

APR 29 2011

FILE NO. OPA-PA 11-02

DEPARTMENT OF EDUCATION

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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of)
)
TOWN HOUSE DEPARTMENT STORES,)
INC., dba ISLAND BUSINESS SYSTEMS)
& SUPPLIES Appellant)
)
)

APPEAL NO. OPA-PA 11-02

**DEPARTMENT OF EDUCATION'S
MOTION TO DISMISS**

XEROX CORPORATION
Party In Interest

Now comes, Department of Education "DOE", by and through undersigned counsel and moves the Office of Public Accountability to decline the Appeal in this matter pursuant to 5 GCA § 5703 and 2 GAR Div. 4 § 12103 (b) due to the pending Judicial Proceeding in CV1536-10 concerning DOE's Procurement of Document Management Services in GDOE IFB 022-2010, which is also the subject matter of the Appeal in OPA PA 11-02. The procurement in GDOE IFB 022-2010 is post award, and contract and there is no automatic stay in effect during the pendency of this Appeal.

Attached is copy of the Complaint filed in CV1536-10 brought by Appellant. Although Appellant seeks to distinguish the current appeal from CV1536-10 that was pending at the time the Appeal in this action was filed, stating that Appellant is seeking a different remedy with regard to the procurement, the law as set forth in 5 GCA § 5703 and 2 GAR Div 4 § 12013 (b) is quite clear on its face and states that:

The Public Auditor shall have the power to review and determine de novo any matter properly submitted to her or him.

(5 GCA § 5703)

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2 Effect of Judicial Proceeding. If an action concerning the procurement under Appeal has
3 commenced in court, the Public Auditor shall not act on the Appeal except to notify the
4 parties and decline due to the Judicial involvement. This Section shall not apply where a
5 court requests the decision of the Public Auditor.

(2 GAR Div 4 § 12013 (b))

6
7 The matter pending before the Court in CV1536-10 is concerning GDOE IFB 022-2010 and
8 larger issues surrounding the context of the procurement of document management services
9 (“DMS”) (See paragraph #9 of the Complaint in CV1536-10). The Request for Information
10 process and input of Appellant in developing GDOE IFB 022-2010, the solicitation process of
11 GDOE IFB 022-2010 including pre-bid conference, and numerous amendments and
12 clarifications, and subsequent times period are part of CV1536-10. The depositions of DOE’s
13 Superintendent, Nerissa Bretania Underwood, and Deputy Superintendent of Finance and
14 Administrative Services, Taling Taitano taken in CV1536-10 include the procurement process in
15 GDOE IFB 022-2010.

16 There has not been a Court request for the decision of the Public Auditor with regard to GDOE
17 IFB 022-2010.

18 This matter is not properly before the OPA and DOE respectfully requests the OPA to dismiss
19 and decline the within Appeal pursuant to the authority set forth in 5 GCA § 5703 and 2 GAR
20 Div 4 § 12013 (b).

21
22 **PURCHASING AGENT**
DEPARTMENT OF EDUCATION

23 
24 **By: LAURA J. MOONEY**
25 Counsel for Department of Education

Maher
& THOMPSON,
P.C.

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 OF GUAM

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COURT OF GUAM

Attorneys for Plaintiff
 TOWN HOUSE DEPARTMENT
 STORES, INC. dba ISLAND BUSINESS
 SYSTEMS & SUPPLIES

IN THE SUPERIOR COURT OF GUAM **CV 1536-10**

TOWN HOUSE DEPARTMENT
 STORES, INC. dba ISLAND
 BUSINESS SYSTEMS &
 SUPPLIES
 Plaintiff,

vs.

DEPARTMENT OF EDUCATION,
 GOVERNMENT OF GUAM,
 GENERAL SERVICES AGENCY,
 DEPARTMENT OF ADMINISTRATION,
 GOVERNMENT OF GUAM
 NERISSA BRETANIA UNDERWOOD,
 CLAUDIA AFCALLE & DOES I-X,
 Defendants.

CIVIL CASE NO. CV _____

COMPLAINT

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Plaintiffs allege as follows:

1. This Court has jurisdiction pursuant to the Organic Act of Guam, §3105, Title 7, section 7102 and 7103, Title 5 of the Guam Code Annotated as this action involves the improper expenditure of public moneys by officers, employees and agents of agencies of the Government of Guam in violation of the procurement regulations and laws of Guam.
2. Plaintiff, TOWN HOUSE DEPARTMENT STORES, INC. dba Island Business Systems & Supplies, is and at all times mentioned herein, was, and at all times mentioned herein, a corporation duly registered and licensed to do business under the laws of Guam

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whose principal headquarters is Guam and which pays taxes under the laws of Guam.

3. Defendants, DEPARTMENT OF EDUCATION, GOVERNMENT OF GUAM, GENERAL SERVICES AGENCY DEPARTMENT OF ADMINISTRATION, GOVERNMENT OF GUAM, are, at all times mentioned herein, were, instrumentalities and line agencies of the Government of Guam.

4. Defendant, NERISSA BRETANIA UNDERWOOD, is, and at all times mentioned herein, was, Superintendent of Education, Department of Education, Government of Guam and an officer, agent and employee of the Government of Guam.

5. Defendant, CLAUDIA S. ACFALLE, is, and at all times mentioned herein, was, Chief Procurement Officer, Department of Administration, Government of Guam and an officer, agent and employee of the Government of Guam.

6. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as DOES I-X, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that the damage as herein alleged was proximately caused by their conduct.

7. Defendants, as agencies, officer, agents and employees of the Government of Guam are entrusted with public funds, stand in a fiduciary relationship to the people of Guam in regard to the management of public money and thus charged with expending public money in compliance with the laws of Guam pursuant to section 7102, 5 G.C.A.

8. Since January 2010 through the present, the defendants, DEPARTMENT OF EDUCATION, GOVERNMENT OF GUAM and GENERAL SERVICES AGENCY DEPARTMENT OF ADMINISTRATION, GOVERNMENT OF GUAM, acting through its officers, agents and employees, defendants, NERISSA BRETANIA UNDERWOOD, CLAUDIA S. ACFALLE and DOES

I-X, have, upon information and belief, improperly, contrary to law and illegally expended public funds in the approximate amount of \$133,037.00, or more, and will continue to spend public money to procure supplies and services in contravention of the procurement laws and regulations.

9. Since January 2010 through the present, the defendants, DEPARTMENT OF EDUCATION, GOVERNMENT OF GUAM and GENERAL SERVICES AGENCY, DEPARTMENT OF ADMINISTRATION, GOVERNMENT OF GUAM, acting through its officers, agents and employees, defendants, NERISSA BRETANIA UNDERWOOD, CLAUDIA S. ACFALLE and DOES I-X, have, on information and belief, expended public money to procure document management services ("DMS") in violation of the applicable procurement regulations and law through the improper use of "emergencies", purported renewals and extensions of a non-existent contract which the Office Of The Public Auditor found was improperly procured, improperly renewed and which it terminated on November 28, 2008.

10. Defendants, NERISSA BRETANIA UNDERWOOD, CLAUDIA S. ACFALLE and DOES I-X are personally liable pursuant to section 7103, 5 G.C.A. for all public money expended improperly, illegally or contrary to law.

WHEREFORE, Plaintiff prays for judgment against defendants, and each of them, as follows:

1. For judgment against defendants, Nerissa Bretania Underwood, Claudia S. Acfalle and DOES I-X in an amount determined to have been expended improperly, illegally and contrary to law.

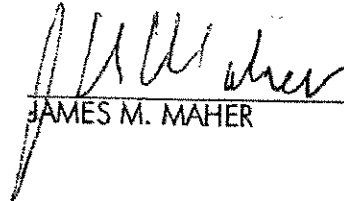
2. For a preliminary injunction and a permanent injunction, each enjoining defendants, and each of them, and their agents, officers and employees and all persons acting under, in concert with, or for them, from expending public funds to procure document management services through the use of renewals, extensions and

otherwise in violation of the applicable procurement regulations and laws.

- 3. For reasonable attorney's fee pursuant to section 7112 of 5 G.C.A.
- 4. For costs of suit herein incurred;
- 5. For such other and further relief as the court may deem proper.

Dated: 9/3/10

MAHER & THOMPSON, P.C.
Attorneys for Plaintiff

By: 
JAMES M. MAHER

VERIFICATION

I, JOHN T. BROWN, declare that I am plaintiff's duly authorized representative above-entitled action, that I have read the foregoing complaint and know the contents thereof, and that the same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and that as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct and that his declaration was executed on 3 September, 2010, at Hagatna, Guam.

