



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

PROCUREMENT APPEALS

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

APPEAL NO: OPA-PA-10-010

DECISION

I. INTRODUCTION

This is the Decision of the Public Auditor for an appeal filed on November 26, 2010, by TOWN HOUSE DEPARTMENT STORES, INC., dba ISLAND BUSINESS SYSTEMS & SUPPLIES (Hereafter referred to as "IBSS") regarding the Department of Education's, Government of Guam's (Hereafter referred to as "DOE") denial of IBSS' September 2, 2010 protest concerning DOE's solicitation of Invitation for Bid No. IFB-006-2010 (Small Multi-Function Copier Machines) (Hereafter referred to as "IFB"). The Public Auditor holds that DOE must award the contract to comply with 5 G.C.A. §5211(g). Accordingly, IBSS's appeal is GRANTED.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties, pursuant to IBSS's January 21, 2011 Waiver of Hearing. Additionally, the Public Auditor takes judicial notice of the record in the files of *In the Appeal of Town House Department Stores, Inc., dba Island Business Systems & Supplies*, OPA-PA-08-003, (Procurement Appeals, Office of Public Accountability), and *In the*

1 *Appeal of Town House Department Stores, Inc., dba Island Business Systems & Supplies*, OPA-
2 PA-08-011 (Procurement Appeals, Office of Public Accountability), because the Public Auditor
3 finds the record and decisions in those cases relevant to the issues the Public Auditor must decide
4 here. Anthony R. Camacho, Esq. served as the Office of Public Accountability's Hearing
5 Officer for this appeal, and the Public Auditor makes the following findings of fact:
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7 1. On December 15, 2000, DOE¹, executed Document Services Agreement No. 7002364
8 (Hereafter "DSA") with XEROX CORPORATION (Hereafter referred to as "XEROX"). The
9 DSA required, in relevant part, XEROX to provide office document services, copying
10 equipment, and software to DOE in exchange for DOE's minimum monthly payment of
11 \$128,365, for the period January 1, 2001 to December 31, 2005. There is no record of DOE
12 soliciting the office document services and equipment required by the DSA, and there is no
13 record of the XEROX being awarded the DSA as the result of such a solicitation.²

14 2. On or about April 17, 2001, DOE and XEROX executed Amendment No. 1 to the
15 DSA which, in relevant part, added additional equipment to the DSA and extended the DSA's
16 term to April 1, 2001 to March 31, 2006 for the additional equipment.³

17 3. On December 16, 2004, DOE and XEROX executed Amendment No. 17 to the DSA
18 which, in relevant part, extended the entire agreement from January 1, 2005 to December 31,
19 2009.⁴

20 4. In 2005, IBSS began marketing their copier products and services to DOE. At that
21 time, IBSS understood that DOE had a long-standing relationship with a competitive vendor.⁵

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24 ¹ The Public Auditor shall use the term "DOE" to describe the purchasing agency in this matter. DOE was also
known as the "Guam Public School System" or "GPSS" during the period described here.

25 ² DSA No. 7002364, Page 1, DOE Procurement Record in OPA-PA-08-011, Tab 3.

26 ³ Amendment No. 1 to DSA, Page 1, DOE Procurement Record, Tab 3.

27 ⁴ Amendment No. 17 to DSA, Page 1, DOE Procurement Record, Tab 8.

28 ⁵ Letter from Roland R. Franquez, IBSS' General Manager, to Juan P. Flores DOE Superintendent dated July 14,
2005, Attachment 1, to IBSS Notice of Appeal in OPA-PA-08-003.

1 5. On July 12, 2005, Juan P. Flores, DOE Superintendent, informed IBSS that DOE
2 would issue a solicitation for copier services before the end of FY2005.⁶

3 6. Sometime between September 20, 2005 and November, 18, 2005, Juan P. Flores,
4 DOE Superintendent, informed Roland R. Franquez, IBSS' General Manager that DOE extended
5 the expired DSA for a couple of months to allow FY2006 funds to be transferred to DOE. IBSS
6 responded by requesting DOE to disclose when it would issue the copier solicitation.⁷

7 7. On February 15, 2007, IBSS informed DOE that, despite DOE' failure to comply with
8 IBSS' repeated demands to provide a copy of the DSA or the bid documents for that agreement,
9 that IBSS knew that DOE had not put the copier contract out for bid in many years, that DOE
10 issued Purchase Order No. (PO) 200500350 in December 2004 which extended the DSA from
11 October 1, 2004 to September 30, 2005, that the PO was sole sourced, and that DOE issued PO
12 200601065 extending the DSA from January 1, 2006 through June 30, 2006.⁸ IBSS also made a
13 formal demand that DOE issue a solicitation for a new copier contractor.⁹

14 8. On October 10, 2007, IBSS informed Claudia S. Acfalle, Chief Procurement Officer,
15 General Services Agency (GSA), that IBSS believed that procurement of the DSA may have
16 been organized through GSA through the Federal GSA Supply Schedule.¹⁰ IBSS also stated that
17 it had no knowledge how DOE continued to procure copier services and products from XEROX
18 after June 30, 2006 due to DOE's failure to respond to IBSS requests to review the DSA and
19 IBSS made a formal demand for a copy of the DSA's procurement record.¹¹

20 _____
21 ⁶ Letter from Roland R. Franquez, IBSS' General Manager, to Juan P. Flores DOE Superintendent dated September
22 20, 2005, Attachment 2 to IBSS' Notice of Appeal in OPA-PA-08-003.

23 ⁷ Letter from Roland R. Franquez to Juan P. Flores dated November 18, 2005, Attachment 3 to IBSS' Notice of
24 Appeal in OPA-PA-08-003.

25 ⁸ Letter from John Thos. Brown, Esq., General counsel for Jones & Guerrero Co., Inc. (Guam, USA) to Luis S.N.
26 Reyes dated February 15, 2007, Attachment 4 to IBSS' Notice of Appeal in OPA-PA-08-003.

27 ⁹ Id.

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

¹¹ Id.

1 9. On October 15, 2007, GSA responded to IBSS' October 10, 2007 request to review
2 the DSA's procurement file by advising IBSS that GSA would forward IBSS' request to DOE's
3 legal counsel.¹²

4 10. After getting no response, IBSS sent DOE's Legal Counsel a letter on October 26,
5 2007 requesting that DOE respond to the concerns and requests IBSS raised in their October 10,
6 2007 letter to GSA.¹³

7 11. On or about December 4, 2007, IBSS filed a protest with DOE alleging improper
8 procurement of copier machine products and related services by DOE and requesting that DOE'
9 award of the DSA to XEROX be terminated, and that the DSA be declared null and void.¹⁴

10 12. On or about January 10, 2008, IBSS requested DOE to provide them a final decision
11 on their December 4, 2007 protest.¹⁵

12 13. On or about January 31, 2008, DOE issued PO 200800507 to XEROX for the
13 amount of \$399,111 to cover various DSA costs for the period January 1, 2008 thru March 31,
14 2008.¹⁶

15 14. Approximately sixty-five (65) days after filing their protest, on or about February 7,
16 2008, IBSS filed their appeal in OPA-PA-08-003 stating that it was appealing DOE's failure to
17 respond to IBSS' protest.¹⁷

18 15. On July 11, 2008, the Public Auditor decided OPA-PA-08-003 by finding
19 she did not have jurisdiction to hear the appeal due to DOE' failure to issue a decision on IBSS'
20 protest. The Public Auditor held that DOE's failure to decide the protest violated 5 G.C.A.

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

24 ¹³ Ibid. Letter from John Thos. Brown, Esq., General Counsel for Jones & Guerrero Co., Inc. (Guam, USA) to
25 Fred Nishihira, Esq., DOE Legal Counsel dated October 26, 2007, Attachment 7, Appeal No. OPA-PA-08-003.

26 ¹⁴ Id. IBSS Notice of Protest, dated December 4, 2007, Attachment 8, Appeal No. OPA-PA-08-003.

27 ¹⁵ Id. IBSS Request for Final Decision on Notice of Protest dated January 10, 2008, Attachment 9, Appeal No.
OPA-PA-08-003.

28 ¹⁶ Purchase Order No. 200800507, DOE Procurement Record, Tab 14, in Appeal No. OPA-PA-08-003.

¹⁷ IBSS' Notice of Appeal, Pages 1-2, in Appeal No. OPA-PA-08-003.

1 §5425(c) and (d) and 2 G.A.R., Div. 4, Chap. 9, §9101(g), and the failure to issue the decision
2 was a bad faith act that violated 5 G.C.A. §5003 because it undermined the integrity of the
3 procurement process. The Public Auditor also ordered DOE's Superintendent to produce the
4 decision no later than seven (7) days after the decision date.

5 16. On July 22, 2008 DOE issued its decision denying IBSS' protest because the protest
6 was filed in the third year of a five year contract, well beyond the fourteen (14) working days
7 which Guam Procurement Law and DOE' Procurement Rules and Regulations permit protests to
8 be filed.¹⁸

9 17. On July 24, 2008, IBSS filed their appeal in OPA-PA-08-011 concerning DOE
10 denying their December 4, 2007 procurement protest.

11 18. On November 28, 2008, the Public Auditor issued her Decision in OPA-PA-08-011
12 and ruled, in relevant part, that: (1) DOE, through its inaction, improperly denied IBSS' right to
13 inspect and copy the DSA procurement file in violation of 5 G.C.A. §10102(d) §10103(b),
14 §5249, and §5251, and Chapter III, §3.27.3 and §3.27.5, DOE Procurement Regulations; (2)
15 DOE's failure to inform IBSS of DOE's extension of the DSA to December 31, 2009, and
16 DOE's statements to IBSS that DOE would solicit copier services in 2005 or 2006 were
17 misleading, and DOE's failure to solicit for the copier services undermines the integrity of the
18 procurement process and is a bad faith act that violates 5 G.C.A. §5003; and (3) DOE
19 improperly sole sourced the DSA to December 31, 2009, by executing DSA Amendment 17 in
20 violation of 5 G.C.A. §5237(b)(2).¹⁹ Additionally, the Public Auditor terminated the DSA as of
21 November 28, 2008.²⁰

22 19. DOE did not appeal the Public Auditor's Decision in OPA-PA-08-011, however,
23 DOE stated that if XEROX appealed the decision, DOE would continue the paying for the copier
24 services XEROX was providing under the DSA, and that if XEROX did not appeal the decision,
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27 ¹⁸ DOE' Response to Protest, dated July 22, 2008, Attachment 1, IBSS' Notice of Appeal No. OPA-PA-08-011.

28 ¹⁹ See Page 15, Decision dated November 28, 2008, Appeal No. OPA-PA-08-011.

²⁰ Id. Page 16.

1 DOE would pay XEROX for copying services on a month to month basis until DOE issued a
2 new copier services solicitation.²¹

3 20. On December 12, 2008, Xerox filed an appeal of the Public Auditor's Decision in
4 OPA-PA-08-011 in *In the Appeal of Town House Department Stores, Inc., dba Island Business*
5 *Systems & Supplies by Xerox Corporation*, SP0240-08 (Superior Court of Guam).

6 21. On January 21, 2010, SP0240-08 was dismissed with prejudice by stipulation of the
7 parties.²²

8 22. On May 3, 2010, DOE issued the IFB.²³

9 23. The IFB required prospective bidders to submit their bids no later than 10:00 a.m. on
10 May 21, 2010.²⁴

11 24. The IFB stated that in consideration to the expense of the Government in opening,
12 tabulating, and evaluating the bids, and other considerations, all bids submitted in response to the
13 IFB would remain firm and irrevocable within ninety (90) calendar days from the date of
14 opening to supply any or all the items which prices are quoted.²⁵

15 25. The IFB stated that DOE's Supply Management Administrator shall have the
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18 ²¹ Letter dated December 11, 2008 from Dr. Nerissa Bretania-Shafer to Margaret
19 Tyquiengco, General Manager, XEROX, attached to IBSS' Notice of Dismissal of
20 Complaint and Appeal to Superior Court filed on January 22, 2010 in OPA-PA-
21 08-011.

22 ²² Stipulation and Order for Dismissal with Prejudice filed on January 21,
23 2010 in SP0240-08, attached to IBSS' Notice of Dismissal of Complaint and
24 Appeal to Superior Court filed on January 22, 2010 in OPA-PA-08-011.

25 ²³ Page 1, Bid Invitation and Award, IFB, Exhibit 1, Procurement Record filed
26 on December 10, 2010 in Appeal No. OPA-PA-10-010.

27 ²⁴ Id.

28 ²⁵ Id.

1 authority to award, cancel, or reject bids, in whole or in part for any one or more items if he
2 determines it is in the public interest.²⁶

3
4 26. On May 17, 2010, DOE issued Clarification No. 1 for the IFB, which clarified
5 specifications concerning paper weights and user account setup and warranty requirements.²⁷

6 27. On May 21, 2010, IBSS, and Interested Party XEROX submitted bids in response to
7 the IFB.²⁸

8 28. XEROX bid a total price of \$244,776 for the 94 small multifunction copiers required
9 by the IFB, and a total price of \$7,737 for the one-hundred sets of software required by the
10 IFB.²⁹

11
12 29. IBSS bid a total price of \$228,984 for the 94 small multifunction copiers required by
13 the IFB, and a total price of \$8,900 for the one-hundred sets of software required by the IFB.³⁰

14 30. IBSS submitted the lowest bid for the 94 small multifunction copiers required by the
15 IFB, and XEROX submitted the lowest bid for the one-hundred sets of software required by the
16 IFB.³¹

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18 31. Despite receiving the bids and creating the bid abstract indicating the lowest bids for
19 the items being solicited, DOE took no further action on the IFB after opening the bids on May
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22 ²⁶ Paragraph 22, Award, Cancellation, & Rejection, Page 13, General Terms and
23 Conditions, IFB, Exhibit 1, Procurement Record filed on December 10, 2010.

24 ²⁷ Clarification No. 1, IFB, Id.

25 ²⁸ Bidders Register, Exhibit 2, Procurement Record filed on December 10, 2010.

26 ²⁹ XEROX Bid, Bid Specifications, Exhibit 3, Procurement Record filed on
27 December 10, 2010.

28 ³⁰ IBSS Bid, Bid Specifications, Id.

³¹ Abstract of Bids, Exhibit 4, Procurement Record filed on December 10, 2010.

1 21, 2010. However, DOE did issue a Declaration of Emergency for Document Management
2 Services seeking the Governor of Guam's permission to continue emergency procurement of
3 Document Management Services for June 1-30, 2010 and stating that the DOE issued the IFB to
4 accommodate a larger Document Management Services solicitation that DOE had submitted to
5 the Attorney General's Office for review.³²

7 32. On September 2, 2010, IBSS filed a protest alleging that DOE could no longer cancel
8 the IFB due to DOE opening the bids on May 21, 2010; that DOE had not awarded the contract
9 for the IFB; that DOE's failure to conduct the solicitation and award the contract was an act of
10 bad faith; that lack of available funds was not a reason justifying the delay in awarding the
11 contract for the IFB due to DOE's monthly expenditure of funds for its emergency procurement
12 of Document Management Services; and that XEROX was improperly interfering with DOE's
13 award of the IFB by conspiring with DOE to avoid awarding the contract for the IFB to IBSS.³³

16 33. On October 18, 2010, IBSS filed its Petition to Compel Decision and Enforce
17 Automatic Stay in OPA-PA-10-006 as a result of DOE's failure to respond to IBSS's September
18 2, 2010 protest.

19 34. On November 8, 2010, the Public Auditor issued her Order dismissing OPA-PA-10-
20 006 finding that she did not have jurisdiction to hear said appeal because without DOE's
21 decision on IBSS' September 2, 2010 protest, the matter was not properly before the Public
22 Auditor. However, the Public Auditor did find that DOE's failure to decide the protest was again

24 ³² Declaration for Emergency for Document Management Services dated May 21,
25 2010, Exhibit 6, Notice of Appeal from Decision on Protest filed on November
26 26, 2010.

27 ³³ IBSS' Procurement Protest dated September 2, 2010, Exhibit 4, Procurement
28 Record filed on December 10, 2010.

1 an act of bad faith in violation of 5 G.C.A. §5003 and the Public Auditor ordered DOE to issue a
2 decision on IBSS' protest promptly and expeditiously.³⁴

3
4 35. On November 23, 2010, DOE issued its decision denying IBSS' September 2, 2010
5 protest on the following grounds: (1) Funding was not certified or reserved prior to processing
6 the IFB; (2) Fiscal 2010 funds have lapsed; (3) Paragraph 7, titled "All or None Bids" of the
7 IFB General terms and conditions should have been marked off; (4) Only the DOE facilities
8 and Maintenance Division can make outright purchases; (5) The bids were firm and irrevocable
9 for only ninety (90) days; (6) There was a duplication of purchases between the IFB and DOE-
10 IFB-022-2010; and (7) DOE was not responsible for securing information not identified in the
11 bid.³⁵

12
13 35. On November 26, 2010, three (3) days after DOE denied their September 2, 2010
14 Protest, IBSS filed this appeal.³⁶

15 16 III. ANALYSIS

17 A. DOE's Motion to Lift the Automatic Stay to Proceed with an Award of Item No. 18 1 in the IFB is Untimely.

19 As a preliminary matter, the Public Auditor must decide DOE's January 5, 2011 Motion
20 to Lift the Automatic Stay. DOE moves the Public Auditor for a limited lifting of the automatic
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22 ³⁴ Order Dismissing Appeal and Compelling Production of Protest Decision filed
23 on November 8, 2010 in OPA-PA-10-006.

24 ³⁵ Letter dated November 23, 2010 from DOE Acting Supply Management
25 Administrator Albert G. Garcia to IBSS General Manager Roland R. Franquez,
26 Exhibit 5, Procurement Record filed on December 10, 2010.

27 ³⁶ Notice of Appeal, OPA-PA-10-010, from Decision on Protest filed on November
28 26, 2010.

1 stay so that DOE can award the IFB. Generally, when a protest has been filed within fourteen
2 (14) days and before an award has been made, the head of a purchasing agency shall make no
3 award of the contract prior to final resolution of such protest and any such further action is void.
4 5 G.C.A. §5425(g) and Chapter IX, §9.2.5., DOE Procurement Regulations.³⁷ Under the
5 aforementioned statutory and regulatory requirements, the Public Auditor must consider two (2)
6 issues regarding the timing of the filing of the protest, the first being its timeliness in relation to
7 the underlying facts, the second being whether it was filed before the award was made. *Guam*
8 *Imaging Consultants, Inc. et. al., v. Guam Memorial Hospital Authority, et. al.*, 2004 Guam 15,
9 ¶24, (Supreme Court of Guam). As to the first issue, the Public Auditor must decide, here, IBSS
10 filed its protest approximately three (3) months, and twelve (12) days after it submitted its bid in
11 response to the IFB on May 21, 2010. A protest must be submitted in writing within fourteen
12 (14) days after an aggrieved person knows or should know of the facts giving rise thereto. 5
13 G.C.A. §5425(a) and Chapter IX, §9.2.3.1., DOE Procurement Regulations.³⁸ Despite this long
14 period of time, IBSS could not know whether DOE would finally act on the IFB because there is
15 no record of DOE awarding the contract for the IFB, canceling the IFB, or rejecting the bids
16 submitted in response to the IFB. The Public Auditor finds that IBSS' September 2, 2010 protest
17 was timely and the three (3) month and twelve (12) day period between the opening of the bids
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22 ³⁷ DOE is authorized to promulgate its own procurement regulations. 5 G.C.A.
23 §5125, §5130(a) and §5131.

24 ³⁸ The Public Auditor has previously determined that the conflict in the
25 language "fourteen days" in 5 G.C.A. §5425(a) and "fourteen working days" in
26 Chapter IX, §9.2.3.1, is resolved in the favor of the use of the statutory
27 language of "fourteen days" as set forth in 5 G.C.A. §5425(a). See Line 20,
28 Page 6, Decision in OPA-PA-08-011 dated November 28, 2008.

1 on May 21, 2010 and the filing of the protest on September 2, 2010 was reasonable because
2 DOE's lack of action on the IFB after bid opening did not signal DOE's cancellation of the IFB,
3 or the rejection of the bids submitted in response to the IFB, nor did it signal the award of the
4 contract of the IFB to another bidder. As to the second issue, the Public Auditor must decide
5 whether an award of the contract for the IFB has been made. DOE readily admits that the
6 current status of the IFB is that it is post bid opening and **pre-award** (Bold Emphasis Added).³⁹

7
8 Thus, the Public Auditor finds that no award has been made concerning the IFB. When a protest
9 is timely and made pre-award, the automatic stay is triggered. *Guam Imaging Consultants, Inc.*
10 *et. al., v. Guam Memorial Hospital Authority, et. al.*, 2004 Guam 15, ¶40, (Supreme Court of
11 Guam). Here, as stated above, IBSS' September 2, 2010 protest was timely and made pre-award,
12 thus, IBSS' protest triggered the automatic stay provisions of 5 G.C.A. §5425(g) and Chapter IX,
13 §9.2.5., DOE Procurement Regulations.

14
15 DOE may not obtain relief from the automatic stay until this appeal is resolved. As
16 stated above, when a timely procurement protest is filed pre-award, a purchasing agency shall
17 make no award of the contract prior to final resolution of such protest and any such further action
18 is void. 5 G.C.A. §5425(g) and Chapter IX, §9.2.5., DOE Procurement Regulations. Here, as set
19 forth above, DOE denied IBSS' protest on November 23, 2010, however, this denial was not a
20 final resolution of IBSS' protest as IBSS appealed DOE's denial of the protest to the Public
21 Auditor. Generally, a protestor may appeal a purchasing agency's decision denying the protest
22 to the Public Auditor within fifteen (15) days after receipt by the protestant of the purchasing
23 agency's notice of decision. 5 GCA §5425(e). As stated above, DOE denied IBSS' protest on
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27 ³⁹ DOE's Reply to XEROX's Opposition to DOE's Motion to Lift Stay filed on
28 January 18, 2011.

1 November 23, 2010 and IBSS appealed to the Public Auditor three (3) days later on November
2 26, 2010. Thus, the Public Auditor finds that DOE's Motion to Lift the Automatic Stay is
3 untimely, because the motion was filed on January 5, 2011 and on that date, no final resolution
4 of this appeal was made. Therefore, DOE's aforementioned motion to lift the automatic stay is
5 hereby DENIED.
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7 **B. There Is No Merit to IBSS' Motion to Dismiss XEROX's Appearance.**

8 As a second preliminary matter, the Public Auditor must consider IBSS' January 21,
9 2011 Motion to dismiss XEROX's appearance wherein IBSS argues that XEROX is not an
10 interested party in these proceedings. Comments on the Agency Report in a procurement appeal
11 by an appellant or an interested party, including testimony and evidence by any competing
12 bidder, offeror, or contractor of the appellant, shall be filed with the Public Auditor within ten
13 (10) days after the Public Auditor's receipt of the Agency Report. 2 G.A.R., Div. 4, Chap. 12,
14 §12104(c)(4). The term "interested party" as used in the aforementioned regulation, means an
15 actual or prospective bidder, offeror, or contractor who appears to have a substantial and
16 reasonable prospect of receiving an award if the appeal is denied. 2 G.A.R., Div. 4, Chap. 12,
17 §12102(b). Further, since Guam's procurement law mandates good faith and an objective
18 evaluation of bids, the Court must allow firms who have submitted bids to be heard in order to
19 protect the integrity of the procurement process. *ITI Power Savers, Inc. v. Guam Waterworks*
20 *Authority*, CV2120-03, Decision and Order dated July 26, 2004, Line 20, page 4 (Superior Court
21 of Guam). Here, as set forth above, XEROX is an actual bidder for the IFB and XEROX has a
22 substantial and reasonable prospect of receiving an award if the appeal is denied because
23 XEROX is the only other bidder who submitted a bid in response to the IFB. Thus, XEROX
24 shall be heard as an interested party in this matter and IBSS' Motion to Dismiss XEROX's
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1 Appearance is hereby DENIED.

2 **C. DOE Was Not Excused From Awarding the Contract for the IFB or Rejecting the**
3 **Bids Submitted in Response to the IFB**

4 IBSS's central argument in its protest in this appeal is that DOE's failure to continue with the
5 solicitation of the IFB after it opened the bids on May 21, 2010 violates Guam's Procurement
6 law. Generally, in Competitive Sealed Bidding, commonly known as an Invitation for Bids, after
7 bids are received and opened, the purchasing agency shall unconditionally accept the bids and
8 the bids shall be evaluated based on the requirements set forth in the Invitation for Bids. 5
9 G.C.A. §5211(e). Further, the contract is to be awarded with **reasonable promptness** by written
10 notice to the lowest responsible and responsive bidder whose bid meets the requirements and
11 criteria set forth in the Invitation for Bids (Bold Emphasis Added). 5 G.C.A. §5211(g) and
12 Chapter III, §3.9.14.1., DOE Procurement Regulations. Here, as evidenced by the three (3)
13 month and twelve (12) day period between DOE's opening of the bids submitted in response to
14 the IFB on May 21, 2010 and IBSS' September 2, 2010 protest, DOE failed to award the contract
15 for the IFB with reasonable promptness. Thus, the Public Auditor finds that DOE violated 5
16 G.C.A. §5211(g) by failing to award the contract for the IFB with reasonable promptness after it
17 opened and evaluated the bids on May 21, 2010, and again another act of bad faith.

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21 DOE could have rejected all the bids but failed to do so. Generally, it is DOE's policy
22 that solicitations should only be issued when there is a valid procurement need. Chapter III,
23 §3.15.2, DOE Procurement Regulations. Further, due to the fact that the government expends its
24 time and funds preparing and distributing solicitations and businesses incur expenses in
25 examining and responding to solicitations, therefore, although issuance of a solicitation does not
26 compel award of a contract, a solicitation is to be cancelled only when there are cogent and
27 compelling reasons to believe that the cancellation of the solicitation is in DOE's best interests.
28

1 Id. However, DOE may only cancel an Invitation to Bid prior to bid opening. Chapter III,
2 §3.15.4.1.2, DOE Procurement Regulations. After opening, but prior to award, DOE may reject
3 all bids in whole or in part when the Superintendent determines in writing that such action is in
4 DOE's best interest for reasons including, but not limited to, in relevant part: (1) Ambiguous or
5 otherwise inadequate specifications were part of the solicitation; (2) The Solicitation did not
6 provide for consideration of all factors of significance to the Department; (3) Prices exceed
7 available funds and it would not be appropriate to adjust quantities to come within available
8 funds; and (4) All otherwise acceptable bids received are at clearly unreasonable prices.

9
10 Chapter III, §3.15.4.2.1., DOE Procurement Regulations. Here, DOE was limited to rejecting the
11 bids in whole or in part after it opened the bids submitted in response to the IFB on May 21,
12 2010. To reject the bids in accordance with its procurement regulations, DOE's Superintendent
13 must submit a written determination that such action was in DOE's best interests as set forth
14 above, and DOE would have to issue a notice of rejection to IBSS and XEROX. Chapter III,
15 §3.15.4.2.2, DOE Procurement Regulations. Here, the record is devoid of any written
16 determination or notice of rejection of the bids. Thus, the Public Auditor finds that DOE did not
17 reject the bids submitted in response to the IFB.
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21 DOE sought to justify its failure to award the contract for the IFB by arguing that: (1)
22 Funding was not certified or reserved prior to processing the IFB; (2) Fiscal 2010 funds have
23 lapsed; (3) Paragraph 7, titled "All or None Bids" of the IFB General terms and conditions
24 should have been marked off; (4) Only the DOE facilities and Maintenance Division can make
25 outright purchases; (5) The bids were firm and irrevocable for only ninety (90) days; (6)
26 There was a duplication of purchases between the IFB and DOE-IFB-022-2010; and (7) DOE
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1 was not responsible for securing information not identified in the bid.⁴⁰ XEROX also argued
2 that DOE's funding arguments had merit.⁴¹ DOE's and XEROX's arguments concerning
3 funding not being certified and the lapse of the Fiscal 2010 funds are now moot as a result of
4 DOE's recent claims that it has identified funding and wants to proceed with award of the
5 contract for the IFB.⁴² None of DOE's other arguments have merit. As set forth above, both
6 IBSS and XEROX submitted bids for all the supplies solicited by the IFB making DOE's failure
7 to mark Paragraph 7 of the IFB's General Terms and Conditions moot. The statement that only
8 DOE's Facilities and Maintenance Division can make purchases is not supported by applicable
9 Guam law or regulations. DOE's Supply Management Administrator issued the IFB for and on
10 behalf of DOE's Superintendent.⁴³ DOE's Superintendent is DOE's Chief Executive Officer of
11 DOE's internal operating organization and shall be responsible for the administration of the
12 academic and service activities thereof, and shall administer DOE's day to day activities and
13 shall serve as DOE's approving authority for the expenditure of funds. 17 G.C.A. §3103(1) and
14 (4). Thus, the Public Auditor finds that DOE's Superintendent had the broad authority to
15 authorize the purchases of the equipment and supplies the IFB was soliciting for. Although the
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21 ⁴⁰ Letter dated November 23, 2010 from DOE Acting Supply Management
22 Administrator Albert G. Garcia to IBSS General Manager Roland R. Franquez,
23 Exhibit 5, Procurement Record filed on December 10, 2010.

24 ⁴¹ XEROX's Comments filed on December 23, 2010, Paragraph III, pages 2-4.

25 ⁴² Line 23, Page 1, DOE's Motion to Lift the Automatic Stay to Proceed with
26 Award filed on January 5, 2011.

27 ⁴³ See Invitation for Bid, for the IFB, as published on page 4, Friday, April
28 30, 2010 edition of the *Marianas Variety*, Guam Edition, Exhibit 1,
Procurement Record filed on December 10, 2010.

1 bids were firm and irrevocable for only ninety (90) days, the bidders could have sought
2 modification of their bids, if required, due to DOE's long period of inaction after DOE opened
3 the bids on May 21, 2010. Chapter III, §3.9.11.2, DOE Procurement Regulations. However, this
4 issue is not relevant here as there is no evidence in the procurement record that any bidder sought
5 to modify their bids as a result of the expiration of the ninety (90) day period. Likewise, the
6 argument that DOE was not responsible for securing information not found in the IFB is not
7 relevant to any issues in this appeal. The Public Auditor will discuss DOE's justification that the
8 IFB duplicated procurement sought in DOE-IFB-022-2010 below. Thus, the Public Auditor
9 finds that DOE's aforementioned justifications do not excuse DOE from the statutory
10 requirement that it award the contract for the IFB with reasonable promptness as set forth above,
11 nor can they be used to justify rejecting the bids pursuant Chapter III, §3.15.4.2.1., DOE
12 Procurement Regulations, because they are not moot or lack merit as set forth above.
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17 **D. There Is No Merit to DOE's Claim that the IFB Duplicates the Equipment and**
18 **Services DOE is Soliciting in DOE-IFB-022-2010.**

19 As stated above, DOE attempts to justify its denial of IBSS' September 2, 2010 protest
20 by arguing that there was duplication between the IFB and DOE-IFB-022-2010. However, DOE
21 did not provide any documentation to support this argument. The Public Auditor has a copy of
22 DOE-IFB-022-2010 (Document Management Services) in the record of *In the Appeal of Town*
23 *House Department Stores, Inc., dba Island Business Systems & Supplies, OPA-PA-11-002*
24 (Office of Public Accountability). Generally, in reaching a decision on a procurement appeal,
25 the Public Auditor may take official notice of any fact that may be judicially noticed by the
26 courts of Guam. 2 G.A.R., Div. 4, Chap. 12, §12108(h). Judicial notice for Guam courts is also
27 called knowledge of the court. 6 G.C.A. §2106. Guam courts may take judicial notice of facts
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1 that are not subject to reasonable dispute because such facts are either generally known within
2 the jurisdiction of the court or capable of accurate and ready determination by resort to sources
3 whose accuracy cannot reasonably be questioned. Rule 201(b), Guam Rules of Evidence. The
4 Public Auditor finds that she can take official notice of the copy of DOE-IFB-022-2010
5 submitted in OPA-PA-11-002. The record in OPA-PA-11-002 is part of the knowledge of the
6 Public Auditor in this matter and said record is not subject to reasonable dispute or question by
7 the parties. As stated above, the IFB solicited for the purchase of ninety-four (94) small
8 multifunction copiers and the one-hundred (100) sets of software. In DOE-IFB-022-2010, DOE
9 was soliciting for a sixty (60) month lease of document management equipment and software and
10 related supply and support services.⁴⁴ There are some similarities between the types of copying
11 equipment in the IFB and DOE-IFB-022-2010. Specifically, Item 1 of the IFB is similar to Item
12 5 of DOE-IFB-022-2010, in that both solicit for 94 multifunction copiers, however there are
13 slight variations between the specifications for said items. Further, Item 2 of the IFB is similar
14 to Item 6 of DOE-IFB-022-2010 because both solicit for one-hundred sets of software for
15 working with scanned images, and for performing optical character recognition and for creating
16 PDF files. However, the main difference is that the DOE was soliciting to purchase the
17 equipment in the IFB's Items 1 and 2 and DOE was soliciting to lease Items 5 and 6 of DOE-
18 IFB-022-2010. Further, as set forth above, DOE issued the IFB to accommodate a larger
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25 ⁴⁴ Description of Equipment and Software Plan, Bid for Document Management
26 Hardware (Multifunction Copiers/Printers/Scanners/Fax Machines) and Software,
27 DOE-IFB-022-2010, Exhibit 2, Procurement Record filed in OPA-PA-11-002 on
28 February 8, 2011.

1 Document Management Services solicitation set forth in DOE-IFB-022-2010.⁴⁵ Thus, although
2 some of the equipment is similar, the Public Auditor accepts DOE's explanation of the IFB as an
3 accommodation to the equipment solicited in DOE-IFB-022-2010 and finds that the IFB does not
4 needlessly or improperly duplicate the equipment or services solicited in DOE-IFB-022-2010.
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6 **E. DOE Must Award the Contract for the IFB.**

7 DOE's must award the contract for the IFB. If prior to an award, it is determined that a
8 solicitation or proposed award is in violation of law, the solicitation or proposed award shall be
9 cancelled or revised to comply with the law. 5 G.C.A. §5451 and Chapter IX, §9.6, DOE
10 Procurement Regulations. Here, as set forth above, the Public Auditor finds that DOE violated 5
11 G.C.A. §5211(g) by failing to award the contract for the IFB with reasonable promptness after it
12 opened and evaluated the bids on May 21, 2010. Also, as set forth above, DOE now states that it
13 has identified funding for the contract and desires to proceed with award of the contract. Further,
14 as set forth above, the arguments DOE used to deny IBSS' protest are either moot now that DOE
15 has identified a source of funding for the IFB's contract, or they lack merit and these arguments
16 are insufficient to justify rejection of the bids pursuant to Chapter III, §3.15.4.2.1., DOE
17 Procurement Regulations. Thus, the Public Auditor finds that DOE must award the IFB to
18 comply with 5 G.C.A. §5211(g).

19 The Public Auditor does not agree with IBSS' argument that DOE should immediately
20 award the contract to IBSS because IBSS submitted the lowest bid for Item No. 1. Nor does the
21 Public Auditor agree with XEROX's arguments that IBSS' bid should be disqualified because
22 their HP LaserJet M3035xs Multifunction Printer does not enable users to track prints, copies,
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26 ⁴⁵ Declaration for Emergency for Document Management Services dated May 21,
27 2010, Exhibit 6, Notice of Appeal from Decision on Protest filed on November
28 26, 2010.

1 faxes, and scans in a Mac environment.⁴⁶ Generally, bids shall be evaluated based on the
2 requirements set forth in the invitation for bids and DOE must first conduct an acceptability
3 evaluation using the evaluation criteria set forth in the IFB. 5 G.C.A. §5211(e) and Chapter III,
4 §3.9.14.3. The acceptability evaluation is not conducted for the purpose of determining whether
5 one bidder's item is superior to another but only to determine that a bidder's offering is
6 acceptable as set forth in the invitation for bids, and any bidder's offering which does not meet
7 acceptability requirements shall be rejected as non-responsive. Chapter III, §3.9.14.3, DOE
8 Procurement Regulations. After DOE's conducts its acceptability evaluation, the contract shall
9 be awarded to the lowest responsible bidder whose bid meets the requirements and criteria set
10 forth in the invitation to bids. 5 G.C.A. §5211(g) and Chapter III, §3.9.14.4, DOE Procurement
11 Regulations. Here, as set forth above, other than opening the bids and recording them on the
12 Bid Abstract on May 21, 2010, DOE has not conducted an acceptability evaluation to determine
13 whether IBSS or XEROX's product offerings are acceptable and comply with the evaluation
14 criteria set forth in the IFB. This is a crucial step in an invitation for bids because DOE must
15 first determine whether the bidder's offerings are acceptable in order to conclude that the bids
16 are responsive. Only after the acceptability evaluation is complete can DOE award the contract
17 to the lowest bidder whose product or service offerings have been deemed acceptable. Thus, the
18 Public Auditor finds that DOE must conduct an acceptability evaluation as required by Chapter
19 III, §3.9.14.3, DOE Procurement Regulations before awarding the contract for the IFB.
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27 ⁴⁶ Page 2, XEROX's Comments filed on December 23, 2010, and Page 2, XEROX's
28 Opposition to DOE's Motion to Lift the Automatic Stay to Proceed with Award
filed on January 7, 2011.

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IV. CONCLUSION

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

1. DOE's January 5, 2011 Motion to Lift the Automatic Stay is untimely, because the motion was filed on January 5, 2011 and on that date, no final resolution of this appeal was made and said motion is hereby DENIED.

2. IBSS' January 21, 2011 Motion to Dismiss XEROX's Appearance has no merit, said Motion is hereby DENIED, and XEROX shall be heard as an interested party in this matter.

3. DOE violated 5 G.C.A. §5211(g) by failing to award the contract for the IFB with reasonable promptness after it opened and evaluated the bids on May 21, 2010.

4. DOE's arguments are moot, or lack merit, and they do not excuse DOE from the statutory requirement that it award the contract for the IFB with reasonable promptness as set forth above, nor can they be used to justify rejecting the bids pursuant Chapter III, §3.15.4.2.1., DOE Procurement Regulations.

5. The IFB does not needlessly or improperly duplicate the equipment or services solicited in DOE-IFB-022-2010.

6. IBSS's Appeal is GRANTED.

7. DOE must comply with Chapter III, §3.9.14.3, DOE Procurement Regulations by conducting an acceptability evaluation of IBSS' and XEROX's respective bids no later than five (5) working days after DOE receives this Decision.

8. DOE shall comply with 5 G.C.A. §5211(g) by awarding the contract for the IFB no later than seven (7) working days after DOE receives this Decision.


9. IBSS is hereby awarded its reasonable costs, pursuant to 5 G.C.A. §5425(h) (2), excluding attorney's fees, incurred in connection with the solicitation and its September 2, 2010 protest, including IBSS's reasonable bid preparation costs, excluding IBSS's attorney's fees, because, as IBSS was the lowest bidder for the IFB's Item 1, and the second lowest bidder for IFB Item 2, there is a reasonable likelihood that IBSS could have been awarded the contract but for DOE's failure to award the contract with reasonable promptness in violation of 5 G.C.A. §5211(g) as set forth above. IBSS shall submit its reasonable costs, excluding attorney's fees to

1 DOE, within thirty (30) days of the date of this Decision. DOE may object to IBSS's cost
2 demand by filing the appropriate motion with the Public Auditor no later than fifteen (15) days
3 after IBSS submits such cost demand to DOE.

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

8 A copy of this Decision shall be provided to the parties and their respective attorneys, in
9 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website
10 www.guamopa.org.

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12 **DATED** this 7th day of March, 2011.

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16 _____
17 DORIS FLORES BROOKS, CPA, CGFM
18 PUBLIC AUDITOR
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FAX

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John T. Brown, Esq., Legal Counsel
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Re: **Appeal No. OPA-PA-10-010: DECISION**

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Anne Camacho – acamacho@guamopa.org

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