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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

TOWNHOUSE DEPARTMENT STORES,  
INC. dba ISLAND BUSINESS SYSTEMS &  
SUPPLIES

Appellant.

DOCKET NO. OPA-PA-11-002

**XEROX CORPORATION'S BRIEF ON  
REMEDIES**

Interested Party Xerox Corporation requests that the OPA dismiss this matter in its entirety. In the alternative, if the OPA finds that a violation of law has occurred, the OPA should allow the contract to continue in the best interests of the Territory of Guam.

If the OPA finds that IBSS' protest is without merit, the OPA should dismiss the appeal and protest. Dismissal is proper because the protest was untimely filed, as briefed in Xerox's Comments. Dismissal is also proper because there is no controversy, as DOE has not accepted or paid for any additional quantities, or accepted any terms other than what was specified in the Invitation for Bid.

In the event the OPA finds that some violation of law has occurred, section 5452 of Title 5 of the Guam Code Annotated governs the available remedies for a procurement that has already been awarded, as is the case here. Section 5452 offers alternate remedies in the event an

awardee has acted in bad faith or in good faith. The evidence presented at the hearing demonstrated that Xerox did not act in bad faith or fraudulently. Xerox never imposed any additional quantities or contractual terms on DOE, but rather provided the recommendations pursuant to the Device Management Services and pursuant to DOE's request.

Accordingly, because Xerox has not acted in bad faith or fraudulently, the following provisions apply:

- (i) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Territory; or
- (ii) the contract may be terminated and the persons awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.

5 G.C.A. § 5452(a). The territory's "best interests" are based on cost, the possibility of returning supplies delivered under the contract and decreasing the costs of termination, the progress made toward performing the whole contract, and the possibility of obtaining a more advantageous contract by resoliciting. 2 GAR Div. 4 § 9106(c)(3).

In this case, the best interests of the Territory support the affirmation and ratification of the contract. First, as the testimony at the hearing demonstrated, this contract represents a savings of at least \$20,000 per month on Items 1 through 4 compared to IBSS' bid.<sup>1</sup> This contract is already 20 months into the 60 month term. Over the course of the next 40 months, DOE will save at least \$800,000 by keeping the Xerox machines rather than requiring that they be uninstalled and replaced.

Second, there are associated costs of termination. Section 9106(d) allows a contractor to file a claim of termination, and for settlement to be made in accordance with applicable termination provisions in the contract. In this case, paragraph 37 of the contract allows the

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<sup>1</sup> Compare Xerox's monthly figure of \$54,446 as shown on IBSS Exhibit 20 with IBSS' monthly figure of \$75,663.40, as shown on Xerox's Exhibit X16.

Government to terminate for convenience in accordance with 2 GAR Div. 4 § 6101. Section 6101 contemplates compensation to a contractor to include, but not limited to, the contract price up until termination, the legal and clerical expenses for preparing a settlement claim, along with "reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this contract." 2 GAR Div. 4 § 6101(d)(3). Under a termination scenario, Xerox will be required to claim not just what it is entitled to under the contract up until termination, and legal fees for filing the claim, but if it cannot dispose of the 149 machines ordered in reliance on the original Purchase Order, the cost of transporting the machines off-island will also be sought.

Third, the best interests of the Territory do not advocate for halting the contract which is a third of the way through its full term, and resoliciting the services. Testimony at the hearing revealed that DOE took two years to draft this procurement. Enormous resources will be expended in drafting another solicitation and undergoing the procurement process. Moreover, a new procurement will continue to delay stocking schools with the amount of machines DOE initially procured. For example, since the Stop Work Orders were issued in December 2010, and DOE stopped accepting machines in excess of the bid quantities for Items 1 and 2, and in excess of the Purchase Order quantities for Items 3 and 4, DOE's schools have suffered from the lack of required machines on campus. Under the current arrangement, some schools have only one machine on campus, when they had up to six machines in the prior contract. Schools which have already suffered for 20 months will be the true victim of the delay inherent in a resolicitation.

In addition, DOE's personnel have been trained on how to use the four categories of machines. It is in the best interests of the Territory to allow DOE to continue the present contract after resources have been expended on training.

Finally, a more advantageous contract would not result from a resolicitation. The current contract does not include any terms outside those specified in the IFB, and it also does not include any quantities in excess of those specified in the IFB. The contract is performed under the exact same terms that DOE solicited. DOE would not be in a more advantageous contractual position through a resolicitation under the same terms specified in IFB22 and the same terms it currently enjoys in the contract with Xerox.

On the other hand, if the OPA determines to terminate the contract, section 5452 states that the awardee is entitled to actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination. Xerox respectfully requests that in addition to being paid at the contract rate, that it receive the actual expenses reasonably incurred under the contract. This consists of the expenses of shipping the machines to Guam, which were shipped in good faith reliance on the authority of the Purchase Order. Again, termination should be made in accordance with the contract, 2 GAR Div. 4 § 9106, and thus, Xerox may also be entitled to transportation costs incurred in returning any of the 149 machines that cannot otherwise be disposed of on Guam.

The foregoing considerations of costs, efficiency, and economy mandate that the proper remedy be to continue the contract in place through the duration of the 60 month term. Xerox asks that the OPA dismiss this matter, or alternatively, find that continuation of the contract remains in the Territory's best interests.

DATED: Hagåtña, Guam, 11 July 2012.

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