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XEROX CORPORATION

IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT PETITION

IN THE PETITION OF
TOWNHOUSE DEPARTMENT STORES,
INC. dba ISLAND BUSINESS SYSTEMS &
SUPPLIES,

Appellant.

OPA-PA-10-010

**XEROX CORPORATION'S
OPPOSITION TO DOE'S MOTION TO
LIFT THE AUTOMATIC STAY TO
PROCEED WITH AN AWARD TO
APPELLANT OF ITEMS #1 & #3 IN
IFB 006-2010**

Party-in-Interest Xerox Corporation hereby opposes DOE's Motion to Lift the Automatic Stay on IFB 006-2010 ("IFB6") on the grounds that it violates two important objectives of the Procurement Law. First, because IBSS' machines do not comply with DOE's specifications, the Territory will be paying for machines that fall short of DOE's stated needs and is therefore in violation of the procurement laws and regulations. Second, the motion seeks only a partial lifting of the stay. DOE has not explained why it has funding for but will not award part of IFB6 to Xerox, which is the lowest bidder on Item 2 of IFB6. Xerox asks for a denial of the motion, but if the motion is nonetheless granted, Xerox seeks an award for Item 2 of IFB6.

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The Public Auditor has the responsibility to ensure 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 "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).

DOE's Motion declares that funding has been identified and that it is ready to award part of IFB6, particularly only those portions in which IBSS is the lowest bidder. Xerox urges the Public Auditor to prohibit DOE from proceeding with the partial lifting because it does not maximize the purchasing value of the public funds of the Territory and it treats the bidders unfairly and inequitably.

First, the purchasing value of the public funds is not maximized because IBSS does not meet the requirements of IFB6. As discussed in Xerox's comments, 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.

IBSS offers to supply to DOE the HP Laserjet M3035xs MFP. Should this matter proceed to hearing, Xerox will present evidence from two HP sources that this machine does not enable users to track prints, copies, faxes, and scans, and that the limited amount of tracking may only occur in a Windows environment, not in a Mac environment. Xerox raised this issue in its

Comments, and IBSS, who replied to those Comments without leave, had an opportunity to provide evidence that its machines complied with DOE's specifications. However, IBSS failed to address the issue, presumably because it knows it is providing a non-compliant machine.

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. Also, DOE will not be able to track usage on any of its Mac systems. Because IFB6 involves a *purchase* of machines, as opposed to a short-term or even long-term lease, DOE will be stuck with these non-compliant machines, hampering their operations until new machines with the full tracking capability in both operating systems are procured. Even though DOE acquiesces in the noncompliance of the IBSS machines, because this matter is now before the OPA, it should render its input on this issue and prevent the delivery and use of the noncompliant machines.

IBSS has argued previously that because Xerox did not protest IBSS' responsiveness or responsibility as a bidder, doing so now is untimely. However, the general rule is that time limitations only apply to claims, not to defenses. According to the Guam Supreme Court, the purposes of limitations period "is to bar actions, not to suppress or deny matters of defense . . . it is a general rule that such statutes are not applicable to defenses, but apply only where affirmative relief is sought." *Guam Yun Shan Ents., Inc. v. Shenzhen Dev. Bank, Ltd.*, 1998 Guam 21, ¶ 7. *See also Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998) (the "object of a statute of limitation in keeping 'stale litigation out of the courts,' would be distorted if the statute were applied to bar an otherwise legitimate defense to a timely lawsuit, for limitations statutes 'are aimed at lawsuits, not at the consideration of particular issues in lawsuits'"). In this case, Xerox raises IBSS' non-responsiveness and non-responsibility as they are important issues for

the OPA to consider as it evaluates whether IBSS should receive its requested remedy in the form of an award of IFB6. On the issue of IBSS' request for affirmative relief, issues pertaining to its responsiveness and responsibility are timely, unaffected by limitations periods, and should be considered here.

Second, even if a lifting of the stay is allowed, DOE's partial lifting unfairly prejudices Xerox, the lowest bidder on Item 2 of IFB6. DOE states in its Motion that it "has identified funding and wants to proceed with awarding the bids in GDOE IFB 006-2010." DOE appears to have received funding for the entire procurement, but only seeks a lift on Item 1. It is patently unfair for DOE to choose not to award Item 2 to the lowest bidder, Xerox.¹ No explanation is given as to why DOE withholds an award on Item 2, and Xerox reserves the right to respond to any such explanation.

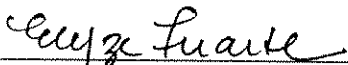
IBSS also apparently believes this matter would be moot if the stay was lifted on Item 1, which means that IBSS does not intend to pursue this matter with respect to Item 2. If funding has been found, and IBSS does not contest Item 2, then it should be awarded without delay.

In conclusion, the OPA should deny the motion to lift the automatic stay because the Territory would not be receiving the items it has solicited under Item 1. Furthermore, should DOE be allowed a lifting of the stay, it should be for the entire procurement and not just on Item 1.

¹ IFB6 solicited bids for: (1) 94 small multifunction copiers, (2) 100 software programs for working with scanned images, and (3) network device management software for monitoring multifunction devices and printers on the network. At the opening of the bids, IBSS was the lowest bidder on Item 1 and incorporated Item 3 into its pricing on Item 1. Xerox was the lowest bidder on Item 2, and provided a website whereby Item 3 was provided free of charge.

DATED: Hagåtña, Guam, January 7, 2011.

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