GOOGLE, INC. et al v. USA Doc. 62

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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,	)	
Defendant-Intervenor.	)	

SOFTCHOICE CORPORATION'S MOTION TO TERMINATE THE STAY OF PROCEEDINGS, DISSOLVE THE COURT'S PRELIMINARY INJUNCTION, AND DISMISS THE ACTION

Softchoice Corporation ("Softchoice") hereby joins in the motion to terminate the stay of proceedings and dissolve the Court's preliminary injunction, filed by the Government on March 4, 2011 ("Motion to Dissolve"), on the grounds advanced therein in support of that relief.

In addition, Softchoice continues to contend that the Court lacks subject matter jurisdiction over this lawsuit, and therefore respectfully submits that the January 3, 2011 preliminary injunction should be dissolved and Plaintiffs' amended complaint dismissed, with prejudice, on this independent ground. As explained in Softchoice's November 19, 2010 Motion to Dismiss ("Mot.") and its December 17, 2010 Reply Memorandum ("Reply"), neither plaintiff qualifies as an "interested party" under the Tucker Act, 28 U.S.C. § 14991(b)(1), because neither is an "actual or prospective bidder" with a "direct economic interest" in the procurement, as

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required under binding Federal Circuit precedent. *See*, *e.g.*, *American Federation of Government Employees* ("*AFGE*") v. *United States*, 258 F.3d 1294, 1300-02 (Fed. Cir. 2001).

Google is not an "actual or prospective bidder" because it cannot establish that it bid or intended to bid on the procurement at issue in this lawsuit. (Mot. at 5-8; Reply at 6-9.) Indeed, Google lacks the necessary "direct economic interest" in the procurement because it was never qualified to submit a bid. (Mot. at 8-9; Reply at 7-9.) Onix, which may have been qualified to bid on the procurement by virtue of its Federal Supply Schedule 70 contract, neither submitted an offer nor filed a bid protest prior to the end of the proposal period, and thus is not an "actual or prospective bidder." (Mot. at 10-12; Reply at 9-11.)

The Court held in its January 3, 2011 memorandum opinion and order that "[w]here a claim is made that an agency violated the CICA by failing to comply with the procedures set forth, 'it is sufficient for standing purposes if the plaintiff shows that it likely would have competed for the contract had the government publicly invited bids or requested proposals.'" *Google, Inc. v. United States*, 95 Fed. Cl. 661, 673 (2011) (quoting *CCL, Inc. v. United States*, 39 Fed. Cl. 780, 790 (1997)).[1] But here, the Government did solicit bids, and the case law from the Federal Circuit establishes that when an agency does so, a protestor is only regarded as an "interested party" under the Tucker Act if the protestor has taken the affirmative steps to qualify as an "actual or prospective offeror" prior to the bid submission deadline -- either by submitting a bid or filing a bid protest. *See Rex Serv. Corp.* v. *United States*, 448 F.3d 1305, 1308 (Fed. Cir. 2006); *MCI Telecommunications Corp.* v. *United States*, 878 F.2d 362, 365 (Fed.

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[1] For the reasons advanced in our November 19, 2010 Motion to Dismiss (p. 8) and our December 17, 2010 Reply Memorandum (pp. 3-4), Softchoice respectfully submits that *CCL* is no longer good law on the issue of protestor standing because *CCL* applies a definition of "interested party" different and more expansive than that subsequently adopted by the Federal Circuit in *AFGE*.

Cir. 1989). Because Google and Onix both failed to take action to qualify themselves as "actual or prospective offerors," they are not "interested parties" and do not have standing to bring this lawsuit.

WHEREFORE, Softchoice respectfully requests that this Court terminate the stay of proceedings, dissolve the January 3, 2011 preliminary injunction, and dismiss this lawsuit for lack of subject matter jurisdiction.

Respectfully submitted,

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