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IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT PETITION

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| In the Petition of<br><br>TOWN HOUSE DEPARTMENT STORES, INC., dba ISLAND BUSINESS SYSTEMS & SUPPLIES,<br>APPELLANT | APPELLANT'S OPPOSITION TO INTERESTED PARTY'S MOTION TO DISMISS APPEAL<br><br>DOCKET NO. OPA-PA-11-002 |

Xerox raises three issues in support of its Motion to Dismiss.

First, it breathlessly accuses Appellant of "submitting a bid containing a false Affidavit Concerning Ownership ..., which renders the bid nonresponsive".

Second, it wants the Appeal dismissed because Appellant argues the bid allows increased quantities and Appellant did not timely protest inclusion of the clauses allegedly allowing the increases seen in this bid.

Finally, it regurgitates the already made argument it put forward in its Opposition to IBSS' Motion to Disclose Procurement File to the effect that the regulation which in fact requires an independent determination by the agency as to the bona fides of a claim of confidentiality instead provides a limitation on public access to bid information.

Appellant opposes each of these arguments as stated below.

1. THE AFFIDAVIT

Xerox ignores both fact and law in making this claim. Indeed, it has recklessly failed to investigate the facts before bringing this Motion on this claim. It has not couched its claim as in any way conditional upon good faith belief and subject to further discovery – it has made assertively bold, and near libelous[1], accusation without any good faith belief because it has conducted no due diligent investigation.

Xerox claims Appellant misrepresented ownership of its shares because an Annual Report dated August 6, 2010 showed Appellant to be 99% owned by Mrs. Elaine C. Jones, whereas, the Affidavit submitted with Appellant's bid and opened October 26, 2010 claimed the Mr. and Mrs. Jones were the owners of 99% of the shares within the prior year (that is, they were the sole owners of more than 10% of the "interest or shares" of the corporation; 5 GCA § 5233).

As with other matters in this Appeal, Xerox is dead right (but only so far as it goes, which is not far enough), and entirely off the mark. The mark in this case is what the law actually required and what the Affidavit form, as required by DOE, stated. It's a case, once again, that Xerox does not appreciate the particular time frames required of the law and regulation.

The disclosure law (5 GCA § 5233) contains many ambiguous terms which call into question its legal intent and application, but one thing it does very clearly do is establish the relevant time frame in which ownership is concerned, which is **"at *any time* during the twelve (12) month period immediately preceding submission of a bid."** Ownership interests greater than 10% at any time in that one-year period must be disclosed. So it is important to look beyond the immediate time frame of the bid and the Annual Report, an important task Xerox simply overlooks, from ignorance or convenience or otherwise.

In looking to the relevant time frame, it can be shown that the legal interest of Mr. Jones was not transferred to Mrs. Jones until June 2010, and thus it was properly recorded in the Annual Report in August that Mrs. Jones then held 99% ownership (see copy of share certificates, and Affidavit of Linda A. Affaisen, attached hereto). Whatever *beneficial* interest Mrs. Jones may have had in the shares held by legal title in the name of Mr. Jones, Mr. Jones (as an estate asset) held *legal* title until the shares were transferred[2].

Xerox makes the argument that Mr. Jones' death in 2008, by itself, makes the Affidavit untrue, as if his death divested him, and his estate, of all interest in any assets (see discussion at footnote 2 of Xerox' Motion to Dismiss Appeal). If that were so there would be no need of the elaborate

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[1] Appellant "submitted a bid containing a false Affidavit", which is a sworn statement, under penalty of perjury; and, IBSS "falsely swore".

[2] "No transfer, however, shall be valid, except as between the parties, until the transfer is entered and noted upon the books of the corporation so as to show the names of the parties to the transaction, the date of the transfer, the number of the certificate, and the number of shares transferred." (18 GCA § 3101.)

probate and other estate administration procedures applicable to identifying, marshaling, accounting, distributing and transferring assets of decedent estates. Death would automatically serve as the transfer mechanism. Alas, the law is not so simplistic.

The disclosure law does not distinguish between legal interests or beneficial interests, so must reasonably include disclosure of all legal and beneficial interests. It simply requires disclosure of "**the outstanding interest or shares** in said ... corporation at any time during the twelve (12) month period immediately preceding submission of a bid." During a significant portion of this relevant time frame, the outstanding interest or shares of more than 10% of the shares of Appellant were, in fact, legally registered in the name of Mr. Jones, as an asset of his estate. *Appellant was **required** to disclose the outstanding interest and shares held in Mr. Jones' name,* despite his earlier demise.

The law, unlike Xerox, recognizes the distinction between legal and beneficial titles and interests. The law, unlike Xerox, recognizes that appropriate transfer formalities are required to actually transfer title and interest, particularly in shares of corporations (see footnote 2). Until those steps are taken, legal title may reside in one person, even a deceased person as an asset of that person's estate, while beneficial interest may reside in another.

Appellant has properly provided all the information required of the law and of DOE's form of Affidavit. Xerox' claim that IBSS has filed a fraudulent Affidavit is plainly wrong on *the facts*.

Xerox is so patently and egregiously wrong on the *facts* that Appellant seeks leave to spare the Public Auditor the additional *legal* argument which would refute Xerox' *legal* arguments that the Affidavit, if *factually* false as claimed, render Appellant's bid nonresponsive[3]. In the interests of legal economy, Appellant reserves the right, if necessary, to provide Points and Authorities in support of such legal argument at a subsequent time if it is found Xerox' claims have been, despite the factual showing herein, factually correct.

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[3] For instance, Xerox' own allegations show that it was well publicized that Mr. Jones passed away in October 2008, and, from that Xerox makes the claim that the Affidavit was wrong to say Mr. Jones owned any interest or shares because he had died two years prior. Xerox claims Mr. Jones' interest is a legal impossibility because of his death. Well, just assuming for a moment that all of that would follow, would not that then require a procurement officer to waive the patent error "evident from the bid document" (2 GAR § 3109(m)(4)(b)), or to seek confirmation under 2 GAR § 3109(m)(3): "situations in which confirmation should be requested include obvious, apparent errors on the face of the bid"? If, as claimed, Mr. Jones could not own shares because, as everyone knew, he was dead, having his name on the Affidavit would be obvious and *inconsequential* error, not misrepresentation; if he was incapable of ownership, his name on the Affidavit would be an empty act. Either way, as an "apparent or evident error" or as a legal impossibility, the appearance of Mr. Jones' name on the Affidavit would be without material legal significance – it would not render the bid non-responsive.

## 2. TIMELINESS OF CLAIMS OF ILLEGALITY OF CONTRACT TERMS

Xerox properly frames Appellant's protest "on DOE's *exercise* of the various IFB022 clauses permitting DOE to increase the solicited quantities." Xerox claims Appellant should have protested within 14 days after the IFB was issued, before the alleged reserved rights and options were exercised. Appellant disagrees.

First, the clauses are each on their face illegal and therefore without legal effect or need to protest, and, second, there was nothing in the IFB that made it mandatory for DOE to exercise any of the clauses and no assurances that it would, thus it would have been speculative to protest, and, third, Appellant was not aggrieved by the clauses until – and especially in the degree and manner – they were exercised and Appellant found out about that.

Appellant claims the contract clauses in issue are each illegal on their face, not just their application. To the extent the subject matter of agreement is the performance of an illegal act, there is no binding contract. Merely requiring illegal acts will not render the contract to do such acts legal or binding or enforceable. They can be, and should be, disregarded as legal nullities.

Disregarding illegal clauses is not simply legal construction of basic contract law, it is what all bidders were instructed to do by the IFB. They were told, regardless what you find in this document, the procurement laws and regulations control over any inconsistency:

> "This solicitation is issued **subject to** all the provisions of the Guam Procurement Act (5 GCA Chapter 5) And the Guam Procurement Regulations." (General Terms and Conditions, Paragraph 1, Authority.)

Any fair application of this paragraph would require bidders to abide by the terms of the IFB but only to the extent they conformed to the law and regulations; the rest should be ignored.

Xerox would have the illegal clauses be made legal simply by the omission of Appellant to protest the IFB. If that were the case, how would the integrity of the procurement law ever be enforced? OPA would be bound to uphold illegal arrangements due to the mere reluctance or omission of other protesters. That is most certainly contrary to the mandates of 5 GCA § 5703. The legality of a contract is not subject to the serendipity of third parties; it rests squarely on its own terms and must be enforced, or not, on those terms.

There are two clauses that Xerox hangs its hat on for the right to "open-ended" variations (as it defined the incremental additions clause in its intervention in the protest below). First, there is the clause that DOE has used to allow *changes in quantity*, and then there is the infamous "*incremental additions*" clause.

### A. The Changes in Quantity Clause:

Substance of Clause:

It is hard to know how DOE came to draft this clause (paragraph 22 of the General Terms), but it is not authorized by the law or regulation.

The change of quantity clause in IFB022 simply reads,

> "[t]he government reserves the right to increase or decrease **the quantity** of the items for award and make additional awards for the same type items and the vendor agrees to such modifications and additional awards based on the bid prices for a period of thirty (30) days after original award."

Agencies, however, are not given unfettered right to just put whatever old clause they concoct into an IFB. Guam law intends more uniformity of procurement than such a broad license would portend.

Under the Procurement Act, the Policy Office *alone* has authority to "promulgate regulations **permitting or requiring the inclusion of clauses** providing **for ... variations** occurring between *estimated* **quantities** of work in a contract *and* **actual quantities**." (5 GCA § 5350(a)(2).) It is to be noted that there are no "*estimated*" quantities in IFB022; there are only fixed quantities, with nebulous "options", reservations and discretions intended to serve in place of the authorized methods of source selection.

The obligation to use Policy Office regulation clauses for variations occurring between estimated and actual quantities is mandatory for any ***change in quantity*** *clause*, **except**,

> "the head of a purchasing agency *may vary the clauses promulgated* by the Policy Office under Subsection (a) and Subsection (c) of this Section for inclusion in any particular territorial contract; ***provided*** **that any variations are supported by a written determination that states the circumstances justifying such variation *and provided* that notice of any such material variation be stated in the Invitation for Bids or Request for Proposals**." (5 GCA § 5350(d).)

The Procurement Record in IFB022 does not contain any such written determination, nor does the IFB provide the notice required.

The *change in quantity* clause authorized by the Policy Office, and required if any change in quantity clause is intended for use in an IFB (unless varied as mentioned above) is *specifically* set out in 2 GAR § 6101(a)(5)(a):

> "**The *following clause* is authorized** for use in definite quantity supply or service contracts:
>
> "VARIATION IN QUANTITY
> "Upon the agreement of the parties, the quantity of supplies or services or both specified in this contract may be increased by a maximum of ten percent (10%) provided:

(i) the unit prices will remain the same (except for any price adjustments otherwise applicable); and

(ii) the Procurement Officer makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract."

The "Variation in Quantity" clause permitted by the regulation and the actual clause used by DOE are substantially dissimilar. The DOE clause does not include any limits on quantity, only on time. The mandatory change in quantity clause limits quantity but says nothing about time. They are not at all the same thing. The clause in Paragraph 22 of the General Terms and Conditions is not authorized by the relevant regulation. It is an unauthorized statement which has no force of law to make quantity changes.

Form of Notice:

As already noted, agencies cannot vary a variations clause without a determination and a notice. As with the substance of the clause itself, the regulation (2 GAR § 6101(2)) is also very particular about the notice required:

> "**Any material variation from these clauses shall be described in the solicitation documents in substantially the following form**:
>
> "Clause No. _____ , entitled _____ is not a part of the general terms and conditions of this contract and has been replaced by Special Clause No. _____ , entitled _____."

No such notice accompanies the change in quantity clause in paragraph 23 of the General Terms and Conditions of IFB022, nor in the so-called Incremental Additions clause. Therefore, neither such clause has any legal authority. They must be disregarded.

**B. The Incremental Additions Clause**:

The issues with the Incremental Additions Clause were extensively dealt with by Appellant in its response to Xerox' intervention in the Protest below, a copy of which is attached to and herein incorporated by reference in, the Notice of Appeal, so need not be repeated here. In short, it was not effected incrementally as it was described, it totally fails as a valid requirements ("as needed") clause, and, as any kind of a clause authorizing a change in quantity, it fails the requirements of the law and regulations regarding the form and substance of such clauses ,as discussed above. It too must be disregarded.

**C. Clauses Without Legal Authority Must Be Disregarded**:

The issues regarding the legality of the changes clauses in this IFB are not peripheral. They go to the heart not just of this appeal but to all others. The so-called changes in quantity clause is a pre-printed general term and condition, so is bound to repeat until the legality of the issue is decided for once and all. The "incremental additions" clause seems mimicked from some prior or other source and is likewise likely to keep popping up until its legality is determined.

The legality of the subject matter of a contract can, like issues of jurisdiction and standing, be raised at any time. It is beyond the power of any tribunal to enforce a contract which in substance has no legal authority. But Xerox asks the Public Auditor to do so here.

Appellant was not required to contest the legality of the clauses at the time the IFB was issued because the whole IFB was issued *subject to* law and regulation, and these clauses do not pass muster under either the law or regulation.

Clauses without legal authority do not aggrieve a bidder.

With the IFB being specifically made "subject to" law and regulation, Appellant had no definite expectation DOE would even invoke the clauses; to protest before they were invoked would be to protest before Appellant was aggrieved. Apart from the very definitely stated quantities, all other potential changes in quantities were an "option" or discretionary – either a "reserved right" in the changes clause or "as needed" in the incremental additions clause. Incipient, unexercised rights, do not aggrieve a bidder.

The *existence* of the clauses did not aggrieve Appellant, only the *use* of them did. Xerox asks too much of a bidder, and the procurement process, to vet every possible unauthorized statement in an IFB before its aggrieving effect is even felt. Doing so would hopelessly bog the procurement process. The law does not require it. The law only requires bidders to address those matters that actually aggrieve them, when they know or should know that they have indeed been aggrieved, not when they think they might possibly become aggrieved.[4]

## 3. THERE IS NO TIME LIMIT OR PROCESS RESTRICTING REVIEW OF BID DOCUMENTS BEARING ON WHETHER XEROX' BID WAS RESPONSIVE

Appellant has claimed, based on such information as has been revealed, that Xerox was a non-responsive bidder. To fully appraise that argument, however, Appellant needs access to those public portions of Xerox' bid which reveal *the terms and conditions of its bid.* Xerox denies Appellant any right to see the terms and conditions of its bid or anything by which it may be judged nonresponsive, and claims Appellant is barred from seeking the material because

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[4] The law requires a protest to be made only after a bidder is *aggrieved* by some wrongdoing (5 GCA § 5425(a)). Simply placing an obviously unauthorized provision is an IFB does not wrong the bidder; only the *use* of the provision does. As the kids say, "sticks and stones may break my bones, but words will never hurt me".

Appellant did not first seek to see the bid document (which presumably then as now is somehow identified as confidential) at bid opening.

This is absolutely baseless argument.

Xerox says 2 GAR § 3109(l)(2), which allows bids to be publically inspected at bid opening, means they cannot afterwards be inspected. That just doesn't make sense. There is nothing in the law anywhere that says that once something is open it is forever thereafter closed; indeed, the opposite is rationally implied. The only rational reading is that **a public document is at once and forever a public document**. It does not lose public character by passage of time. There is nothing anywhere that says public right to inspection is a use it or lose it proposition[5].

5 GCA § 5251 says the procurement record can be inspected by any person. There is no time limit express or implied. There is no limit on the number of inspections any person may make, express or implied. Nor are there any such limitations express or implied in 2 GAR § 3109(l)(2).

Xerox then makes the additional claim that 2 GAR § 3109(l)(3) establishes *a process* by which a bidder *can examine the confidential information of another bidder*[6]; Xerox claims that section stands for the proposition that a bidder wishing to see confidential information must first request to do so from the Procurement Officer, failing which he is forever barred from such information. That is wholly unsupported by the language of the section and begs the veracity of the claim.

§ 3109(l)(3) does not speak about and is not directed to any bidder other than a bidder who claims confidentiality over any information it submits with a bid. That bidder, the one seeking confidentiality, must convince the Procurement Officer of the bona fides of the claim for confidentiality[7]. There is nothing in that section that places any obligation on anyone else to first

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[5] See, to the contrary, 5 GCA § 5485(a): "On complaint by any member of the public, the Superior Court has jurisdiction to enjoin a governmental body from withholding procurement data and to order the production of any government data improperly withheld from the complainant." Nothing in § 5485 conditions any such action on first seeking disclosure from the Procurement Officer at bid opening, nor does it place any use it or lose it limit on when such action may be taken.

[6] "Guam's Procurement Regulations establish a process allowing bidders to examine the confidential documents submitted by another bidder", thereafter quoting and citing to "Subsection 3109*(l)(3)*". (Xerox Motion to Dismiss, p 6.)

[7] "The Procurement Officer shall examine the bids **to determine the validity of any *requests for nondisclosure*....** [T]he Procurement Officer shall inform the bidders in writing what portions of the bids will be disclosed and that, **unless the bidder protests ... 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 § 3109(l)(3).) **In the Protest below, the Procurement Officer never, to Appellant's knowledge, made any determination as to the**

or ever seek permission from the Procurement Officer.

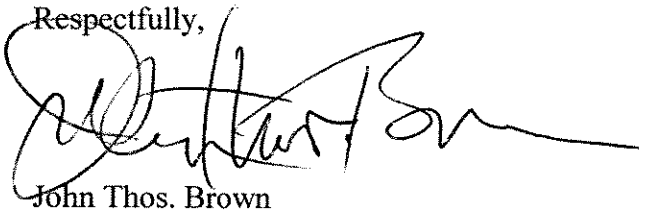
Furthermore, contrary to Xerox' claim[8], that section would NEVER allow any other bidder to see any confidential information, so it can hardly be construed as "a process by which one bidder can see the confidential information of another". Once the Procurement Officer has made a determination confirming the claimed confidentiality of the material, it becomes non-public information forever (unless the determination is overturned on review or otherwise subject to legal production), and for all persons.

CONCLUSION

Xerox' Motion to Dismiss this appeal is as desperate as it is groundless. It has rushed in hyperventilating to claim the ownership Affidavit was false before examining the facts which must be examined before concluding that the disclosure was improper as to the entire relevant time frame. It seeks to turn the Public Auditor's eye from the glaring legal inadequacies of the relevant clauses by which Xerox hopes to make gross variations to the IFB specifications, all contrary to law. It concocts from whole cloth a "process" to review confidential information that could not be conceived by anyone with even a rudimentary understanding of the English language.

It should be summarily denied.

Respectfully,



John Thos. Brown
For Appellant
March 1, 2011

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**validity of *any* request for nondisclosure**, nor did it inform bidders to protest nondisclosure; it simply produced a Procurement Record when the Appeal ensued, with parts of the Record identified (and so far withheld from Appellant) as "Proprietary". Even if there were a protest procedure requiring a bidder to first seek disclosure from a Procurement Officer (which Appellant rejects), Appellant cannot be penalized for failing to protest nondisclosure of information when the agency made no validity of confidentiality determination, and Appellant had no notice of such claim to confidentiality until the Procurement Record was produced; rather, the Public Auditor should fulfill the (alleged) review role that the agency failed or refused to play, and de novo determine the validity of such claim to confidentiality.

[8] See footnote 6.

**AFFIDAVIT**

I, LINDA R. AFAISEN, Executive Assistant for Jones and Guerrero Company, Inc., its subsidiaries and affiliates, including Town House Department Stores, Inc., do hereby solemnly swear:

1. I personally administered the transfer of shares of Town House Department Stores, Inc., held in the name of Kenneth T. Jones, Jr. to his wife and widow, Mrs. Elaine Cruz Jones.

2. The shares of Mr. Jones, prior to the transfer, were represented by Share Cetificate Nos. 2 and 11, issued on March 6, 1985 and October 1, 1997, respectively, in the name of Kenneth T. Jones, Jr.

3. On June 11, 2010, I caused said share certificates of Mr. Jones to be cancelled for transfer, and coincidentally issued to Mrs. Jones all of the shares represented by the cancelled share certificates, said transferred shares represented by Share Certificate No. 19, issued on June 11, 2010, in the name of ELAINE CRUZ JONES.

Linda R. Afaisen
LINDA R. AFAISEN

IN AND FOR GUAM, U.S.A:

Subscribed and sworn to before me this 28th day of February, 2011 by Linda R. Afaisen.

NOTARY PUBLIC

ANNA MARIE DELGADO ALLAGUE
Notary Public
In and for Guam, U.S.A.
My Commission Expires Jan 6, 2014
Po Box 2089 Hagatna GU 96932-2089

INCORPORATED UNDER THE LAWS

OF THE TERRITORY OF GUAM

NUMBER 2

NOTICE: These shares are not freely transferable. Transfer is subject to certain restrictions and rights of first refusal as more fully set forth in the By-laws of Corporation, Article VI, reference to which is hereby made and directed.

SHARES ***1***

# TOWN HOUSE DEPARTMENT STORES, INC.

CAPITAL STOCK $10,000,000.00 • 1,000,000 SHARES • PAR VALUE $10.00 EACH

This Certifies that KENNETH T. JONES, JR. is the owner of

***ONE (1)*** Shares of the Capital Stock of

TOWN HOUSE DEPARTMENT STORES, INC.

transferable only on the books of the Corporation in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed.

Witness the Seal of the Corporation and the signatures of its duly authorized officers

Dated March 6, 1985

SECRETARY

PRESIDENT

COHARN COMPANY
LOS ANGELES

INCORPORATED UNDER THE LAWS

OF THE TERRITORY OF GUAM

NOTICE: These shares are not freely transferable. Transfer is subject to certain restrictions and rights of first refusal as more fully set forth in the By-Laws of Corporation, Article VI, reference to which is hereby made and incorporated.

SHARES 11

SHARES 399,998

# TOWN HOUSE DEPARTMENT STORES, INC.

CAPITAL STOCK $10,000,000.00 • 1,000,000 SHARES • PAR VALUE $10.00 EACH

This Certifies that KENNETH T. JONES, JR. is the owner of THREE HUNDRED NINETY NINE THOUSAND NINE HUNDRED NINETY EIGHT Shares of the Capital Stock of

**TOWN HOUSE DEPARTMENT STORES, INC.**

transferable only on the books of the Corporation in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed.

Witness the Seal of the Corporation and the signatures of its duly authorized officers

Dated OCTOBER 1, 1997.

T. R. S[illegible]

AN[illegible]
ETARY

KENNETH T.[illegible]

[illegible] JR.

INCORPORATED UNDER THE LAWS

OF THE TERRITORY OF GUAM

NUMBER 19

NOTICE: These shares are not freely transferable. Transfer is subject to certain restrictions and rights of first refusal as more fully set for in the By-Laws of Corporation, Article VI, reference to which is hereby made and directed.

SHARES 399,999

# TOWN HOUSE DEPARTMENT STORES, INC.

CAPITAL STOCK $10,000,000.00 • 1,000,000 SHARES • PAR VALUE $10.00 EACH

This Certifies that ELAINE CRUZ JONES is the owner of THREE HUNDRED NINETY NINE THOUSAND NINE HUNDRED NINETY NINE Shares of the Capital Stock of

**TOWN HOUSE DEPARTMENT STORES, INC.**

transferable only on the books of the Corporation in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed.

Witness the Seal of the Corporation and the signatures of its duly authorized officers

Dated JUNE 11, 2010.

NOLI C. CADAG SECRETARY

RAMONA JONES PRESIDENT (Vice)