

Suite 401 DNA Building
238 Archbishop Flores St.
Hagåtña, Guam 96910



FAX

To:	Carmen Taitano Supply Management Administrator Guam Department of Education 500 Mariner Avenue A-Building Suite A-13 Barrigada, Guam 96913	From:	Doris Flores Brooks Guam Public Auditor Office of Public Accountability
Phone: Fax:	(671) 475-0438 (671) 472-5001	Pages:	10 (including cover page)
CC:	Elyze M. Iriarte Iriarte Camacho Calvo Law Group LLC (Attorneys for Appellant Xerox Corporation) 134 W Soledad Ave., Suite 401 Hagatna, Guam 96910	Date:	August 11, 2016
Phone: Fax:	(671) 472-6813 (671) 477-4375	Phone: Fax:	475-0390 x. 208 472-7951

Re: OPA-PA-16-010 Notice of Receipt of Appeal

Urgent **For Review** **Please Comment** **Please Reply** **Please Recycle**

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Please acknowledge receipt of this transmittal by re-sending this cover page along with your firm or agency's receipt stamp, date, and initials of receiver.

Thank you,
Jerrick Hernandez
Auditor

jhernandez@guamopa.org

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OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

August 11, 2016

Carmen Taitano
Supply Management Administrator
Guam Department of Education
500 Mariner Avenue
A-Building Suite A-13
Barrigada, Guam 96913
VIA FACSIMILE: (671) 472-5001

Re: Notice of Receipt of Appeal – OPA-PA-16-010

Dear Ms. Taitano,

Please be advised that Xerox Corporation (Xerox) filed an appeal with the Office of Public Accountability (OPA) on August 10, 2016 regarding the Guam Department of Education (GDOE) Invitation for Bid (IFB) No. 004-2016, Lease of Multifunction (Copy, Print, Scan, and Fax) Devices. OPA has assigned this appeal case number OPA-PA-16-010.

Immediate action is required of GDOE pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA's office and on its website at www.opaguam.org. The notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeals. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), please submit one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated, to OPA by **Thursday, August 18, 2016**, five work days following receipt of this notice of appeal; and one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Div. 4, Chap. 12, §12105, by **Thursday, August 25, 2016**, ten work days following receipt of this notice of appeal.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to Xerox. OPA respectfully asks that GDOE provide one original and two copies of the procurement record as the Guam Procurement Law and Regulations require

only one copy. The three procurement record copies requested by OPA are distributed as follows:
Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 208 or jhernandez@guamopa.com, or Llewelyn Terlaje at ext. 211 or lterlaje@guamopa.com, should you have any questions regarding this notice.

Sincerely,



Llewelyn Terlaje
Audit Supervisor

Enclosure: Notice of Appeal – OPA-PA-16-011

CC: Elyze M. Iriarte, Attorney for Xerox

IRIARTE CAMACHO CALVO LAW GROUP LLC

ELYZE M. IRIARTE
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Attorneys for Appellant
XEROX CORPORATION

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 8/10/16
TIME: 2:00 AM PM BY: LP
FILE NO OPA-PA: 16-010

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

XEROX CORPORATION,

Appellant.

Docket No. OPA-PA_____

NOTICE OF PROCUREMENT APPEAL

Xerox Corporation brings this appeal of a protest denial issued by the Guam Department of Education.

Appellant Information:

Name: Xerox Corporation.

Mailing Address: 137 Murray Blvd., Floor 1, Hagåtña, Guam 96910. For the purposes of this Appeal, please direct filings and correspondence to Xerox's legal counsel: Iriarte Camacho Calvo Law Group LLC, Attn: Elyze Iriarte, Esq., 134 W Soledad Ave Ste 401, Hagåtña, GU 96910.

Business Address: 137 Murray Blvd., Floor 1, Hagåtña, Guam 96910.

Email Address: eiriarte@icclawgroup.com

Daytime Contact No.: 472-6813

Fax No.: 477-4375

Appeal Information

Purchasing Agency: Guam Department of Education (GDOE)

Identification of Contract: GDOE IFB 004-2016 (referenced herein as "Contract").

Decision being appealed was made on August 4, 2016 by Carmen T. Taitano, GDOE Supply Management Administrator.

Appeal is made from a Decision denying Xerox's Protest of GDOE's Notice of Rejection of All Bids and Amended Bid Status.

Names of Competing Bidders, Offerors, or Contractors known to Appellant:
No other entities submitted a bid.

Statement Supporting the Appeal

1. Background

The Office of Public Accountability has jurisdiction over procurement disputes, including the present dispute. 5 GCA §§ 5427, 5706.

GDOE IFB 004-2016 solicited the lease of multifunction (copy, print, scan, and fax) devices. As part of the solicitation, GDOE specified that it will consider bids that offered federal GSA pricing and its terms and conditions.

Understanding GDOE would accept pricing based on federal schedules, Xerox offered to provide multi-function devices to GDOE using such schedules. Other interested entities were free to provide a bid using federal pricing, or pricing of their own invention. However, no other entity submitted an offer to GDOE.

In a June 28, 2016 Memorandum from the Office of the Attorney General, the

AG concluded that GDOE had no authority to procure under the federal supply schedule. Following that Memorandum, on July 5, 2016, GDOE informed bidders that all bids were rejected.

Xerox submitted a timely Protest on July 18, 2016. Xerox challenged the rationale in the AG's Memorandum concerning GDOE's authority to set the pricing terms and to utilize the federal supply schedule.

On August 4, 2016, GDOE denied Xerox's Protest, and made no attempt to discuss the merits of Xerox's appeal. Instead, it advised that since the AG takes the position that GDOE had no authority to utilize Federal GSA pricing, it would not approve the contract containing such term.

Xerox now appeals.

2. DOE Has Authority to Set the Terms of the IFB

A fundamental error in the AG's analysis was that GDOE could not set the terms of the bidders' pricing. This is incorrect because Guam law gives GDOE autonomy over its procurement. Guam law also states that "any governmental body of Guam may act as a purchasing agency and contract on its own behalf for such services." 5 GCA § 5121. GDOE, as the purchasing agency, has the authority to establish the terms and conditions it finds acceptable. 5 GCA § 5263 ("Specifications for supplies [or] services . . . may be prepared by a purchasing agency"). In this instance, GDOE in fact drafted specifications and pricing it deemed acceptable.

Xerox challenges the misstatement in the AG's Memo that the IFB's language allowing bids based on federal schedules was "inadvertent." GDOE made clear on more than one occasion that such a bid was acceptable and proper. Even further,

such a specification is allowed by Guam Procurement Law which states "All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the Territory's needs, and shall not be unduly restrictive." 5 GCA § 5265. Notably, there is no Guam law or regulation that prohibits price lists in this instance. Instead, GDOE allowed for even greater competition by permitting bidders flexibility in their proposals.

The policy and benefits behind extending federal GSA pricing to state and local governments must also be considered. The GSA program allows local governments to connect with pre-vetted companies that offer products at volume discount pricing. If the pricing offered by such vendors is competitive, then it satisfies the purposes of Guam's Procurement Law, particularly, "maximiz[ing] to the fullest extent practicable the purchasing value of public funds to the Territory." 5 GCA § 5001(b)(5).

DOE should be permitted to utilize whatever methods it determines will provide it with the best price.

3. § 5122 does Not Constrain GDOE from utilizing federal GSA schedules

The AG's Memorandum determined that because 5 GCA § 5122 mentions only GSA as being able to procure supplies from the United States, GDOE had no authority to accept pricing based on federal schedules. This is also in error.

Section 5122 applies to instances in which GSA procures supplies directly "from the United States." Section 5122 harkens back to a time when the federal government operated supply centers from which both it and the local government could obtain supplies. This process is now obsolete because those supply centers

are no longer in existence, and, GSA no longer purchases supplies directly from the federal government. When that process still existed, however, section 5122 dictated that GSA could purchase federal supplies as long as it was less than ten percent from other contractors.

Section 5122 does not apply where GSA or any other agency such as GDOE directly procures supplies from vendors such as Xerox. Section 5122 does not pertain to the federal schedules as described above. Under the federal program, local governments do not purchase "from the United States." The local government instead benefits from the federal government's pre-approved price schedule, but pays the vendor, not the federal government.

The AG's Memorandum references an antiquated provision of the Procurement Law that fails to apply both literally and in practice. GDOE was not purchasing supplies from the United States, and is not constrained from section 5122 from utilizing the federal price schedules.

4. DOE Has Not Satisfied the Test to Cancel a Bid

Given that section 5122 GDOEs not apply, GDOE's adoption of the AG's analysis is in error. In its Notice of Rejection of All Bids, GDOE accepted that "the use of the Federal General Services Agency pricing, along with its terms and conditions is prohibited under Guam Procurement Law and Regulations." Since that conclusion is in error, and GDOE stated no other grounds for rejecting Xerox's bid, the bid must be reinstated and accepted.

5. The OPA Has the Authority to Determine the Legality of the Contract

GDOE denied the protest for the sole reason that the AG would not sign the

contract. While it is correct that during the procurement review process, the AG must determine the correctness of the form and the legality of a government contract (5 GCA § 5150), the OPA, however, has the jurisdiction to review those decisions made by the AG: "The Public Auditor shall have the power to review and determine *de novo* any matter properly submitted to her or him." 2 GAR Div. 4 § 12103(a). Furthermore, "No prior determination shall be final or conclusive on the Public Auditor." 2 GAR Div. 4 § 12103(a). Therefore, if the OPA makes the determination that the GDOE IFB 004-2016 was correct in form and legal, that decision shall be conclusive on those issues. 2 GAR Div. 4 § 12111(c).

Relief Requested

Xerox asks that this appeal reverse GDOE's decision, that the OPA order GDOE to execute the bid offered by Xerox without further delay, that the OPA determine that GDOE IFB 004-2016 is legal, and for such other appropriate relief that may be available.

Declaration re Court Action

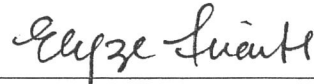
Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of Public Accountability within 24 hours if court action commences

regarding this Appeal or the underlying procurement action.

DATED: Hagåtña, GU, 10, August, 2016.

IRIARTE CAMACHO CALVO LAW
GROUP LLC



ELYZE M. IRIARTE

Attorneys for Appellant
XEROX CORPORATION

TRANSACTION REPORT

AUG/11/2016/THU 02:33 PM

BROADCAST

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