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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
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IN THE OFFICE OF PUBLIC ACCOUNTABILITY

PROCUREMENT APPEAL

In the Appeal of TOWN HOUSE DEPARTMENT STORES, INC., dba ISLAND BUSINESS SYSTEMS & SUPPLIES, APPELLANT	DOCKET NO. OPA-PA 10-010 APPELLANT'S REPLY TO XEROX' COMMENTS ON APPELLANT'S COMMENTS ON AGENCY REPORT

Xerox protests, in its "Comments", that Appellant's bid was non-responsive[1] and Appellant is non-responsible[2], and that DOE has not yet secured funding for the bid (Xerox Comments, p 3). It claims its own bid was responsive (Xerox Comments, p 6), contrary to Appellant's allegation. It also protests Appellant's allegations that it has acted in bad faith or contaminated the procurement process (id, at p 6-7). These protests are untimely, unfounded and improperly raised.

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[1] "IBSS fails to address that it is in fact a non-responsive and substantially non-conforming bidder". At Xerox Comments, p 4.

[2] "[I]t's inability to supply the user tracking service rendered it non-responsible." At Xerox Comments, p 5.

NON-RESPONSIVENESS

DOE never once gave Appellant any notice that its bid was in any way non-responsive. Xerox is the first to raise this issue. In fact, Xerox has *already* raised it months ago on June 23rd, unfairly and in perversion of the procurement process by surreptitiously making the same complaints as made herein made, directly in a letter to DOE's Supply Management Administrator while the award remained pending. If it had a complaint, it should have protested to the "head of the purchasing agency" in the manner required by law (5 GCA § 5425)[3] rather than seek to undermine the bid by unfair and incorrect assumptions and allegations. If that is not contaminating the procurement process, indeed due process, what might it be? Appellant disputes Xerox' allegations of non-responsiveness, but this is not the time or place to do so. The time for that would have been in a protest, but Xerox did not bring it.

DOE has not questioned the responsiveness of IBSS' bid, yet Xerox *again* raises it in its Comments herein. Enough, already. The time and manner to have raised any objection to the bid was within 14 days after Xerox became aware of the facts by which it may have been aggrieved, in an appropriate protest to DOE. It did not do so then and it must not be allowed to do so now; clearly its letter acknowledges the grounds for complaint at that time if not earlier. It must not now be allowed to resurrect its unprotested complaints when it never filed the protest.

Indeed, by again raising the issue outside the processes intended, Xerox is again contaminating the procurement process, this time by raising stale allegations of non-responsiveness to the Public Auditor, hoping to persuade it to make a nonresponsive finding. All of these allegations are untimely and should be stricken from the record and disregarded by the Public Auditor. If, nevertheless, the Public Auditor does decide to determine the matter, Appellant must have the opportunity to contest it.

NON-RESPONSIBILITY

Xerox entirely and erroneously conflates bid responsiveness and bidder responsibility in this allegation. After making broad statements that Appellant's bid is non-responsive, it claims IBSS is non-responsible because of "its inability to supply the user tracking services" (Xerox Comments, p 5). Xerox does not know what IBSS' ability is, but the real point missed here is that capability is not responsiveness. Supplying user tracking services goes to the thing to be provided, not the bidder's capability and integrity. It is inappropriate to try to pin issues of product features on any determination of responsibility. Xerox either doesn't know the law, or how to apply it, or it is just plain disingenuous.

XEROX' "BID"

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[3] See Notice of Appeal, at footnote 1.

Xerox really wants to refute Appellant's allegation that its bid was non-responsive; it wishes it hadn't said what it did say in its submission. But, Appellant quoted from directly form Xerox' own submission, showing that what Xerox submitted was expressly a "proposal" and an "offer", and that it desired to "negotiate a solution that is acceptable to both parties" and to "adjust our proposed equipment, support services, terms, and/or price offering based on the Department's final requirements"; the submission, by its own terms, failed to meet the requirement of an *unconditional acceptance* of the IFB, as required by law (5 GCA § 5211(e)).

Xerox tries to skirt this plain fact with nonsense about clarifications it had sought: those clarifications were history by the time the submission was made, and if the submission was conditional on the clarifications, it was not an unconditional acceptance. Xerox tries to characterize its submission as a promise, but it was not an unconditional acceptance. That is the promise the law requires in response to an IFB.

Xerox' submission was non-responsive because it was not a bid at all. The problem with its submission was not in how it responded to the *specifications*; it was in submitting a *proposal* more appropriate to an RFP. Xerox offered to negotiate when what was required was unconditional acceptance. It was non-responsive to the form and terms of the solicitation.

CONTAMINATION

Appellant made several specific allegations of instances of bad faith in its Supplementary Comments as well as the Notice of Appeal, as well as in the Protest itself. Xerox has made a general denial without discussing this matter in any detail. There is, therefore, nothing of detail to which to reply.

Appellant would point out that when it protested the illegal procurement of copiers in March 2010, it asked for, and received, a commitment to put out a bid, the within bid, for fair and competitive procurement. Did Xerox, at any time in 2009 insist that DOE put out a competitive bid for the copiers, knowing full well the contract would expire? Or did it sit back and continue to bill exorbitantly while the contract was continuously, and illegally, rolled over by its partner. Xerox knows the law, and never insisted on its proper implementation.

Xerox, it seems, was habituated with private, noncompetitive proposals in its partnering with DOE. That is one supposition of how it ended up with a proposal rather than a bid in IFB 006. It continued to try to solicit a proposal even after IFB 006 submissions were opened, in private "confidential" correspondence from Xerox' General Manager to DOE's Office of Supply Management on June 17th: "we'd be pleased to provide a proposal for replacement services and devices ...." Is it a coincidence, then, that the copiers solicited by IFB 006 ended up also being part of the equipment solicited under IFB 022? Or another incident of contamination of the procurement process?

Xerox contaminated the procurement process by being the willing partner, if not facilitator, in years of improper copier procurements, including many purchases under is contract but beyond its scope. The Public Auditor found its sole sourced 2000 Xerox Document Services Agreement was illegal, as well as its 2004 extension. It insisted on sole sourcing movement of machines by deceptively asserting to DOE the warranty on its machines would be violated if any third party mover was contracted for the purpose. It provided favors by forgiving, after detailing the need for and DOE's responsibility for, repairs for significant rodent damages. These allegations, and others, are disclosed in DOE's procurement files Appellant received under FOIA; if Xerox wants to debate the issue, it will have to disclose its files as well.

Xerox does make the point, however, that it attempted to obtain payment and obtain a purchase order for goods and services rendered "consistent with the principles of any prudent business". (Xerox Comments, p 7.) That may have some validity if Xerox had, at the time it provided goods and services, any legal right or obligation to do so. Yet, as has been alleged, and will be shown by dates and absences of emergency declarations and purchase orders, and presence of bogus declarations of emergency and Xerox communications, Xerox was providing goods and services without any contract as required by law, and without any valid method of source selection[4], and often times without any purchase order. Did it do that in good faith? Was it done to drag out the hugely oversized monthly billings? Was it a favor, or done to maintain its incumbent advantage and inside access and knowledge? Was Xerox an innocent victim of DOE subterfuge, or a complicit partner? Xerox' alleged bad faith is *prima facie* apparent, and it has not made any specific factual showing to the contrary.

The contamination that Appellant alleges is not an isolated event restricted to the within IFB 006. It is a pattern of paternalistic and controlling behavior that goes back to the original insinuation of Xerox into the copier management system at DOE. If Xerox wants to defend its record, Appellant agreeable.

FUNDING

Xerox again either misreads or misstates the law. It says that all bids should be *rejected* because "[a]fter bid opening, a bid may be *cancelled* if 'prices exceed available funds'," ... and "lack of

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[4] Xerox specifically admitted it was providing goods and services to DOE under an "effectively expired" contract in its General Managers' letter of July 30 to DOE Superintendent and other administrators: "Xerox is continuing to provide document management services under the GDOE/XMS Agreement that effectively expired on December 31, 2009. ... In the interim, GDOE has worked to provide Xerox monthly purchase orders to cover the services being rendered ...." See Exhibit 15 to Petition to Compel Decision, etc., OPA-PA-006-2010. This agreement was the same agreement originally executed as a sole source procurement in 2000, and renewed in 2004, and declared illegally procured, and terminated, by the Public Auditor in November 2008. The "interim" produced no contract or other proper procurement.

funding can therefore justify the *cancellation* of a solicitation." This is another conflation of the law, confusing the differences between what the law requires to *cancel* a bid (before award) and to *reject* all bids (after award).

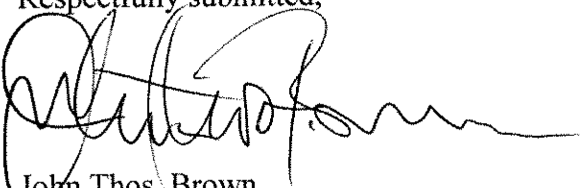
Appellant has very carefully detailed the critical differences in these laws in its Notice of Appeal and elsewhere, in explaining that certification of funding is not a Procurement Act prerequisite. No obvious funding source *may* be grounds to *cancel* a bid under the procurement laws (it is *not* mandatory – even if no funding is "available"), but bids cannot be cancelled once opened, as here. After opening bids, which is the case here, *lack* of *funding* is not a ground to *reject* all bids; rejection is only allowed (and even then not required) if the bid *prices exceed* available funding. This is a condition expressly dependent on bid *prices*, not funding. There has been no allegation by DOE that bid prices were excessive, and neither DOE nor Xerox make any assertion Xerox' higher pricing in IFB 006 was excessive, therefor Appellant's lower pricing was not excessive either.

The only hang up with funding has been that DOE failed to perform a ministerial duty to do the many different things it could have done, and routinely does do, to balance its funds and needs, to obtain, identify or secure funding. It did admit to making efforts to obtain funding, but there has been no evidence as to the extent of the effort, and no capitulation by DOE that it has given up.

Even so, Xerox should not be heard to make *any* complaint about what DOE did or did not do about obtaining funds. It does not come before this body on this issue with clean hands. It has itself clearly demanded and received DOE funds to provide the same equipment as specified in the instant IFB under circumstances showing no lawful contract, purchase order or procurement. Was funding available for illegal expenditure on Xerox' copiers?

Xerox has prevailed upon DOE to identify, obtain and pay *it* funds for providing this same equipment, without contract, without proper procurement and without timely purchase order. Appellant has merely asked that DOE do all it can legally do to obtain funds for this IFB, as the Superintended herself advised she was attempting to do in her July 7th letter, identified in the Notice of Appeal. Xerox, with its pockets full of DOE money from improper procurement, does not have the clean hands to make *any* accusation about the funding for this IFB, especially when Appellant only asks that good faith efforts be made to legally obtain it.

Respectfully submitted,



John Thos. Brown
December 27, 2010