

JUL 15 2010

J. DAVID NAVARRO, Clerk
By *[Signature]* DEPUTY

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.

Case No. CV-OC-09-23757

MEMORANDUM DECISION
AND ORDER

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; 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.

This matter is before the Court for determination of a motion for summary judgment filed by Defendants Idaho Department of Administration (DOA), J. Michael “Mike” Gwartney (Gwartney) and Jack G. “Greg” Zickau (Zickau) (collectively, the State Defendants). For the reasons set forth below, the Court will grant the motion.

Background and Proceedings

In 2008, the Idaho State Legislature authorized the creation of a “statewide coordinated and funded high-bandwidth education network” called the Idaho Education Network (IEN). 2008 Idaho

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1 Sess. Laws, ch. 260 § 3. (codified at Idaho Code § 67-5745D.) The IEN was meant to be “the
2 coordinated, statewide telecommunications distribution system for distance learning for each public
3 school” Idaho Code § 67-5745D(2). The legislation assigned DOA with oversight responsibility
4 for development and implementation of the IEN. 2008 Idaho Sess. Laws, ch. 260 § 3. Among its
5 duties, DOA was to “[p]rocure telecommunications services and equipment for the IEN through an
6 open and competitive bidding process.” *Id.*

7 In December of 2008, DOA issued the IEN Request for Proposals 02160 (IEN RFP),
8 seeking bids for the initial phase of the IEN project. A copy of the IEN RFP is attached as
9 Exhibit A to the Verified Complaint and Demand for Jury Trial. The IEN RFP provided that
10 “[s]trong consideration will be given to proposals that incorporate partnerships between multiple
11 providers.” IEN RFP at § 3.3(b). The IEN RFP also specified that “[a]ny resulting contract from
12 this solicitation will be awarded to up to four providers.” *Id.* at § 5.3. In a later amendment to the
13 IEN RFP, this language was changed to “any resulting contract from this solicitation **may** be
14 awarded to up to four providers.” (emphasis in original) (March 19, 2010 Affidavit of Bill
15 Burns at ¶ 7 (hereinafter “Burns Affidavit.”)) (See March 19, 2010 Affidavit of Mark Little at
16 Exhibit E (hereinafter “Little Affidavit.”))
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19 The IEN RFP contained the following limitation: “Bidders must also have a service
20 provider identification number from the Universal Service Administrative Company and be
21 eligible to participate in the Universal Service Fund discount program for telecommunications
22 services provided to the E-Rate eligible entities.” IEN RFP at § 3.2. The Telecommunications
23 Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (codified and amended in various and scattered
24 sections of title 47, United States Code), requires interstate telecommunications providers to
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1 make contributions into the Universal Service Fund. The Universal Service Administrative
2 Company (USAC) collects these contributions and disburses a portion of these funds to support
3 telecommunications projects for schools and libraries. The funding for schools and libraries is
4 called "E-Rate" funding.¹ To receive E-Rate funding through USAC, a service provider must be
5 registered with USAC.

6 Plaintiff Syringa Networks, LLC (Syringa) is a telecommunications network provider in
7 Idaho. The Court understands that Syringa is not registered with USAC, and therefore, Syringa is
8 not eligible to participate in E-Rate funding. Defendant ENA Services, LLC (ENA) is a
9 telecommunications company that provides managed internet access services to governments,
10 schools and libraries. ENA makes contributions to the Universal Service Fund, is registered with
11 USAC, and is eligible to participate in E-Rate funding. ENA is a wholly owned subsidiary of
12 Defendant Education Networks of America, Inc. (Unless the context requires otherwise, both
13 ENA Services, LLC and Education Networks of America, Inc. will be referred to as ENA).
14 Education Networks of America, Inc. is also registered with USAC, and is eligible to participate
15 in E-Rate funding.
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19 ¹ "One of the goals of the 1996 Telecommunications Act was to encourage universal telecommunications service.
20 Universal service includes 'advanced telecommunications and information services,' particularly high-speed internet
21 access, for schools (as well as for libraries and rural health care providers). *See* 47 U.S.C. § 254(b)(6), (h)(1) (2000).
22 The internet highway for these schools is paved with mandated contributions from the telecommunications
23 industries; the U[niversal] S[ervice] F[und]'s coffers are filled by interstate telecommunications providers who pay
24 mandatory charges, which they typically pass on to consumers in their bills. *See id.* § 254(d); 47 C.F.R. § 54.706
25 (2002). Federal regulations give U[niversal] S[ervice] A[dministrative] C[ompany] the responsibility to administer
26 the USF, collect the charges, and disburse its funds, all under the direction of the Federal Communications
Commission (FCC) *See* 47 C.F.R. §§ 54.701, 54.702. The USF monies are not appropriated federal funds;
nonetheless, they exist by reason of a federal mandate. The funds are not distributed by a federal agency but by
USAC, a private nonprofit corporation, subject to regulation. *See generally Tex. Office of Pub. Util. Counsel v. FCC*,
183 F.3d 393, 405-09 (5th Cir.1999) (describing USF provisions of 1996 Telecom Act and subsequent regulations);
R.F. Frieden, *Universal Service*, 13 Harv. J.L. & Tech. 395, 397-422 (2000) (same)." *In re LAN Tamers, Inc.*, 329
F.3d 204, 206 (1st. Cir. 2003).

1 Syringa and ENA entered into a "Teaming Agreement" for the purpose of responding to
2 the IEN RFP. A copy of the Teaming Agreement is attached as Exhibit 2 to the February 23,
3 2010 Affidavit of Greg Lowe. Under the Teaming Agreement, ENA sought to become the IEN
4 RFP prime contractor, or the prime contractor for providing services to schools and libraries.
5 (Teaming Agreement at Section 2(a)). ENA would be responsible for "(i) procuring and owning
6 all customer premises equipment, (ii) coordinating field service, (iii) managing the customer
7 relationship, (iv) serving as the fiscal and contracting agent, including responsibility for invoicing
8 and collections, (v) management of E-Rate funds, and (vi) procuring, managing, and provisioning
9 last mile circuits." (Teaming Agreement at Section 3(b).) Syringa would be responsible for "(i)
10 providing the statewide backbone for the services, (ii) providing and operating a network
11 operations center for the backbone, (iii) providing for co-location of core network equipment,
12 (iv) procuring and owning all customer premises equipment not provided by ENA, (v)
13 coordinating field service for non-school or library sites, (vi) managing the customer relationship
14 for non-school or library sites, and (vii) procuring, managing and provisioning last mile circuits
15 for non-school or library sites." (*Id.* at Section 3(c).)

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18 Syringa and ENA jointly responded to the IEN RFP by submitting a proposal printed on
19 stationary that displayed logos for both Syringa and ENA at the top of each page. A copy of the
20 proposal (IEN Alliance Proposal) is attached as Exhibit B to the December 15, 2009 Verified
21 Complaint and Demand for Jury Trial. ENA and Syringa referred to their joint proposal as the
22 "IEN Alliance." The cover letter to the IEN Alliance Proposal states: "The IEN Alliance
23 founding members, ENA and Syringa will lead the partnership. For the purpose of executing a
24 contract, ENA will be the contracting entity for the project with Syringa as the principal partner
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1 and prime supplier.” (RFP Proposal at p. 1.) The IEN Alliance Proposal identified ENA and
2 ENA, Inc. as the service providers who were registered with USAC. (*Id.* at p. 107.)

3 The IEN RFP required a bidder to submit a signed signature page on a DOA supplied
4 form. The signature page for the IEN Alliance bid proposal was signed by David M. Pierce,
5 President and CEO of ENA. The signature page identifies the bidder/offeror as “Education
6 Networks of America, Inc./ENA Services, LLC.”

7 DOA received three (3) responsive proposals: the IEN Alliance proposal, a proposal from
8 Defendant Qwest Communications Company, LLC (Qwest), and a proposal from Verizon Business
9 Network Services, Inc. Based upon evaluation criteria, the DOA scored the proposals as follows:
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Criteria	Points	Qwest	ENA	Verizon
Prior Experience	200	110	145	65
Legislative Intent	100	73	83	15
Management Capacity	100	56	72	35
Financial & Risk	100	29	82	35
Subtotal	500	268	382	150
E-Rate Cost (1)	400	267	400	278
Non-E-Rate Cost (1)	100	100	74	64
TOTAL	1000	635	856	492

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22 (January 20, 2009 Letter from DOA to ENA, attached as Exhibit C to Verified Complaint and
23 Demand for Jury Trial.) On January 20, 2009, the DOA issued a Letter of Intent expressing its
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1 intent to make awards of the IEN RFP to ENA and Qwest “for being awarded the most points.”

2 (*Id.*)

3 On January 28, 2009, DOA issued nearly identical statewide blanket purchase orders to
4 ENA (SBPO1309) and Qwest (SBPO1308). (March 19, 2010 Affidavit of Mark Little at
5 Exhibits I and J.) Each purchase order stated that it: “constitutes the State of Idaho’s acceptance
6 of your signed offer” (*Id.*)

7 On February 26, 2009, DOA issued Amendment 1 to the Qwest and ENA statewide
8 blanket purchase orders. (*Id.* at Exhibits K and L.) Each amendment stated: “It is the intent of
9 the State of Idaho to amend SBPO1308 [SBPO1309] to clarify the roles and responsibilities of
10 the parties to the Agreement.” (*Id.*) Each amendment also stated: “The State considers Qwest
11 and ENA equal partners in the IEN project as demonstrated in the Intent to Award Letter dated
12 January 20, 2009 and the subsequent SBPO1308 [SBPO1309] dated January 28, 2009.” (*Id.*)
13 The amendments clarified the scope of work for both ENA and Qwest.
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15 Syringa contends, and the contention does not appear to be disputed, that the effect of the
16 amendments was to award to Qwest the entire scope of work assigned to Syringa in the Teaming
17 Agreement and the IEN Alliance Proposal. The effect of the amendments to the purchase orders
18 was to eliminate Syringa from participation in the IEN RFP project.
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20 Prior to filing this action, Syringa did not seek any form of administrative relief from the
21 IEN RFP specifications, the awards to ENA and Qwest, or the amendments to the awards.

22 On December 15, 2009, Syringa filed a Verified Complaint and Demand for Jury Trial
23 asserting various causes of action against the State Defendants, Qwest and ENA. Gwartney is
24 Director of DOA. Zickau is DOA’s Chief Technology Officer. In Count One of the complaint,
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1 Syringa alleges that DOA breached a contract by awarding work to Qwest. In Count Two,
2 Syringa seeks declaratory judgment that the award of work to Qwest was a violation of Idaho
3 Code § 67-5726² and should be voided. In Count Three, Syringa seeks declaratory judgment that
4 the award of work to Qwest was a violation of Idaho Code § 67-5718A³ and should be voided.
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7 ² “(1) No contract or order or any interest therein shall be transferred by the contractor or vendor to whom such
8 contract or order is given to any other party, without the approval in writing of the administrator. Transfer of a
9 contract without approval shall cause the annulment of the contract so transferred, at the option of the state. All
10 rights of action, however, for any breach of such contract by the contracting parties are reserved to the state. No
11 member of the legislature or any officer or employee of any branch of the state government shall directly, himself, or
12 by any other person in trust for him or for his use or benefit or on his account, undertake, execute, hold or enjoy, in
13 whole or in part, any contract or agreement made or entered into by or on behalf of the state of Idaho, if made by,
14 through, or on behalf of the department in which he is an officer or employee; or if made by, through or on behalf of
15 any other department unless the same is made after competitive bids.

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17 (2) Except as provided by section 67-5718, Idaho Code, no officer or employee shall influence or attempt to
18 influence the award of a contract to a particular vendor, or to deprive or attempt to deprive any vendor of an
19 acquisition contract.

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21 (3) No officer or employee shall conspire with a vendor or its agent, and no vendor or its agent shall conspire with an
22 officer or employee, to influence or attempt to influence the award of a contract, or to deprive or attempt to deprive a
23 vendor of an acquisition award.

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25 (4) No officer or employee shall fail to utilize an open contract without justifiable cause for such action. No officer
26 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.

1 In Count Four, Syringa alleges that the conduct of the State Defendants constitutes tortious
2 interference with the Teaming Agreement. The remaining counts of the complaint allege claims
3 against Qwest and ENA.

4 On March 19, 2010, the State Defendants filed this Motion for Summary Judgment on all
5 claims asserted against them by Syringa. Syringa opposes the motion. The Court heard
6 argument on May 25, 2010. Merlyn W. Clark, Hawley, Troxell, Ennis & Hawley, LLP, appeared
7 and argued for the State Defendants. David R. Lombardi, Givens Pursley LLP, appeared and
8 argued for Syringa.

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10 **Standard of Review**

11 “Summary judgment is appropriate if the pleadings, affidavits, and discovery documents
12 on file with the court . . . demonstrate no material issue of fact such that the moving party is
13 entitled to a judgment as a matter of law.” *Brewer v. Washington RSA No. 8 Ltd. Partnership*,
14 145 Idaho 735, 738, 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks*, 115 Idaho 101, 102, 765
15 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to
16 demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.*,
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20 (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.

21 (3) Where a contract for property has been awarded to two (2) or more bidders in accordance with this section, a
22 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.

23 (4) A multiple award of a contract for property under this section shall not be made when a single bidder can
24 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.”

25 Idaho Code § 67-5718A

1 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935
2 P.2d 165, 168 (1997)); *Baxter*, 135 Idaho at 170, 16 P.3d at 267. The court must liberally
3 construe disputed facts in favor of the non-moving party and draw all reasonable factual
4 inferences in favor of the non-moving party. *Kiebert v. Goss*, 144 Idaho 225, 227, 159 P.3d 862,
5 864 (2007).

6 Where the party moving for summary judgment will not carry the burden of production or
7 proof at trial, the “genuine issue of material fact” burden may be met by establishing the absence
8 of evidence on an element that the nonmoving party will be required to prove at trial. *Heath v.*
9 *Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000). Such an
10 absence of evidence may be established either by an affirmative showing with the moving party's
11 own evidence or by a review of all the nonmoving party's evidence and the contention that such
12 proof of an element is lacking. *Id.* (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475,
13 478 (Ct.App.1994); *Withers v. Bogus Basin Recreational Ass'n, Inc.*, 144 Idaho 78, 80, 156 P.3d
14 579, 581 (2007) (quoting *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000)). Once
15 such an absence of evidence has been established, the burden then shifts to the party opposing the
16 motion to establish, via further depositions, discovery responses or affidavits, that there is indeed
17 a genuine issue for trial, or to offer a valid justification for the failure to do so under I.R.C.P.
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19 56(f).

20 21 **Analysis and Discussion**

22 Syringa contends that by making an award to ENA, DOA accepted all parts of the IEN
23 Alliance proposal and the award to ENA created a binding obligation to utilize Syringa as
24 specified in the IEN Alliance proposal. Syringa contends that DOA breached the contract by
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1 making an award to Qwest. DOA argues that it reserved the right to make multiple awards, and
2 made two (2) awards for the work. DOA argues that there are no genuine issues of material fact
3 here. DOA reserved the right not to accept all parts of the IEN Alliance Proposal. DOA did not
4 accept all parts of the IEN Alliance Proposal. Syringa did not submit a bid and was not a
5 qualified bidder. DOA did not enter into any contract with Syringa and there is no contract with
6 Syringa. DOA argues it is entitled to summary judgment on the breach of contract cause of
7 action.

8 The basic elements of a contract are subject matter, consideration, mutual assent to all
9 material terms and an agreement that sets forth what the parties have agreed. *State v. Korn*, 148
10 Idaho 413, ____, 224 P.3d 480, 482 (2009) (citing 17A Am. Jur. 2d *Contracts* § 19 (2d ed.
11 2009)). DOA has made a sufficient showing that it did not accept all of the IEN Alliance
12 proposal terms, and that DOA did not accept the IEN Alliance proposal that Syringa be awarded
13 any part of the work. Therefore, the burden shifts to Syringa to show that there is a genuine issue
14 of fact on this issue. Syringa has failed to present sufficient evidence to demonstrate that there is
15 a genuine issue of fact as to whether DOA accepted all of the IEN Alliance proposal, or that
16 DOA was obligated to permit Syringa to perform the work specified in the Teaming Agreement
17 or the IEN Alliance proposal. The Court will grant summary judgment against Syringa on the
18 breach of contract claim as alleged in Count One of the complaint.
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21 In Counts Two and Three of the complaint, Syringa seeks a declaratory judgment that the
22 award of the work to both ENA and Qwest was improper. The State Defendants assert that they
23 are entitled to summary judgment on these claims because Syringa does not have a sufficient
24 stake in the bidding process to create an actual or justiciable controversy. The State Defendants
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1 also assert, in the alternative, that these claims are precluded because Syringa failed to exhaust its
2 administrative remedies. Syringa argues that there is a justiciable controversy because Syringa
3 has sustained a distinct injury because Syringa cannot work on the project. Syringa argues that
4 the doctrine of exhaustion of administrative remedies does not apply here because no
5 administrative remedies were available.

6 The Declaratory Judgment Act, Idaho Code Title 10, chapter 12, provides authority to
7 declare rights, status, or other legal relations. However, that authority is limited by the rule that a
8 court can grant declaratory relief only in cases that present an actual or justiciable controversy.

9 *Davidson v. Wright*, 143 Idaho 616, 620, 151 P.3d 812, 816 (2006) (citing *Weldon v. Bonner*
10 *County Tax Coalition*, 124 Idaho 31, 36, 855 P.2d 868, 873 (1993)). A justiciable controversy is
11 one which is:
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13 distinguished from a difference or dispute of a hypothetical or abstract character;
14 from one that is academic or moot.... The controversy must be definite and
15 concrete, touching the legal relations of the parties having adverse legal interests....
16 It must be a real and substantial controversy admitting of specific relief through a
decree of a conclusive character, as distinguished from an opinion advising what
the law would be upon a hypothetical state of facts.

17 *Weldon*, 124 Idaho at 36, 855 P.2d at 873 (quoting *Harris v. Cassia County*, 106 Idaho
18 513, 516, 681 P.2d 988, 991 (1984))(overruled by other grounds by *City of Boise City v.*
19 *Keep the Commandments Coalition*, 143 Idaho 254, 141 P.3d 1123 (2006)).

20 Justiciability questions have been divided into a number of categories including: advisory
21 opinions, feigned and collusive cases, standing, ripeness, mootness, political questions and
22 administrative questions. *Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006)
23 (citing *Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757, 761 (1989)). Specifically,
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1 the State Defendants allege that Syringa has no standing to obtain the declaratory relief it seeks in
2 Counts Two and Three of the complaint.

3 “Standing is the requirement that each party to the suit has such a personal stake in the
4 outcome as to assure the court that a justiciable controversy exists.” *Van Valkenburgh v. Citizens*
5 *for Term Limits*, 135 Idaho 121, 131, 15 P.3d 1129, 1139 (2000) (citing *Bowles v. Pro Indiviso,*
6 *Inc.*, 132 Idaho 371, 375, 973 P.2d 142, 146 (1999)). The question is whether Syringa has a
7 “tangible and legally protectable interest” in the requests for declaratory relief. *Id.* In resolving
8 this question, the court must focus on the party seeking relief and not the issue the party wants
9 the court to decide. *Id.* In addition, Syringa must allege an injury. *Id.* (citing *Selkirk-Priest*
10 *Basin Ass'n, Inc. v. State*, 127 Idaho 239, 242, 899 P.2d 949, 952 (1995)). The injury must be
11 more than an injury that would be sustained by all citizens and taxpayers. *Id.*

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13 The State Defendants argue that Syringa has no standing to challenge the awards because:
14 1) Syringa was not qualified to be a bidder because Syringa does not participate in E-Rate
15 funding; 2) Syringa did not submit a bid; and 3) Syringa did not receive any award. Syringa
16 argues that it has standing because Syringa suffered a distinct injury when the State awarded part
17 of the work to Qwest.

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19 There is little specific guidance on this issue in the reported appellate decisions in Idaho.
20 Because Syringa could not be a bidder, and did not submit the bid, Syringa was a subcontractor
21 to ENA. Courts in other jurisdictions have considered whether a subcontractor has standing to
22 challenge a bid award. For instance, in *Connecticut Associated Builders and Contractors v. City*
23 *of Hartford*, No. CV 9805840375, 1998 WL 918609 (Conn. Super. Dec. 17, 1998) (unpublished
24 opinion), the court found that a subcontractor who did not submit a bid as a general contractor
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1 and who did not intend to bid as a general contractor had no standing to challenge a bid
2 specification. In *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, No. 1-08-1116, 2010
3 WL 2486763 (Ill. App. Ct. 1 Dist. June 18, 2010) (not yet released), the court reviewed a number
4 of decisions involving whether a subcontractor had standing to challenge an award of a public
5 contract to a competing bidder. The court found that a subcontractor would not have standing
6 unless it could show that its prime contractor would have won the contract but for the improper
7 award. In *Treadon v. City of Oxford*, 149 Ohio App. 3d 713, 778 N.E.2d 670, (Ct. App. 2002),
8 the court found that an architect who did not submit a joint bid for the project did not have
9 standing to challenge the award of a public contract. In *Associated Subcontractors of*
10 *Massachusetts, Inc. v. University of Massachusetts Bldg Authority*, 442 Mass. 159, 810 N.E. 2d
11 1214 (2004), the court recognized a long standing rule that a “subcontractor who has the right to
12 be considered a subbidder on such a project has standing to challenge the award of a contract
13 alleged to violate the statutory competitive bidding requirements.” *Id.* at 163, 810 N.E. 2d at
14 1218. Each of these decisions involves statutes and bidding schemes that are distinct from those
15 in Idaho.
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17 The Court has considered that there are two unusual circumstances here. First, after
18 limiting bids to providers who could participate in E-Rate Funding, DOA encouraged
19 partnerships of providers to provide a single bid. Second, by making awards to both ENA and
20 Qwest, DOA made it very unlikely that ENA would file any challenge. Had this been a single
21 award to ENA, Syringa would have participated in the work. It does appear that Syringa was cut
22 off from participating in the work. The Court concludes that Syringa does have standing to
23 challenge the awards. While Syringa was not a bidder, and was not qualified to be a bidder,
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1 Syringa nonetheless has an interest in these awards that is quite distinct and the impact of the
2 awards is certainly different than any injury that would be sustained by all taxpayers and citizens.

3 Accordingly, the Court will deny the State Defendants' Motion for Summary Judgment based
4 upon the argument that Syringa lacks standing to pursue these claims for declaratory relief.

5 Having concluded that Syringa has standing, the Court will address next whether
6 Syringa's claims for declaratory relief must be dismissed for failure to exhaust administrative
7 remedies. ". . . [T]he doctrine of exhaustion of administrative remedies generally requires that a
8 case run the full gamut of administrative proceedings before an application for judicial review
9 may be considered" *Westway Constr. Inc. v. Idaho Transportation Department*, 139 Idaho
10 107, 111, 73 P.3d 721, 725 (2003) (citing *McVicker v. City of Lewiston*, 134 Idaho 34, 37, 995
11 P.2d 804, 807 (2000)). "[I]mportant policy considerations underlie the requirement for
12 exhausting administrative remedies, such as providing the opportunity for mitigating or curing
13 errors without judicial intervention, deferring to the administrative processes established by the
14 Legislature and the administrative body, and the sense of comity for the quasi-judicial functions
15 of the administrative body." *Blanton v. Canyon County*, 144 Idaho 718, 721, 170 P.3d 383, 386
16 (2007) (quoting *White v. Bannock County Commissioners*, 139 Idaho 396, 401-02, 80 P.3d 332,
17 337-38 (2003)). However, the doctrine of exhaustion does not apply if there are no
18 administrative remedies to exhaust. *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 240, 207 P.3d
19 963, 971 (2009).

20 Syringa contends that there are no administrative remedies for it to exhaust. The Court
21 comes to a different conclusion. Title 67, Chapter 57 of the Idaho Code contains provisions
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1 applicable to DOA and its Division of Purchasing. Idaho Code § 67-5715 contains a statement
2 of purpose that provides as follows:

3 The Idaho legislature, recognizing that an offered low price is not always
4 indicative of the greatest value, declares it to be the policy of the state to expect
5 open competitive bids in acquisitions of property, and to maximize competition,
6 and maximize the value received by the government of the state with attendant
7 benefits to the citizens.

8 Idaho Code § 67-5715. Administrative appeals from actions of the Division of Purchasing are
9 provided for in Idaho Code § 67-5733. This section provides for challenges to bid
10 specifications,⁴ and awards.⁵ Syringa did not pursue any challenge to either the specifications,
11 awards or amendments.

12 ⁴“(1)(a) There shall be, beginning with the day of receipt of notice, a period of not more than ten (10) working days
13 in which any vendor, qualified and able to sell or supply the items to be acquired, may notify in writing the
14 administrator of the division of purchasing of his intention to challenge the specifications and shall specifically state
15 the exact nature of his challenge. The specific challenge shall describe the location of the challenged portion or
16 clause in the specification document, unless the challenge concerns an omission, explain why any provision should
17 be struck, added or altered, and contain suggested corrections.

18 Upon receipt of the challenge, the administrator of the division of purchasing shall either deny the challenge, and
19 such denial shall be considered the final agency decision, or he shall present the matter to the director of the
20 department of administration for appointment of a determinations officer. If the director of the department of
21 administration appoints a determinations officer, then all vendors, who are invited to bid on the property sought to be
22 acquired, shall be notified of the appeal and the appointment of determinations officer and may indicate in writing
23 their agreement or disagreement with the challenge within five (5) days. The notice to the vendors may be electronic.
24 Any vendor may note his agreement or disagreement with the challenge. The determinations officer may, on his own
25 motion, refer the challenge portion and any related portions of the challenge to the author of the specification to be
26 rewritten with the advice and comments of the vendors capable of supplying the property; rewrite the specification
himself and/or reject all or any part of any challenge. If specifications are to be rewritten, the matter shall be
continued until the determinations officer makes a final determination of the acceptability of the revised
specifications.

The administrator shall reset the bid opening no later than fifteen (15) days after final determination of challenges or
the amendment of the specifications. If the administrator denies the challenge, then the bid opening date shall not be
reset.

The final decision of the determinations officer or administrator on the challenge to specifications shall not be
considered a contested case within the meaning of the administrative procedure act; provided that a vendor
disagreeing with specifications may include such disagreement as a reason for asking for appointment of a
determinations officer pursuant to section 67-5733(1)(c), Idaho Code.”

1 Syringa asserts that these provisions do not apply here because this is a multiple contract
2 award. Syringa argues that Idaho Code § 67-5733 only applies to single contract awards. The Court
3 does not read this section so narrowly, and there is no sound reason to do so. This section gives any
4 vendor the right to challenge the specification from any bid solicitation and from any determination
5 that the vendor was not the lowest responsive bidder. DOA announced its intention to make a
6 multiple award. DOA did make multiple awards of this contract. Syringa argues that it did not have
7 to challenge the award to ENA under Idaho Code § 67-5733(c) because it was in priority with the
8 lowest responsible bidder and because it did not receive notification that it was not the lowest
9

10
11 Idaho Code § 67-5733(1)(a).

12 ⁵“(c) A vendor whose bid is considered may, within five (5) working days following receipt of notice that he is not
13 the lowest responsible bidder, apply to the director of the department of administration for appointment of a
14 determinations officer. The application shall set forth in specific terms the reasons why the administrator's decision is
15 thought to be erroneous. Upon receipt of the application, the director shall within three (3) working days:

16 (i) Deny the application, and such denial shall be considered the final agency decision; or

17 (ii) Appoint a determinations officer to review the record to determine whether the administrator's selection of the
18 lowest responsible bidder is correct; or

19 (iii) Appoint a determinations officer with authority to conduct a contested case hearing in accordance with the
20 provisions of chapter 52, title 67, Idaho Code.

21 A determinations officer appointed pursuant to section 67-5733(1)(c)(ii), Idaho Code, shall inform the director by
22 written recommendation whether, in his opinion, the administrator's selection of the lowest responsible bidder is
23 correct. The determinations officer in making this recommendation may rely on the documents of record, statements
24 of employees of the state of Idaho participating in any phase of the selection process, and statements of any vendor
25 submitting a bid. A contested case hearing shall not be allowed and the determinations officer shall not be required
26 to solicit statements from any person. Upon receipt of the recommendation from the determinations officer, the
27 director shall sustain, modify or reverse the decision of the administrator on the selection of the lowest responsible
28 bidder or the director may appoint a determinations officer pursuant to section 67-5733(1)(c)(iii), Idaho Code.

29 A determinations officer appointed pursuant to section 67-5733(1)(c)(iii), Idaho Code, shall conduct a contested case
30 hearing and upon conclusion of the hearing shall prepare findings of fact, conclusions of law and a recommended
31 order for the director of the department of administration. Upon receipt of the findings of fact, conclusions of law
32 and recommended order, the director shall enter a final order sustaining, modifying or reversing the decision of the
33 administrator on the selection of the lowest responsible bidder.”

34 Idaho Code § 67-5733(1)(c).

1 responsible bidder. The Court disagrees. Syringa did discover that the award was made to ENA
2 and Qwest. At that time, Syringa had sufficient notification that Syringa was not the lowest
3 responsible bidder and should have challenged that decision under Idaho Code § 67-5733(c).

4 In this action, Syringa contends that the multiple award was improper and asserts that DOA
5 should have found that the IEN Alliance proposal was the lowest responsible bidder. These
6 challenges could have been raised under Idaho Code § 67-5733. DOA should have had the
7 opportunity to evaluate these challenges as part of the bid process. DOA should have had the
8 opportunity to correct or mitigate the effects of any mistakes. Because Syringa did not seek any
9 administrative relief, the Court will find that Syringa failed to exhaust its administrative remedies.

10
11 *See Fieldturf, Inc. v. State Dept. of Admin., Div. of Public Works*, 140 Idaho 385, 94 P.3d 690
12 (2004). Accordingly, the Court will grant summary judgment to the State Defendants on the
13 requests for declaratory relief as alleged in Counts Two and Three of the complaint.

14 In Count Four of the complaint, Syringa alleges that the State Defendants tortiously
15 interfered with the Teaming Agreement. In the Motion for Summary Judgment, the State
16 Defendants assert that these claims are barred pursuant to Idaho Code § 6-904 which provides as
17 follows:

18
19 A governmental entity and its employees while acting within the course and scope
20 of their employment and without malice or criminal intent shall not be liable for
any claim which:

21 1. Arises out of any act or omission of an employee of the governmental entity
22 exercising ordinary care, in reliance upon or the execution or performance of a
23 statutory or regulatory function, whether or not the statute or regulation be valid,
24 or based upon the exercise or performance or the failure to exercise or perform a
discretionary function or duty on the part of a governmental entity or employee
thereof, whether or not the discretion be abused.

1
2 3. Arises out of . . . interference with contract rights.

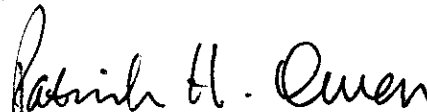
3 Idaho Code § 6-904. The State Defendants assert that there is no evidence that any State
4 Defendant acted in any manner that would make them liable. In his affidavit, Gwartney denies
5 that any person within DOA was directed to use any particular provider, or to not use Syringa for
6 the IEN project. By showing an absence of such evidence, the burden shifted to Syringa to come
7 forward with evidence showing a fact issue. Syringa has not responded to this argument and has
8 produced no admissible evidence that any of the State Defendants acted outside of the course and
9 scope of their employment or acted with malice or criminal intent. The Court will find that the
10 State Defendants are entitled to summary judgment on the claim of tortious interference with
11 contract as alleged in Count Four of the complaint.
12

13 **Conclusion**

14 For the foregoing reasons, the Court will grant the State Defendants' Motion for
15 Summary Judgment.

16 IT IS SO ORDERED.

17 Dated this 15 day of July 2010.

18 

19 _____
20 Patrick H. Owen
21 District Judge
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23
24
25
26

CERTIFICATE OF MAILING

I, J. David Navarro, 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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J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

Date: July 15, 2010

By Martha Lopez
Deputy Clerk