss. In the Court's view, ENA had actual and ample opportunity to respond to Syringa's motion for summary judgment. The Court granted summary judgment against ENA finding there were no genuine issues of material fact concerning the validity of the awards, as amended. In the Court's view, the decision fairly states the Court's analysis and upon what the Court relied in deciding summary judgment.

Conclusion

As explained above, 1) the Court's ruling applies to all work under the awards; 2) SBPO 1308 and SBPO 1309 were awarded as the initial step in a flawed process that violated several provisions of Idaho Code Title 67, Chapter 57; 3) except to declare that the awards are void, no other issue under Idaho Code § 67-5725 is before the Court; and 4) ENA had notice and opportunity to be heard. The Court will enter judgment in favor of Syringa as to Count Three of the Second Amended Post Appeal Complaint.

IT IS SO ORDERED.

Dated this 11 day of February, 2015.

Patrick H. Owen
District Judge

CERTIFICATE OF MAILING

I, Christopher D. Rich, the undersigned authority, do hereby certify that I have mailed (faxed), 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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(615) 252-6335

CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

Date: 2/11/15

By: _____
Deputy Clerk

INGA JOHNSON

DISTRICT COURT JUDICIAL DISTRICT OF THE STATE - OF - IDAHO IN AND FOR ADA COUNTY

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; ENA SERVICES, LLC, a Division of EDUCATION NETWORKS OF AMERICA, Inc., a Delaware corporation; QWEST COMMUNICATIONS, LLC, a Delaware limited liability company;

Defendants.

Case No. CV-OC-2009-23757

JUDGMENT AND I.R.C.P 54(b) CERTIFICATE

JUDGMENT IS HEREBY ENTERED AS FOLLOWS:

1. Statewide Blanket Purchase Order 1308 to Qwest Communications, LLC, as amended by Amendment One, is void.
2. Statewide Blanket Purchase Order 1309 to ENA Services, LLC, as amended by Amendment One, is void.

IT IS SO ORDERED this 11 day of February, 2015.

Patrick H. Owen
District Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the Judgment entered on February 11, 2015, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

IT IS SO ORDERED.

DATED this 4 day of February, 2015.

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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CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

Date: 2/11/15

By: _____
Deputy Clerk