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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,)	
INC., dba)	APPELLANT'S SUPPLEMENTARY
ISLAND BUSINESS SYSTEMS)	COMMENTS ON
& SUPPLIES,)	AGENCY REPORT
APPELLANT)	
)	

After reviewing and commenting upon DOE's Appeal Response, Appellant has delved deeper into the Agency Report and discovered something that must be mentioned: Xerox' "bid" in IFB 006 (see Tab B2) was entirely non-responsive on its face. That leaves IBSS as the only bidder who has submitted a bid which has not been judged to be non-responsive or non-responsible.

Indeed, the Xerox submission was not a *bid* at all. It was a blatant attempt, in bold disregard of the Invitation for Bid and all relevant laws and regulations regarding bids, to subvert the bid process.

What Xerox submitted was an offer, a hard sell, to *negotiate* a contract. It submitted a *proposal* and invited DOE to negotiate terms for a contract around its proposal. It offered up its own terms of contract and challenged DOE to modify the terms of the IFB to conform to its contract. Xerox was not a responsive bidder as that phrase is defined in 5 GCA § 5201(g): "*Responsive Bidder*

means a person who has submitted a bid which **conforms** in all material respects to the Invitation for Bids.”

It’s “bid” submission, opened on the scheduled date, was framed by the terms of its cover letter, from Xerox General Manager Margaret Tyquiengco, which said, in part, the following:

“We have reviewed the Department’s Invitation for Bid (“Bid”) and have prepared the attached Sale **Proposal** for your consideration.”

“In addition we have included a copy of our standard Purchase Agreement which further explains our **offer**.”

“Please note that Xerox *agrees to negotiate a solution that is acceptable to both parties....*”

“Our team is 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.”

“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.”

Bids must only be unconditionally accepted, without alteration; they cannot be negotiated after bid opening (or before).

5 GCA § 5211(e) states,

“**Bids shall be unconditionally accepted without alteration** or correction, except as authorized in this Chapter. Bids shall be evaluated based on the requirements set forth in the Invitation for Bids....”

5 GCA § 5211(f) states,

“After bid opening, **no changes in bid prices or other provisions of bids prejudicial to the interest of the Territory or fair competition shall be permitted.**”

Xerox’ proposal should have been immediately rejected as non-responsive, but evidently was not because, in DOE’s Appeal Response, DOE went out of its way to indicate that IBSS was not the low bidder for the software component of IFB 006, as though Xerox was still a contender. IBSS’ General Counsel’s discussions with DOE’s Legal Counsel also lead to the conclusion that DOE

remains prepared to award the non-copier components of the bid to the Xerox.

Xerox has contaminated this bid process, if not the whole history of copier acquisition for at least a decade. It has been the facilitative if silent “partner” (as Xerox’ General Manger described itself in her letter to DOE of Juxx xx) in all the improper solicitations since the sole source contract was made in the year 2000. It has bullied and cajoled DOE to issue unsupported purchase orders nearly every month of this year, as pointed out in the Petition to Compel Decision and Enforce Automatic Stay in OPA-PA-10-006.

Xerox has had blue-blood legal counsel when it needed it. Xerox is a huge NYSE listed company with, surely, teams of compliance staff. Surely it must know and be well advised as to the law. Surely it must know that its purchase orders require appropriate procurement authority. Surely it knows the difference between a bid submission and a proposal, between an IFB and an RFP.

Yet it ignores the law and continues to favor DOE with continued provision of copiers and services knowing full well it will eventually get paid from a compliant DOE. In a letter written by Xerox’ General Manager Margaret Tyquiengco on June 17, 2010, to Edith A. Pinaula in DOE’s Office of Supply Management, Xerox said,

“The last GDOE Purchase Order we received covered Document Management Services for the month of May. We are currently in the month of June **and require a Purchase Order to cover** the current month. ... Absent a PO or the letter of intent, **Xerox will have no choice but to stop services and supplies being supplied**”. (See, Exhibit 10 to the within Notice of Appeal.)

She wrote again on July 30, 2010 to the Superintendent and her Deputy Superintendent and her Supply Administrator, with a similar message (see Exhibit 14 to Petition to Compel Decision, etc., OPA-PA-10-006):

“Xerox is continuing to provide document management services under the GDOE/XMS Agreement that effectively expired on December 31, 2009. ... [H]owever, we find ourselves at the end of July without a PO covering July and Augusts (sic) services.

“We value GDOE greatly as a partner, however, Xerox will be hard pressed to continue services without a purchase order.... Should we not receive any communication from you by August 4, we will begin disabling equipment and scheduling pick up of Xerox devices.” (Bold italics in original.)

The provision of services and supplies to DOE without any contract, purchase order or legal authority is, Appellant submits, an accommodation intended to curry *favor* with DOE in

violation of 5 GCA § 5630(d), which provides:

Favors to the Territory. For purposes of this Section, a favor is anything ... of more than de minimus value and whether intended for the personal enjoyment of the receiver or for the department or organization in which they are employed *It shall be a breach of ethical standards for any person who is or may become a contractor, ... or any person associated therewith, to offer, give or agree to give any employee or agent of the Territory or for any employee or agent of the Territory to solicit or accept from any such person or entity or agent thereof, a favor or gratuity on behalf of the Territory **whether or not such favor or gratuity may be considered a reimbursable expense** of the Territory, during the pendency of any matter related to procurement, including contract performance warranty periods.*

These acts of accommodating service and supply did take place during the pendency of the solicitation of IFB 006, as well as other requisitions.

Although the Public Auditor does not have jurisdiction to adjudicate the ethical obligations of the procurement act, she can, in deciding if an act of bad faith is based on a reckless disregard of the law, consider the matter. Reckless disregard of the law provides the ethical nexus to the alleged breach of bad faith. (See, *In the Appeal of Latte Treatment Centers*, OPA-PA-08-008.) A finding that Xerox has so acted in violation of 5 GCA § 5630(d), may then be referred by any member of the public to the CPO for investigation and consideration of sanctions under 5 GCA § 5426(b)(6) and (f).

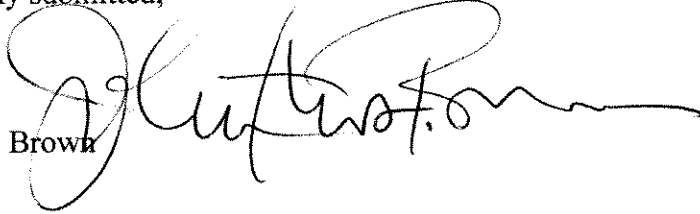
The reckless disregard of the law must be as applicable to Xerox as it is to DOE as a basis for a finding of bad faith. DOE has repeatedly overstepped the bounds of procurement law, but Xerox has been complicit in each instance.

Xerox must be made to bear some of the responsibility that has been borne by DOE alone for all of the procurement impropriety that has occurred in this particular instance as well as in all the related events leading up to IFB 006. Indeed, if the statements of Xerox in the cover letter of its IFB 006 submission (to the effect that Xerox and DOE could negotiate different quantities than specified in the IFB) are any guide, the related events continue on after IFB 006 into IFB 022, where, it has just recently been revealed, immediately after the bids were opened and award was made to Xerox, the quantities requisitioned by DOE's purchase order issued to Xerox varied significantly from the quantities sought in the IFB. How, one must ask, did such a material change so suddenly and quietly occur?

It seems every time a new paper is uncovered, new instances of unfair and inequitable treatment of Xerox' competitors turns up, and the bad faith of both Xerox and DOE is revealed. The only way justice will be done in IFB 006 will be to order that the contract be awarded to IBSS.

Respectfully submitted,

John Thos. Brown

A handwritten signature in black ink, appearing to read "John Thos. Brown", written over the printed name.