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RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 09.06.16
TIME: 4:40 AM PM BY: JW
FILE NO OPA-PA: 16-010

Attorneys for Appellant
XEROX CORPORATION

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

XEROX CORPORATION,

Appellant.

Docket No. OPA-PA-16-010

**APPELLANT XEROX CORPORATION'S
COMMENTS TO AGENCY REPORT;
HEARING REQUEST**

COMMENTS

I. Introduction

In response to Xerox Corporation's protest and on this appeal, DOE does not defend or justify the Attorney General's Memorandum prohibiting DOE from allowing bidders to offer pricing based on federal supply schedules. DOE simply contends that because the AG is required to approve the contract as to form and legality, and refuses to do so, DOE's hands are tied. However, the AG long ago waived the objections it raised post-award. DOE has always consulted the AG or its designee as required under Guam Procurement Law. Since the AG did not object to the language of the IFB prior to the publication, prior to the opening of bids, or even prior to award, and DOE and the bidders relied upon the advice given by the AG's designated agent, the AG cannot interject an objection after an award has been

issued. Furthermore, the AG's analysis is incorrect; DOE has the authority to accept federal pricing and is not prohibited by 5 GCA § 5122.

Xerox therefore asks that DOE's rejection of Xerox's bid be reversed and that the Contract be deemed legal.

II. Factual Background

On November 18, 2015, DOE published DOE IFB No. 004-2016, which sought to lease multifunction (copy, print, scan, and fax) devices. GDOE 0010. Before publishing the IFB, on November 16, 2015, DOE's Superintendent declared under penalty of perjury that DOE had complied and will comply with the requirement to obtain advice from an attorney designated by the Office of the Attorney General concerning the legality of all phases of the procurement. GDOE 0958. According to the Superintendent's Declaration re Compliance with 5 GCA § 5150,

I must be advised by legal counsel designated by the Attorney General (which may be an Assistant Attorney General or other legal counsel designated as Special Assistant Attorney General ('SAAG') under 5 GCA § 5150) during each and every phase of the procurement process, beginning with the planning stage and before any request for proposal or invitation to bid is issued or notice published

GDOE 0958. Furthermore, because the estimated cost of the procurement is \$500,000 or more, the Superintendent agreed that DOE could "not proceed with any phase of the procurement unless [the Superintendent has] been advised by an Assistant Attorney General or a SAAG to proceed." GDOE 0958. On November 9, 2015, before the IFB was published, DOE informed the AG's Office that DOE Attorney James Stake was its designated SAAG. GDOE 0959. Accordingly, it is presumed that the IFB had legal approval from the AG's Office at all stages of the

procurement, including over the language of the IFB itself.

The IFB stated that a successful bidder shall provide firm fixed pricing for the duration of the lease. GDOE 0017. The IFB contained a Bid Form for bidders to fill out and sign. GDOE 0040. The Bid Form required bidders to offer a specific price per month for six categories of machines (ranging from high volume to medium volume). GDOE 0040. The IFB Bid Form further stated "The Federal GSA contract pricing and its terms and conditions will be considered, if offered." GDOE 0040. During the question and answer phase, a potential bidder inquired about this statement on the Bid form, to which DOE responded that "**Federal GSA contract pricing consideration will remain.**" GDOE 0090 (emphasis in original). Again, according to the Superintendent's Declaration, it is presumed that DOE had the assistance of the AG's designee, Attorney Stake.

Xerox was the sole bidder and offered firm pricing for each of the six categories of machines. GDOE 0679, 0687. Its pricing was based on Xerox's federal contract, Contract GS-25F-0062L, approved by federal GSA. GDOE 0566-668. On May 2, 2016, DOE, presumably again with the AG's designee's approval, determined that Xerox's pricing was "fair and reasonable:" "The determination is based on the fact that the pricing per month has gone down and the pricing being offered is also Federal GSA pricing which is understood to be a lower pricing for organizations GDOE's size." GDOE 0686. On the machines alone, compared to the prior contract, DOE would save close to \$23,000 per month. GDOE 0686. DOE also concluded that "The pricing for IFB 004-2016 has more value with the lower pricing, more copiers, and more printing allowances of both black and color." GDOE 0686.

On January 25, 2016, Xerox received a Letter of Intent to Award, presumably again with the approval of the AG's designee. GDOE 0696. Xerox and DOE's Superintendent, Legal Counsel, Certifying Officer, and Supply Management Administrator, executed an Agreement for the services under IFB 004-2016. GDOE 0701-10. The Agreement was then submitted to the Office of the Attorney General for review as to form and legality.

On July 5, 2016, DOE issued a Notice of Rejection of All Bids and an Amended Bid Status. GDOE 0690-91. The Notice referenced a Memorandum from the Office of the Attorney General concluding that DOE is prohibited from procuring under the Federal GSA Supply Schedule, despite the immense value and savings DOE was able to procure. GDOE 0692-93. Even though the AG's designee was involved in all phases of this procurement, the Procurement Record contains no indication that the AG's office ever objected to the analysis of its designee, Attorney Stake, or interjected during any phase of this procurement process, particularly in the formation of the language which informed bidders that they were permitted to offer federal GSA pricing. Nonetheless, the AG's Office, at this late stage, has thrown out the entire solicitation without having ever warned DOE, wasting over ten months of due care and investment in this otherwise correctly conducted procurement process.

Xerox protested the AG's analysis, the Amended Bid Status and rejection of its bid. DOE denied the protest without defending the AG's Memorandum.

III. The Attorney General Has Waived Objections

The AG has not entered an appearance in this case to defend its unfair

Memorandum terminating DOE's procurement process after it had multiple opportunities to fix any alleged defects. However, the AG's lack of effort in this case is consistent with its pattern of failing to get involved in any portion of the procurement process prior to DOE investing numerous hours in developing specifications, answering bidders' questions, opening the bids, and analyzing responses.

By waiting until post-award to assert its objections, and by not defending its decision in this case, the AG has waived all objections. Under 5 GCA § 5150, the AG has a duty "to act as legal advisor during all phases of the solicitation." The AG may act through a designated SAAG, but that does not excuse the AG from its underlying and fundamental responsibility to oversee all aspects of a procurement exceeding \$500,000. DOE, which informed the AG that the procurement would exceed \$500,000, acted appropriately in relying upon the advice of the AG's designated SAAG. DOE's actions, as overseen by its SAAG, are therefore presumed to be legally acceptable to the AG's Office.

Moreover, third parties have relied on the AG-approved legality of DOE's procurement process. This is no different from a contractual situation in which an express agent contracts with a third party under the actual authority granted by a principal: here, by law, DOE published the IFB with the approval of the AG's designee. Under contractual law, a principal becomes bound to contracts entered into by its agents with the authorization of the principal. The same result must govern here, binding the AG to the analysis of its designee.

It is important to uphold the IFB and to hold AG's office to its decision to utilize

its designee throughout the procurement. Xerox and other bidders have relied upon the Government's broadcasting that this procurement process was wholly valid, and expended thousands of dollars to develop their bids. Even in this case, DOE does not challenge the validity of the IFB's language, meaning that it continues to believe the procurement was legal and legitimate. In doing so, DOE also relied upon its AG designee, Attorney Stake. The AG's office cannot revoke the authority granted to its SAAG and waste DOE's immense investment in this procurement process. If the AG's office had an objection, the proper time to voice that objection was back in November 2015 prior to publication, not eight months later and after a contract has been signed by the interested parties.

Xerox therefore requests that the OPA determine that the AG has waived its objections. The AG waived its opportunity to timely object to the language of the solicitation, and waives it again in this case by failing to enter an appearance and defend its analysis.

IV. The AG's Analysis is Incorrect

Even if the AG has not waived objections, its analysis is incorrect, and DOE's cancellation of bids is unsupported.

a. DOE Has the Autonomy and Authority to Accept Pricing and Terms Based on Federal Supply Schedules

The AG's Memorandum incorrectly concluded that DOE cannot accept pricing and terms based on federal supply schedules. The Procurement Law gives DOE autonomy over its procurement. 5 GCA § 5125. 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. As the purchasing agency, DOE 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."). With its autonomy, and given the pricing advantage that federal GSA pricing gives DOE and other local governmental bodies, DOE is fully authorized to avail of federal supply schedules by accepting federal contract pricing.

Furthermore, contrary to the AG's conclusion that DOE acted inadvertently, DOE, with the approval of its legal counsel designated by the AG's office, made clear in the IFB and in the Amendment that a bid based on federal schedules was acceptable and proper. Its use was intentional and legally approved, not "inadvertent" as the AG had concluded.

Using federal pricing provided DOE the best value, as DOE itself recognized. This is in compliance with the Guam Procurement Law's aim to utilize specifications which "seek to promote overall economy for the purposes intended and encourage competition in satisfying the Territory's needs." 5 GCA § 5265. In fact, allowing local governments to connect with pre-vetted companies that offer products at volume discount pricing also satisfies the purpose of the Guam Procurement Law to "maximize to the fullest extent practicable the purchasing value of public funds to the Territory." 5 GCA § 5001(b)(5).

DOE has the authority to utilize whatever methods will provide it with the best price, including federal supply schedules.

b. The Town House Decision is Inapplicable

The AG's analysis also misapplied the OPA's holding in *In the Appeal of Town House Dept. Stores, Inc. dba Island Business Sys. & Supplies*, OPA-PA-08-012. In that

case, GSA issued a Request for Quotations and required that the suppliers provide federal GSA pricing and terms and conditions.¹ The OPA held that generally "all Government of Guam contracts shall be awarded by competitive sealed bidding," making GSA's RFQ procedure non-compliant. OPA-PA-08-012 Decision at 7. The OPA found "that although GSA is authorized to purchase supplies, services, or equipment from the United States Government when the cost is less by 10% than from other contractors, GSA is still required to use a method of source selection authorized by Guam's Procurement Laws or Regulations, such as the competitive sealed bid procedure GSA subsequently agreed to use to solicit the copiers at issue in this matter." OPA-PA-08-012 Decision at 7.

In the present case, DOE used the competitive sealed bidding procedure in compliance with Guam law. As shown in the Procurement Record, a number of bidders preliminarily indicated interest in the solicitation and submitted questions on the various specifications. Just like Xerox, these other potential bidders had an opportunity to formulate a bid, which were sealed until opening. DOE has not varied from the approach required under Guam law or upheld by the OPA in *Town House Dept. Stores, Inc.*, OPA-PA-08-012.

Contrary to the OPA's conclusion, DOE did not develop an alternative method of source selection. Bidders were still required to submit competitive sealed bids. All bidders were free to bid based on any price they chose, or even based on what is provided under a federal supply schedule. DOE has not veered outside of the

¹ Before the OPA, GSA altered its position and stated it would not use the RFQ procedure but rather the competitive sealed bid method of source selection.

Guam Procurement Law in allowing bid to be based on any method, including the federal schedules.

c. The Guam Procurement Law Does Not Prohibit DOE from Using Federal Supply Schedules

The AG's Memorandum further incorrectly 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. That provision states that the "General Services Agency shall procure supplies from the United States when the cost to the General Services Agency is less by ten percent (10%) than from other contractors." 5 GCA § 5122. Section 5122 applies to instances in which GSA procures supplies directly "from the United States," which was not the case here. Section 5122 is an antiquated provision which applied back 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 current 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 by section 5122 from utilizing the federal price schedules.

V. Cancellation is Inappropriate

DOE claims that all bids were rejected because the solicitation did not provide for consideration of all factors of significance to the Territory. *See* 2 GAR Div. 4 § 3115(d)(2)(A)(iii). In the context of a procurement, "factors" reference "evaluation factors," that is, all considerations utilized by the agency to evaluate bids. For example, 2 GAR Div. 4 § 3109(c)(2)(B) discusses what must be included in an IFB, and specifies that such must include "the purchase description, evaluation factors, delivery or performance schedule, and such inspection and acceptance requirements as are not included in the purchase description." Further, section 3109(n)(4) reinforces that "factors" means "evaluation factors" in the determination of the lowest bidder: "Evaluation factors need not be precise predictors of actual future costs, but to the extent possible such evaluation factors shall: (a) be reasonable estimates based upon information the territory has available concerning future use; and (b) treat all bids equitably." *See also* 2 GAR Div. 4 § 3114(f)(2) (discussing evaluation factors in RFPs).

In this proceeding, DOE outlined the various factors it would consider, including the vendor's experience, established clientele, supply management, technical support, and most especially, price. *See* Agency Rep., Ex. 7. All evaluation factors of significance to the Territory were provided for and included in the IFB, a

fact undisputed by DOE. Therefore, DOE's rationale to reject bids is unsupported by the language of the Procurement Law.

One underlying goal of considering all factors of significance to the Territory would be to ensure that the Government has maximized the competitive field. While DOE claims that allowing federal pricing may have affected prospective offerors' bidding, there is absolutely no evidence to support that claim and the solicitation should not be cancelled based on unsupported speculation. All bidders were free to provide either federal pricing or pricing of their own creation for DOE's consideration. In fact, when prospective bidders first challenged DOE's ability to utilize federal pricing, their concern was not with being able to compete. GDOE 0090. Rather, their concern focused on the post-award situation of contractual terms and conditions approved under the federal program. DOE has not received any indication from bidders that the mere fact that federal pricing was allowed has prejudiced bidder's ability to submit a bid or be considered.

Contrary to what DOE argues in the Agency Report, the IFB in fact provided for consideration of all evaluation factors of significance to the Territory. Xerox met all of the published evaluation criteria. Having no other bases on which to reject Xerox's bid, DOE's rejection of Xerox's bid is unsupported.

VI. Conclusion

Xerox asks the OPA to reverse DOE's decision to reject Xerox's bid, and to determine that the contract for the multifunction devices is legal.

REQUEST FOR HEARING

Pursuant to 2 GAR § 12108(a), the undersigned party does hereby request a

hearing on the appeal stated above.

DATED: Hagåtña, GU, 6 September 2016.

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