

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CELLCAST TECHNOLOGIES, LLC and
ENVISIONIT LLC,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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) No. 15-1307
)
) Judge Victor J. Wolski
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UNITED STATES' UNOPPOSED MOTION TO NOTICE THIRD PARTY

Pursuant to Rule 14(b) of the Rules of the United States Court of Federal Claims (RCFC), defendant the United States (government) moves this Court to issue a notice to International Business Machines Corporation (IBM), to appear, if it so desires, as a party and assert whatever interest it may have in this action. Notice should be sent to:

International Business Machines Corporation (IBM)
6710 Rockledge Drive
Bethesda, Maryland 20817-1826

On March 4, 2016, counsel for the government conferred with counsel for plaintiffs to determine whether plaintiffs would oppose the motion. Plaintiffs' counsel indicated to counsel for the government that plaintiffs will not oppose this motion.

Statement in Support of Motion

In this lawsuit, plaintiffs, CellCast Technologies, LLC (CellCast) and EnvisionIT, LLC (EnvisionIT) are seeking compensation pursuant to 28 U.S.C. § 1498. The Complaint references "the Integrated Public Alert Warning System ('IPAWS') and alleges that "IPAWS utilizes the inventions claimed in the Asserted Patents." Complaint at ¶ 20. The Complaint specifically

identifies IPAWS as the system whose manufacture or use is allegedly covered by each asserted patent. *See* Complaint at ¶¶ 50, 55, 60, 65, and 70.

Upon information and belief, aspects of the Integrated Public Alert Warning System were developed in work performed by IBM under a multi-part contracting vehicle. More specifically, upon information and belief, the Department of Homeland Security (DHS) awarded an umbrella contract referred to as the EAGLE contract for Information Technology Support Services. *See* A1-81 (Exhibit A) (copy of basic contract award terms for DHS' EAGLE contract).¹ Section C.1.1. of the EAGLE contract provides in pertinent part that:

The primary goal of this acquisition is to establish a suite of indefinite-delivery indefinite-quantity contracts for IT support services that will enable DHS business and program units to accomplish their mission objectives.

A13 (Exhibit A at Section C.1.1). Upon information and belief, IBM was awarded an EAGLE Contract from DHS, which was assigned EAGLE Contract No. HSHQDC-06-D-00019. On further information and belief, Task Order No. HSFEHQ-08-J-2009 was issued to IBM under the terms and conditions of EAGLE Contract No. HSHQDC-06-D-00019. Task Order No. HSFEHQ-08-J-2009 was issued to IBM by the Federal Emergency Management Agency Office of Acquisition Management. *See* A82-92 (Exhibit B) (copy of Order for Supplies or Services under Task Order No. HSFEHQ-08-J-2009).² In an amendment identified as amendment no. "P00072" under Task Order No. HSFEHQ-08-J-2009, a new Work Order (WO) was incorporated entitled "Integrated Public Alert & Warning System (IPAWS)" as WO No. 35. *See* A93-95 (Exhibit C) (copy of Task Order No. HSFEHQ-08-J-2009, Amendment No. P00072). Upon information and

¹ "A ___" refers to the corresponding page number in the attached Appendix.

² The monetary terms of the price schedules in this document and in Exhibit C have been redacted pending the entry of a protective order in this matter.

belief, Work Order 35 under Task Order No. HSFEHQ-08-J-2009 includes a seven page document listing a Statement of Objectives. *See* A96-A102 (Exhibit D) (copy of Work Order No. 35). A number of Objectives are listed in Work Order 35, such as, for example, the following work relating to IPAWS: “[I]lead CAP Alerting Tool solution engineering, system development, testing and deployment efforts.” A99 (WO No. 35, page 4).

Upon information and belief, in Section I., DHS’ EAGLE Contract, including EAGLE Contract No. HSHQDC-06-D-00019 incorporated by reference, among others, Federal Acquisition Regulation (FAR) Clause 52.227-3 (APR 1984). *See generally* A58-61 (Section I.1 Clauses Incorporated By Reference, Page 53-56 of 76); *see also* A60 (listing FAR Clause 52.227-3 (APR 1984)). This clause, in turn, provides in pertinent part as follows:

Patent Indemnity (a) The Contractor shall indemnify the Government and its officers, agents, and employees against liability, including costs, for infringement of any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. 181) arising out of the manufacture or delivery of supplies, the performance of services, or the construction, alteration, modification, or repair of real property (hereinafter referred to as *construction work*) under this contract, or out of the use or disposal by or for the account of the Government of such supplies or construction work.

48 C.F.R. § 52.227-3 (Apr 1984). Accordingly, pursuant to the patent indemnity clause in Contract No. HSHQDC-06-D-00019, IBM may have an interest in the subject matter of this suit within the meaning of RCFC 14(b).

Conclusion

The issuance of the requested notices to the above-listed companies conforms to the established practice of the United States Court of Federal Claims, as exemplified by *Carrier Corp. v. United States*, 534 F.2d 250, 251-52 (Ct. Cl. 1976); *Bowser, Inc. v. United States*, 420 F.2d 1057,

1060 (Ct. Cl. 1970); and *Rockwell Int'l Corp. v. United States*, 31 Fed. Cl. 536, 539-40 (1994). See also *In re Uusi, LLC*, No. 2013-155, 549 Fed. Appx. 964, 2013 WL 6136602 (Fed. Cir. 2013). For the reasons stated above, the government respectfully requests that this motion be granted and the requested notice be issued.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

JOHN FARGO
Director

s/ David M. Ruddy
DAVID M. RUDDY
Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530
Telephone: (202) 353-0517
Facsimile: (202) 307-0345
E-Mail: david.ruddy@usdoj.gov

Of Counsel:
WALTER W. BROWN
Civil Division
U.S. Department of Justice

March 4, 2016

Attorneys for Defendant United States

U.S. Department of Homeland Security



EAGLE

Information Technology Support Services

Base: June 28, 2006 (Unrestricted)/September 26, 2006 (Set-Aside)
Through Modification A00008 – Date: May 4, 2011

This document provides the basic contract award terms and conditions for all EAGLE prime contractors. Each EAGLE contract is identical except for the award number (PIIN), the contact information (address, POCs), and Attachment B-1 Labor Category/Labor Rate tables. Attachment B-1 for each contractor is provided separately. The periods of performance for the small business and unrestricted track awards are different due to the staggered award dates (See F.2).

Department of Homeland Security
Office of Procurement Operations
Information Technology Acquisition Center
Washington D.C.

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