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XEROX CORPORATION

OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

MAY 08 2011

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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

**INTERESTED PARTY XEROX
CORPORATION'S OPPOSITION TO
IBSS' MOTION TO DISMISS XEROX'S
APPEARANCE**

Interested Party Xerox Corporation hereby replies to IBSS' Motion to Dismiss Xerox's Appearance, filed March 24, 2011.

In the recent matter OPA-PA-10-010, the OPA, confronted with a motion to dismiss Xerox's appearance as an interested party, outlined the standard upon which a bidder is qualified as an "interested party." "The term 'interested party' as used in [2 G.A.R. Div. 4 § 12104(c)(4)], means an actual or prospective bidder, offeror, or contractor who appears to have a substantial and reasonable prospect of receiving an award if the appeal is denied." *In re Town House Dept. Stores, Inc. dba Island Business Systems & Supplies*, OPA-PA-10-010 (March 7, 2011 Decision)

("Decision") at 12 (citing 2 G.A.R. Div. 4 § 12102(b)). The OPA further stated that "since Guam's procurement law mandates good faith and an objective evaluation of bids, the [OPA] must allow firms who have submitted bids to be heard in order to protect the integrity of the procurement process." Decision at 12. In denying IBSS' motion to dismiss Xerox's appearance in OPA-PA-10-10, the OPA found that Xerox is an actual bidder and has a "substantial and reasonable prospect of receiving an award if the appeal is denied because Xerox is the only other bidder who submitted a bid in response to the IFB. Thus, Xerox shall be heard as an interested party in this matter...." Decision at 12.

In IBSS' Motion to Dismiss Xerox's Appearance in this case, IBSS again attempts to deny Xerox its due process and an opportunity to provide input on the solicitation at hand. What makes this case different, however, is that Xerox has an ever greater stake in the issues at hand. The distinct difference between Xerox's position in OPA-PA-10-010 and its position in this case is that Xerox is not just a bidder as it was in OPA-PA-10-010. In this procurement appeal, Xerox is the contract awardee and is also already performing under the contract award. As undisputed in this case, Xerox was awarded GDOE IFB 022-2010, and pursuant to Purchase Order #201100024, was directed to begin providing the solicited multifunction machines. Xerox has already installed machines at the various schools and is performing according to the contract terms.

Therefore, it goes without saying that Xerox has an interest in this matter. The standard the OPA established in OPA-PA-10-010 for interested parties is whether the party has a substantial and reasonable prospect of receiving an award if the appeal is denied. If the appeal is denied, Xerox has more than a reasonable prospect of receiving an award; indeed, if the appeal is denied, Xerox will continue to perform under the award. Since Guam law requires "firms who

have submitted bids to be heard in order to protect the integrity of the procurement process," Decision at 12, Guam law must also allow Xerox, the contract awardee, to provide input as to the various issues in this case. For example, one issue is whether the solicitation allows DOE to add additional quantities. In order to protect the integrity of the procurement process, as it has done before, the OPA here should consider allowing those who bid on the solicitation to express their viewpoints on this issue. DOE, which issued the solicitation, has yet to address this issue. IBSS advocates that the solicitation was invalid on its face. Xerox provides the counterposition by citing to the language of the solicitation. If the integrity of the procurement process is to be preserved, Xerox should not be prohibited from defending the language and intent of the solicitation.

Another issue is whether the additional quantities ordered by DOE were within the scope of the solicitation. Xerox has a unique position on this issue as the recipient of the Purchase Order requiring additional quantities. Xerox must be allowed an opportunity to explain its perspective why it was reasonable for all bidders to expect that DOE had the ability to order more machines, and why Xerox complied in providing more machines than the bid originally called for. It would be unjust to the procurement process to prohibit Xerox from demonstrating the various ways in which IBSS' arguments as to these and other issues are invalid and incorrect.

Overall, it would be inequitable to proceed to hear the legality of this solicitation without the appearance of the party who is already performing under the contract. Because the OPA has already determined that a good faith and objective evaluation of bids must include allowing all bidders (let alone contract awardees) to appear in an action, it is without question appropriate and necessary to allow Xerox to continue its appearance in this action.

DATED: Hagåtña, Guam, May 6, 2011.

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