

I.

INTRODUCTION

Because the continued vitality of the State of Idaho's wide area network used by the state agencies, and the statewide telecommunications distribution system for public schools known as the Idaho Education Network ("IEN") depends on the existence of a lawful Statewide Blanket Purchase Order(s) (the "SBPOs"), the DOA respectfully requests this Court clarify and/or reconsider its November 10, 2014 Order.

As this Court has held, Syringa is judicially estopped from challenging SBPO 1308 and 1309. Because this decision has become the law of the case, which Syringa has not moved to reconsider or appealed, the DOA reasonably has grounds to interpret that this Court's November 10, 2014 Order struck down the Amendments No. 1 to the SBPOs, but did not disturb its conclusion that the original SBPOs were lawful. The DOA requests the Court clarify this aspect of its Order.

In the event this Court has concluded that not only are the Amendments No. 1 void, but so are the original SBPOs, the DOA requests the Court reconsider, because (1) the law of the case precludes such a decision; (2) void amendments do not affect a lawful underlying contract; and (3) the standard terms and conditions of the DOA's contracts require that the Amendments No. 1 be severed and the underlying lawful agreements be enforced.

II.

BACKGROUND

Due to the Court's familiarity with the record, DOA will only mention facts and procedure relevant to the Motion for Reconsideration and/or Clarification.

1. Original SBPOs. The Idaho Division of Purchasing issued Statewide Blanket Purchase Orders (SBPO) 1308 and 1309 to Qwest Communications Company, LLC (“Qwest”) and Education Networks of America, Inc. (“ENA”) respectively, on January 28, 2009. SBPO 1308 and SBPO 1309 are identical awards authorizing the state to select any service covered by the Idaho Education Network (“IEN”) Request for Proposals (“RFP”), which also includes the wide area network used by the state agencies, from either Qwest or ENA.

After this Court granted summary judgment to the DOA on, *inter alia*, Count Three of Syringa’s Complaint for failure to exhaust administrative remedies, Syringa appealed that decision to the Idaho Supreme Court. On appeal, Syringa represented that it was not challenging the lawfully issued SBPOs. Sup. Ct. Reply Br. at 8. The Idaho Supreme Court reversed this Court’s decision as to Count Three, finding that Syringa had no administrative remedies to exhaust and could therefore challenge “the amended contract and/or purchase order(s) issued to Qwest.” *Syringa Networks, LLC v. Idaho Dept. of Admin.*, 305 P.3d 499, 506 (Idaho 2013).

Syringa’s subsequent attempt to change course on remand and challenge both the original and amended SBPOs was rebuffed by this Court on June 24, 2014. *See* Memorandum Decision and Order Re: Motion to Reconsider at 13. Indeed, this Court held that Syringa could not challenge the lawfulness of the original SBPO 1308 and SBPO 1309. *Id.* This Court so held, by way of the doctrine of judicial estoppel, because Syringa acknowledged before the Idaho Supreme Court that it was not challenging “the lawful SBPOs issued to Qwest and ENA on January 28, 2009 because they did not split the IEN Project.” *Id.* at 12 (quoting Reply Brief of Syringa at 8).

Further, Syringa did not appeal this decision or move for reconsideration. Rather, Syringa modified its Partial Motion for Summary Judgment to comply with it. On August 21, 2014, Syringa filed a Fourth Amended Notice Hearing for its partial Motion for Summary Judgment, which noticed the Court that “the scope of Syringa’s Motion for Partial Summary Judgment will be limited, pursuant to the Court’s June 24, 2014 Memorandum Decision and Order RE: Motion to Reconsider, to a determination whether SBPO 1308 and SBPO 1309, *as amended by the February 26, 2009 Amendments*, ... are void.” Fourth Amended Notice of Hearing at 2.

2. Amendments No. 1. On February 26, 2009, the Division of Purchasing issued Amendments No. 1 to SBPO 1308 and SBPO 1309, which were issued in order to clarify the State’s intended roles and responsibilities for the implementation of certain phases of the IEN. These Amendments did not relate in any way to state agency networks, which are a separate component of the IEN RFP for the IEN itself, and which were not affected by the Amendments NO. 1 to SBPO 1308 and SBPO 1309.

3. On November 10, 2014, this Court held that “[t]he Statewide Blanket Purchase Order to Qwest (SBPO 1308), as amended by Amendment One, and the Statewide Blanket Purchase Order to ENA (SBPO 1309), as amended by Amendment One, are void.” Order at 13.

III.

ANALYSIS

A. Standard of Review

“A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry

of the final judgment.” I.R.C.P. 11(a)(2)(B). Although Rule 11(a)(2)(B) motions are often used to notify the Court of new evidence to be considered, they may also be used to correct “errors of law or fact in the initial decision.” *Johnson v. Lambros*, 147 P.3d 100, 105 (Idaho 2006). The movant bears the burden of establishing an error of law or fact, and the “decision to grant or deny a motion for reconsideration generally rests in the sound discretion of the trial court.” *Spur Prods. Corp. v. Stoel Rives LLP*, 153 P.3d 1158, 1161 (Idaho 2007).

B. DOA Respectfully Requests Clarification of the November 10, 2014 Order, Because the Continued Existence of the IEN Depends on Whether the Original SBPOs are Valid.

Because Syringa has conceded that the original SBPOs are lawful, the Idaho Supreme Court accepted Syringa’s representation as part of its decision on appeal, and this Court held Syringa to its word by way of the doctrine of judicial estoppel, DOA asserts the legal position that any order in Syringa’s favor on Syringa’s Motion for Partial Summary Judgment could only pertain to the Amendments No. 1.

The “law of the case” doctrine “is well established in Idaho” and provides that when a Court, whether trial or appellate, “states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal.” *Swanson v. Swanson*, 5 P.3d 973, 976 (Idaho 2000).

In the June 24, 214 Order, this Court held that “[t]he doctrine of judicial estoppel precludes Syringa from having it both ways. Because Syringa has previously conceded that the original SBPOs were lawful, Syringa will be estopped from taking the opposite position now.” *See Memorandum Decision and Order Re: Motion to Reconsider* at 13.

This decision by the Court established the “law of the case” with respect to the underlying SBPOs. As a result, the record of this case supports a legal interpretation that the Court’s November 10, 2014 Order holds void Amendments No. 1 to SBPO 1308 and SBPO 1309, without impacting the underlying and lawful SBPO 1308 and 1309.

This distinction is critical to the State of Idaho. If the Court has found, contrary to its previous decisions, that the underlying SBPOs are also void, then there is no contract on which to order and run critical wide area network services for state agencies¹ or under which to operate and fund the education network. Therefore, the DOA respectfully requests this Court clarify its November 10, 2014 Order in order to allow the State to ascertain the validity of the underlying SBPOs.

Moreover, the original SBPOs are underlying contract vehicles for both the state agency networks and the IEN. These state agency services have never been part of this case, and they are not addressed in the challenged Amendments No. 1, which address only the IEN. As this Court held and the Idaho Supreme Court recognized, Syringa, did not challenge the original SBPOs; its challenge has been limited to the IEN and the Amendments No. 1. Therefore, the DOA respectfully requests this Court clarify its November 10, 2014 Order to make clear that it only addresses the Amendments No. 1 as they may pertain to the IEN.

¹ These agencies include: Department of Building Safety; Department of Corrections; Department of Environmental Quality; Department of Fish & Game; Department of Health & Welfare; Health District I, II, III, V and VII; Industrial Commission; Department of Juvenile Corrections; Department of Labor; Liquor Dispensary; Department of Parks & Recreation; Retirement System; Idaho Supreme Court; Tax Commission; Veterans Services; Vocational Rehabilitation; and Department of Water Resources.

C. If This Court's November 10, 2014 Order Voided both the Amendments No. 1 and the Original SBPOs, DOA Respectfully Requests this Court to Reconsider.

In the event this Court has voided both the Amendments No. 1 and the original SBPOs, the DOA respectfully requests this Court reconsider that decision. Grounds for reconsideration include: (1) the Court's November 10, 2014 Order would be contrary to the "law of the case"; (2) when an amendment to a contract is void, the parties return to the status quo under the original contract; and (3) the severability clause of the standard terms and conditions to the contract preserves the original SBPOs notwithstanding a finding that Amendments No. 1 are void.

1. The "Law of the Case" Precludes Finding that the Original SBPOs are Void.

As set forth above, the doctrine of the "law of the case" applies to preserve this Court's decision that Syringa is judicially estopped from challenging the original SBPOs. However, in the event this Court has adopted Syringa's argument that the void "taint" of the Amendments No. 1 have somehow poisoned the underlying, lawful SBPOs, the DOA submits that such is barred by both principles of judicial estoppel and the doctrine of the law of the case.

Syringa has neither moved for reconsideration nor appealed this Court's decision that it was judicially estopped from challenging the validity of the original SBPOs. As a result, Syringa should not be allowed to "back door" the same result by making the unprecedented and unsupportable argument that a void amendment to a contract somehow taints and effectively voids the entire underlying agreement. As set forth in the DOA's papers, and discussed further briefly below, the law is clear that a void amendment does not exist, and the terms of the underlying contract govern. But in adopting Syringa's "taint" approach, this Court would be sanctioning what the law does not permit (judicial estoppel and the law of the case) in a manner that is inconsistent with the law regarding void contractual amendments. Therefore, the Court

should reconsider its November 10, 2014 Order and preserve the validity of the underlying SBPO 1308 and SBPO 1309.

2. By Voiding the Amendments No. 1 to SBPO 1308 and SBPO 1309, the Result is a Return to the Original SBPOs, which are lawful.

This Court has found that the Amendments No. 1 are void, because the Idaho Supreme Court determined that by splitting the IEN-specific work between ENA and Qwest with the Amendments No. 1 was unlawful. *See* November 10, 2014 Order at 11. However, this conclusion does not implicate the otherwise lawful underlying contracts.

In *Knowlton v. Mudd*, 775 P.2d 154 (Idaho Ct. App. 1989), the Idaho Court of Appeals addressed an analogous factual scenario. There, a woman sold a piece of real property to her son. *Id.* at 155. After five years, the son stopped paying his mother on the loan. *Id.* The mother had become mentally and physically debilitated, however, so she did not enforce her son's loan obligations. *Id.* When the woman's daughter was appointed conservator of her mother's estate, the son presented his mother with an amendment to the real estate contract that would reduce the balance of the loan, forgive unpaid interest, reduce the loan's interest rate, and lengthen the loan term. *Id.* The Idaho Court of Appeal affirmed the trial court's decision that the amendment to the contract was void, because the mother was incapacitated when she signed it. *Id.* at 156. Tellingly, the Court did not hold that the amendment nullified the entire contract. *Id.*

Likewise, the Idaho Supreme Court has held that void "contracts are deemed never to have existed in the eyes of the law." *S. Idaho Realty-Century 21 v. Larry J. Hellhake & Assocs.*, 636 P.2d 168, 173 (Idaho 1981). Because the Amendments No. 1 are void and non-existent, all that remains is the original SBPOs, which this Court has unequivocally held cannot be challenged as unlawful. This position is consistent with many other states' law. *See, e.g., Shinn*

v. Edwin Yee, Ltd., 553 P.2d 733, 745 (Haw. 1976) (“But even if we were to assume that an agreement to modify the original contract was reached at that meeting ... the amendatory agreement would have been so permeated with the illegality of the kickback provision that it would have been void and unenforceable. In that even, obviously, the amendatory agreement could have no effect and the original contract must stand.”) (internal citation omitted); *Tillman v. Talbert*, 93 S.E.2d 101 (N.C. 1956) (“A subsequent illegal agreement by the parties cannot affect a previous fair and lawful contract between them in relation to the same subject. The change is regarded as a mere nullity, and as such cannot scathe the original contract.”).

Therefore, if this Court has concluded that not only the Amendments No. 1 are void, but also the underlying SBPOs, DOA respectfully requests this Court reconsider this decision, because a void amendment does not impact an otherwise lawful contract.

3. Even if this Court Views each SBPO and Amendment No. 1 as One Contract together, the Severability Clause of the Contract Preserves the Underlying, Lawful SBPOs.

Finally, even if this Court has concluded that the Amendments No. 1 have by way of their invalidity somehow tainted the otherwise lawful original SBPOs, thereby becoming one agreement, the State of Idaho Standard Contract Terms and Conditions, which were a part of this agreement, contain a Severability Clause: “In the event any term of the Contract is held to be invalid or unenforceable by a court of competent jurisdiction, the remaining terms of the Contract will remain in force.” *See* Affidavit of Steven Schossberger, Exhibit 1.

Were this Court to reject all of DOA’s above arguments, nevertheless the Court would still be required to sever the unlawful Amendments No. 1 from the otherwise lawful original SBPOs. Indeed, the “issue of severability of an agreement has been frequently addressed by” the

Supreme Court. *Magic Valley Radiology Assocs., P.A. v. Prof. Business Servs., Inc.*, 808 P.2d 1303, 1311 (Idaho 1991). “Whether a contract is entire or severable depends on the intention of the parties.” *Id.* at 1312.

As established by the standard terms and conditions of the contract, the Amendments No. 1 must be severed from the original and lawful SBPOs. Therefore, to the extent this Court has determined that both Amendments No. 1 and the original SBPOs are void, DOA respectfully requests the Court to reconsider.

IV.

CONCLUSION

The DOA respectfully requests this Court clarify its November 10, 2014 Order with respect to whether it holds void only Amendments No. 1 or also the original SBPOs. In the event the latter, the DOA respectfully requests the Court reconsider its decision on the basis set forth above.

DATED THIS 18 day of November, 2014.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By Steven F. Schosberger
Merlyn W. Clark, ISB No. 1026
Steven F. Schosberger, ISB No. 5358
Attorneys for Defendant Idaho Department of
Administration

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18 day of November, 2014, I caused to be served a true copy of the foregoing MEMORANDUM IN SUPPORT OF IDAHO DEPARTMENT OF ADMINISTRATION'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION RE THE COURT'S 11/10/2014 MEMORANDUM DECISION AND ORDER RE PENDING DISPOSITIVE MOTIONS by the method indicated below, and addressed to each of the following:

David R. Lombardi
Melodie A. McQuade
GIVENS PURSLEY, LLP
601 W. Bannock
P.O. Box 2720
Boise, ID 83701
[Attorneys for Plaintiff]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail: drl@givenspursley.com
melodiemcquade@givenspursley.com
lkb@givenspursley.com
 Telecopy: 208.388.1300

Steven J. Perfrement
BRYAN CAVE HRO
1700 Lincoln Street, Suite 4100
Denver, CO 80203
[Attorneys for Qwest Communications Company, LLC]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-Mail:
steven.perfrement@bryancave.com
 Telecopy: 303.866.0200

Stephen R. Thomas
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS,
CHARTERED
101 S. Capitol Boulevard, 10th Floor
P.O. Box 829
Boise, ID 83701
[Attorneys for Qwest Communications Company, LLC]

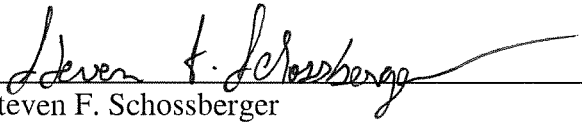
U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-Mail: SRT@moffatt.com
 Telecopy: 208.385.5384

Phillip S. Oberrecht
GREEN BURKE SHOEMAKER OBERRECHT, PA
950 W. Bannock Street, Ste 950
Boise, ID 83702
[Attorneys for ENA Services, LLC]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-Mail:
poberrecht@greenerlaw.com
 Telecopy: 208.319.2601

Robert S. Patterson
BRADLEY ARANT BOULT CUMMINGS LLP
1600 Division Street, Ste 700
Nashville, TN 37203
[Attorneys for ENA Services, LLC]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-Mail: bpatterson@babco.com
- Telecopy: 615-252-6335



Steven F. Schossberger