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XEROX CORPORATION

RECEIVED  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

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IN THE OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT PETITION

IN THE PETITION OF

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

Appellant.

~~CIVIL CASE NO.~~ OPA-PA-10-010

**XEROX CORPORATION'S  
COMMENTS**

**I. INTRODUCTION**

Like Appellant Townhouse Department Stores Inc. dba Island Business Systems & Supplies ("IBSS"), Party-in-Interest Xerox Corporation has been awaiting the award of Guam Department of Education IFB 006-2010 ("IFB6"). As a result of this appeal, Xerox has learned that DOE did not secure funding for IFB6. In spite of a lack of funding, IBSS insists that DOE be penalized by awarding IFB6 to IBSS. This request ignores DOE's financial situation. Xerox asks that in fashioning a remedy here, the OPA consider implementing procurement controls at DOE which would prevent the issuance of future unfunded procurements, and addressing the efforts bidders have undertaken to respond to the unfunded IFB.

Furthermore, awarding IFB6 to IBSS is improper because IBSS does not possess a

critical capacity required to perform under IFB6: to track users' prints, copies, faxes and scans on both Windows and Mac operating systems. IBSS is a nonresponsive or even non-responsible bidder by failing to meet this requirement. In asking that it be awarded IFB6, IBSS wants the OPA to ignore this component which will help DOE monitor copier usage and potentially eliminate wasteful usage of copiers. By no means should DOE be compelled to accept IBSS' machines which are nonconforming with its bid. If DOE is forced to award IFB6, Xerox is the only responsive bidder capable of performing the bid's requirements.

Finally, heavy accusations of bad faith have been laid before Xerox, all of which Xerox disputes. Xerox does not deny that as a DOE vendor, it partners with DOE in helping the Department operate smoothly. However, Xerox strongly contests every accusation that it has contaminated the procurement process.

Xerox asks that IBSS' appeal be denied and that IFB6 not be awarded to IBSS.

## **II. BACKGROUND**

On May 3, 2010 DOE issued IFB 06-2010 which procured 94 small multifunction copiers and 100 seats of software for working with scanned images. DOE opened the bids on May 21, 2010, but has not awarded or canceled the contract. Only IBSS and Xerox bid on the items in IFB6: IBSS presented a lower bid on the 94 copiers and Xerox presented the lower bid on the software.

IBSS protested DOE's failure to make an award. IBSS filed this appeal after DOE rejected IBSS' protest. DOE cited a number of reasons supporting its rejection of the protest, including that certification of funds was never obtained or reserved, and that funds have elapsed for this fiscal year.

## **III. FUNDING AND THE PROPER REMEDY IN THIS CASE**

The Public Auditor has the "power to review and determine *de novo* any matter properly

submitted to her." 2 GAR Div. 4 § 12103(a). "The Public Auditor's jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of" Guam's Procurement Law. 5 G.C.A. § 5703. Among other purposes and policies, Guam's Procurement Law seeks to "provide for increased public confidence in the procedures followed in public procurement," "ensure the fair and equitable treatment of all persons who deal with the procurement system," and "maximize to the fullest extent practicable the purchasing value of public funds of the Territory." *See generally* 5 G.C.A. § 5001(b).

Indeed, these three elements underlying Guam's procurement law policies form the focus of this appeal. Funding, or the lack thereof, is central to this matter, and has affected public confidence and treatment of proposed vendors. DOE asserts that it did not certify or secure funds for the procurement before the bid was issued. Such conduct diminishes "public confidence in the procedures followed in public procurement," as well as "the fair and equitable treatment of all persons who deal with the procurement system of this Territory." 5 G.C.A. § 5001(b). The proper solution, however, is to restore that confidence and fair and equitable treatment, not to mandate DOE to use non-existent funds and set itself up for a breach of contract.

DOE asks that IFB6 be cancelled in its entirety. There must exist "cogent and compelling reasons to believe that the cancellation of the solicitation is in the territory's best interest." 2 GAR Div. 4 § 3115(c). After a bid opening, a bid may be cancelled if "prices exceed available funds." 2 GAR Div. 4 § 3115(d)(2)(iv). A lack of funding can therefore justify the cancellation of a solicitation, as it would not be in the territory's best interests to commit to a contract without being able to fund it. Forcing funding where none exists is counterintuitive to

the reality of DOE's financial situation and the territory's best interests.<sup>1</sup>

The most appropriate solution would be to implement controls at DOE to ensure that its future procurements comply with the procurement laws and regulations, particularly with respect to having funding in place before solicitations are issued. As the procurement law recognizes, bidders must have confidence in the procurement system and know that their efforts at gathering and submitting a bid will not go to waste. It would be appropriate to implement whatever measures are needed to reinstitute confidence in the DOE procurement system. Moreover, it would be appropriate to compensate the bidders who "incur expense in examining and responding to solicitations" particularly in this case in which the bidders believed funding to exist and acted in accordance with that belief. 2 GAR Div. 4 § 3115(b).

However, the solution proposed by IBSS - that it be awarded IFB6 - is inappropriate because IBSS does not meet the requirements of IFB6. IBSS asks repeatedly that the OPA automatically award IFB6 to IBSS, claiming it is the only appropriate remedy in this case. However, in doing so, IBSS fails to address that it is in fact a non-responsive and substantially non-conforming bidder.

Guam law defines a "responsive bidder" as "a person who has submitted a bid which conforms in all material respects to the Invitation for Bids." 5 G.C.A. § 5201(g). One material criteria of IFB6 is that the small multifunction copiers must "enable[] user to track prints, copies, faxes, and scans" in both Windows and Mac operating systems. DOE confirmed this requirement in its May 17, 2010 Clarification No. 1, whereby it answered affirmatively to the question whether the Account Setup requires the ability to setup individual user accounts whereby the number of copies, prints, scans, and faxes are automatically tracked. R., Ex. 1.

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<sup>1</sup> In response to DOE's contention that it did not have funding in place for IFB6, IBSS points to DOE's emergency procurements and demands a finding of bad faith. Xerox has no knowledge of DOE's decisions on how to allocate funding for this solicitation or any other solicitation, and takes no position on DOE's bad faith.

In this matter, IBSS does not satisfy the requirement of being a responsive bidder. At the bid opening, it was announced that IBSS offered to supply the HP Laserjet M3035xs MFP. However, this machine does not enable users to track prints, copies, faxes, and scans. Xerox contacted HP customer service, and has been advised by an HP customer service representative that the HP 3035xs "can track copies and faxes, but not by user." Moreover, the limited amount of tracking may only occur in a Windows environment, not in a Mac environment. This evidence will be presented at the hearing in this matter. Also, IBSS' failure to comply with the specifications will be confirmed at the hearing through testimony by authorized HP support personnel.

Even if IBSS is found to be responsive, its inability to supply the user tracking service renders it non-responsible. A responsible bidder "has the capability in all respects to perform fully the contract requirements. 5 G.C.A. § 5201(f). Responsibility concerns whether a bidder can perform as promised. *In re J&G Constr.*, OPA-PA-07-005 (Dec. 12, 2008 Findings and Recommendations of Hearing Officer) at 15. Here, IBSS' inability to provide user tracking demonstrates it cannot perform as promised. Should the Laserjet M3035xs be installed at DOE, DOE will be unable to determine how many copies, scans or faxes are made per user, severely limiting the Department's ability to monitor and control usage.

IBSS' machines, if forced to be implemented at the Department's schools, will be substantially nonconforming to DOE's requirements. Its bid must be rendered nonresponsive and/or non-responsible, and IBSS disqualified. Moreover, automatically awarding IFB6 to IBSS places DOE at a disadvantage in that IBSS' proffered machines fall short of the Department's requirements.

#### **IV. OTHER GROUNDS**

DOE mentions two other justifications for rejecting IBSS' protest: that the time for firm

and irrevocable bids has elapsed, and that DOE did not respond to the protest timely. Xerox takes no position on these two points, but reserves the right to make further comment should DOE elaborate on these issues. Xerox also reserves the right to make further comment should DOE raise other defenses at the hearing in this matter.

V. **XEROX RESPONSE TO APPELLANT'S SUPPLEMENTARY COMMENTS**

A. **XEROX'S BID WAS RESPONSIVE**

As indicated earlier, a "responsive bid" is one which conforms in all material respects to the Invitation for Bids. 5 G.C.A. § 5201(g). "Responsiveness . . . deals with the question of whether the contractor has promised to do exactly what the Government has requested." *In re J&G Constr.*, at 12. Contrary to IBSS' contentions, Xerox has promised to do exactly what DOE has requested. In Xerox's "Comments" to IFB6, Xerox believed certain provisions of IFB6 were ambiguous, and proposed clarifications. However, those clarifications were explicitly subject to DOE's approval. Xerox specified that its clarifications were dependent on being consistent with Guam law, and being accepted by the Department. R., Ex. 3.

At the time of the bid opening, and even at award, Xerox remained fully able to perform as promised--to provide the 94 copiers meeting DOE's specifications, and at the price quoted. None of Xerox's clarifications affected Xerox's promise, and accordingly, its bid was responsive. If the OPA compels DOE to award IFB6 in spite of lack of funding, Xerox asks that it be awarded IFB6 as the only responsive and responsible bidder.

B. **XEROX HAS NOT "CONTAMINATED" THE BID PROCESS**

IBSS makes heavy and unjustified accusations against its competitor, Xerox. As a preliminary matter, these comments should be disregarded because they have nothing to do with this procurement appeal. What is at issue here is DOE's conduct in compiling, funding, and handling IFB6, as well as responding to protests on the IFB. While Xerox was a bidder in IFB6,

it had nothing to do with DOE's management of its procurement process. It did not interfere with the bid process, and it did not bully or cajole DOE as IBSS contends.

Xerox is a business that, like every other business, cannot support its workforce without being paid for its services. When Xerox advised DOE that it could not continue to provide copiers without a purchaser order, it did so consistent with the principles of any prudent business.

IBSS twists all of Xerox's communications as part of its scheme to have IFB6 awarded to IBSS without funding in place and without IBSS complying with the requirements of IFB6. IBSS believes it can win a bid by screaming bad faith using unjustified accusations. IBSS contends that because Xerox has asked to be paid for the services it has provided to DOE, that it must be in breach of ethical duties. The fact is that Xerox has had no role in determining when DOE should issue its IFBs, how DOE funded the requested machines, how DOE responded to IBSS' protests, and how DOE justifies any of the alleged misconduct laid before it. Xerox has simply responded diligently to the solicitation put out by DOE, and has had no other role or interference in the procurement process.

IBSS claims justice may only be done if it wins a contract award. IBSS cannot provide the user tracking required under IFB6 and demands an award nonetheless. IBSS believes that mud-slinging is the appropriate way to win bids. As the OPA has ruled before, it will find here that Xerox has not committed any bad faith in responding to solicitations and working with DOE to fulfill procurements for the Department's essential needs.

## **VI. CONCLUSION**

If IFB6 is not awarded due to lack of funding, the proper remedy is to cancel the bid with instructions to DOE on future procurements. In addition, if the OPA awards IFB6, IBSS is an unqualified bidder because its bid was nonconforming, non-responsive and non-responsible.

Accordingly, Xerox, the only responsive bidder here, should be awarded IFB6 if an award is made. Xerox respectfully requests that this appeal be dismissed, and that Xerox be relieved of any and all accusations of bad faith.

DATED: Hagåtña, Guam, December 23, 2010.

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