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John Thos. Brown
General Counsel for Petitioner
545 Chalan Machaute (Route 8 @ Biang St), Maite, Guam 96910
Mail to: P.O. Box 7, Hagåtña, Guam 96932
Ph: 477-7293; Fax: 472-6153
ingoz@ozemail.com.au

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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
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FILE NO. OPA-PA 11-002

IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT PETITION

In the Petition of)	
)	APPELLANT'S RESPONSE TO
)	INTERESTED PARTY'S OPPOSITION
TOWN HOUSE DEPARTMENT STORES,)	TO APPELLANT'S MOTION TO
INC., dba)	DISMISS XEROX' APPEARANCE
ISLAND BUSINESS SYSTEMS)	DOCKET NO. OPA-PA-11-002
& SUPPLIES,)	
APPELLANT)	
)	

What's this? Xerox' Opposition does not deny that it had, during the relevant time, an undisclosed shareholder owning more than 10% of the outstanding shares of Xerox Corporation?

That's right. Xerox' opposition to Appellant's motion does not deny the factual evidence raised by Appellant that Xerox' Ownership Disclosure statement was absolutely false. Xerox does not even mention it. If Xerox cannot deny the fact, which it should and no doubt would if it could, the fact must be deemed admitted.

Xerox has appeared herein arguing strenuously, passionately that Appellant bear the blow torch of complete dismissal of its protest, appeal and claims for lack of standing because it may not have disclosed some undefined "interest" in the ownership disclosure requirement of 5 GCA § 5233. Xerox gave no quarter in its attack on the issue.

Appellant has brought this motion against Xerox on the same high legal ground claimed by Xerox in its motion against Appellant.

So let's just take Xerox' strident arguments and subject it to the same blow torch, substituting Xerox in place of Appellant in the words of Xerox' Motion to Dismiss:

First, HBSS Xerox submitted a bid containing a false Affidavit Disclosing Ownership and Commissions, which renders the bid nonresponsive. HBSS² Xerox' nonresponsiveness deprives it of standing....

Based on the OPA's recent Decision *In the Appeal of Pacific Data System, Inc.*, the HBSS Xerox bid must suffer the same fate as GTA's bid.

Just as GTA's bid was rendered non-responsive, HBSS² Xerox' submission of false information deems it non-responsive.

Finally, just as GTA's bid was disqualified from award, the HBSS Xerox bid must be disqualified and rejected as pursuant to the requirements set forth in IFB22 and the Guam Procurement Law.

Bidders who fail to submit responsive bids cannot be considered for award. HBSS Xerox is not aggrieved here because its non-responsiveness takes it out of consideration for award. Its protest and appeal must therefore be dismissed for lack of standing.

Xerox would have the Public Auditor hold that any interested party has standing, *and* being an "awardee"¹ ipso facto supplies the "interest"². Xerox claims that having been awarded the contract it has proved it "has a substantial and reasonable prospect of receiving an award". But all of that begs the question *whether it was entitled to award* in the first instance. If the party was not entitled to be named the awardee in the first place "because its non-responsiveness takes it out of consideration for award" (Xerox' own words³), it has no interest, it has no standing.

The questions of Xerox' standing must first be decided before the questions of contract legality are even considered.

Reflecting the inherent direct correlation between standing and responsiveness, the U.S. Court of Appeals for the Federal Circuit has said,

"We see responsiveness as another facet of the interested party inquiry. When responsiveness is an issue, **it must be resolved before** the board can proceed. If a

¹ "... Xerox is not just a bidder ... Xerox is the contract awardee...." (Xerox' Opposition to this motion, page 2.)

² "Therefore, it goes without saying that Xerox has an interest in this matter." (*Id.*)

³ From Xerox' Motion to Dismiss, page 4.

bid is not responsive, the protester has no more right to invoke the office of the board than the proverbial man on the street. *A nonresponsive bidder is the epitome of one who lacks a direct economic interest.* This is not a mere technicality; it is the predicate for the board's right to intervene in governmental procurements.” (*U.S. v. IBM*, 892 F.2d 1006, at 1012, (1989); bold and italic emphasis added.)

(Appellant has also raised other arguments, additional to the ownership nondisclosure, that Xerox' bid was nonresponsive because of material deviations from its contractual conditions in its bid and the conditions of the IFB, arguments that will be more fleshed out when the wrongfully withheld bid material is disclosed. This argument has never been fully responded to by the government because it never made any relevant inquiry into the factual basis of that argument in the first place; its bid evaluation was defective. In its *de novo* review of the IFB award, the Public Auditor should, likewise, first consider all arguments whether Xerox was a responsive bidder, as a “predicate” to determining its other defences to the claims of the protest and Appeal.)

Xerox would have it that it is exempt from the same exact non-disclosure charges it has laid against Appellant simply because the government failed to uncover the fact that Xerox' Ownership Disclosure was materially faulty. (See footnote 1.) But the government did not charge Appellant with nondisclosure, either. If Xerox can bring the nonresponsive claim against Appellant when the government has not, there is no bar to allowing Appellant to bring it against Xerox, and no immunity, either.

Xerox would have the Public Auditor ignore its lack of standing because, Xerox urges, it would be “inequitable”⁴. It asserts an equitable right to defend Appellant's charges that Xerox' contract award is defective because the changes made to the bid specifications were of such legal nature and factual magnitude as to make the contract awarded illegal on its face; it argues “the OPA here should consider allowing those who bid on the solicitation to express their viewpoint on this issue”. Well, that is exactly what Appellant has been trying to do in this case, but Xerox (and DOE) objects to its standing, timing and every other technicality that can be summonsed.⁵

Xerox seeks equity but it offered none to Appellant⁶. Oh no, when it came to Xerox' motion to dismiss Appellant's entire appeal, it was “off with its head” because Appellant's bid, so Xerox claims, was nonresponsive due to alleged factual shortcomings in its Owners Disclosure

⁴ “Overall, it would be inequitable to proceed to hear the legality of this solicitation without” Xerox. (Xerox' Opposition, p 3.)

⁵ DOE allowed the award to go forward notwithstanding the other clear violations of the law (5 GCA § 5211(e) – bids shall be unconditionally accepted without alteration – and § 5211(f) – after bid opening, no changes in bid prices or other provisions of bids prejudicial to the interests of the Territory or fair competition shall be permitted). Indeed, DOE itself seems to have been complicit in those violations and must itself defend those changes.

⁶ “He who seeks equity must do equity.” *Remedies*, Dan B. Dobs, West Publishing Hornbook Series, 1973, n. 24, p 44.

statement. Said Xerox of Appellant, it had *no standing* to express *its* viewpoint; dismiss the Appeal!

The mere fact this Appeal arises in respect of a protest brought after the award, after Xerox was named awardee, changes nothing.⁷ The essence of the within protest and Appeal is that the award itself was illegal and what's more should never have been made in the first place. The protest was brought prior to delivery and installation of any (or any significant amount) of the equipment. It was brought in ample time for DOE to learn of the major changes to the contract, yet DOE and Xerox pressed ahead. In fact, as DOE has testified, much of the award has not yet been performed pending clarification of the legality of the contract under this Appeal.

Professors Cibinic and Nash have discussed this issue in the following manner⁸:

“Where, however, the contract action is considered to clearly compromise the competition that led to the award, it will be considered a contract award controversy, *Webercraft Packaging, Div. Of Beatrice Foods Co.*, Comp. Gen. Dec. B-194087, 79-2 CPD ¶ 120 (agency should have resolicited rather than relax specifications in contract for specialty product produced by only a few sources). Thus, the contract award controversy process will be available where a contract modification alters the contract requirement to the extent that the modified contract is outside the scope of the original competition, *AT&T Communications, Inc., v. Wittel, Inc.*, 1 F.3d 1201 (Fed Cir. 1993).”

This Motion is brought to apply the same legal standards to Xerox as it wished upon Appellant. Appellant did in fact disclose all record, legal ownership of all relevant shares of the corporation during the relevant time period. Xerox has not, and has not offered any denial or explanation of that failure.

In its reply in support of its Motion to Dismiss, Xerox said

“The OPA must continue to enforce *complete accuracy* when it comes to IBSS' bid. *** The statute is simple and clear: it mandates the disclosure of any person (or entity) that owns more than ten percent interest for the immediate 12 months preceding the submission of the bid. *** An affidavit that states otherwise is *false*, which is the circumstance here.” (Italics in original.)

Xerox concluded its Reply with this:

“IBSS' entire protest should be dismissed as it is a non-responsive bidder, having

⁷ Note that the *GTA Appeal*, OPA-PA-10-005, was also a post-award case, and that the Public Auditor voided the award and terminated the contract.

⁸ Formation of Government Contracts, Third Edition, John Cibinic and Ralph C. Nash, The George Washington University, 1998, pp 1483-1484.

filed a false Affidavit Disclosing Ownership and Commissions with its bid.”

Appellant has refuted the factual basis of that argument. But if that is to be the law of this case as Xerox asserts, then there is no doubt that Xerox is, by virtue of its undenied failure to disclose the relevant shareholding during the relevant time period, a non-responsive bidder, and was a non-responsive bidder at bid opening. Whatever fate Xerox has demanded of Appellant must befall Xerox; if Xerox wishes to live by this sword it should die by it.

Xerox should be dismissed from this entire Appeal as it is and was a non-responsive bidder, having filed a false Affidavit Disclosing Ownership and Commissions with its bid. In consequence, the contract awarded to Xerox should be terminated⁹, and award should go to the next lowest bidder, Appellant.

Respectfully,

/s/

John Thos. Brown
For Appellant
May 9, 2011

⁹ “The Public Auditor finds that ratifying or affirming GCC's contract with GTA is not in the best interests of the Government, because waiver of the statutory requirements for the submission of a valid Major Shareholders Disclosure Affidavit and the statutory requirements that contracts arising from Competitive Sealed bidding be awarded to the lowest responsible and responsive bidder are serious threats to the integrity of the procurement system as stated above, and must not be condoned by contract ratification. The Public Auditor finds that the contract awarded to GTA shall be terminated as of the date of this Decision.” (*In the Appeal of Pacific Data Systems, Inc.*, OPA-PA-10-005 (Jan. 12, 2011 Decision, p 19).