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OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

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FILE NO. OPA-PA: 10-010

IN THE OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEAL

|                               |   |                              |
|-------------------------------|---|------------------------------|
| In the Appeal of              | ) | DOCKET NO. OPA-PA 10-010     |
|                               | ) |                              |
| TOWN HOUSE DEPARTMENT STORES, | ) | APPELLANT'S BRIEF            |
| INC., dba                     | ) | IN SUPPORT OF MOTION         |
| ISLAND BUSINESS SYSTEMS       | ) | TO DISMISS XEROX' APPEARANCE |
| & SUPPLIES,                   | ) | AND WAIVER OF HEARING ON     |
| APPELLANT                     | ) | MOTION                       |
| _____                         | ) |                              |

Appellant brought this Motion immediately prior to the pre-hearing conference on January 21, 2011. The Motion was allowed to be introduced but not heard at the pre-hearing conference, the Hearing Officer indicating that it would be taken under consideration. He did not schedule a hearing on the Motion at that time, reserving the decision to do so.

This Brief is submitted in aid of its Motion and, in the event the Hearing Officer determines to consider a hearing for argument on the Motion, Appellant now waives any such hearing.

Appellant's Motion is based on the argument that Xerox is not an interested party because it was not an actual bidder and cannot now be considered to be a potential bidder. By law, only actual or prospective *bidders* who may be aggrieved can protest an IFB. (5 GCA § 5426.)

So-called bidders who fail to submit responsive bids cannot be considered for award (5 GCA § 5425(g)). A party who does not submit a responsive bid therefore has no interest in the outcome.

“In order to have a direct economic interest, an actual or prospective bidder or offeror must be in line for award....” (*Formation of Government Contracts*, 3<sup>rd</sup> Edition, Cibinic and Nash, p. 1498.) “Parties that are ineligible for award do not have a direct economic interest in the award.” (*Id.*, p 1401.) “Where a firm submits a bid or proposal extension conditioned upon a change to a material term of the solicitation, the firm is ineligible for award and will not be considered an interested party [citation omitted].” (*Id.*, p 1502.)

In this case, Xerox did not respond to the bid in the manner required of a bidder. It did not respond with the unconditional acceptance the law requires (5 GCA § 5211(e)).

Appellant's Motion touched on some of the statements made by Xerox in its submission, not one of which indicated unconditional acceptance, all clearly expressing offers of proposal and agreement to negotiate terms, including price, quantity and type of equipment.

Appellant offers the additional matters of proof.

First, in addition to the comments mentioned in the Motion, Xerox' cover letter framing its proposal also included the following statements:

“Our team is also prepared to discuss our *Proposal* in greater detail, **and adjust** our *proposed* equipment, support services, terms, and/or price *offering* based on the Department's final requirements.”

and:

“Xerox also *agrees to negotiate* a final Contract **that incorporates the mutually agreed terms** contained in the Department's Bid, **this document**, Xerox's *Purchase Agreement*, **and any other negotiated term.**”

This is not unconditional agreement. It is only an agreement to negotiate further, and only upon mutually agreed terms and upon conditions “clarified” in the submission.

The submittal detailed the terms it insisted upon by attaching its own Purchase Agreement which obligated the Department to express representations and warranties not contained in the IFB, specified payment terms and imposed late charges not expressed in the IFB or otherwise authorized by law, limited liability and otherwise unilaterally conditioned acceptance on its own terms.

Second, in the document indicated by the file name "GU-Department of Education IFB 006-2010.doc, JJDB (05/2010)" attached immediately following the Purchase Agreement (see Tab B2 of the Agency Report), Xerox reiterated:

"Although the Proposal is based on the requirements included in your Bid it does include some responses that require an explanation. Those explanations are included in this document and also detailed in our Proposal"

That document then specified its so-called "explanations" as "clarifications", conditioning and changing the contract in ways materially different from the IFB, and which should have been "clarified" prior to bid opening, where the same provisions, if agreeable to the Department, would have been applicable to all bids. (If these were not deemed by them to be essential to their submission, why did they go to such trouble to itemize the exceptions?)

"Xerox's Clarifications Regarding the Department's Bid

General Terms and Conditions

6 - Compliance with Specifications and Other Solicitation. **Xerox's contract offer is based on the Department's acceptance of this Amendment and the Xerox Lease Agreement.....**

27 - Inspection. ... **However**, unless you specifically require that the equipment be inspected and accepted by your representative through the execution of a Trial order, **the equipment/software will be deemed accepted** on the equipment's installation date....

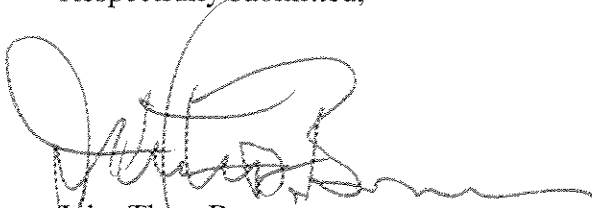
36 - Stop work Order. ... **However, ... neither party can suspend or terminate a maintenance agreement once the equipment has been installed....**

40 - Liquidated Damages. ... **provided that the Department notifies Xerox in writing of the specific performance shortfall, and allows Xerox 30 calendar days to correct** the performance failure to the contracted specification.

41 - Physical Liability. Xerox will agree to this indemnity provision **with the exception ....**

Xerox submitted a conditional proposal, not an unconditional acceptance. It thus failed to bid. Since it was not an actual bidder it has no interest in the outcome of the award and should not be a party to this Appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Thos. Brown". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

John Thos. Brown  
January 27, 2011