

ORIGINAL

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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT PETITION

In the Petition of)	
)	PETITION TO COMPEL DECISION
)	AND ENFORCE AUTOMATIC STAY
TOWN HOUSE DEPARTMENT STORES,)	
INC., dba)	
ISLAND BUSINESS SYSTEMS)	DOCKET NO. OPA-PA <u>10-006</u>
& SUPPLIES,)	
APPELLANT)	
_____)	

PETITIONER 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

FURTHER PETITION INFORMATION

Purchasing Agency: Guam Department of Education (“DOE”)

Number/Description of Procurement:

DOE IFB No: DOE 006-2010, Bid Opening May 21, 2010

The IFB was issued to acquire 98 “stand-alone” multifunction copiers for use throughout DOE.

CONTEXT OF PETITION

Petitioner brings this action following Protest of the referenced solicitation and reminder(s) of protest, all to no avail: no decision has yet been rendered on the Protest.

1 Following publication and solicitation of bids pursuant to the referenced IFB, bids were opened on the scheduled date, May 21, 2010. Petitioner IBSS was the announced low bidder. The only other bidder was Xerox Corporation.

2 On the same day, May 21, 2010, the Superintendent of DOE wrote to Governor Camacho a letter requesting approval to issue a Declaration of Emergency for document management services (i.e., copiers and related services). The letter stated the effective period of the so-called emergency was not imminent, but “will commence for a period of (1) month from June 1, 2010”.

2.1 The letter noted DOE was working on a draft Document Management Services Proposal. In addition, “DOE has been working diligently since our last emergency declaration to produce a new scope of work for document management services.”

2.1.1 It might be noted that the referenced “last emergency declaration” was issued by the Superintendent on date March 31, 2010, and certified by the Governor on April 1, 2010; such certification was sought by the Superintendent in a letter to the Governor on March 31, 2010, in which she stated “[t]his service will commence for a period of one (1) month from April 1, 2010 - April 30, 2010 allotting the Department of Education time to establish a new contract.” DOE subsequently issued and paid purchase orders to Xerox Corporation for the month of May 2010 (the very month in which IFB 006-2010 was issued and opened) for the delivery of copiers and related services, but did so apparently without a declaration of emergency or other legal authority.

2.2 Most pertinent here, the May 21st letter added, “[f]urthermore, since our last emergency declaration DOE has issued IFB 006-2010 for small multifunction copier machines to accommodate our larger solicitation. This solicitation is intended to outfit several areas of the

department while the larger solicitation is awaiting approval.” This indicates that IFB 006-2010 was thoroughly contemplated to be in support of and ancillary to a “larger solicitation”.

2.3 Thus, both to encourage the Governor to certify the state of emergency, and to illustrate the steps DOE was taking to mitigate the effects of the so-called emergency, DOE undertook to solicit the 98 copiers which are the subject of the protested bid No. 006-2010.

3 Correspondence between Petitioner’s counsel and DOE’s counsel further underlines the intended separate nature of IFB 006-2010 for any “larger”, and later, solicitation. By letter dated April 9, 2010, DOE Legal Counsel wrote IBSS’ General Counsel committing, in part, that DOE, “[n]o later than the last day of April ... will agree to issue an Invitation for Bid for all fax machines [which it did] **and if time permits small copier machines that are used throughout the Department**”. The only condition of this commitment was “if time permits”. Time did obviously permit and the bids were duly opened May 21, 2010.

3.1 The intended distinction from the “larger” bid and the “smaller” IFB 06-2010 is further underlined by an email from DOE Counsel to IBSS Counsel on August 12, 2010, in which he said “[w]hen we get that appointment [of review authority from the Attorney General] we will be issuing a bid for the larger copiers.”

3.2 The distinction is further made in the letter from the Superintendent of DOE to IBSS’s General Counsel dated July 7, 2010, wherein she advised “[w]ith regard to the larger copying services for the Department, on May 21, 2010 an IFB was forwarded to the Attorney General’s office for review and approval....”

4 On July 1, 2010, IBSS’ General Counsel wrote to the Superintendent, among other matters, reminding her of the outstanding matter of IFB 006-2010, stating, “DOE is permitting supposedly precious time to elapse”, and “[w]ith the IFB, IBSS had high hopes, especially with its low bid, that DOE would level the playing field for copiers”.

5 On July 7, 2010, the Superintendent responded to IBSS’ Counsel advising only that “no award has been made with regard to IFB 006-2010 due to lack of funds” and that “[t]he Department is in the process of requesting a supplemental budget to secure funding to award IFB 006-2010”. Meanwhile, DOE was finding plenty of funding to continue to obtain copiers from Xerox pursuant to the terms of the year 2000 Xerox contract which had been found to be illegal and declared terminated in November 2008, sometimes under the cover of dubious rolling, serial “emergencies”, and sometimes with no such “authority” at all.

6 After several intervening attempts by IBSS staff to obtain information on the status of IFB 006-2010, IBSS brought protest on IFB 06-2010 on September 2, 2010, claiming right to an award.

7 By letter dated October 5, 2010, among other issues raised, IBSS Counsel reminded the Superintendent that “[t]here has been no decision on the protest [IFB 006-2010]”.

8 There still has been no decision, and Petitioner IBSS hereby seeks the Public Auditor’s order that DOE provide such a protest decision. (See, *In the Appeal of Town House Dept. Stores, Inc., dba Island Business Systems and Supplies*, OPA-PA-08-003.)

9 Meanwhile, DOE has finally issued an IFB, previously professed to be for the “larger” copier needs: DOE IFB 022-2010. This IFB includes a solicitation to acquire the copiers which have already been solicited under IFB 006-2010, and as to which IBSS disclosed its pricing and was low bidder.

9.1 This situation is analogous to the circumstances in *In the Appeal of Town House Dept. Stores, Inc., dba Island Business Systems and Supplies*, OPA-PA-08-012, where IBSS brought an Application to Stay a subsequent solicitation by GSA involving the same subject matter of the protested solicitation. That case was resolved by stipulation of the Attorney General to withdraw the subsequent solicitation.

10 The Petitioner seeks the Public Auditor’s order that the solicitation of copiers in DOE IFB 022-2010 be amended to strike the solicitation of copiers which were intended to be solicited under IFB 006-2010.

RELEVANT LAW AND ARGUMENT

5 GCA § 5425(b) gives the head of the purchasing agency the “authority” and duty to settle and resolve a protest. § 5425(c) requires that the decision “shall” be issued “promptly”.

2 GAR § 9101(g)(1) requires the head of the purchasing agency “shall” issue a decision on a protest “as expeditiously as possible”.

This is the same situation Petitioner found itself in in a prior Appeal, OPA-PA-08-003. In that Appeal, the Public Auditor ruled that a Protestor has no jurisdictional basis to appeal a protest until a Decision on the protest has been rendered. This requirement has the effect of denying a protestor due process if the government simply fails to timely render a protest decision.

The Public Auditor there ruled,

“The Public Auditor holds that the GPSS’ failure to produce a decision on IBSS’ December 4, 2007 protest is a violation of 5 G.C.A. §5425(c) and (d) and 2 G.A.R. Div. 4, Chap. 9, §9101(g) and a bad faith act that violates 5 G.C.A. §5003 and undermines the integrity of the procurement process **and the Public Auditor**

has the authority to compel the Superintendent of GPSS to produce the decision.” (Bold emphasis added; Decision, OPA-PA-08-003.)

Petitioner is entitled to due process, and due process requires an expeditious rendering of a Protest Decision.

EVIDENCE OF POSSIBLE PREJUDICE AND/OR BREACH OF AUTOMATIC STAY

Moreover, Petitioner is concerned that actions have been taken which prejudice its position as a prospective contractor for the copiers sought in IFB 006-2010 by including the same need for those copiers in IFB 022-2010. And, this is a violation of the automatic stay of the solicitation of IFB 006-2010.

THE STAY:

“In the event of a timely protest ... the Territory shall not proceed further with the solicitation....” (5 GCA § 5425(g).) The Protest of IFB 006-2010 was submitted September 2, 2010. IFB 022-2010 was issued of date September 12, 2010. DOE should not be allowed to “proceed further” with the solicitation of the copiers which are the subject of IFB 006-2010 by including them in IFB 022-2010.

It must be reiterated that IBSS does not seek to stay all of IFB 022-2010; it simply seeks to stay the solicitation of the 98 copiers which are the subject of the protest IFB 006-2010.

PREJUDICE:

IBSS’ competitively low bid price has been disclosed to its competitors at bid opening. This is competitive information that is prejudicially disclosed given that DOE is now planning a re-bid. Matters of bidder prejudice include factors that affect price. (2 GAR § 3109(m)(4)(B).)

Moreover, IBSS believes that it was prejudiced by wrongful and coercive intervention of Xerox Corporation which impeded and perhaps derailed due consideration and award of IFB 006-2010 to the lowest bidder, IBSS.

Bear in mind that Xerox Corporation (“Xerox”) did bid on the instant IFB, without protest as to its specifications or other substance.

Also bear in mind that Xerox had been providing machines such as those specified in the IFB under its prior contract, which not only was at this time expired, but had actually been declared

illegal and terminated by a Final Decision of the Public Auditor in November 2008 ¹.

This is evident from Xerox' General Manager *explicit admission* to the Superintendent by letter dated July 30, 2010, wherein the General Manager says “**Xerox is continuing to provide document management services under the GDOE/XMS Agreement that effectively expired on December 31, 2009. ...** In the interim, GDOE has worked to provide Xerox monthly purchase orders to cover the services being rendered” (Bold emphasis added.)

That letter, and others, continually pressed DOE for payment and yet more purchase orders to continue to roll over an expired, illegal and terminated contract, to which DOE obligingly deferred. In original bold and italicized type, in that letter of July 30th, the General Manager said, “*[w]e value GDOE greatly as a partner, however, Xerox will be hard pressed to continue services without a purchase order....*” (Bold and italics in the original; underlining added.)

In a June 17, 2010 letter from the General Manager to the Office of Supply Management at GDOE, the GM confirmed its bid of \$133, 037.00 as its monthly fee “if it is the desire of GDOE to **continue with the existing Xerox agreement** ... to include the existing in-place services and fleet of devices....” The GM then demanded payment: “[t]he last GDOE Purchase Order we received covered ... the month of May. We are currently in the month of June and require a Purchase Order to cover the current month. ... Absent a PO or the intent letter, Xerox will have no choice but to stop services and supplies being provided.” (Bold emphasis added.)

The collusive nature of this arrangement is suggested by Xerox' use of the term “partner”, referring to DOE, in the July 30th letter. It might also be suggested by Xerox' uninterrupted eleven year (at least) provision of copiers to DOE without any competitive bid – except IFB 006-2010, which IBSS won as low bidder, but DOE has so far declined to conclude. The letter the Superintendent wrote to Xerox on December 11, 2008 would not be inconsistent with that suggestion, either.

In that letter, the Superintendent advised Xerox, if Xerox would appeal the Decision of the Public Auditor in OPA-PA-08-011 to the Superior Court, “then GPSS proposes to work with the parties involved with the case, and to continue the agreement on a month to month basis until a new invitation for bid is completed.” In fact, GPSS only worked with the one party, Xerox, and did not even manage to plan to issue “a new invitation for bids” to implement a new contract for copiers by the time the Xerox contract expired of its own, known terms on December 31, 2009, a

¹ Although Xerox appealed the Auditor's original decision to the Superior Court, the Court never heard or ruled on the substantive merits. The Superior Court case was dismissed January 20, 2009, with prejudice, upon the stipulation of Xerox, DOE and IBSS. See “Notice of Dismissal of Complaint and Appeal to Superior Court”, filed January 22, 2009, in *In the Appeal of Town House Dept. Stores, Inc., dba Island Business Systems and Supplies*, OPA-PA-08-011. Upon that dismissal, the original decision of the Public Auditor in that matter became final.

year after the Superintendent's letter.

Although Xerox did not protest IFB 006-2010, it did prejudicially and coercively communicate with DOE about it while consideration of the award was still pending.

By letter to Edith A. Pinaula, GDOE Office of Supply Management, of date June 23, 2010, the Xerox General Manager again pressed for a PO for June, but went further on to demand information about the outstanding IFB 006-2010. It is hard to interpret the letter as anything but an attempt to influence the bid evaluation to include consideration of matters beyond the IFB's specifications in violation of 2 GAR § 3109(n)(1): "No bid shall be evaluated for any requirement or criterion that is not disclosed in the Invitation for Bids".

The Xerox General Manager said (bold and italicized emphasis added):

"[W]e have several questions regarding your future intent for the contract after June 30, 2010.

"1.) The recent bid for small multifunction copier machines (IFB #006-2010) **would allow** small **standalone** multifunction devices **to proliferate** throughout DOE.

"a. Are these machines meant to *replace*, [sic] ***machines currently provided under the Document Management Services contract*** and if so, which specific ones and when?²

"b. **How do you intend on managing these units** since supplies are not included in the maintenance/warranty plan and what specifically are your contractual expectations with "warranty" coverage? ... [I]t is very likely that GDOE will have runaway supplies costs not figured in to the bid cost analysis. And with regard to warranty, **the bid was not clear** on describing "warranty" and how the proposed units will be maintained or supported. For example, will the awarded vendor be responsible for installing warrantable parts or will end users be required to do it? Can warrantable parts be replaced with Non-OEM parts? How long would GDOE provide the awarded vendor to bring in parts from off-island? What parts stocking levels does the vendor maintain to assure minimum downtime of the fleet of machines? Will the machines have a replacement guarantee for the warranty period? Etc.

"c. **How do you intend on evaluating IBSS's [sic] proposal** for a HP M3035x

² Well, yes, that is *exactly* what DOE supposedly wanted from IFB 006-2010. As already mentioned, DOE Legal Counsel wrote IBSS General Counsel on April 9, 2010. In that letter, he confirmed a meeting held back on March 6, 2010, during which he agreed DOE "will do the following: ... agree to issue an Invitation for Bid for ... small copier machines that **are used** throughout the Department." (Bold emphasis added.)

multifunction copier since it does NOT have the ability to set up individual user accounts, track copying, printing, scanning, and/or faxing and generate usage reports per user as is required in the bid specs? (The INABILITY of the HP M3035x to do this has been confirmed by HP Support and another locally authorized HP reseller.)

“2.) When do you intend on issuing a bid for the **larger** equipment and when do you expect it to be awarded?

“3.) **When will you be issuing a purchase order for Document Management Services covering the next couple of months...?**

“**Should you have any questions about ... Xerox’ position on the HP M3035x meeting the bid specs, please don’t hesitate to call me**”

This is clearly inappropriate behavior, suggesting a relationship so close that the GM considered herself fully able to instruct the evaluation, determine the specifications and to decide for DOE what its needs are.

It has to be kept firmly in mind that DOE has not rejected IBSS’ low bid nor at any time indicated it was non-responsive or that IBSS might be non-responsible. Implicitly, then, and by explicit statements of the Superintendent, there was no articulable reason to find its bid non-responsive or otherwise reject it.

The Superintendent stated, in her July 7th letter to IBSS’ General Counsel that the *only* thing holding back the award was funding, and DOE was attempting to obtain supplementary funding. She made no suggestion that the IBSS’ low bid was in any way defective or non-responsive.

This is not a satisfactory answer for several reasons: First, in her May 21st letter seeking the support of the Governor for the June declaration of emergency, she said DOE was unconditionally issuing IFB 006-2010. This was the same day bids were opened, and about two weeks after the IFB was issued. She did not ask the Governor for funds nor suggest funding was a problem, and given the premises expressly given for the declared emergency, funding for the IFB should have been given top priority.

The declarations of emergency that have been issued by the Superintendent, under penalty of perjury, and certified by the Governor and Acting Governor for the months of April and June, emphatically declared that “document management services is integral for the functioning of the department” and that “the continuance of the **document management services is the highest priority**”. IFB 006-2010 was issued precisely to provide at least some of these document management services.

Second, it appears that, in the month of May when the IFB was issued and opened, there was no

declaration of emergency made for that month; yet, without any legally authorized basis, DOE was quite prepared to, and ultimately did, give Xerox \$133,000.00 – money which could, and should, have gone to the *legally* solicited IFB 006-2010.

And **this is critical** to undermining any claim the IFB should not be awarded based on funding. As noted above (see discussion at footnote 2), the *IFB was intended to replace machines already being provided* by Xerox under the serial-emergency, illegal roll-over. **The funds were already available but were being diverted** to a trumped-up emergency (which the IFB in part addressed) and illegal roll-overs of the old, discredited Xerox contract. Whether for bogus emergency or illegal roll-over, DOE had the funds for these machines but was giving it to Xerox. If nothing else, DOE should have awarded the IFB and reduced the funds going to Xerox for the same machines the IFB was meant to replace.

Third, if DOE did not have the money, it should have cancelled the bid rather than open the bids and begin its evaluation of them. (Notwithstanding that cancelling the bid after inducing the Governor to certify that an emergency existed for the reasons that “Every Child is Entitled to a Public Education” and “document management services is integral for the functioning of the department” and “the continuance of document management services is the highest priority” would presumably be a bit embarrassing if not altogether disingenuous.)

2 GAR § 3115(d)(1)(B)(ii) says that a bid can be cancelled before bids are opened “if the territory **no longer can reasonably expect** to fund the procurement”.

That is **not**, however, a sufficient reason to cancel a bid *after* bids have been opened (2 GAR § 3115(d)(2)(A)). The government should not *open* bids if the territory “no longer can reasonably expect to fund” the procurement. *After bid* opening, the government can only reject all bids if **prices exceed** available funds. (2 GAR § 3115(d)(1)(A)(iv).)

There is no hint that the bid *price* received from IBSS *exceeded expected availability* of funds. In fact, the Superintendent clearly said *only* that “no award has been made with regard to IFB 006-2010 due to a *lack* of funds”. Price has never been mentioned as a factor. Indeed, Xerox’ own bid price was higher and, it can reasonably be assumed, that the price Xerox was already getting for these machines under its continued roll-over of the expired, illegal and terminated contract would be at least as much as its bid in IFB 006-2010 (the cost of which had evidently not been raised for some period of time).

Given the outside interference with Xerox’ “partner”, and the inconsistent and contradictory expressions as to the need of copiers as the “highest priority”, and the availability of funds for illegal procurement which could easily have been directed to a legal one, there is no good reason for DOE to fail to award the contract to IBSS.

And there certainly is no good reason to give Xerox another crack, in IFB 022-2010, at the same

products already properly solicited in IFB 006-2010. That simply deprives IBSS of the fair and equitable treatment to which it is entitled.

After over a decade of uncompetitive and illegal copier procurement, DOE finally put out a competitive bid for copiers. It did this while it was continuing to roll-over an expired and terminated and illegal contract with Xerox for the greater bulk of copier services, under dubiously supported and premised serial emergencies. And IBSS was low bidder for this one legal bid. It is well past time to recognize that Xerox lost this one, and to award the bid under IFB 006-2010 to the bid of the responsible bidder with the lowest responsive bid – IBSS.

RELIEF REQUESTED

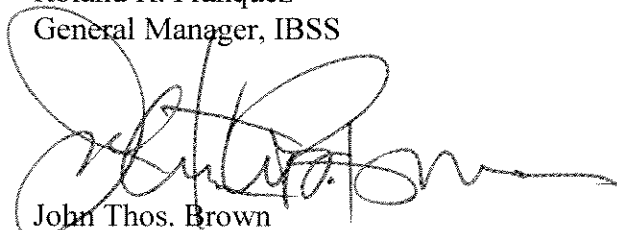
Petitioner respectfully asks the Public Auditor to exercise her power to compel DOE to produce and deliver its Decision on IBSS' Protest of IFB 006-2010. Moreover, to assure the integrity of the procurement process, Petitioner respectfully asks the Public Auditor to order the stay of the solicitation of the copiers identified in IFB 006-2010 in IFB 022-2010.

Dated this 18th day of October, 2010, and

Respectfully submitted,



Roland R. Franquez
General Manager, IBSS



John Thos. Brown
General Counsel for Petitioner

ORIGINAL

Exhibits

Petition to Compel Decision and Enforce Automatic Stay DOE IFB 006-2010

1. IFB 006-2010
2. IFB 022-2010

3. Letter to Governor, re Declaration of Emergency, Superintendent DOE, May 21, 2010
4. Certified Declaration of Emergency, May 28, 2010

5. Letter to Governor, re Declaration of Emergency, Superintendent DOE, March 31, 2010
6. Certified Declaration of Emergency, April 1, 2010

7. April 9, 2010, DOE Legal Counsel letter to IBSS General Counsel
8. email from DOE Counsel to IBSS Counsel on August 12, 2010

9. Letter, July 1, 2010, from IBSS' General Counsel to the Superintendent
10. Superintendent response, July 7, 2010

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12. Letter, October 5, 2010, from IBSS' General Counsel to the Superintendent

13. Letter from Xerox General Manager to DOE (Pinaula), June 17, 2010
14. Letter from Xerox General Manager to DOE (Mafnas), June 23, 2010
15. Letter from Xerox General Manager to DOE (Superintendent), July 30, 2010

16. Letter from Superintendent to Xerox General Manager, December 11, 2008