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IN THE UNITED STATES COURT OF FEDERAL CLAIMS
Bid Protest

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

SOFTCHOICE CORPORATION'S UNOPPOSED RENEWED MOTION TO INTERVENE

Pursuant to Rule 24(a) of the Rules of the United States Court of Federal Claims ("RCFC"), Softchoice Corporation ("Softchoice"), by its undersigned counsel, respectfully submits this renewed motion to intervene in the above-captioned protest. This motion is unopposed.[1] As discussed below, Softchoice is entitled to intervene as a matter of right in accordance with RCFC 24(a). Alternatively, Softchoice should be permitted to intervene under RCFC 24(b).

BACKGROUND

Softchoice is a technology solutions and services company that manages the technology needs of more than 15,000 corporate and public sector organizations across the United States and Canada. *See* Ex. A (Decl. of James Kman) ¶ 2. Softchoice is a General Services Administration ("GSA") Federal Supply Schedule 70 contractor, and an authorized

[1] Counsel for Softchoice has spoken with counsel for Plaintiffs and counsel for the Government. Both indicated that they do not oppose this renewed motion to intervene.

reseller of Microsoft products, including Microsoft's Business Productivity Online Suite — Federal ("BPOS-Federal"). *See* Ex. A (Decl. of James Kman) ¶¶ 3, 4, 6 & Attachment 1 thereto; Amend. Compl. ¶ 6. On September 13, 2010, Softchoice submitted a timely quotation to the Department of the Interior ("DOI") in response to Request for Quotation No. 503786 ("the RFQ"), which is the subject of this protest. *See* Ex. A (Decl. of James Kman) ¶¶ 5, 6 & Attachment 2 thereto; Amend. Compl. ¶ 6. Softchoice's quotation proposed a comprehensive solution to meet DOI's messaging and collaboration services requirements using BPOS-Federal. *See* Ex. A (Decl. of James Kman) ¶ 5.

On November 15, 2010, Softchoice filed an unopposed motion to intervene in this matter, and later that same day the Court granted Softchoice's motion, pursuant to RCFC 24(a). On January 3, 2011, the Court issued a decision in which the Court reconsidered its earlier decision to permit Softchoice to intervene because the record "does not include any verification of Softchoice's GSA Schedule 70 status or Softchoice's 'timely quotation' nor did Softchoice independently proffer either in support its November 15, 2010 Motion." *Google, Inc.* v. *United States*, No. 10-743C, 2011 WL 17619, at *13 (Fed. Cl. Jan. 3, 2011). Accordingly, the Court denied Softchoice's intervention, "without prejudice to refile with appropriate documentation." *Id.*

Softchoice now files this renewed motion to intervene, together with verification that Softchoice indeed holds a GSA Schedule 70 contract and submitted a timely quotation to DOI in response to the RFQ, *see* Ex. A (Decl. of James Kman) ¶¶ 3, 5, 6; Amend. Compl. ¶ 6.

ARGUMENT

A. Softchoice Is Entitled To Intervene As A Matter Of Right.

Softchoice is entitled to intervene as a matter of right as an actual offeror whose interests will be substantially affected by the outcome of this bid protest. RCFC 24(a) requires

the Court to permit "[o]n timely motion, . . . anyone to intervene who: . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." The Federal Circuit has held that "the requirements for intervention are to be construed in favor of intervention." *Am. Mar. Transp., Inc.* v. *United States*, 870 F.2d 1559, 1561 (Fed. Cir. 1989). Softchoice satisfies each of the elements for intervention as a matter of right in this protest, and thus intervention under RCFC 24(a) is proper. *See Mgmt. Solutions & Sys., Inc.* v. *United States*, 75 Fed. Cl. 820, 826-27 (2007) (finding standing to intervene under the elements of RCFC 24(a)).

1. Softchoice's Motion To Intervene Is Timely.

The Federal Circuit has identified three factors to be considered in determining whether an intervention is timely: (1) the length of time during which the would-be intervenor knew or should have known of its rights; (2) whether the prejudice to the rights of existing parties by allowing intervention outweighs the prejudice to the would-be intervenor by denying intervention; and (3) existence of unusual circumstances militating either for or against a determination that the application is timely. *See Belton Indus., Inc.* v. *United States*, 6 F.3d 756, 762 (Fed. Cir. 1993).

Softchoice filed its original motion to intervene in this case on November 15, 2010, approximately one week after the Government's filing of the administrative record, and prior to any briefing on the allegations raised in the Plaintiffs' compliant or their motion for preliminary injunction. Softchoice now files this renewed motion to intervene within eleven days of the Court's decision to reconsider and deny Softchoice's intervention and the Court's invitation to Softchoice to renew its motion to intervene. Under these circumstances, Softchoice's intervention will pose no prejudice to Plaintiffs or the Government, and neither is

opposing Softchoice's renewed motion to intervene. Moreover, no unusual circumstances would militate against intervention by Softchoice. Accordingly, Softchoice's motion is timely.

2. Softchoice Has A Direct Interest In This Action, And Its Disposition May Impair Or Impede Softchoice's Ability To Protect That Interest.

RCFC 24(a)(2) requires that a putative intervenor establish that its interests relate to property or a transaction that is the subject of the proceeding and that its interests are so situated that the disposition of the action may as a practical matter impair or impede the putative intervenor's ability to protect that interest. As a company that is actively seeking to be awarded a contract pursuant to the challenged RFQ (*see* Ex. A (Decl. of James Kman) ¶ 7), Softchoice has a direct and substantial economic interest in the disposition of this action, and these interests would be significantly impaired if the relief sought by the Plaintiffs in this action were granted. *See* RCFC App. C, ¶ V.12 (contemplating intervention in bid protest cases by the party in whose favor the challenged agency action was rendered); *see also Greenleaf Const. Co., Inc.* v. *United States*, 67 Fed. Cl. 350 (2005) (prospective contract awardee allowed to intervene in pre-award protest); *Pikes Peak Family Housing, LLC* v. *United States*, 40 Fed. Cl. 673, 675 (1998) (competing bidder allowed to intervene as defendant in pre-award protest).

Plaintiffs' complaint seeks to preliminarily and permanently enjoin DOI from proceeding with the RFQ. Amend. Compl. at 24. If the Court were to do so, the DOI procurement would be further delayed, and Softchoice's financial interests, as a company that already submitted a timely and compliant bid, will be directly harmed. *See* Ex. A (Decl. of James Kman) ¶¶ 5, 7.

Furthermore, this protest seeks to reverse DOI's decision to require a BPOS-Federal solution, based *inter alia* on its requirement of a cloud housing federal government tenants only. As a reseller of BPOS-Federal, Softchoice has a substantial interest in defending

that decision. Moreover, as a reseller of BPOS-Federal and other Microsoft products (*see* pp. 1-2 *supra*), Softchoice has a substantial interest in refuting Plaintiffs' allegations concerning the technical and security capability of BPOS-Federal. *See* Ex. A (Decl. of James Kman) ¶ 8.

3. The Other Parties In This Litigation Cannot Adequately Represent Softchoice's Interests.

Finally, no other party shares or adequately can represent Softchoice's interest in this protest. As this Court has noted, "[t]he burden of demonstrating inadequacy of representation is not heavy: according to the Supreme Court, this requirement 'is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal.'" *Klamath Irr. Dist.* v. *United States*, 64 Fed. Cl. 328, 336 (2005) (quoting *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). Furthermore, when the party that would be expected to represent the intervenor's interests is a government body or officer, there is no presumption that this representation will be adequate, unless the body or officer is charged by law with representing the interests of the intervenor. *See Natural Res. Def. Council* v. *E.P.A.*, 99 F.R.D. 607, 610 n.5 (D.D.C. 1983); *see also Dimond* v. *District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986).

First, there should be little doubt that Plaintiffs will not adequately represent Softchoice's interest in this matter. Although the Government will presumably continue to defend this bid protest in a zealous manner, Softchoice, in conjunction with Microsoft, is in the best position to describe the harm to it, and to refute Plaintiffs' baseless attacks on the technical and security capability of BPOS-Federal. The decision-making process of DOI is at issue in this matter; however, DOI's decision hinged on the technical and security capabilities of BPOS-Federal.

Moreover, Softchoice's business interests as an actual bidder for the contract that DOI plans to award in response to the RFQ and a reseller of BPOS-Federal and other Microsoft products may overlap with but also differ from the Government's institutional interests in this matter. *See Costal Int'l Sec., Inc* v. *United States*, 93 Fed. Cl. 502, 526 (2010) (recognizing that the Government could represent the intervenor's interest in a bid protest involving a NASA procurement, in part, because the Government "has the responsibility to represent only NASA's interest"); *CHE Consulting, Inc.* v. *United States*, 71 Fed. Cl. 634 (2006) (subcontractor was entitled to intervene in pre-award bid protest because there was a likelihood that its interest might not be adequately protected by the Government). As this Court has observed in similar protest circumstances, the Government "could, at any point in the proceedings, take a position or action that conflicts with [Softchoice's] interests." *Mgmt. Solutions & Sys.*, 75 Fed. Cl. at 827.

B. In The Alternative, Softchoice Should Be Permitted to Intervene.

Alternatively, Softchoice should be permitted to intervene in accordance with RCFC 24(b) because Softchoice's claims and defenses regarding DOI's decision to obtain messaging and collaboration services via a BPOS-Federal solution have questions of law or fact in common with the issues presented in this matter. *See* RCFC 24 (b)(1) ("On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact."). Accordingly, if the Court deems that RCFC 24(a) does not entitle Softchoice to intervene as a matter of right, Softchoice respectfully urges the Court to grant it permissive intervention. *See CHE Consulting*, 71 Fed. Cl. 634 (permitting an original equipment manufacturer to intervene in a pre-award protest challenging a solicitation provision requiring that maintenance work be performed by the original equipment manufacturer).

WHEREFORE, Softchoice respectfully requests that this Court grant this unopposed renewed motion to intervene in this matter.

Respectfully submitted,

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