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IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT PETITION

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

Interested Part Xerox was not paying attention in OPA-PA-10-010. In that case the issue was presented whether the bid submission should be disclosed, or could be sealed as requested by the Appellee, DOE. In ruling that the information must be disclosed, *not even two months ago*, the Hearing Officer said:

> **"Upon written request**, the Office of Public Accountability shall make available to any interested party or member of the public information submitted that bears on the substance of the Appeal except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or regulation. 2 G.A.R., 9 Div. 4, Chap. 12, §12106."

Appellant has made just such a Motion to Disclose herein, yet Xerox objects.

If Xerox might have produced any law or regulation that would prevent its opposition from being a frivolous filing, it has failed to do so.

Xerox claims "Guam's Procurement Regulations establish *a process allowing bidders to examine*

the confidential documents submitted by another bidder." That is wrong on at least two counts.

First, the Regulations do not, absolutely do not, allow bidders to examine the confidential documents submitted by another bidder (*and* Appellant has not made any request to review confidential information). The law and regulations do not require public disclosure of bona fide confidential documents. It recognizes non-public information to be non-public, but it does require public disclosure of information which the public should have access to; and this includes information that a bidder would simply *prefer* to be kept secret.

Second, neither the law nor regulation establish any *process* to *allow* bidders to examine *public* information. The law and regulations Xerox cites only establishes a procedure whereby, when bids are opened, confidential information is examined to make sure it is bona fide confidential. The process, such as it is, the law and regulation speak to is a process to determine whether claimed confidential information is indeed confidential. *It is a process directed to those who claim confidentiality, not a process directed to those who seek disclosure.*

Xerox asserts "[i]f a bidder wishes to see information designated as confidential, he must request disclosure...." Xerox cites to 2 GAR § 3109(l)(3), and quotes it, but there is not one sentence, not one clause that says what Xerox says it says. That section provides a process whereby allegedly confidential information is independently examined to determine if it is indeed confidential. There is no, absolutely no, requirement that another bidder "must request disclosure". The regulation simply says, "[t]he bids shall be opened to public inspections...."

Xerox makes the unsubstantiated assertion that "a bidder who wishes to view a competing bidder's designated confidential information must do so at the bid opening...."

It does not. There is absolutely no statement or even implication that bidders, or the public more broadly (and the section is intended for *public* inspection, not bidder inspection), that the request for disclosure must be made *at bid opening*. It is clear that the availability of public inspection is an ongoing right of the public and obligation of the government. (5 GCA § 5251.)

Xerox claims that OPA has no jurisdiction to rule on the matter of the confidentiality of the information if the request was not first made to the agency, that "the matter must first endure the review process at the agency level." The law and regulation very clearly say that OPA has jurisdiction over a protest only if there is first a protest to the agency. It very clearly does *not* say that there is any condition of first applying to an agency for disclosure of information before the Public Auditor has any jurisdiction over the question. There is simply no such express requirement in the law or regulation, and it is an audacious statement that cannot reasonably be implied from anything in the law or regulation.

This becomes a truly outlandish argument when the footnote to this assertion is examined. It says Xerox was not served with the portions of the record labeled confidential, so cannot comment. As Appellant mentioned in its Motion for Disclosure, there is very good reason to believe that the portions labeled as confidential are portions of Xerox' own bid, of which it patently has knowledge. Has Xerox itself labeled parts of its bid as confidential? Was it on that basis that the agency followed suit? DOE did not express why it labeled the undisclosed

information confidential, but whatever the reason, Appellant is entitled to a de novo determination by the Public Auditor.

And the inclusion of the footnote just adds more to the confusion Xerox attempts to sow. In the first place, Xerox points to 2 GAR § 3109(l)(3) to say that the only time that the confidentiality of the information can be determined is at bid opening, and that the Public Auditor has no jurisdiction over the determination unless the agency first makes a determination. But in the footnote, Xerox demands the right to "submit specific comments" to the Public Auditor for its determination of the matter. Xerox wants to deny Appellant's review of the information on the unsupported notion that the Public Auditor does not have jurisdiction, yet wants to submit information so that the Public Auditor can make the determination.

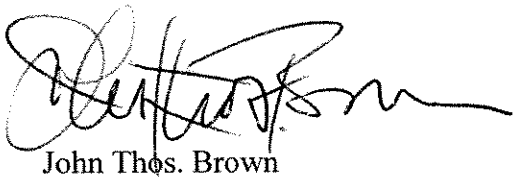
Xerox has not identified what the "review process" is, which it claims to have been violated, nor has it paid any heed whatsoever to the jurisdiction of the Public Auditor. The Public Auditor has de novo review of all agency determinations (5 GCA § 5703), including any determination as to what is or is not confidential information. This jurisdiction is intended to be utilized to promote the purposes and policies of the Procurement Act (*id.*). One fundamental purpose of the Act is "to require public access to all aspects of procurement consistent with the sealed bid procedure and the integrity of the procurement process." (5 GCA § 5001(b)(8).)

Appellant has not sought any information which is truly confidential, as that term is meant to be used in the procurement context. It's Motion for Disclosure simply asked "that the Hearing Officer or the Public Auditor review that material to determine de novo whether it is truly non-public matter, and to the extent it is not, that such matter be immediately made public and available to Appellant. (See, 2 GAR § 3109(l)(3).)"

It is absolutely within the power, if not a positive duty, of the Public Auditor to determine whether, as Appellant has sought with this Motion, the information is truly confidential or only an attempt to cover up essential terms and conditions of Xerox' bid.

The integrity of the procurement system rests squarely on the right of the public to examine the terms and conditions of a bid. If the public is denied knowledge of what the terms and conditions of a bid are, it does not know what exactly was bid, whether the bid complies with the solicitation, and whether the government is providing "the fair and equitable treatment of all persons who deal with the procurement system", as required by fundamental procurement policy. (5 GCA § 5001(b)(4).)

Respectfully,



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