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IN THE UNITED STATES COURT OF FEDERAL CLAIMS
Bid Protest

GOOGLE, INC, and ONIX NETWORKING CORPORATION, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant, SOFTCHOICE CORPORATION, Intervenor.	Case No. 10-743C Judge Susan G. Braden

SOFTCHOICE CORPORATION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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Softchoice demonstrated in its motion to dismiss and supporting memorandum ("Softchoice Mem.") that neither Google nor Onix qualifies as an "interested party" under 28 U.S.C. § 1491(b)(1). Neither company satisfies the requirements set forth in *American Federation of Government Employees ("AFGE")* v. *United States*, 258 F.3d 1294, 1300-02 (Fed. Cir. 2001): that the plaintiff be an "actual or prospective bidder," with a "direct economic interest" in the procurement. Specifically,

Google did not and never intended to submit an offer. Under the Federal Circuit's holdings in, *e.g.*, *Rex Service Corp.* v. *United States*, 448 F.3d 1305 (Fed. Cir. 2006), and *MCI Telecommunications Corp.* v. *United States*, 878 F.2d 362 (Fed. Cir. 1989), these failures prevent Google from qualifying as either an actual or a prospective bidder. In addition, under the Federal Circuit's holding in, *e.g.*, *Myers Investigative & Security Services, Inc.* v. *United States*, 275 F.3d 1366, 1370 (Fed. Cir. 2002), Google also lacks the requisite "direct economic interest" in the procurement, because Google is not a Federal Supply Schedule contract holder and therefore lacks the threshold ability even to submit an offer.

Onix neither submitted an offer nor filed a bid protest prior to the end of the proposal period. Under the Federal Circuit holdings in, *e.g.*, *Rex Service* and *MCI*, these failures mean that Onix is neither an actual or prospective bidder. This reading of *Rex Service* and *MCI* was explicitly endorsed and applied by this Court in *Shirlington Limousine & Transportation, Inc.* v. *United States*, 77 Fed. Cl. 157 (2007) (Braden, J.); *accord Infrastructure Defense Technologies, LLC* v. *United States*, 81 Fed. Cl. 375, 388-89 (2008) ("*IDT*").

Google's and Onix's opposition brief ("Pls.' Opp.") misstates the standard of review on a motion to dismiss for lack of subject matter jurisdiction,[1] and rests on two additional false legal premises. First, Google and Onix continue to rely upon the expansive definition of "interested person" provided by a Court of Federal Claims ("CFC") decision that predates and in pertinent respects conflicts with the Federal Circuit's decision in *AFGE*.

Second, Plaintiffs attempt to combine the status and actions of Onix with those of Google to try to establish standing. Even if Plaintiffs were allowed to do so, they would lack standing. But as a matter of law, whether standing exists must be assessed on an individualized basis.

Google's and Onix's individual failure to qualify as an "interested party" is manifest. Their only remaining argument is that, notwithstanding the fact that neither is an "actual or prospective bidder" with a "direct economic interest" in the procurement, they can

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[1] Google and Onix contend that the Court must assume all factual allegations in their complaint to be true, and that they need only set forth a prima facie showing of jurisdictional facts. (Pls.' Opp. at 19-20). While that statement may reflect Plaintiffs' initial burden of pleading, "[i]f a motion to dismiss for lack of subject matter jurisdiction . . . challenges the truth of the jurisdictional facts alleged in the complaint, the district court may consider relevant evidence in order to resolve the factual disputes," *Reynolds* v. *Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988), in which case the plaintiff must establish standing by a preponderance of the evidence. *Id. at* 748; *see also, e.g.*, *Menchaca* v. *Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980) ("A 'facial attack' on the complaint requires the court merely to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion. . . . A 'factual attack,' however, challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.").

Through citations to the Administrative Record and other material, Softchoice has directly challenged Plaintiffs' averments in their Complaint and other pleadings that they were actual or prospective bidders with a direct economic interest in the procurement. *See* Softchoice Mem. at 4-5 and pp. 6-11, *infra*. Accordingly, under *Reynolds*, Google's and Onix's factual allegations are not presumed to be true, and Plaintiffs have the burden of establishing standing by a preponderance of the evidence.

purportedly establish standing by relying upon the ultimate clause of § 1491(b)(1), which provides for a challenge to "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." But on its face, this provision is also subject to the requirement that the person asserting such a violation satisfy the "interested party" requirement. The ultimate clause of § 1491(b)(1) thus provides no means of escape for Google or Onix, and none of the case law they cite suggests otherwise.

A. The Controlling Definition Of "Interested Party" Is Set Forth In The Federal Circuit's Binding *AFGE* Decision.

The Federal Circuit in *AFGE* addressed for the first time the "interested party" requirement of § 1491(b)(1), which had been added to the Tucker Act in 1996. The Federal Circuit noted several possible competing definitions, *see* 258 F.3d at 1299, but "guided by the principle that waivers of sovereign immunity . . . are to be construed narrowly," *id*. at 1301, ultimately held that "standing under § 1491(b)(1) is limited to actual or prospective bidders or offerers whose direct economic interest would be affected by the award of the contract or by failure to award the contract." *Id.* at 1302 (adopting the definition provided in the Competition in Contracting Act ("CICA"), 31 U.S.C. § 3551(2)).

The Federal Circuit has never swayed from this formulation of the test. *See, e.g.*, *Rex Service*, 448 F.3d at 1307; *Distributed Solutions, Inc.* v. *United States*, 539 F.3d 1340, 1345 (Fed. Cir. 2008). Google and Onix nonetheless persist in defending the more expansive definition of "interested party" adopted prior to *AFGE* in *CCL, Inc.* v. *United States*, 39 Fed. Cl. 780, 790 (1997) (*see* Pls.' Opp. at 24), even though that definition leaves out the requirements that the plaintiff be an "actual or prospective bidder" and that its economic interest be "direct." *See* Softchoice Mem. at 4 & n.2.

Google's and Onix's assertion that *CCL* is still good law because "*CCL* also relied upon the CICA definition of 'interested party' to frame its result" (Pls.' Opp. at 24) ignores that the Federal Circuit in *AFGE* explicitly adopted the CICA definition for purposes of § 1491(b)(1), while *CCL* had held that the CICA definition "does not . . . necessarily represent[] the four corners of potential standing" under § 1491(b)(1). 39 Fed. Cl. at 789-90. Indeed, *CCL* went on to adopt a definition "similar to that applied in connection with the Administrative Procedure Act," *id*., the very approach that was later advanced by the plaintiff in *AFGE*, *see* 258 F.3d at 1299, and ***rejected*** by the Federal Circuit, *see id.* at 1300-01.[2]

B. Standing Must Be Assessed Individually For Each Plaintiff.

Perhaps intentionally, Google's and Onix's brief fails to distinguish between the salient facts applicable to each. (*See, e.g.*, Pls.' Opp. at 19 ("***Plaintiffs*** would have submitted a proposal in response to the anticipated solicitation") (emphasis added); *id.* at 22 ("Google and Onix were prospective suppliers")). Even if such an amalgamation of identities were permissible, Google and Onix would not emerge as a "prospective bidder," because neither submitted a timely bid nor filed a timely CFC bid protest, *see* Softchoice Mem. at 2 and pp. 9, *infra*. But in fact, standing must be assessed separately for each company.

"***Each plaintiff*** must have standing to seek each form of relief in each claim." *Bronson* v. *Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007) (emphasis added); *accord Whitaker* v. *Garcetti*, 486 F.3d 572, 580 (9th Cir. 2007) ("[W]e must determine the viability of each claim

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[2] Plaintiffs also rely on *Distributed Solutions* (Pls.' Opp. at 24), but the Federal Circuit there repeated and applied the same test adopted in *AFGE* and *Rex Service*. *See* 539 F.3d at 1345. *Distributed Solutions*'s footnote citation to *CCL*, upon which Plaintiffs rely, did not endorse the expansive definition of "interested party" adopted by *CCL* that was quoted by Plaintiffs in their preliminary injunction motion at page 22, and challenged by Softchoice, *see* Softchoice Mem. at 4 & n.2.

as to each Plaintiff.") (citing *Sacks* v. *Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006) ("Article III standing requires the plaintiff to establish standing for each challenge he wishes to bring and each form of relief he seeks.")).

This rule of law is especially pertinent where, as here, a party's standing turns in part on whether it has engaged in specified conduct prior to the end of the proposal period. *See* Softchoice Mem. at 10-11 and pp. 9-11, *infra*. For example, the Hobbs Act's limitation of standing to "parties aggrieved" has been judicially interpreted to limit standing to those parties that participated directly in the agency proceedings leading to the challenged conduct. Courts applying this requirement have uniformly rejected a plaintiff's efforts to rely upon actions taken by others in an effort to establish standing, even when those actions were taken by closely affiliated persons that had espoused the same position that the plaintiff subsequently sought to advance.[3]

Viewed individually, and assessed against the governing *AFGE* criteria, Google's and Onix's lack of standing is beyond cavil.

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[3] *See, e.g.*, *American Civil Liberties Union* v. *FCC*, 774 F.2d 24, 25-26 (1st Cir. 1985) ("Petitioners contend that NHCLU [the New Hampshire Civil Liberties Union] and CLUM [the Civil Liberties Union of Massachusetts] are nevertheless 'parties aggrieved' by the [agency's] order because their interests were represented by [their parent organization] ACLU [the American Civil Liberties Union] in the administrative proceedings. . . . Nothing in the statute suggests that Congress intended such a result. In fact the standard selected by Congress -- '*party* aggrieved' as opposed to '*person* aggrieved' -- demonstrates an intent to limit the number of persons entitled to petition for review."); *Packard Elevator* v. *ICC*, 808 F.2d 654, 656 (8th Cir. 1986) ("Neither the participation of RLEA [the Railway Labor Executives Association] nor the submission of an affidavit by an IBEW [the International Brotherhood of Electrical Workers] member in support of RLEA's position constitutes participation by IBEW in [these] administrative proceedings. . . . The fact that RLEA chose not to request judicial review and the resulting inability of IBEW to secure judicial review of the [agency] decision presents no compelling reason to ignore congressional intent."); *Alabama Power Co.* v. *ICC*, 852 F.2d 1361, 1368 (D.C. Cir. 1988) (railroad was not a "party aggrieved" based upon participation in the administrative proceeding by a trade association to which the railroad belonged).

C. Google Is Not An Interested Party.

Google is not an actual or prospective bidder because it never bid, never intended to bid, and was never qualified to bid. *See* Softchoice Mem. at 5-6. At most, Google products might have been supplied by someone else (*e.g.*, Onix). This does not make Google a bidder. *See id*. at 6 (quoting, *e.g.*, *Pure Power!, Inc.* v. *United States*, 70 Fed. Cl. 739, 744-45 (2006) ("Because plaintiff is properly characterized as, at best, a prospective supplier or subcontractor to [the bidder], rather than an actual or prospective bidder on a government solicitation, plaintiff cannot qualify as an interested party with standing.") (internal quotation marks and citation omitted)).

Google never establishes that it bid or intended to do so. Google's undifferentiated assertion that "***Plaintiffs*** would have submitted a proposal" (Pls.' Opp. at 19) only underscores ***Google***'s inability even to contend that *it* would have done so, a *sine qua non* to Google's standing. *See* Softchoice Mem. at 4-6 (citing *MCI*[4] and *Rex Service*). Google's contention that Softchoice has relied upon post-bid protest cases is both overstated[5] and irrelevant with respect to the propositions for which such cases have been cited.[6] *See also* pp. 9-11, *infra*.

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[4] *MCI* interpreted and applied the CICA definition of "interested party," which was later adopted in *AFGE* as the governing standard under § 1491(b)(1). *See* p. 3, *supra*.

[5] Among the pre-award cases cited in Softchoice's opening brief were *CS-360, LLC* v. *United States*, 94 Fed. Cl. 488 (2010); *IDT*; *Scott* v. *United States*, 78 Fed. Cl. 151 (2007); *Frazier* v. *United States*, 79 Fed. Cl. 148 (2007); *Weeks Marine, Inc.* v. *United States*, 575 F.3d 1352 (Fed. Cir. 2009); *Blue & Gold Fleet, L.P.* v. *United States*, 492 F.3d 1308 (Fed. Cir. 2007); and *Erinys Iraq Ltd.* v. *United States*, 78 Fed. Cl. 518 (2007).

[6] *Rex Service* was a post-award bid protest, but its logic has been applied in a number of pre-award bid protest cases. *See IDT*, 81 Fed. Cl. at 386; *Shirlington*, 77 Fed. Cl. at 167; and *Scott*, 78 Fed. Cl. at 157. The same is true with respect to both *MCI*, cited in pre-award bid protest cases *Scott*, 78 Fed. Cl. at 157, and *Shirlington*, 77 Fed. Cl. at 166; and *Myers Investigative*, cited in pre-award bid protest cases *IDT*, 81 Fed. Cl. at 387-88, and *CS-360*.

Google is reduced to contending that "[w]hether Google or Onix submitted a proposal or intended to submit a proposal . . . is irrelevant." (Pls.' Opp. at 22.) That contention, if accepted, would vitiate settled case law regarding the meaning of "interested party," including, among many other decisions, *MCI*, *Rex Service*, and *Shirlington*.

Google also observes that manufacturers commonly sell their products through re-sellers, and Government documents sometimes refer by name to the manufacturer rather than the re-seller. (*see* Pls.' Opp. at 22). Even if true, neither observation can overcome the rule of law that only the entity that bid or would have bid on a procurement has standing (assuming it also meets other prerequisites). *See* Softchoice Mem. at 8-9.

Moreover, the fact that Google is not a Federal Supply Schedule 70 contract holder, and thus could not possibly have submitted a proposal, provides further proof both that Google was not a prospective bidder ***and*** that the company lacks the requisite ***direct*** economic interest in the procurement. *See* Softchoice Mem. at 6-9 (citing, *e.g.*, *Myers Investigative*, 275 F.3d at 1370 (the protestor must establish it "***could*** compete for the contract") (emphasis added; quotation marks and citation omitted)). Google in response merely observes that *Myers Investigative* was a post-award decision (*see* Pls.' Opp. at 22 n.8), an irrelevant distinction with respect to the salient *Myers Investigative* legal holding.

The fundamental point is straightforward: Even were the Court to accept Plaintiffs' argument that the Interior Department should not have issued the Limited Source Justification, but should instead have opened competition to Google Apps for Government cloud computing, competition for that contract would still have been limited to Federal Supply Schedule 70 contract holders. Google has not challenged that requirement, and it is not a Federal Supply Schedule 70 contract holder. Google was therefore never going to submit a bid

regardless of whether the Limited Source Justification was adopted. *See* Softchoice Mem. at 7-8. Google accordingly cannot pursue this protest.

Savantage Financial Services, Inc. v. *United States*, 81 Fed. Cl. 300, 306 (2008) (*see* Pls.' Opp. at 23), does not allow Google to avoid the disqualifying effect of its lack of a Federal Supply Schedule 70 contract. The *Savantage* plaintiff protested that a procurement had not been put out for bid, and the court explicitly held that there was no "reason why plaintiff [the incumbent provider] would not have been a qualified bidder" had the Government done so. 81 Fed. Cl. at 306. Google points to the Government's contention that the *Savantage* plaintiff lacked the requisite status as an "EAGLE program vendor" (Pls.' Opp. at 23), but this only meant that the company could not compete for the support services contract, and did ***not*** prohibit it from bidding to supply its software as the agency's baseline. *See* 81 Fed. Cl. at 306.

Such a conclusion is simply not available to Google, which has *never* challenged the Government's requirement here that a bidder be a Federal Supply Schedule 70 contract holder.[7] Google was thus never a qualified bidder, regardless of whether the RFQ contained the provision that Google does challenge (the limitation to the Microsoft Business Productivity Online Suite). Google's bare averment that it "could have competed in a proper competition" (Pls.' Opp. at 23 n.9) lacks foundation and is entitled to no weight. *See* p. 2 n.1, *supra*.

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[7] Indeed, Federal Acquisition Regulation ("FAR") Subpart 8.4 expressly provides in pertinent part: "BPAs [Basic Purchasing Agreements] and orders placed against a MAS [Multiple Award Schedule], using the procedures in this subpart, are considered to be issued using full and open competition (see [FAR] 6.102(d)(3)). Therefore, when establishing a BPA . . . or placing orders under Federal Supply Schedule contracts using the procedures of 8.405, ordering activities shall not seek competition outside of the Federal Supply Schedules or synopsize the requirement . . . ." FAR 8.404(a).

This case is on all fours with *CS-360*, in which the plaintiff lacked standing because it did not satisfy the eligibility requirement of a Department of Veterans Affairs' vendor information pages database listing. *See* Softchoice Mem. at 8. Google ignores *CS-360*, except with respect to that decision's entirely separate discussion of whether the "non-trivial competitive injury" standard discussed in *Weeks Marine*, 575 F.3d at 1361-62, is limited to cases where there were no bids or offers submitted. *See* Softchoice Mem. at 9. That question is of no relevance to Google, given that even under the relaxed *Weeks Marine* standard, Google must make a showing of which it is incapable: that it both intended to bid on the Interior Department contract ***and*** was eligible to do so. *Weeks Marine*, 575 F.3d at 1360-61; *CS-360*, 94 Fed. Cl. at 496.

D. Onix Is Not An Interested Party.

Onix neither submitted a bid, nor filed a bid protest, prior to the end of the proposal period. Onix thus cannot establish itself as an actual or prospective bidder, given that a party must have done one of these two things in order to qualify, *see MCI*, 878 F.2d at 362, 365, and "the opportunity to qualify either as an actual or a prospective bidder ends when the proposal period ends," *Rex Service*, 448 F.3d at 1308.[8]

It is irrelevant whether Onix believes that proposals should not have been limited to the Microsoft Business Productivity Online Suite: Onix "could have [bid] for the contract award . . . and could have utilized [the] protest procedures available to an interested party to

[8] Although Plaintiffs claim (*see* Pls.' Opp. at 19 n.7) that Softchoice relies upon *Blue & Gold Fleet L.P.* v. *United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007), in arguing their lack of standing, Softchoice cited that decision solely in the context of comparing waiver with lack of subject matter jurisdiction. *See* Softchoice Mem. at 11-12. Furthermore, to the extent Plaintiffs claim that a bid protest before the GAO suffices to establish one as a "prospective bidder" (*see* Pls.' Opp. at 19 n.7), that position has been rejected by this Court, which would not in any event be of any benefit to Google or Onix. *See* p. 11, *infra*.

correct the deficiencies it perceived in the procurement process." *Id.* (dismissing protest for lack of standing) (quoting *Fed. Data Corp.* v. *United States,* 911 F.2d 699, 705 (Fed. Cir. 1990)); *accord IDT,* 81 Fed. Cl. at 384.

IDT addressed very similar facts. As here, *IDT* was a pre-award protest, with the plaintiff challenging that the bid solicitation was for a sole source contract, and specified by part number products made by the plaintiff's competitor. The plaintiff neither submitted a bid nor filed a bid protest prior to the end of the proposal period, but instead waited until six weeks after the end of the proposal period to file a CFC bid protest. *IDT,* 81 Fed. Cl. at 382-83.

IDT held that the plaintiff lacked standing because it was not an "interested party." Quoting the admonitions of *Rex Service,* 448 F.3d at 1308, that "the opportunity to qualify either as an actual or a prospective bidder ends when the proposal period ends," the *IDT* court held:

> In the present case, the asserted deficiencies of which IDT complains were patent, apparent in the Presolicitation Notice and the Solicitation. IDT has not established any valid basis by which the standing requirements can be obviated.

81 Fed. Cl. at 385.

Notwithstanding the prominent treatment given *IDT* in Softchoice's motion to dismiss, *see* Softchoice Mem. at 10-11, Plaintiffs do not mention the decision in their brief, thus seemingly acknowledging *sub silentio* that *IDT*'s holding is irreconcilable with Onix having standing here.

Moreover, *IDT* relied (*see* 81 Fed Cl. at 385) upon this Court's decision in *Shirlington*, which also dismissed a pre-bid protest for lack of standing. In *Shirlington,* this Court adopted and applied the Federal Circuit's holding in *MCI* that status as a prospective bidder or offeror must be secured either by: (1) filing a bid, or (2) filing a protest before the close

of the solicitation. 77 Fed. Cl. at 167 (citing *MCI*, 878 F.2d at 362, 364). The *Shirlington* plaintiff lacked standing because, like Onix here, it had failed either to bid or file a protest prior to the end of the proposal period. *Id.*

This Court also rejected the *Shirlington* plaintiff's contention that it qualified as a prospective offeror because it had filed a GAO bid protest prior to the end of the proposal period. *Id.* ("[A]s a matter of law, Plaintiff's . . . GAO protest does not confer 'prospective offeror' status for purposes of standing in the United States Court of Federal Claims.") (citing *Rex Service*, 448 F.3d at 1308, and rejecting the plaintiff's contention that *Rex Service* could be distinguished on the ground that it involved a post-award protest). Given that Onix did not file either a CFC ***or*** a GAO bid protest prior to the end of the proposal period, its lack of standing is even clearer than that of the unsuccessful plaintiff in *Shirlington*.

Onix attempts to cast the test as one of prejudice, and to rely upon the GAO protest that Google filed. (Pls.' Opp. at 19 n.7.) This argument fails on multiple grounds. First, under this Court's holding in *Shirlington*, the GAO protest would have been insufficient to render Onix an interested party even if Onix itself had made that filing. Second, neither *MCI*, *Rex Servic*e, *Shirlington*, nor *IDT* casts the issue as one of prejudice to the Government or intervenors, but rather whether the putative plaintiff took the affirmative steps necessary to qualify as a prospective bidder. Third, Onix must establish standing based upon its own conduct, not that of Google. *See* pp. 4-5, *supra*.

E. The Ultimate Clause Of Section 1491(b)(1) Is Of No Benefit To Google Or Onix.

Faced with the overwhelming case law establishing that neither has standing, Google and Onix seek final refuge in a wholly untenable reading of the ultimate clause in § 1491(b)(1), which provides for a challenge to "any alleged violation of statute or regulation in

connection with a procurement or a proposed procurement." On its face, Plaintiffs' reading is untenable, given that this clause, like the other clauses of § 1491(b)(1), is subject to the explicit requirement that the plaintiff be an "interested party,"[9] the very requirement that each Plaintiff fails. *See* pp. 6-11, *supra*.

The cases construing the ultimate clause of § 1491(b)(1) do not hint of a statutory reading that would benefit Google or Onix. Plaintiffs principally rely on *Diversified Solutions,* which involved a challenge to a federal agency's decision not to procure software through a direct competitive process, but rather to task a single, existing contractor with awarding subcontracts for such software. *See* 539 F.3d at 1343-44. The Federal Circuit found that the plaintiffs had standing because they were "prospective bidders in that they submitted qualifying proposals in response [to a Request for Information (RFI)] and, according to their complaint, were prepared to submit bids pursuant to the anticipated Request for Quotation (RFQ) or Request for Proposal (RFP) that typically ensues after an RFI is issued." *Id.* at 1345.

It was the Government's decision "to forego the direct competitive process of procurement," and *not* proceed to the RFQ or RFP stage, that formed the basis of the *Diversified Solutions* plaintiffs' claims. *Id.* Under these circumstances, the plaintiffs had standing, and could rely upon the "in connection with a procurement" provision of the ultimate clause of § 1491(b)(1) as a basis for their challenge. *Id*. at 1345-46.

By the nature of the dispute presented, *Diversified Solutions* says nothing about the requirement -- established in *MCI* and *Rex Service* and applied in, *e.g*., *Shirlington* and *IDT* --

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[9] 28 U.S.C. § 1491(b)(1) provides in pertinent part: "[T]he United States Court of Federal Claims . . . shall have jurisdiction to render judgment on an action ***by an interested party*** objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." (Emphasis added).

that a plaintiff, in order to qualify as a prospective offeror and thus to establish standing, must either submit a bid, or file a bid protest, before the end of the solicitation period. *Diversified Solutions* says nothing about that requirement because *Diversified Solutions* addresses the situation in which there was ***no*** solicitation, and therefore ***no*** solicitation period.

A plaintiff in those circumstances obviously is not held to the requirement that it submit a bid or file a protest before the end of the solicitation period, given that such period, and the concomitant deadline for taking action, do not exist. (The situation can alternatively be conceptualized as one in which the plaintiff did file its bid protest before the end of the solicitation period, because the absence of any solicitation period means that a filing would inherently be before the "end" of that period.)

The instant litigation involves the reverse situation: There was a solicitation. There was an RFQ. There was a deadline for responses, and thus a solicitation period, with an end date for responses. The obligation to take specified action before that end date, as established by *MCI*, *Rex Service*, *IDT*, and *Shirlington*, was thus triggered. Plaintiffs' failure to have done so precludes them from pursuing their claims.

Indeed, were Plaintiffs correct in their reading of the ultimate clause of § 1491(b)(1), numerous precedents, dismissing claims brought by plaintiffs that failed to bid or file protests before the end of a solicitation period, were wrongly decided, including at a minimum *IDT*, *Shirlington*, *MCI*, and *Rex Service*. Nothing in *Diversified Solutions* or any other decision suggests such a result.

* * *

Neither Google nor Onix is an interested party. The lawsuit should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

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