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Filed March 6, 2015

LAWRENCE DENNEY
Secretary of State

Lucy Mason
March 6, 2015
BY

ALFA INTERNATIONAL 55
The Global Legal Network

Via Hand Delivery

The Honorable Lawrence Denney
Idaho Secretary of State
700 West Jefferson, Room E205
Boise, ID 83720-0080

Re: NOTICE OF CLAIM PURSUANT TO I.C. § 6-901 *et seq.*
Contract (SBPO 1309) Awarded to ENA Under RFP 2160 For the Idaho
Education Network
GBSO File No. 45950-001

2015 MAR 10 10:55 AM
RECEIVED
STATE OF IDAHO
SECRETARY OF STATE

Dear Mr. Secretary:

Our firm represents ENA Services, LLC, a Division of Education Networks of America, Inc. (“ENA”). ENA has provided services to the children served by the Idaho Education Network (“IEN”) without payment and despite the legal uncertainties surrounding that contract. Consistent with the governor’s acknowledgment that payment is due and owing, please take notice that our client has authorized me to prepare a lawsuit against the State related to the State’s decision to stop making payments to ENA for its services under the Idaho Education Network (“IEN”). Absent payment, my client is left with no choice but to ask me to provide you this Notice of Claim on behalf of ENA and its intent to file claims against the State in accordance with Idaho Code § 6-901 *et seq.*

1. CLAIMANT

Claimant is a Delaware corporation, with its headquarters located at 618 Grassmere Park Drive, Suite 12, Nashville, TN 37211, and has been located at this address for more than six (6) months prior to the time this claim arose. Since 2009, ENA has engineered, implemented and maintained the IEN.

2. CONDUCT & CIRCUMSTANCES

The Idaho Legislature enacted legislation in 2008, creating the Idaho Education Network (“IEN”), which includes a high-bandwidth telecommunications distribution system for distance learning in public schools. In December, 2008, the Department of Administration issued a Request for Proposals 02160 for the IEN project (the “RFP”), seeking a unified solution for internet access with an E-rate component to administer the federally funded program and a connectivity component

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to physically connect schools and libraries through the IEN. The RFP also contemplated a second phase in which all state offices would be connected through the IEN. Under the RFP, only telecommunication and internet access companies that were qualified as E-rate service providers could bid on the IEN RFP. The RFP specifically requested an “end-to-end” solution for both E-rate and the network architecture required for the connectivity services.

In response to the RFP, ENA worked with Syringa Networks, LLC (“Syringa”) (jointly, the “IEN Alliance”) to prepare and submit a proposal with the goal of obtaining the entire IEN contract. ENA was the prime bidder and, if awarded a contract, intended to work with Syringa among others to deliver the services required by the RFP.

On January 20, 2009, the State issued a letter of intent to award the IEN project to ENA and Qwest (now CenturyLink), without explicit recognition of the IEN Alliance or Syringa in the letter of intent. Subsequently, on January 28, 2009, the State issued two, identical Statewide Blanket Purchase Orders (SBPO) with identical terms: one to ENA (SBPO 1309) and the other to Qwest (SBPO 1308) to provide goods and services for the IEN. On February 19, 2009, the State of Idaho designated ENA its named vendor under the federal E-Rate program in its FCC Form 471, making ENA eligible to collect, on behalf of the State of Idaho, federal E-Rate funds for the federally subsidized costs related to the IEN. Then on February 26, 2009, the State unilaterally issued amendments to the statewide blanket purchase order (the “Amendments”) to “clarify” the roles and responsibilities of the parties to the original awards. ENA was neither required nor asked to sign the Amendment to SBPO 1309, which the State characterized as having issued “unilaterally.” In the Amendments, the State segregated E-rate and connectivity services, awarding ENA control of the E-rate functions and awarding Qwest control of the connectivity services. The State also required ENA to contract with Qwest and vested in Qwest control of the technical network and connectivity services.

On December 15, 2009, Syringa sued DOA, seeking to invalidate the Amendment that vested Qwest with control of the technical network and connectivity services. Syringa’s Complaint also had claims of breach against ENA related to a Teaming Agreement between ENA and Syringa, and intentional interference claims against Qwest and DOA officers. Eventually, all claims were dismissed on summary judgment on March 8, 2011. Syringa appealed dismissal of all claims. On appeal, the Supreme Court affirmed the dismissal on all counts except for Count Three, remanding that single count for further proceedings consistent with its opinion. *Syringa Networks, LLC v. Idaho Dept. of Admin.*, 155 Idaho 55, 305 P.3d 499 (2013). Regarding the specific claim asserted against ENA, the Supreme Court stated that the “district court did not err in dismissing the claim against ENA for breach of contract,” and further that since Syringa “failed to prevail on its breach of contract claim against ENA,” it was not entitled to an award of fees on appeal. *Id.* at 64, 67, 305 P.3d at 508, 511. ENA was fully and finally dismissed from the case.

On remand, Syringa was granted permission to amend Count Three, and in its Second Amended Post Appeal Complaint and Demand for Jury Trial (“Post Appeal Complaint”) modified its Count Three, seeking a declaratory judgment against DOA declaring the February 26, 2009 IEN Amended SBPOs to both Qwest and ENA to be void. Syringa had originally sought only to obtain a

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declaratory judgment declaring the award to Qwest void, and to prohibit the State and Qwest from performing thereunder. Subsequently, ENA was served with the Post Appeal Complaint and filed its own Motion to Dismiss. At the time the District Court heard ENA's Motion to Dismiss, Syringa had pending a Motion for Partial Summary Judgment seeking a finding that SBPO 1308 and SBPO 1309 be declared void. ENA's Motion to Dismiss was denied and Syringa's Motion for Partial Summary Judgment was granted. The Court's decision treated ENA's Motion as a motion for summary judgment and avoided addressing the merits of ENA's Motion. Contrary to its due process rights, ENA was afforded no notice that its Motion would be treated as such, and was not allowed an opportunity to present all material pertinent to a Rule 56 Motion or to present appropriate materials in opposition to Syringa's partial summary judgment motion. Although ENA was not allowed an opportunity to defend its position, on February 11, 2015, the District Court entered a Judgment declaring each SBPO, "as amended by Amendment One," void. According to the Court, the State's actions relative to the RFP and amendments to the SBPOs were contrary to Idaho competitive bidding and procurement laws, thus making the entirety of the awards to ENA and Qwest void. ENA has filed its Notice of Appeal from the District Court's judgment on February 13, 2015, and that appeal is currently pending.

Accordingly, ENA finds itself in the anomalous position of having undeniably provided valuable services to the IEN, but being denied payment because of the unilateral actions of the State. No actions of ENA contributed to the finding that SBPO 1309 and its amendment were void, and the false statements stating otherwise in the media are causing great harm to ENA's reputation.

Additionally, the State has continued to appropriate funds for the IEN throughout the course of this litigation. As the express terms of the appropriations required payment for the services being rendered by ENA to the IEN, ENA further asserts a proprietary interest in payment from those funds for the services that it has provided, and that the denial of that payment is a violation of its rights.

Since the original awards, throughout the Syringa litigation and despite non-payment by the State, ENA has provided all goods and services required by SBPO 1309 for the IEN. Upon approval of IEN's annual 471 filing requesting E-Rate funding and indication by IEN to USAC to pay ENA invoices directly for the E-Rate funded portion of service costs under the Service Provider Invoice method, the E-rate funds for the federally subsidized portion of the cost to implement and operate the schools phase of the IEN were paid directly by USAC to ENA from December, 2009 until March, 2013. On July 31, 2013, ENA informed the DOA that payments from USAC had not been received since the end of March, 2013, which is when the Idaho Supreme Court decision in the Syringa lawsuit was issued. The USAC administrators have made clear to the DOA that USAC may determine not to continue E-rate funding for the IEN, endangering ENA's E-Rate certifications. The Idaho Legislature has made continuing appropriations for the IEN, until most recently, and the DOA has continued to seek the goods and services of ENA under its SBPO 1309. ENA has continued to provide goods and services under SBPO 1309 in reliance upon the continued appropriations and DOA's insistence upon ENA continuing to provide its goods and services. The State of Idaho and the children served by the IEN have received the full benefit of ENA's services; yet, ENA has not been paid.

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ENA has performed all terms and conditions required of it under SBPO 1309 in good faith to the continuing and substantial benefit of the State, its schools, libraries and agencies. It made the infrastructure investments required for the long term benefit of the IEN. The State of Idaho continues to defend the challenges to the awards and to acknowledge its obligation to pay ENA. Moreover, the State was aware when it continued the IEN and represented to ENA that it would be paid for the goods and services it was providing that ENA had made and was continuing to make costly investments to serve the State and the State's public schools, libraries and agencies in reasonable reliance on these representations.

Despite rendering these valuable services at the request of the State, the State has failed to pay ENA under SBPO 1309 and perform under the terms and conditions of the agreement between the parties. As of February 28, 2015, the State has defunded the IEN, effectively terminating the contract before the expiration of its anticipated term. These actions constitute material breaches of the agreement and an illegal taking of ENA's property without compensation and without due process of law, in violation of the Idaho and United States constitutions. In addition, the State's recent refusal to make requests for the mandated expenditures under the State's appropriations for the Department of Administration for the IEN under Chapter 229 of the 2014 Idaho Session Laws violates express statutory obligations and constitutes tortious interference with ENA's contracts with CenturyLink under the work required by the IEN. ENA is entitled to recover its damages for breach if the Idaho Supreme Court reverses the District Court judgment. In the alternative, if the Supreme Court affirms the judgment declaring SBPO 1309 void, ENA has unjustly enriched the State by providing its goods and services and is entitled to recover the amount of the benefit conferred upon the State, or to recover just compensation for the taking of ENA's property. ENA is also entitled to be indemnified by the State, which is obligated under the principles of common law or implied indemnity as an active or primary actor to cover any damages ENA, as a passive or secondary actor, has or will have as a result of the State's failure to comply with the statutory provisions related to competitive bidding and procurement. Accordingly, ENA intends to file a Complaint for Breach of Contract, Unjust Enrichment, Promissory Estoppel, Common Law Indemnity, Tortious Interference With Contract, violation of ENA's constitutional rights to just compensation and due process of law, and for all other appropriate legal and equitable rights and remedies to which it is entitled, to recover all damages it has or will have as a result of the State's failure to comply with Idaho's competitive bidding and procurement statutes.

3. INJURY OR DAMAGE

As a result of the State's refusal to compensate or indemnify ENA for the goods and services it has provided under the IEN and ENA's reasonable reliance on the State's representations that it would compensate ENA, ENA has suffered damages in the approximate amount of \$6,000,000, including ancillary damages, plus statutory interest, costs, expenses and reasonable attorneys' fees.

4. TIME & PLACE

The State has continually defended the challenges to the IEN awards and acknowledged its obligation to pay for the goods and services provide by ENA for the IEN. Beginning in March of

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2013, the State, while accepting the services of ENA, has withheld payments to ENA for its goods and services provided for the IEN across the State of Idaho.

5. PERSONS INVOLVED, IF KNOWN

The following are names of persons known to me at this time who may in some manner be involved, or have knowledge of, ENA's claims:

Bob Collie, ENA

Gayle Nelson, ENA

Rex Miller, ENA

Various current and past officials with and employees of the Department of Administration and Department of Education including without limitation

Teresa Luna

Greg Zickau

Mike Gwartney

Governor Butch Otter

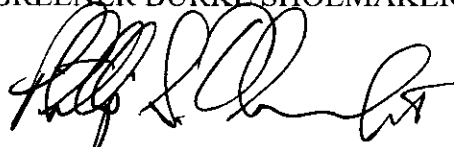
Various current and past employees, agents and representatives of CenturyLink/Qwest

6. DAMAGES CLAIMED

At this time, ENA claims damages against the Idaho Department of Administration pursuant to Idaho Code § 6-901, *et seq.*, in the approximate amount of \$6,000,000, including ancillary damages, plus interest, costs, expenses and attorney fees.

Very truly yours,

GREENER BURKE SHOEMAKER OBERRECHT P.A.



Phillip S. Oberrecht

PSO/jrm
(750587)

cc: State of Idaho, Department of Administration
State of Idaho, Office of the Attorney General
Merlyn Clark, Hawley Troxell
Steven Perfrement, Bryan Cave