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XEROX CORPORATION

RECEIVED  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

FEB 17 2011

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

**INTERESTED PARTY XEROX  
CORPORATION'S OPPOSITION TO  
IBSS' MOTION TO DISCLOSE  
PROCUREMENT FILE**

The Guam Procurement Regulations require that a bidder seeking the disclosure of competing bidder's confidential information first apply to the agency Procurement Officer. Because IBSS failed to do comply with this procedure, its motion seeking the disclosure of confidential portions of Xerox's bid should be denied due to untimeliness and lack of jurisdiction.

Guam's Procurement Regulations establish a process allowing bidders to examine the confidential documents submitted by another bidder. At a bid opening, "opened bids shall be available for public inspection except to the extent the bidder designates trade secrets and other proprietary data to be confidential as set forth in Subsection 3109(I)(3) of this section." 2 GAR

Div. 4 § 3109(I)(2). If a bidder wishes to see information designated as confidential, he must request disclosure from the Procurement Officer handling the invitation for bids.

The Procurement Officer shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidders in writing . . . what portions of the bid will be disclosed and that, unless the bidder protests under Chapter 9 (Legal and Contractual Remedies of this Guam Procurement Regulations[]), the bids will be so disclosed. The bids shall be opened to public inspections subject to any continuing prohibition on the confidential data.

2 GAR Div. 4 § 3109(I)(3). As section 3109(I)(3) prescribes, a bidder who wishes to view a competing bidder's designated confidential information must do so at the bid opening, and direct such requests to the Procurement Officer. Accordingly, the decision as to whether designated confidential information should be disclosed must first come from the Procurement Officer. Should a bidder then be dissatisfied, it then has the remedy of a protest, and if applicable, an appeal to the OPA.

The Regulations for Procurement Appeals to the Public Auditor also address the issue of disclosure of confidential information.

The Public Auditor shall, upon written request, make available to any Interested Party or member of the public information submitted that bears on the substance of the Appeal except where information is proprietary, confidential, or otherwise permitted to be withheld by law or regulation. Persons who wish to keep such information submitted by them confidential shall so request by specifically identifying such information within documents submitted, and indicating on the front page of each document that it contains such information.

2 GAR Div. 4 § 12106. Section 12106 must be read so as to be consistent with section 3109(I)(3).

A statutory provision should be interpreted consistently and so as not to render another statutory provision, particularly one

concerning the same subject, null and void. . . 'when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'

*Pangelinan v. Gutierrez*, 2004 Guam 16, ¶ 21 (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). In reading both sections consistently, it remains clear that the first step to obtaining the release of confidential material is to seek it from the Procurement Officer, not from the OPA.

IBSS has failed to comply with these procedural steps, and now stands before the OPA seeking to sidestep this process. In this case, the bid opening occurred on October 26, 2010. R., Ex. 7, p. 1 (Abstract of Bids showing bid opening date). At the bid opening, and until its Motion to Disclose was filed, IBSS failed to ask the Procurement Officer to disclose portions of Xerox's bid that were marked confidential. IBSS' Motion, filed on February 10, 2011, is three months late and also improperly directed at the OPA, rather than at the DOE Procurement Officer.

IBSS cites section 3109(I)(3) for the proposition that the OPA has the jurisdiction to determine if the matter should be made public, however, section 3109(I)(3), as recited above, does not confer such jurisdiction on the OPA. While section 12106 confers that jurisdiction, however, the matter must first endure the review process at the agency level.<sup>1</sup> In order to be "capable of co-existence" with section 3109(I)(3), section 12106 cannot usurp or override the agency's initial jurisdiction to determine disputes on what information is and is not confidential. In any event, IBSS would be untimely in making such request.

Accordingly, because IBSS failed to seek disclosure from the DOE Procurement Officer at the bid opening, its Motion to Disclose confidential portions of Xerox's bid must be denied.

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<sup>1</sup> Xerox has not been served with the portions of the procurement record which have been labeled confidential, and on that point, cannot offer specific comments. Xerox asks that if the OPA finds it has jurisdiction to disclose the confidential portions of the record in spite of IBSS' failure to seek disclosure at the bid opening, Xerox first have the opportunity to examine what has been labeled as confidential, and submit specific comments pursuant to section 12106.

DATED: Hagåtña, Guam, February 17, 2011.

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