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IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

In the Appeal of	DOCKET NO. OPA-PA 11-002
TOWN HOUSE DEPARTMENT STORES, INC., dba ISLAND BUSINESS SYSTEMS & SUPPLIES, APPELLANT	APPELLANT'S COMMENTS ON AGENCY REPORT

Appellant "IBSS" hereby responds to and comments upon DOE's "Appeal Response" in its Agency Report for OPA-PA-11-002, dated February 22, 2011, at Book 2, Tab G. It must first be mentioned that DOE has failed to disclose the entire procurement record, withholding certain Xerox bid documents it describes as proprietary. Appellant must reserve the right to amend and supplement its Comments if and when such information becomes publically available.

DOE has stuck to its guns, saying, as it did in its denial of Appellant's Protest, that the protest was untimely because "Appellant knew or should have known the allegations it sets forth in its December 16, 2010 protest within fourteen (14) working days from October 29, 2010." (Paragraph G. 1.)

Ironically, DOE refers to this as "the threshold issue". (Paragraph G.2.) It is ironic because that is exactly what the Public Auditor said[1] in her Decision in OPA-PA-008-011 way back on November 28, 2008. Appellant would have thought that her discussion of the timing

[1] "The threshold issue in this matter is whether IBSS' December 4, 2007, protest was timely." (Decision, p 6.)

requirements in that Decision would have been dispositive here.

Ironic because DOE had the bid documents and the irregular[2] P/O in its possession from the get go, but *even it did not know that it had been aggrieved*, and did not take any action on the irregular P/O until the day after Appellant served its protest, December 17th.

And yet, DOE claims *Appellant* should have known *it* was aggrieved 4 days ***before* the irregular P/O was even issued**! DOE requires that Appellant have knowledge of facts that, so far as has been shown by the Procurement Record, *did not even exist* 14 days after the notice of intent to award was given. It is simply *factually* preposterous to make such a claim.

Yes, even before the notice of intent was issued, Appellant knew that it was not likely to get the award because it knew at bid opening it was not low bid – but that knowledge does not *aggrieve* Appellant, it does no *harm*. Assuming Xerox' submission was responsive and there were no irregularities in the award, as one must, Appellant already knew Xerox was likely to get the award. The notice of intent only confirmed what was expected; it did not suggest or reveal any of the subsequently revealed facts and irregularities by which Appellant would be aggrieved.

It is factually preposterous and *legally* fatuous, if not frivolous, to make such a claim. This issue was settled long ago in OPA-PA-08-011, but DOE does not have much of an institutional attention span to recall it. Both Xerox[3] and DOE claimed then, as they do now, that Appellant's protest was untimely. The Public Auditor ruled it is not time alone that counts but time from knowledge of aggrieving facts that counts. And, that is plainly what the law says in 5 GCA § 5425(a)[4].

In a statement that reveals how long this saga has dragged on, she said, "The Public Auditor finds that the December 16, 2004, date DSA Amendment No. 17 was executed did not trigger the fourteen (14) day protest period for IBSS because IBSS did not know and could not have known about the Amendment until after it had reviewed the DSA procurement file." (Decision, p 8; bold and italic emphasis added.)

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[2] DOE's response notes "[a] series of separate *irregularities* occurred in the procurement" (Paragraph G.2(e)), but characterizes the P/O as only containing a couple of "*errors*" (Paragraph G.2(a) and(b)).

[3] See, Xerox Corporations' Comment on Agency Report, OPA-PA-08-011.

[4] The clock starts "within fourteen (14) days after such *aggrieved* person knows or should know of the *facts giving rise thereto*".

That is the same situation here, but again both Xerox[5] and DOE ignore the element of knowledge of facts or wrongdoing in the calculation of the time for protest, and ignore the Public Auditor's decision in OPA-PA-08-011 on November 28, 2008. It is exasperating for Appellant to again have to answer the same *frivolous* assertion – and for the OPA to again have to repeat the obvious.

Only when IBSS finally obtained and reviewed information in the procurement file, specifically the P/O, did it know of at least some of the information in the solicitation and award that aggrieved it, and it timely filed after obtaining that knowledge[6]. The same ruling should follow: Appellant's protest *was* timely and the denial of Appellant's Protest was contrary to law.

Although DOE did not address the substantive issues Appellant raised in its Protest, it decides to now come clean, at least in part, disclosing but downplaying some "error" and "irregularities", but not effectively dealing with the contract, except to place temporary "stop work" orders against part of it.

DOE's response, for instance, says "[a]n error did occur in the Purchase Order Quantities per Line Item from the original bid amounts." (Paragraph G.2(a).) That was not error. That was design. DOE's response itself said (Paragraph G.2(e)) that "DOE accepted a Purchase Order Template from Xerox" and that in that "Template", "Line Item Quantities were different than what was part of the original bid." This was a deliberate change in "line item quantities", which Appellant picked up on when it saw the P/O, but DOE did not until after Appellant Protested[7].

Moreover, in the Procurement Record there are Procurement Meeting Notes of a meeting between DOE and Xerox held on December 17th to "discuss history of IFB 022-2010". On the first page, the notes record that DOE counsel asked Mike Salas, representing Xerox, "to clarify how the quantity changed from the bid". His response was "because he has worked with DOE for years, he was able to make recommendations as to how many machines were needed and

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[5] Xerox makes the same claim in its submission intervening in the protest action below; see, Procurement Record.

[6] As the Decision in OPA-PA-08-011 said (p 8):
"[W]ithout access to the DSA procurement file, IBSS did not know of and could not have known of DSA Amendment No. 17. Only after a protestor is afforded the opportunity to review the procurement record can it fully develop its arguments with regard to alleged bidding irregularities and statutory violations. [Citation omitted.] The Public Auditor finds that the December 16, 2004, date DSA Amendment No. 17 was executed did not trigger the fourteen (14) day protest period for IBSS because IBSS did not know and could not have known about the Amendment until after it reviewed the DSA procurement file."

[7] As was said in Paragraph 2(e), "[t]he difference was not picked on [sic] in the input process" but "[o]n December 17, 2010 **after** receipt and review of the December 16, 2010 letter from IBSS, DOE reviewed the issues and took action." (Bold emphasis added.)

where they were needed." That's not error, that's design. Submitting the P/O containing significant changes to the IFB specifications smacks, at face value, of fraud or bad faith.

When questioned about the changes, Mr. Salas equivocated and dissembled. When asked, according to the meeting notes, by DOE counsel if changes in the P/O were "based on Mike's recommendations and not the original written proposal[,] **Mike confirmed that the changes were just typos** and that the machine/equipment stayed the same."

In fact, there were *substantial* multiple changes to the equipment configurations, as elaborated in Appellant's Protest letter of December 16, 2010, attached as part of the Notice of Appeal and the Procurement Record. Was it a "typo" to increase booklet finishers from the 92 quantity specified in the IFB to the 116 specified in the P/O? Or dishonesty.

And there were changes – *significant* changes[8] – to the *price* notwithstanding the efforts of Xerox to obfuscate. As the Notes record,

> "Laura wanted clarification on how the overall Purchase Order amount stayed the same. Mike said their formula consisted of the equipment plus the optional services and the number of items. Laura asked if the total amount for the 60 month lease stayed the same and Mike said that the amount stayed the same for the equipment. Laura asked for more clarification regarding the formula Mike used to keep the amount the same even though the quantity changed."

The total price increased significantly, not solely due to the fact that the configurations of the machines changes so that the numbers of expense machines were increased while the numbers of less expensive machines decreased. Typo, or fraud?

DOE's response also claims there was an *error* "on the face of the Purchase Order as to mention of a Xerox Service Agreement which is not part of the terms and conditions of the bid." The P/O makes prominent, specific reference to the "Xerox Response and *Services & Solutions Agreement No. 7099405*".

Mike Salas, in the cover letter for Xerox' submission for IFB 022 dated October 26, 2010, (Tab B2, Book 2), expressly incorporated by reference documents, "[a]ttached herewith [in] our response to your IFB which includes ... *Xerox Services & Solutions Agreement*".

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[8] The Meeting Notes say, "[i]n the Purchase Order item review it became clear that there was a price change that also occurred." This was amplified by the notations on a copy of the P/O attached to the Notes as Exhibit A, which indicated a price increase for equipment from $54,446 per month under the IFB configuration to $67,260.98 under the P/O. It may be questioned whether the changes were in the best interests of DOE, but they were obviously in the best interests of Xerox.

The claim that **this "is not part of the terms and conditions of the bid"** are accurate only if mention of *"the bid"* is meant to mean IFB 022, but not if *"the bid"* refers to the Xerox bid submission; its bid submission was explicit that such terms and conditions were meant to be part of "the bid" it submitted.

There were various letters between Xerox and DOE discussing making amendments to the P/O, but nothing was said about making any changes to the express reference to the Xerox Services & Solutions Agreement prominently displayed on the P/O, and no discussion about modifying that reference.[9] How, then, could that reference be described as a simple "error"?

Bearing in mind that DOE's response already admitted the P/O "template" was prepared by Xerox, was it an *error* to include reference to the Xerox Purchase Agreement, since Mr. Salas had already expressly intended that it be incorporated as part of its bid package? Or was it by his design?

The DOE response is indeed correct that the terms and conditions of "the bid" (that is, the IFB) did not include any such service agreement, but the award issued to Xerox most certainly did contain such terms, plastered plainly across the top of the P/O. It is not proper to accept such a submission as responsive in the first place if the terms and conditions of the IFB did not allow for it. If it was error, as DOE's response claims, the was error in accepting the Xerox submission with such conditions "attached herewith" in the first place. The Xerox submission should have been tossed out as non-responsive.

Now DOE and Xerox seemed embroiled in a bit of IFB revisionism, in yet another attempt to tamper with *the award* after getting caught tampering with *the IFB*. As the Procurement Meeting Notes indicate,

> "*Mike clarified* if the main issue was changing the quantities back. **Xerox should be able to go back and reduce the quantities to what the IFB says**. Mike stated that he and Pam would assess what's been delivered already. Laura confirmed that Xerox needs to stick with the original IFB quantities."

DOE's response herein is a curiosity. It denies the Protest yet acknowledges a defective procurement process, based exactly on the issues Appellant raised in its Protest – issues DOE was blissfully unaware of until Appellant protested. Its actions indicate it yearns to remain blissfully unaware, because it has taken no action to terminate the contract, no action to rescind its determination that Xerox responsively bid, no action to discipline Xerox for tampering with the bid specifications, taking actions merely to stop work, for the time being, on certain portions

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[9] For instance, there was correspondence as late as December 9, 2010 from Xerox to DOE Supply Administrator (Acting), concluding various P/O modifications to make technical changes to machine nomenclature, without suggesting any change to the Services & Solutions Agreement.

of the awarded contract. This is a bit of a scandal, really.

DOE seems determined to affirm the contract in part, and *somehow* deal with the remaining part. In its letter of December 20, 2010, Xerox, on the other hand expresses belief that it is only the roll out of the equipment purchased under the P/O that was affected, not the ultimate contract itself.

As was said in the response herein, "DOE has not accepted any Line Item Quantities not part of the original bid." In the Meeting Notes, DOE counsel said "[t]here isn't a contract in effect for the revised quantities." If there's no contract, what terminated it and when? DOE cannot decide to accept part of the contract and reject part of it after it has been awarded, without breaching the contract it made.

Partial termination and partial affirmation, however, is not a remedy allowed by the procurement act. 5 GCA § 5450 discusses remedies at the administrative (agency) level or upon administrative or judicial review. § 5452 (a)(1) says a contract may be ratified and affirmed ((a)(1)(i)) – "*or*" – it may be terminated ((a)(1)(ii)). It does not suggest, as did King Solomon, that it can be parceled; and it must be remembered that the wisdom of the good King was demonstrated by the mere suggestion of such an act, not the rendering of it.

DOE could have made the determination to avail itself of the remedies in § 5452 as a result of Appellant's protest (such remedies only being available in the event of a protest or review), but instead DOE denied the protest.

The remedy to ratify or terminate in § 5452(a)(1) is based on the proposition that "the person awarded the contract has not acted fraudulently or in bad faith." If the person has acted fraudulently or in bad faith, the choice is not termination or ratification but a declaration that the contract is null and void, unless ratified. (§ 5452(a)(2).) The Public Auditor might want to consider that possibility considering the clearly revealed bid tampering and contract tampering attempts evident on the face of the P/O and confirmed in the Procurement Meeting Notes of December 17th.

The Procurement Meeting Notes reveal that Xerox certainly took some liberties, but are inconclusive as to whether those liberties were in concert with DOE or were executed knowingly in bad faith, with the benefit of Xerox' knowledge after many, many years of working inside DOE and closely with its personnel, to take advantage of DOE's systemic, and personnel, weaknesses.

For instance, the Procurement Meeting Notes reveal Mr. Salas suggested that the changes in the

P/O had the blessing of Taling[10], but DOE counsel asserted Taling had no knowledge of any such changes.

Nevertheless, whether due to contrivance or conspiracy, this Procurement Record, and DOE's response, evidence, indeed beg more information about, a complete disregard of the procurement process, and a carefree freedom to re-write IFBs and awards, that is just shocking. It goes to the very heart of this award, and it should be terminated or declared null and void in whole, and awarded to the next higher responsive and responsible bidder.

Finally, Appellant notes and disagrees with the statement made by DOE regarding court action. (Tab I, Book 2 to Agency Response.) DOE correctly, but irrelevantly, notes that there is a pending (still pre-discovery) civil action in the Superior Court. That civil action is not implicated by the rule to disclose court action.

The notice requirement is based on 2 GAR § 12103(b). It speaks of "an action concerning the procurement under Appeal". This procurement administrative review lacks the nexus to the civil action required to trigger the notice. Indeed, DOE itself understood that in the still pending OPA-P-10-006 Appeal involving the same parties and, tangentially, this IFB. In that action, DOE declared there was *no* such action "concerning the procurement under Appeal" pending, though that same civil action was then pending.

The action in the referenced civil case is not a procurement appeal. It is not conditioned on any protest or decision on the protest in this Appeal. The plaintiff is not required to be an aggrieved bidder, and the remedy available does not affect the validity of the award or solicitation in this Appeal or any other protest or appeal. An action in the Superior Court under the Procurement Act may be brought only under the waiver, and for the remedies, specified in 5 GCA § 5480, and in the manner required of § 5481.

The civil action is based on an Act to Enforce Proper Government Spending (5 GCA §§ 7101 et *seq*. It is an in personam action brought against individuals and agencies, not an in rem action brought on a protest, solicitation or award. It is not founded in an agency determination or administrative review. It is brought to recover, by any taxpayer, on behalf of the government, funds spent contrary to law, not to overturn agency actions against aggrieved bidders conducted contrary to law. Standing and jurisdiction to sue is based on 5 GCA § 7103, not 5 GCA § 5480.

The notice of court action is intended to avoid competing venues because the Public Auditor has jurisdiction to review protest decisions concerning the validity of a "solicitation or award of a

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[10] A letter dated December 3, 2010 is included in the Procurement Record from Xerox to Ms. Taling Taitano, Deputy Superintendent, from Xerox General Manager, Acting, Pam Quinata, thanking her for a prior meeting "to discuss the current situation with in-place Xerox Services and Equipment", and adding, "Xerox will begin to remove the existing devices upon receipt of the *amended* PO".

contract" (5 GCA § 5425(e)), while such action might also be brought directly to the Superior Court "to determine whether a solicitation or award of a contract is in accordance with the statutes, regulations, and the terms and conditions of the solicitation" under 5 GCA § 5480(a). There is no possibility of such a conflict of venues in a § 7103 case; it cannot be brought to the Public Auditor. There is no need to notify the Public Auditor of a case in another venue over which the Public Auditor holds no jurisdiction to begin with.

There may be certain common facts and parties between the two cases, but not necessarily so. The § 7103 civil action is not dependent on the outcome of this Appeal; it alleges multiple expenditures contrary to law, any of which would be adequate to prove the claim, without any outcome of this procurement affecting the validity of that action.

The purpose of the Procurement Act is to organize and control government contracting for goods, services and construction and to ensure those who deal with the government procurement system are treated fairly and equitably. The purpose of the Act to Enforce Proper Government Spending is to control spending and obligating the money of the government without appropriation or contrary to law, providing altogether different remedies than does the Procurement Act.

The situation is analogous to the curious case of the "phantom"[11] code section 4 GCA § 4137, referenced in the remedies Part of Article 9 of the Procurement Act, 5 GCA § 5452(b), which provides, "[t]his Section shall be read as being in addition to and not in conflict with, or repealing 4 GCA § 4137 (Prohibitions on the Activities of Government Employees)."

The Comment to § 5452(b) says:

> "**COMMENT**: See 4 GCA § 4134(f)(2) regarding situations where a government employee has a conflict of interest. **Since this Section deals with similar remedies as does 4 GCA § 4137, the two sections should be read as complementing each other, not one repealing the other. Both have their place within the government**. In cases of employee conflicts, 4 GCA should prevail and those contracts rendered null and void as a result of the application of 4 GCA § 4137 would not be subject to this Section."

The same can be said here. The § 7103 action in the Superior Court has its separate place within the governmental scheme of oversight protection. Only at face value might they at all be seen as

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[11] The almost humorous Compiler's Note to that section reads:
NOTE: (2004) After a diligent search, it appears that 4 GCA § 4134 no longer exists. While, specifically, there is no record of its repeal, the Compiler believes that this section was removed as a part of the overall re-enactment of Title 4 GCA Chapter 4 in the 16th Guam Legislature. Nowhere were individual sections repealed in that Legislature, rather the entire first Article was repealed and reenacted. Since it adds nothing to this Section, it loss will not be missed.

similar. In law and substance, they are not similar at all. The remedies are not similar, the jurisdictional bases are not similar, the parties do not bear the same requisite characteristics, the limitations periods are different, and the Public Auditor does not share, with the Superior Court, any jurisdiction of the subject matter of a § 7103 complaint as she does with a procurement dispute. It is a misguided claim to make, as DOE does here, that the referenced civil action is of the type contemplated by 2 GAR 12103(b).

If the Public Auditor were to decline to hear this Appeal based simply on the § 7103 action pending, Appellant, and the public, would be denied any prophylactic recourse from the procurement irregularities and other matters complained of in the Protest. The § 7103 action will not provide, and cannot provide, Appellant any chance of undoing the contract in this matter and obtaining the bid it properly competed for. It will not provide Appellant any relief at all for the wrongs by which it has been aggrieved. The only point of stepping aside due to a Superior Court case would be to defer to the court's handling of the procurement protest. The § 7103 action can do nothing to address it.

The requirement of 2 GAR § 12103(b) to report court cases which "concern the procurement under appeal" must not be read so broadly as to prevent administrative review of procurement cases simply because some court action may or may not involve common facts or parties; to do so would ignore the specific context of the Procurement Act as well as the essential role that review of procurement decisions plays in the promotion and maintenance of the integrity of the procurement process. The civil case to which DOE refers is irrelevant to this matter and no notice of it is appropriate or necessary to promote the integrity of the procurement system; indeed, to do decline to hear this Appeal and deprive Appellant of its procurement rights of review would work a terrible injustice on Appellant and fail to redress the obvious, and admitted, "irregularities" in this case.

Respectfully submitted,

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