



OFFICE OF THE PUBLIC AUDITOR

November 28, 2008

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**Appellee: Guam Public School System**

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Transmitted herewith is a copy of the Decision and Findings and Recommendations on appeal OPA-PA-08-011 in the appeal of Town House Department Stores Inc. dba Island Business Systems & Supplies regarding the Guam Public School System, Document Services Agreement Renewal Amendment Number 17.

A complete copy of the Decision and Findings will be posted on our website within the next day and available for public view at [www.guamopa.org](http://www.guamopa.org).

Senseramente,

Doris Flores Brooks, CPA, CGFM  
Public Auditor





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Guam Public School System  
Office of the Superintendent  
Rec'd By: [Signature]  
Date/Time: 11/28/08 4:15 PM



OFFICE OF THE PUBLIC AUDITOR

Guam Public School System  
Office of the Superintendent

Rec'd By: Emily F. Tan  
Date/Time: 11/28/08

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OFFICE OF THE PUBLIC AUDITOR  
PROCUREMENT APPEALS

IN THE APPEAL OF,  
TOWN HOUSE DEPARTMENT STORES,  
INC., dba ISLAND BUSINESS SYSTEMS &  
SUPPLIES,

APPEAL NO: OPA-PA-08-011

DECISION

Appellant

I. INTRODUCTION

This is the Decision of the Public Auditor, an appeal filed on July 24, 2008, by TOWN HOUSE DEPARTMENT STORES, INC., dba ISLAND BUSINESS SYSTEMS & SUPPLIES, (Hereafter "IBSS") regarding the GUAM PUBLIC SCHOOL SYSTEMS' (Hereafter "GPSS") receipt of copier equipment and related services from XEROX CORPORATION (Hereafter "XEROX"). This appeal is based on IBSS's December 4, 2007, protest. This is the second time this matter has come before the Public Auditor. IBSS submitted the original appeal on February 7, 2008, which was filed as OPA-PA-08-003. On July 11, 2008, the Public Auditor determined that she did not have the jurisdiction to hear the appeal in OPA-PA-08-003 because GPSS had not rendered a decision on IBSS' protest. Subsequently, GPSS issued their decision denying IBSS' protest and IBSS filed their second appeal. The Public Auditor holds that IBSS' December 4, 2007, protest was timely and hereby sustains IBSS' appeal because the GPSS contract with XEROX was improperly sole sourced and improperly extended to December 31, 2009.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the Findings of the Hearing Officer issued on November 28, 2008. In addition, this Decision is based on the Procurement Record and all documents submitted by the parties in the appeal because no party to this proceeding has requested a hearing.

1 All matters submitted in OPA-PA-08-003 will be considered here. IBSS requests the  
2 Public Auditor take judicial notice of all matters submitted in OPA-PA-08-003 and GPSS did not  
3 oppose this request. Generally, in reaching a decision on a procurement appeal, the Public  
4 Auditor may take official notice of any fact that may be judicially noticed by the courts of Guam.  
5 2 G.A.R., Div. 4, Chap. 12, §12108(h). Judicial notice for Guam courts is also called knowledge  
6 of the court. 6 G.C.A. §2106. Guam courts may take judicial notice of facts that are not subject  
7 to reasonable dispute because such facts are either generally known within the jurisdiction of the  
8 court or capable of accurate and ready determination by resort to resources whose accuracy  
9 cannot reasonably be questioned. Rule 201(b), Guam Rules of Evidence. The Public Auditor  
10 finds that she can take official notice of all matters submitted in OPA-PA-08-003. The record in  
11 OPA-PA-08-003 is part of the knowledge of the Public Auditor for this matter. The record in  
12 OPA-PA-08-003 is not subject to reasonable dispute or question by the parties. Thus, IBSS'  
13 request is hereby granted and the Public Auditor takes official notice of all matters in OPA-PA-  
14 08-003. Based on the record in this matter and in OPA-PA-08-003, the Public Auditor makes the  
15 following findings of fact:

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18  
19 1. On December 18, 2000, GPSS<sup>1</sup>, executed Document Services Agreement No.  
20 7002364 (Hereafter "DSA") with XEROX. The DSA required, in relevant part, XEROX to  
21 provide document production services, copying equipment, and software to GPSS in exchange  
22 for GPSS' minimum monthly payment of \$128,365, for the period January 1, 2001 to December  
23 31, 2005. There is no record of GPSS soliciting the document production services and  
24 equipment required by the DSA, and there is no record of the XEROX being awarded the DSA  
25 as the result of such a solicitation.<sup>2</sup>

26  
27 <sup>1</sup> The Public Auditor shall use the term "GPSS" to describe the purchasing agency in this matter. GPSS was known  
28 as the "Department of Education" or "DOE" prior to June 6, 2005. On that date, P.L. 28-045:10 became effective  
and changed the Department of Education or DOE to GPSS.

<sup>2</sup> DSA No. 7002364, Page 1, GPSS Procurement Record, Tab 3.

1           2. On or about April 17, 2001, GPSS and XEROX executed Amendment No. 1 to the  
2 DSA which, in relevant part, added additional equipment to the DSA and extended the DSA's  
3 term to April 1, 2001, to March 31, 2006, for the additional equipment.<sup>3</sup>

4           3. On December 16, 2004, GPSS and XEROX entered into Amendment No. 17 to the  
5 DSA which, in relevant part, extended the entire agreement from January 1, 2005, to December  
6 31, 2009.<sup>4</sup>

7           4. In 2005, IBSS began marketing their copier products and services to GPSS. At that  
8 time, IBSS understood that GPSS had a long-standing relationship with a competitive vendor.<sup>5</sup>

9           5. On July 12, 2005, Juan P. Flores, GPSS Superintendent, informed IBSS that GPSS  
10 would issue a solicitation for copier services before the end of FY2005.<sup>6</sup>

11           6. Sometime between September 20, 2005, and November 18, 2005, Juan P. Flores,  
12 GPSS Superintendent, informed Roland R. Franquez, IBSS' General Manager that GPSS  
13 extended the expired DSA for a couple of months to allow FY2006 funds to be transferred to  
14 GPSS. IBSS responded by requesting GPSS to disclose when it was planning to issue the copier  
15 solicitation.<sup>7</sup>

16           7. On February 15, 2007, IBSS informed GPSS that, despite GPSS' failure to comply  
17 with IBSS' repeated demands to provide a copy of the DSA or the bid documents for that  
18 agreement, that IBSS knew that GPSS had not put the copier contract out for bid in many years.  
19 Specifically, IBSS learned that GPSS issued Purchase Order No. (PO) 200500350 in December  
20 2004, which extended the DSA from October 1, 2004, to September 30, 2005. The PO was sole  
21 sourced and GPSS issued PO 200601065 extending the DSA from January 1, 2006, through June  
22

23 <sup>3</sup> Amendment No. 1 to DSA, Page 1, GPSS Procurement Record, Tab 3.

24 <sup>4</sup> Amendment No. 17 to DSA, Page 1, GPSS Procurement Record, Tab 8.

25 <sup>5</sup> Letter from Roland Franquez, IBSS' General Manager, to Juan P. Flores GPSS Superintendent dated July 14,  
26 2005, Attachment 1, to IBSS Notice of Appeal in OPA-PA-08-003.

27 <sup>6</sup> Letter from Roland R. Franquez, IBSS' General Manager, to Juan P. Flores GPSS Superintendent dated  
28 September 20, 2005, Attachment 2 to IBSS' Notice of Appeal in OPA-PA-08-003.

<sup>7</sup> Letter from Roland R. Franquez to Juan P. Flores dated November 18, 2008, Attachment 3 to IBSS' Notice of  
Appeal in OPA-PA-08-003.

1 30, 2006.<sup>8</sup> IBSS also made a formal demand that GPSS issue a solicitation for a new copier  
2 contractor.<sup>9</sup>

3 8. On October 10, 2007, IBSS informed Claudia Acfalle, Chief Procurement Officer,  
4 General Services Agency (GSA), that IBSS believed that procurement of the DSA may have  
5 been organized through GSA through a Federal GSA Supply Schedule.<sup>10</sup> IBSS also stated that it  
6 had no knowledge how GPSS continued to procure copier services and products from Xerox  
7 after June 30, 2006, due to GPSS's failure to respond to IBSS requests to review the DSA. In the  
8 same letter IBSS made a formal demand that GSA provide it GPSS' DSA procurement record,  
9 based on the information received from GPSS that the DSA may have been organized through  
10 GSA.<sup>11</sup>

11 9. On October 15, 2007, GSA responded to IBSS' October 10, 2007, request to review  
12 the DSA's procurement file by advising IBSS that GSA would forward IBSS' request to GPSS  
13 legal counsel.<sup>12</sup>

14 10. After getting no response, IBSS sent GPSS' Legal Counsel a letter on October 26,  
15 2007, requesting that GPSS respond to the concerns and requests IBSS raised in their October  
16 10, 2007, letter to GSA.<sup>13</sup>

17 11. On or about December 4, 2007, IBSS filed a protest with GPSS alleging improper  
18 procurement of copier machine products and related services by GPSS and requesting that  
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20 <sup>8</sup> Letter from John Thos. Brown, Esq., General counsel for Jones & Guerrero Co., Inc. (Guam, USA) to Luis S.N.  
21 Reyes dated February 15, 2007, Attachment 4 to IBSS' Notice of Appeal in OPA-PA-08-003.

22 <sup>9</sup> Id.

23 <sup>10</sup> Letter from John Thos. Brown, Esq., General counsel for Jones & Guerrero Co., Inc. (Guam, USA) to Claudia S.  
24 Acfalle, Chief Procurement Officer, GSA, dated October 10, 2007, Attachment 5 to IBSS' Notice of Appeal in  
OPA-PA-08-003.

25 <sup>11</sup> Id.

26 <sup>12</sup> Letter from Anita T. Cruz, Assistant Chief Procurement Officer, GSA, to Kenneth T. Jones, President, Jones &  
27 Guerrero Co., Inc., dated October 15, 2007, Attachment 6 to IBSS' Notice of Appeal in OPA-PA-08-003.

28 <sup>13</sup> Letter from John Thos. Brown, Esq., General counsel for Jones & Guerrero Co., Inc. (Guam, USA) to Fred  
Nishihira, Esq., GPSS Legal Counsel, dated October 26, 2007, Attachment 7 to IBSS' Notice of Appeal in OPA-PA-  
08-003.

1 GPSS' award of the DSA to XEROX be terminated, and that the DSA be declared null and  
2 void.<sup>14</sup>

3 12. On or about January 10, 2008, IBSS requested GPSS provide them a final decision  
4 on their December 4, 2007, protest.<sup>15</sup>

5 13. On or about January 31, 2008, GPSS issued PO 200800507 to XEROX for the  
6 amount of \$399,111 to cover various DSA costs for the period January 1, 2008 thru March 31,  
7 2008.<sup>16</sup>

8 14. Approximately sixty-five (65) days after filing their protest, on or about February 7,  
9 2008, IBSS filed their appeal in OPA-PA-08-003 stating that it was appealing GPSS' failure to  
10 respond to IBSS' protest.<sup>17</sup>

11 15. On July 11, 2008, the Public Auditor decided OPA-PA-08-003 by finding  
12 she did not have jurisdiction to hear the appeal due to GPSS' failure to issue a decision on IBSS'  
13 protest. The Public Auditor held that GPSS' failure to decide the protest violated 5 G.C.A.  
14 §5425(c) and (d) and 2 G.A.R., Div. 4, Chap. 9, §9101(g), and the failure to issue the decision  
15 was a bad faith act that violated 5 G.C.A. §5003 because it undermined the integrity of the  
16 procurement process. The Public Auditor also ordered GPSS' Superintendent to produce the  
17 decision no later than seven (7) days after the decision date.

18 16. On July 22, 2008, GPSS issued its decision denying IBSS' protest because the  
19 protest was filed in the third year of a five year contract, well beyond the fourteen (14) working  
20 days which Guam Procurement Law and GPSS' Procurement Rules and Regulations permit  
21 protests to be filed.<sup>18</sup>

22 17. On July 24, 2008, IBSS filed this appeal.  
23

24 <sup>14</sup> IBSS Notice of Protest, Attachment 8 to IBSS' Notice of Appeal in OPA-PA-08-003.

25 <sup>15</sup> IBSS Request for Final Decision on Notice of Protest dated January 10, 2008, Attachment 9 to IBSS' Notice of  
26 Appeal in OPA-PA-08-003.

27 <sup>16</sup> Purchase Order No. 200800507, GPSS Procurement Record, Tab 14.

28 <sup>17</sup> IBSS' Notice of Appeal, Pages 1-2.

<sup>18</sup> GPSS' Response to Protest dated July 22, 2008, Attachment 1 to IBSS' Notice of Appeal.



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### III. ANALYSIS

IBSS appeals GPSS' denial of IBSS' December 4, 2007, protest. IBSS argues that GPSS improperly procured copier and machine products through the DSA by renewing the DSA for several years and failing to include IBSS in a competitive bid for the copier and machine product services.

#### A. IBSS's Protest was timely.

The threshold issue in this matter is whether IBSS' December 4, 2007, protest was timely. Generally, a procurement protest shall be submitted in writing within fourteen (14) days after an aggrieved person either knows or should know of the facts giving rise thereto. 5 G.C.A. §5425(a). We must also review GPSS' procurement regulations to determine the issue of timeliness. GPSS is authorized to promulgate its own procurement regulations. 5 G.C.A. §5131. GPSS' procurement regulations specify that protests be made in writing to the GPSS Superintendent within fourteen (14) working days after the protestor knows or should have known of the facts giving rise thereto. Chapter IX, §9.2.3.1, GPSS Procurement Regulations. GPSS Procurement Regulation's fourteen (14) working day protest period does not include weekends and holidays. In contrast, Guam Procurement Law includes such days in calculating the same period. The Public Auditor must first resolve this conflict between Guam's Procurement Law and GPSS' Procurement Regulations.

#### Guam Procurement Law Controls.

The fourteen (14) day protest period in Guam Procurement Law controls this issue. Guam Procurement Law, to include its Article 9 which governs the time period for filing protests, applies to GPSS. 5 G.C.A. §5125. Whenever Guam procurement law applies to an agency's procurement activities and such agency's procurement regulations conflict with Guam procurement law, such agency's procurement activities must satisfy the requirements of Guam's Procurement Law and not the conflicting agency procurement regulation. *Guam Imaging Consultants, Inc., and RADS v. Guam Memorial Hospital Authority*, 2004 Guam 15, ¶41 (Supreme Court of Guam). Thus, the Public Auditor resolves this conflict by finding that the fourteen (14) day period to file protests set forth in 5 G.C.A. §5425(a) controls the issue of

1 whether IBSS' protest was timely. The next step in this analysis is to determine when the  
2 fourteen (14) day protest period began to run.

3 **The Execution of the DSA on December 18, 2000, did not Trigger the Protest Period.**

4 The Public Auditor finds that IBSS was not aware of or could not be aware of the DSA  
5 until after it filed its protest. On July 14, 2005, as stated above, IBSS knew that Xerox was  
6 providing copier services to GPSS and that this had been occurring for a long period of time. On  
7 February 15, 2007, as stated above, IBSS knew that GPSS had not bid out the copier contract in  
8 many years. On September 18, 2007, GPSS verbally informed IBSS that the DSA was based on  
9 an agreement between GSA and Xerox that allowed GPSS to by-pass the bid process and  
10 contract directly with Xerox.<sup>19</sup> This information merely indicates that GPSS was receiving  
11 copier services from Xerox without a competitive bid based on an agreement between GSA and  
12 Xerox. The Public Auditor finds that this information does not constitute facts that would cause  
13 IBSS to know or should know that the DSA was improperly procured.

14 **The Execution of DSA Amendment No. 17 did not Trigger the Protest Period.**

15 As a result of not having access to the procurement record prior to filing its protest, IBSS  
16 did not know or could not know of the facts giving rise to its protest. The Public Auditor finds  
17 that the execution of DSA Amendment No. 17 on December 16, 2004, did not trigger the  
18 fourteen (14) day protest period for IBSS. GPSS denied IBSS' protest solely on the ground that  
19 it was filed over three (3) years after GPSS executed DSA Amendment No. 17.<sup>20</sup> The Public  
20 Auditor must determine what facts if any, IBSS knew or should have known concerning the  
21 execution of DSA Amendment No. 17 because it extends the DSA until December 31, 2009.  
22 This issue is resolved by determining the date IBSS had access to the procurement record. IBSS  
23 had an absolute right to inspect and make copies of the DSA procurement record. With limited  
24 exceptions, GPSS procurement records are public records. 5 G.C.A. §10102(d), §5249,  
25 and §5251, and Chapter III, §3.27.3 and §3.27.5, GPSS Procurement Regulations. Further, public

26  
27 <sup>19</sup> Page 5, Notice of Appeal in OPA-PA-08-003.

28 <sup>20</sup> GPSS Protest Decision dated July 22, 2008, Attachment 1, Notice of Appeal.

1 records are open to inspection at all times during the office hours of the agency and every person  
2 has a right to inspect any public record. 5 G.C.A. §10103(b). If GPSS treated the DSA  
3 procurement file as a public record, a count as to whether there were more or less fourteen (14)  
4 days between the date IBSS inspected or received a copy of the procurement file and the date  
5 they filed their protest could be determined.

6 The record shows that IBSS did not have access to the DSA procurement file until after  
7 IBSS filed its appeal in OPA-PA-08-003 on February 7, 2008. IBSS received partial access to  
8 the DSA's procurement file on February 20, 2008, and full access to it on February 22, 2008,  
9 when GPSS filed its Procurement Record and Supplemental Procurement Record in OPA-PA-  
10 08-003.<sup>21</sup> This was over eighty (80) days after IBSS filed its protest on December 4, 2007.  
11 GPSS was the sole cause of the delay because IBSS made two (2) requests to inspect the DSA  
12 procurement file and GPSS did not respond to the requests. As stated above, IBSS' made its first  
13 request on October 10, 2007. Although this request was sent to GSA, GSA routed the request to  
14 GPSS' legal counsel. After receiving no response from GPSS, IBSS made a second request  
15 directly to GPSS' legal counsel. IBSS filed their protest after GPSS did not respond to IBSS'  
16 second request. The Public Auditor also finds that GPSS, through its inaction, denied IBSS its  
17 right to inspect and make copies of the DSA's procurement file, which is a public record.

18 Thus, without access to the DSA procurement file, IBSS did not know of and could not  
19 have known of DSA Amendment No. 17. Only after a protestor is afforded the opportunity to  
20 review the procurement record can it fully develop its arguments with regard to alleged bidding  
21 irregularities and statutory violations. *Goodwill Industries Guam, Inc., v. Guam Mass Transit,*  
22 *SP82-00, Page 5, Decision and Order dated March 20, 2000, (Superior Court of Guam).* The  
23 Public Auditor finds that the December 16, 2004, date DSA Amendment No. 17 was executed  
24 did not trigger the fourteen (14) day protest period for IBSS because IBSS did not know and  
25 could not have known about the Amendment until after it reviewed the DSA procurement file.

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28 <sup>21</sup> GPSS Procurement Record filed on February 20, 2008 and Supplemental Procurement Record filed on February  
22, 2008 in OPA-PA-08-003.

1 On another note, a further analysis of the record indicates that (1) GPSS officials made  
2 verbal statements to IBSS concerning the DSA and (2) IBSS knew of DSA purchase orders. As  
3 such, the Public Auditor must determine whether the knowledge of DSA purchase orders or the  
4 verbal statements triggered the fourteen (14) day protest period.

5 **PO 200500350 and PO 200601065 did not Trigger the Protest Period.**

6 IBSS' knowledge of PO 200500350 and PO 200601065 did not trigger the fourteen (14)  
7 day protest period. On February 15, 2007, as stated above, IBSS knew that GPSS issued PO  
8 200500350 in December, 2004, which extended the DSA from October 1, 2004, to September  
9 30, 2005, and that GPSS issued PO 200601065 extending the DSA from January 1, 2006,  
10 through June 30, 2006. Normally, the Purchase Orders extending the DSA from October 1,  
11 2004, to September 30, 2005, and then extending the DSA from January 1, 2006, to June 30,  
12 2006, would constitute facts that IBSS could base a protest on. However, the record indicates  
13 that IBSS only knew about them in February, 2007, well over six (6) months after the last  
14 extension had expired on June 30, 2006. This is supported by IBSS' statement October 10, 2007,  
15 statement that it had no knowledge how GPSS continued to procure copier services and products  
16 from Xerox after June 30, 2006.<sup>22</sup> Thus, the Public Auditor finds that these purchase orders do  
17 not constitute facts that would cause IBSS to know or should know of DSA Amendment No. 17.

18 **GPSS' Verbal Statements did not Trigger the Protest Period.**

19 GPSS' statements were not credible and were insufficient to trigger the fourteen (14) day  
20 protest period. As stated above, sometime between September 20, 2005, and November, 18,  
21 2005, Juan P. Flores, GPSS Superintendent, informed Roland R. Franquez, IBSS' General  
22 Manager that GPSS extended the expired DSA for a couple of months to allow FY2006 funds to  
23 be transferred to GPSS. IBSS also states that in September 18, 2007, meeting they were verbally  
24 informed by GPSS officials<sup>23</sup> that the current extension of the DSA commits GPSS until  
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27 <sup>22</sup> Letter from John Thos. Brown, Esq., to Claudia S. Acfalle dated October 10, 2007, Attachment 5 to IBSS' Notice  
of Appeal in OPA-PA-08-003.

28 <sup>23</sup> Ike Santos, GPSS Federal Programs Administrator, Acting GPSS Chief Financial Officer Frances Danieli, and  
Acting Supply Management Administrator Roque Alcantara

1 September 30, 2009.<sup>24</sup> These verbal statements are not supported by the procurement record.  
2 One of the underlying purposes and policies of Guam's Procurement Law is to ensure the fair  
3 and equitable treatment of all persons who deal with the procurement system of the Government  
4 of Guam. 5 G.C.A. §5001(b)(4) and Chapter I, §1.2.4, GPSS Procurement Regulations. Further,  
5 all parties involved in the negotiation, performance, or administration of Government of Guam  
6 contracts are required to act in good faith. 5 G.C.A. §5003. Here based on the record, the verbal  
7 information concerning the extensions given by GPSS Superintendent Juan P. Flores and other  
8 GPSS officials were conflicting. The record indicates, as stated above, that Juan P. Flores, GPSS  
9 superintendent, executed DSA Amendment No. 17 which extended the DSA to December 31,  
10 2009. Yet, as stated above, seven (7) months later, Flores advised Roland Franquez that GPSS  
11 would issue a solicitation for copier services before the end of 2005, and when this did not occur,  
12 Flores told Franquez that they extended the DSA for a couple of months to allow GPSS to  
13 receive FY2006 funds. The Public Auditor finds that these statements are misleading. The  
14 GPSS Superintendent's verbal representation that the contract was extended until September 30,  
15 2009, is also inaccurate considering the fact that Amendment 17 of the DSA indicates that the  
16 DSA expires on December 31, 2009. The Public Auditor finds that these conflicting statements  
17 do not constitute facts that would trigger the fourteen (14) day protest period.

18 Based on the foregoing, the Public Auditor finds that IBSS' December 4, 2007, protest  
19 was timely. The Public Auditor now addresses the merits of IBSS' protest.

20 **B. GPSS' Sole Sourcing of the DSA to XEROX Violated Guam Procurement Law.**

21 IBSS's first argument is that the DSA was improperly procured because there was no  
22 competitive bidding process.<sup>25</sup> This analysis begins by determining how the DSA was procured.  
23 In the September 18, 2007, meeting mentioned above IBSS was verbally informed by GPSS  
24 Federal Programs Administrator Ike Santos that the DSA was riding on an agreement made  
25 between GSA and Xerox which allowed GPSS to bypass the bid process and directly contract  
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27 <sup>24</sup> Id.

28 <sup>25</sup> Page 1, IBSS Protest, Attachment A, Agency Report.

1 with Xerox.<sup>26</sup> This is not supported by GPSS' record of the procurement. The procurement  
2 record begins with Xerox Blanket Purchase Agreement No. 070036600 (BPA) and a letter dated  
3 March 23, 1989, from the Chief Procurement Officer (CPO) to the Attorney General (AG)  
4 requesting a legal opinion as to whether the CPO could sign the BPA because of the price breaks  
5 being offered by Xerox. Further, an informational memorandum from the AG's Office dated  
6 April 7, 1989, which expresses the belief that the CPO had the authority to sign the BPA and a  
7 signed copy of the BPA referencing the memorandum are also to be considered here.<sup>27</sup> The link  
8 between the BPA and the DSA is unclear. At the time the BPA was signed, GPSS was not part  
9 of the centralized procurement regime governed by GSA and the CPO had no authority to  
10 procure contracts for GPSS. 5 G.C.A. §5030(k), §5120, and §5125. Also, the BPA and the DSA  
11 are not the same or related contracts. Although they are both Xerox contracts, the BPA's No. is  
12 070036600 and the BPA is between Xerox and GSA. In contrast, the DSA's No. is 7002364 and  
13 its between Xerox and GPSS. Finally, the BPA expired on or about April 12, 1990, and the DSA  
14 was executed over a decade later on December 18, 2000.<sup>28</sup> The Public Auditor finds that the  
15 BPA is not the solicitation or method of procurement for the DSA.

16 The DSA is the result of a sole source procurement. PO 200100128, which is the  
17 purchase order authorizing the initial \$1,518,557.56 in funding for the DSA, indicates that the  
18 DSA was sole sourced due to the compatibility of equipment, accessories, or replacement parts.<sup>29</sup>  
19 Thus, the Public Auditor finds that GPSS procured the DSA via sole source procurement. The  
20 next step in the analysis is to determine whether the DSA was properly procured under the laws  
21 and regulations governing GPSS sole source procurement.

22 Generally, a contract may be awarded for a supply, service, or construction item without  
23 competition when the head of a purchasing agency or his designee above the level of  
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25 <sup>26</sup> Letter from John Thos. Brown, Esq., to Claudia S. Acfalle dated October 10, 2007, Attachment 5 to IBSS'  
26 Notice of Appeal in OPA-PA-08-003.

27 <sup>27</sup> Tabs 1 and 2, Procurement Record.

28 <sup>28</sup> BPA, Paragraph 5, Page 1, Tab 2, and DSA, Tab 3, Procurement Record.

<sup>29</sup> Page 2, PO 200100128, Tab 3, Procurement Record.

1 procurement officer and GPSS Supply Management Administrator determines in writing that  
2 there is only one source for the required supply, service, or construction item. 5 G.C.A. §5214  
3 and Chapter III, §3.12, GPSS Procurement Regulations. The determination as to whether a  
4 procurement shall be made as a sole source shall be made by the GPSS Superintendent or the  
5 designee of such officer. Chapter III, §3.12.2, GPSS Procurement Regulations.

6 **Guam Procurement Law Statutes Governing Sole Sourcing Contracts Controls.**

7 The Public Auditor must once against resolve a conflict between Guam Procurement Law  
8 and GPSS Procurement Regulations. Specifically, Guam Procurement Law mandates that only  
9 the head of a purchasing agency or his designee above the level of procurement officer can make  
10 a written determination that there is only one source for the required supply, service, or  
11 construction item. 5 G.C.A. §5214 The term "procurement officer" is defined as any person  
12 duly authorized to enter into and administer contracts and make written determinations with  
13 respect thereto. 5 G.C.A. §5030(p). In contrast, GPSS' Procurement Regulations do authorize  
14 GPSS' Supply Management Administrator, who is GPSS' main procurement officer, to make the  
15 same determination.<sup>30</sup> As stated above, when there is a conflict between Guam Procurement  
16 Law and Agency Procurement Regulations, Guam Procurement Law controls. *Guam Imaging*  
17 *Consultants, Inc., and RADS v. Guam Memorial Hospital Authority*, 2004 Guam 15, ¶41  
18 (Supreme Court of Guam). The Public Auditor resolves this conflict by finding that only the  
19 GPSS Superintendent or his designee above the level of procurement officer can make a written  
20 determination that there is only one source for the required supply, service, or construction item.

21 The written determination made by GPSS' Supply Management Administrator violates  
22 Guam's Procurement Law. As stated above, only the GPSS Superintendent or his designee  
23 above the level of procurement officer can make a written determination that that there is only  
24 one source for the required supply, service, or construction item. Here, the only written

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27 <sup>30</sup> Although Chapter 3, §3.12 states that the written determination for sole source procurement must be made by the  
28 GPSS Superintendent or her designee above the level of Supply Management Administrator, §3.12.2 does not  
specify the rank of the Superintendent's designee. This internal conflict is resolved in favor of §3.12 by the above  
analysis because Guam procurement law requires the designee to be above the level of procurement officer.

1 determination that the copier services, supplies, and equipment covered by the DSA could come  
2 from XEROX was made by Juan M. Pangelinan, then GPSS' Supply Management  
3 Administrator.<sup>31</sup> Thus, the DSA was improperly sole sourced because the written determination  
4 justifying the sole source was made by a procurement officer, and not by GPSS' Superintendent  
5 or designee above the level of procurement officer.

6 Further, there is no evidence that GPSS could not procure the copying services or  
7 equipment from other vendors such as IBSS. Sole source procurement is not permissible unless  
8 a requirement is available from only a single supplier and a requirement for a particular  
9 proprietary item does not justify sole source procurement if there is more than one potential  
10 bidder or offeror for that item. Chapter III, §3.12.2, GPSS Procurement Regulations.  
11 Circumstances which could necessitate sole source procurement include situations in which the  
12 compatibility of equipment, accessories, or replacement parts is of paramount consideration.  
13 Chapter III, §3.12.2.1, GPSS Procurement Regulations. Here, the fact that XEROX provides  
14 copying services and equipment does not justify a sole source procurement determination  
15 because XEROX is not the only possible source of copier services and equipment.

16 The fact that XEROX copiers, equipment, and software is proprietary, does not justify a  
17 sole source procurement determination because other brands of equivalent copiers, equipment,  
18 and software are available. If GPSS intended to limit its copying services, equipment, and  
19 software to the XEROX brand, such intent violates Guam Procurement Law and GPSS  
20 Procurement Regulations. All specifications shall seek to promote overall economy for the  
21 purposes intended and encourage competition in satisfying the Government of Guam's needs and  
22 shall not be unduly restrictive. 5 G.C.A. §5265 and Chapter IV, §4.6, GPSS Procurement  
23 Regulations. Further, all specifications shall be written in such a manner as to describe the  
24 requirements to be met, without having the effect of exclusively requiring a proprietary supply,  
25 service, or construction item, or procurement from a single source, unless no other manner of  
26 description will suffice. In that event, a written determination shall be made that it is not  
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<sup>31</sup> Page 2, PO200100128, Tab 3, Procurement Record.



1 practicable to use a less restrictive specification. Chapter IV, §4.6.1. Here, there is no evidence  
2 in the procurement record that GPSS made a written determination that it was not practicable to  
3 use any brand of copier services, equipment, or software other than the XEROX brand. Thus,  
4 the XEROX brand specification does not justify a sole source procurement determination  
5 because limiting GPSS' copier services, equipment, and software to the XEROX brand would be  
6 an unduly restrictive specification.

7 **C. The DSA was Improperly Extended.**

8 IBSS' second argument is that the DSA was improperly renewed.<sup>32</sup> As stated above, the  
9 DSA's original term expired on December 31, 2005, and GPSS extended the DSA until  
10 December 31, 2009, by executing DSA amendment No. 17 on December 16, 2004. Generally, a  
11 contract for supplies or services may be entered into for any period of time deemed to be in the  
12 best interests of the Government of Guam provided the term of the contract and conditions of  
13 renewal or extension, if any, are included in the solicitation and funds are available for the first  
14 fiscal period at the time of contracting. 5 G.C.A. §5237(a). However, prior to using a multi-year  
15 contract, it must be determined in writing that such contract will serve the best interest of the  
16 Government of Guam by encouraging effective competition or otherwise promoting economies  
17 in government procurement. 5 G.C.A. §5237(b)(2). There is no such written determination in  
18 the procurement record nor can such a determination be made in this case. Here, as stated above,  
19 other vendors of copier services, equipment, and software were excluded from the procurement  
20 process because the DSA was improperly sole sourced. DSA Amendment No. 17 continued this  
21 improper exclusion of competition from the procurement process by extending the DSA for  
22 another five (5) period. Thus, the Public Auditor finds that DSA Amendment No. 17 improperly  
23 renewed the DSA because the five (5) year renewal period continued the improper exclusion of  
24 other vendors for copier services, equipment, and software.

25 **D. The DSA and DSA Amendment No. 17 are Void.**

26 The Public Auditor finds that the award of the DSA to XEROX is void. If after an award  
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28 <sup>32</sup> Page 3, IBSS' Protest, Attachment A, Agency Report.

1 it is determined that a solicitation or award of a contract is in violation of law, and the person  
2 awarded the contract has not acted fraudulently or in bad faith, the contract may be: (1) Ratified  
3 or affirmed if doing so is in the best interests of Guam; or (2) The contract may be terminated  
4 and the person awarded the contract shall be compensated for the actual expenses reasonably  
5 incurred under the contract plus a reasonable profit, prior to the termination. 5 G.C.A.  
6 §5452(a)(1). Here, as set forth above, the Public Auditor finds that the DSA was not properly  
7 sole sourced and improperly extended to December 31, 2009. Further, the Public Auditor finds  
8 that there is nothing in the record indicating XEROX acted fraudulently or in bad faith in  
9 procuring the DSA or DSA Amendment No. 17. The Public Auditor finds that ratifying or  
10 affirming the DSA is not in the best interests of the Government because GPSS' improper sole  
11 sourcing and renewal of the DSA, and GPSS' conflicting comments to IBSS are not in line with  
12 the integrity of the procurement process as IBSS was not given a level playing field to compete  
13 for a contract as other prospective bidders. The Public Auditor finds that the DSA shall be  
14 terminated as of the date of this Decision, and XEROX shall be compensated for the actual  
15 expenses it reasonably incurred under the contract plus a reasonable profit, which the Public  
16 Auditor finds to be the GPSS monthly payments set forth in the DSA, as amended, prior to and  
17 up to the termination date.

#### 18 19 **IV. CONCLUSION**

20 Based on the foregoing, the Public Auditor hereby determines the following:

21 1. GPSS, through its inaction, improperly denied IBSS its right to inspect and copy the  
22 DSA procurement file in violation of 5 G.C.A. §10102(d) §10103(b), §5249, and §5251, and  
23 Chapter III, §3.27.3 and §3.27.5, GPSS Procurement Regulations.

24 2. GPSS' failure to inform IBSS of DSA Amendment No. 17 extension of the DSA until  
25 December 31, 2009, and GPSS' statements to IBSS that GPSS would put out a bid for copier  
26 services in 2005, and/or 2006, were misleading as GPSS did not put out new bids for copier  
27 services. GPSS' failure to put out the bids undermines the integrity of the procurement process  
28 and is a bad faith act that violates 5 G.C.A. §5003.

1 3. IBSS' December 4, 2007, Protest was timely.

2 4. GPSS improperly sole sourced the DSA to XEROX in violation of 5 G.C.A. §5214,  
3 and Chapter III, §3.12.2, GPSS Procurement Regulations.

4 5. GPSS improperly extended the DSA to December 31, 2009, by executing DSA  
5 Amendment No. 17 in violation of 5 G.C.A. §5237(b)(2).


6 6. IBSS appeal is sustained.

7 7. The DSA, as amended, is hereby terminated as of the date of this decision and  
8 XEROX shall be compensated for the actual expenses it reasonably incurred under the DSA plus  
9 a reasonable profit, prior to the termination.

10 This is a Final Administrative Decision. The Parties are hereby informed of their right to  
11 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with  
12 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative  
13 Decision. 5 G.C.A. §5481(a).

14 A copy of this Decision shall be provided to the parties and their respective attorneys, in  
15 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website  
16 [www.guamopa.org](http://www.guamopa.org).

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18 **DATED** this 28th day of November 2008.

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21 DORIS FLORES BROOKS, CPA, CGFM  
22 PUBLIC AUDITOR