

John Thos. Brown  
General Counsel, for Appellant  
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](mailto:ingoz@ozemail.com.au)

**COPY**

RECEIVED  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

NOV 05 2010

TYPE: 318 BY: MNU  
FILE NO. OPA-PA: 10-009

PROCUREMENT APPEAL  
IN THE OFFICE OF PUBLIC ACCOUNTABILITY

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

NOTICE OF APPEAL

DOCKET NO. OPA-PA \_\_\_\_\_

APPELLANT INFORMATION

Name: Town House Department Stores, Inc., dba Island Business Systems & Supplies ("IBSS")  
Mailing Address: P.O. Box 7, Hagåtña, Guam 96932  
Business Address: 545 Chalan Machaute (Route 8 @ Biang St), Maite, Guam 96910  
Daytime Contact No.: Roland R. Franquez, General Manager (671) 477-7454

APPEAL INFORMATION

Purchasing Agency: University of Guam  
Number/Description of Procurement:  
UOG IFB No. P41-2010  
Multi-function Copiers and related software

The decision being appealed is UOG's denial of IBSS' Protest.

Appeal is made from protest of method, solicitation or award.

Names of competing bidders, offerors, or contractors known to Appellant:

Appellant has no firm knowledge of the identity of any other prospective bidders but has reason to believe, based on the specifications, that Xerox Corporation is expected to a "competing" bidder.

### STATEMENT OF GROUNDS FOR APPEAL

#### A. FACTUAL CONTEXT and CHRONOLOGY:

UOG IFB No. P41-2010 was issued August 8, 2010. (Copy of document attached.)

On September 13, 2010, IBSS wrote to UOG expressing concern over issues concerning the content of the solicitation. Specifically, IBSS objected to the "all or none" condition of the bid and to the unduly restrictive nature of certain of the specifications, seeking less restrictive specifications consistent with industry standards. (Copy of document attached.)

On September 22, 2010, UOG replied to IBSS' September 13<sup>th</sup> letter. It was essentially dismissive of IBSS' concerns, without responding substantively to them, and advised it would proceed with the IFB, unchanged. (Copy of document attached.)

On September 27, 2010, IBSS formally protested, reasserting the un-answered issues raised in its September 13<sup>th</sup> letter, and noted the failure of UOG to disclose certain required information in the IFB. (Copy of document attached.)

On October 25, 2010, UOG issued its formal Decision on the Protest, accepting in part and denying in part the bases of the Protest. (Copy of document attached.)

In his Decision, President Underwood agreed to remove the "all or none" condition, agreed to address part of the disclosure issue in the future, failed to address the remainder of the disclosure issue, and rejected the request to modify the specifications.

On October 27, 2010, IBSS sought a reconsideration of the President's Decision. (Copy of document attached.) As of the time of filing this Appeal, no response to the Request for Reconsideration has been received by IBSS.

The parties having failed to mutually totally resolve the issues of the Protest, and IBSS being

wary of the lapse of time to appeal, IBSS now brings this Appeal.

B. ISSUES:

1. “ALL OR NONE”: IBSS protested the “all or none” clause, which protest was accepted; therefore, that is not an issue on this Appeal.
2. DISCLOSURE: IBSS protested the failure of the IFB to disclose the information required by 5 GCA § 5267. UOG’s decision unsatisfactorily responded to this protest, thus that matter is an issue of this Appeal.
3. RESTRICTIVE SPECIFICATIONS: IBSS protested that the specifications were unduly restrictive in at least three respects: as to the requirement of “cartridge-less” and “fuser-less” features, as to the print resolution specifications, and as to required print speeds. Those issues are also subjects of this Appeal.

C. LAW and ARGUMENT:

1. DISCLOSURE: 5 GCA § 5267 requires that “specifications contained in any invitation for bids or request for proposals, and any amendment thereto, for the procurement of supplies shall identify the person responsible for drafting the specifications and any persons, technical literature or manufacturer’s brochures relied upon by the responsible person in drafting the specifications.” It is undisputed that the IFB is for the procurement of supplies, namely, copier equipment.

The President’s Decision admitted only that the IFB did not identify the person responsible for the drafting of the specification, but that this failure “did not act to prejudice any other bidder”. Even if this point is conceded, for sake of argument, the Decision did not rectify the omission of “persons, technical literature or manufacturer’s brochures relied upon by the responsible person in drafting the specifications”.

Since the primary issues of dispute in this Protest involve the restrictive nature of the specifications, it is disingenuous to argue that this information is not prejudicial to the Protestor. It will be a primary focus of discovery to determine how these particular restrictive specifications were formulated, and what alternatives were examined, and on what reasonable basis a selection was made. If that information had been provided in the IFB, it could have served as both a guide to the clarifications sought and a red flag to those who reviewed the Protest, so that this Appeal may have not been necessary.

For purposes of this bid, this statutory duty of disclosure is a material omission requiring that this bid be set aside *or amended* to include the necessary information, together with additional time to assess it before submitting a bid.

## 2. UNDULY RESTRICTIVE SPECIFICATIONS

Before addressing the specific specifications complained of, it is important to understand the legal context. This bid is intended to procure commercially standard office equipment, as is evident based on the types of machines and volumes of print required.

Indeed, it would violate Guam procurement policy if the bid intended to procure non-standardized equipment:

“It is the general policy of this territory to procure **standard commercial products** whenever practicable. In developing specifications, **accepted commercial standards** shall be used and unique requirements shall be avoided to the extent practicable”. (2 GAR § 4102(a)(3).)

There is another policy behind this policy: “to foster *effective* broad-based competition”. (5 GCA § 5001(b)(6).) The Procurement Act is expressly intended to “be construed and *applied*” to promote its policies. (5 GCA § 5001(a).)

To foster effective broad-based competition, the Procurement Act requires that “[a]ll specifications ... shall not be unduly restrictive.” (5 GCA § 5265.) It requires that specifications “shall include *only* the essential physical *characteristics and functions* to meet the Territory’s *minimum needs*”. (5 GCA § 5268(a).)

Without policies and requirements that solicitations must seek to promote competition amongst commercially standard products that meet minimum territory needs, the public purse would be put at risk of whim or caprice. And that would violate the policy to “provide increased economy” and “maximize to the fullest extent practicable the purchasing value of public funds”. (5 GCA § 5001(b)(5); and see, 5 GCA § 5265, which requires that specifications be drafted so as to promote overall economy for the purposes intended.)

The issues of unduly restrictive specifications follow:

A. Print Resolution: The print resolution specified requires 2400 dpi. This is not the commercial standard, and no special use was indicated that would justify the increased cost, and decreased competition, for such a rigid specification, certainly not across all machines. IBSS requested the allowable print resolution range be lowered to 1200 dpi to enable it to competitively bid.

The industry standard is 300 dpi for most color photo printing up to 8 x 10 inches, and less for black and white. 600 dpi is undistinguishable to the naked eye compared to 1200 dpi in the print sizes required of the machines solicited. Even standard wide-scaled color printers for prints up to

two feet across typically demand only 1200 dpi. And the maximum paper size for this machinery is only 17 inches.

2400 dpi printer resolution is over-spec for the customary needs of the government. It is a standard that is used only in the highest graphics arts commercial processes. It will yield no discernable difference in quality, in the print sizes and volumes required, from the 1200 dpi that IBSS asks. It will, however, decrease competition and consequently increase cost. Even assuming that there is some justification from rare and limited uses, it does not justify the standard across the full range of machines required. Specifications are meant to be drafted with an eye on "minimum" needs, not "maximum".

B. Environmentally conscious and energy saving technology: The specifications require use of "cartridge-less" and "fuser-less" features. These are not standard nor commonplace features (that is, "characteristics and functions") in the industry. Indeed, for purposes of this bid, they seem aimed at preventing competition from competitors within the industry.

The President's Decision justifies the demand for these features for "environmentally conscious and energy saving technology" based on an alleged "mandate" which just does not exist. The Decision cites to 17 GCA 16123 and 16124 and Executive Order No. 2010-15 as the legal authority for such a "mandate".

The laws cited do not support the mandate. They deal solely with "natural energy", such as solar, wind, wave and other alternative energy sources. Executive Order 2010-15 ("Relative to *creating an Energy Task Force Committee* to develop and implement a strategic energy plan") is similarly nebulous in its relevance or application to this particular equipment being solicited (and in any event, Executive Orders do not displace the law, which requires minimum needs, unduly restrictive specifications and fostering effective competition).

Moreover, as IBSS' Request for Reconsideration pointed out, even if we were to consider as meritorious the goal to "seek environmentally conscious and energy saving technology", the specifications do so in an unduly restrictive manner. Cartridge-less and fuser-less printing technology is not the only energy saving technology in the industry. (See attached BLI<sup>1</sup> report, "How to Buy a Copier or MFP: 2009", in particular the part of the Sustainability chapter entitled "Environmentally Friendly Product Features", Exhibit 8, also found online at <http://www.buyerslab.com/advisor/copier-buying-guide/appendix/sustainability-II>.) Selecting that one feature among the many other means of providing environmentally conscious and energy saving technology is arbitrary and capricious.

---

<sup>1</sup> Buyer's Laboratory, Inc. is an independent imaging industry authority and provider of competitive intelligence, testing and reviews on multifunction (MFP), copier, printer, scanner and software solutions and products. Its website is as <http://www.buyerslab.com/>.

Other manufacturers achieve energy savings by other means, and if the goal is to seek energy saving technology, those other means must also be considered, and these specifications do not do that. The University has prejudicially selected one amongst many energy savings alternatives. Competitive specifications must only identify the essential *function* to meet the territory's needs (e.g., energy saving technology), not *features* which unnecessarily restrict competition (e.g., cartridge-less or fuser-less printing).

Not only does the lack of legal authority undermine any such "mandate", so too does the application of this particular energy saving goal to this IFB. If there were such a mandate, it should be reasonably applicable to all the machines in the IFB. But, as the President admits, it only applies to two of the seven unit types sought. This is a very selectively applied "mandate", which suggests an arbitrary and capricious determination. Why is that? Might it be that cartridge-less/fuser-less features are not available in all Xerox machines to fully satisfy the range of machines sought in this IFB?

C. Print speeds: The non-competitive print speed specifications are over-spec and not industry standard considering the class of machines requested and the ordinary uses anticipated. This is particularly apparent when examined in terms of the volumes of prints anticipated.

IBSS specifically pointed out the non-competitive nature of the print speeds and provided an analysis of the print speed anomalies with its letter to UOG of date September 13<sup>th</sup>. UOG summarily dismissed the assertions without elaboration. IBSS' Protest specifically objected to the unduly restrictive nature of the specifications and specifically incorporated the objections contained in the letter of September 13<sup>th</sup>.

The IFB is for the acquisition of a total of seven (7) machines. The specified total volume for all 7 machines is 26,600 pages in a month. The per-machine breakdown in volumes is not given, so for analytical purposes, IBSS must presume it is based on an average of 3,800 pages per machine per month.

The specifications require, for instance, a speed of 85 ppm ("pages per minute") for certain of the machines (Units 4 and 5). At the specified speed, the *entire expected monthly volume* of prints for one of these machines could be run off in just 45 minutes, and the machines would then sit idle for the remainder of the month. What's the rush? Does it justify the reduction in cost-effective competition? These specifications entail a larger upfront capital expense than lower, more standard spec machines just to perform intermittent work. Does the capital cost justify the operational minimum needs?

It takes only 1.75 minutes to run off a 150 page document at 85 ppm, and how many 150 page documents per month are typically expected from a machine? Not many if the total volume is 3,800 pages per month. At 45 ppm, it takes 3.3 minutes. That's a difference of just 1.5 minutes. What's the rush? Are students and staff so stressed for time that they don't have a spare 2 or 3 minutes in their whole day to print a 150 page document? Does it justify the reduction in cost-

effective competition? If there is just one particular need in the calendar for high speed volume production, doesn't it make economic and competitive sense to designate only one of the seven machines to serve that particular need and not burden other machines with over-spec demands for routine applications?

Buyer's Laboratory, Inc. identifies the commercial standard ppm for machines such as those solicited in the protested IFB. **Given the volumes specified, a ppm of 11-20 would be commercially standard.** (See attached, Exhibit 7.) Based on this authority, the 85 and 75 ppm specifications found in this IFB are blatantly non-competitive and in violation of 2 GAR § 4102(a)(3).

There is no justification given for these unusually high speed-low volume specifications, other than the bare "best interests of the University and its students". Yet, even a casual analysis shows time is not the essential element given the expected volumes, and market research shows that competitive machines with marginally lower speeds yield significantly higher capital cost benefits.

The speed specifications are arbitrarily over-spec, with the result, if not the intent, that they benefit Xerox Corporation machines, and unfairly discriminate against competitive machines which both cost less and more rationally address the customary commercial needs and standards.

D. "Best interests" not justified: The President's Decision is grounded the "best interest of the territory". The "all or none" clause was removed "[i]n the best interests of the University", but the bid specifications "will remain as originally listed", based on "the best interests of the University" and because it "does not serve the best interests of the University and its students". The material omission of information required by 5 GCA § 5267 was brushed aside "in the best interests of the University", to "proceed with the bidding process".

Bearing in mind that this was intended as the Final Decision of the University on this Protest, something more than a bare declaration was required. Procurement determinations require articulation of sufficient facts, circumstances, and reasoning as will substantiate the specific determination which is made. (See, ABA Model Procurement Regulation R1-201.01.2, which implements the intent of 5 GCA § 5020, being identical in language to ABA Model Procurement Code §1-201.)

In the Guam Supreme Court case, *In re Department of Agriculture v. CSC (Rojas)* 2009 Guam 19, at ¶ 31, the Court said "[w]e explicitly hold here that where the CSC exercises its power to reconsider a final decision *without articulating in its decision a reasoned basis for doing so, the exercise is inherently arbitrary and capricious.*"

**CONCLUSION:**

The so-called energy savings specifications complained of in this IFB are unduly restrictive and not justified on any credible legal basis. Indeed, the irrelevant legal basis cited for creating a "mandate" can only be characterized as purposefully deceptive or woefully inept, perhaps contemptuous.

Moreover, none of the unduly restrictive specifications can reasonably be justified when looked at critically and with a mind to accommodate and give effect to the purposes and policies of the Procurement Act and Regulations. Given the reasonable alternatives found in the industry, which were not apparently considered because no discussion of them was offered in the University's rejection of IBSS' protest, the selections made were facially arbitrary and capricious.

IBSS urges the Public Auditor to examine the complained-of specifications. IBSS believes they overstate needs, exaggerate the commercial standards, and do not stand up to the requirements of relevant authority. IBSS believes that there are reasonable alternatives to these specifications which meet the territory's minimum needs and foster effective broad-based competition and maximize the purchasing value of public funds, yet these reasonable alternatives were arbitrarily dismissed in favor of unduly restrictive specifications that exceed the territory's minimum needs, restrict competition from other commercially standard machines and unnecessarily burden the purchasing value of public funds.

The Public Auditor must review these specifications de novo and determine for herself whether these specifications pass muster.

/// continued...



---

STATEMENT SPECIFYING RULING REQUESTED

This Appeal is brought in the context of a pre-award protest, and no bid has been submitted or opened. Nevertheless, as the Decision indicated, there has been “a free flow of communication by the bidders in clarifying specifications.” Appellant recognizes that the free flow of communication has served to fairly identify the issues.

5 GCA § 5451(b) authorizes the Public Auditor to revise a solicitation “to comply with the law”. This could effectively be done by, and Appellant seeks relief by, a ruling:

1. Requiring the University to provide the information specified in 5 GCA § 5267; and,
2. Eliminating the requirement of “cartridge-less” and “fuser-less” equipment; and,
3. Specifying a print resolution of 1200 dpi in all instances where a 2400 dpi is required; and,
4. Expanding the range of print speed requirements to include the industry standards specified herein, or at least include competitive machines that IBSS can offer with a range of 30-45 ppm for units 4, 5, and 7.

If, in fact, the Public Auditor should only rule as requested in numbers 2 to 4 above, that would obviate the need for the disclosure, in this Appeal, requested in number 1 above.

/// continued...

### SUPPORTING EXHIBITS, EVIDENCE, OR DOCUMENTS

With reference to all the matters submitted in the original Appeal as incorporated above, and reserving the right to provide further written material as it may be considered relevant or come to hand, there are attached hereto the following supporting materials:

Copies of:

1. UOG IFB No. P41-2010
2. Letter of September 13, 2010, IBSS to UOG
3. Letter of September 22, 2010, UOG to IBSS
4. Protest letter of September 27, 2010
5. Letter of Decision on Protest dated October 25, 2010
6. Request for Reconsideration dated October 27, 2010
7. Copy of Buyer's Laboratory, Inc. report concerning industry standards for ppm
8. BLI "Understanding Sustainability", from "How to Buy a Copier or MFP: 2009"

/// continued...

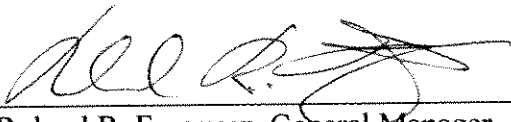
---

VERIFICATION AND DECLARATION RE COURT ACTION

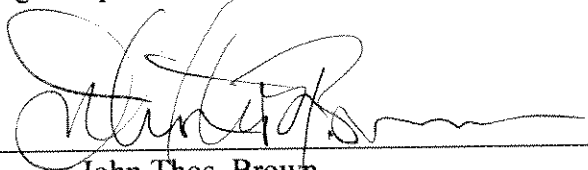
The undersigned party does hereby verify, to the best of information and belief, the facts stated and confirms that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. The undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this 5<sup>th</sup> day of NOVEMBER 2010

APPELLANT, Town House Department Stores, Inc., dba Island Business Systems & Supplies

By:   
Roland R. Franquez, General Manager - IBSS  
authorized representative for Appellant  
PO Box 7, Hagåtña, Guam 96932  
PH: (671)- 477-7454  
Fx: - 477-7660  
for Appellant

Legal Representative:

  
John Thos. Brown  
General Counsel for Appellant  
PO Box 7, Hagåtña, Guam 96932  
PH: (671) - 477-7293  
Fx: - 472-6153