

CARLSMITH BALL LLP

ELYZE M. IRIARTE  
*emcdonald@carlsmith.com*  
Bank of Hawaii Bldg., Suite 401  
134 West Soledad Avenue  
Hagåtña, Guam 96932-5027  
Telephone No. 671.472.6813  
Facsimile No. 671.477.4375

Attorneys for Party-in-Interest  
XEROX CORPORATION

RECEIVED  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

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IN THE OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT PETITION

IN THE PETITION OF

TOWNHOUSE DEPARTMENT STORES,  
INC. dba ISLAND BUSINESS SYSTEMS &  
SUPPLIES,

Appellant.

DOCKET NO. OPA-PA-11-002

**INTERESTED PARTY XEROX  
CORPORATION'S MOTION TO  
DISMISS APPEAL; EXHIBIT X2**

**I. INTRODUCTION**

The Office of Public Accountability may exercise jurisdiction over procurement matters properly submitted to the Office. Improperly submitted matters include those in which the complainant lacks standing, in which the underlying procurement protest was untimely, and in which a bidder has failed to seek relief from the agency before seeking relief from the OPA. IBSS' protest and appeal fail on all three grounds. First, IBSS submitted a bid containing a false Affidavit Disclosing Ownership and Commissions, which renders the bid nonresponsive. IBSS' nonresponsiveness deprives it of standing to raise any issue at the protest level and in these appeal proceedings. Second, IBSS protests DOE's authority to order increased quantities of the solicited multifunction machines, however, its protest comes more than 14 days after it knew of

that authority. IBSS' delay renders its protest untimely. Finally, IBSS protests Xerox's responsiveness and seeks the disclosure of the confidential portions of Xerox's bid. However, the process in which IBSS may seek disclosure of confidential portions of Xerox's bid starts at the agency level, and not with the OPA. IBSS' protest over Xerox's responsiveness is therefore untimely and also procedurally deficient. On these bases, Xerox moves that the OPA dismiss IBSS' appeal in its entirety.

**II. IBSS LACKS STANDING TO PROTEST BECAUSE IT SUBMITTED A FALSE AFFIDAVIT OF OWNERSHIP, RENDERING ITS BID NONRESPONSIVE**

As part of IBSS' bid, IBSS submitted an Affidavit Disclosing Ownership and Commissions indicating that Kenneth T. Jones and Elaine C. Jones held 99% ownership of IBSS. Agency Rep., Ex. B1, p.6. However, those statements were false. Two months before filing its Affidavit of Ownership, IBSS filed its 2010 Annual Report indicating different ownership.<sup>1</sup> Its annual report states that Elaine Cruz Jones owns 99% of outstanding shares in IBSS. There is no mention of Kenneth T. Jones as a shareholder. The Annual Report, dated August 6, 2010, is signed by Noli Cadag, IBSS' Secretary/Treasurer. Mr. Cadag also signed the Affidavit Disclosing Ownership and Commission, which is dated October 26, 2010.

Based on the false Affidavit of Ownership, IBSS' bid submission is non-responsive. Guam Procurement Law requires that a contract be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the criteria set forth in the IFB and whose bid amount is sufficient to comply with Article 13 of Chapter 5 of the Guam Procurement Law. 5 G.C.A. § 5211(g) and 2 G.A.R. Div. 4 § 3109(n)(2). The Guam Procurement Law requires that as a condition of bidding, an entity proposing to do business with the government of Guam submit an affidavit executed under oath that lists the name and address

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<sup>1</sup> Supplementing the exhibits proffered by Xerox, Xerox attaches IBSS' 2010 Annual Report as Exhibit X2. The Annual Report is filed with the Department of Revenue and Taxation and is therefore a public record.

of any person who holds more than ten percent of the outstanding interest or shares in such entity any time during the twelve month period immediately preceding the entity's submission of a bid. 5 G.C.A. § 5233 and 2 G.A.R. § 3109(e)(3)(E). All affidavits must also contain the number of shares or the percentage of all assets of each person that has held the shares during the same twelve month period. *Id.*

The OPA has recently confirmed that the submission of an Affidavit Disclosing Ownership and Commissions is a material requirement of an IFB. *In the Appeal of Pacific Data Systems, Inc.*, OPA-PA-10-005 (Jan. 12, 2011 Decision). Its materiality stems from the Affidavit being required by the Guam Procurement Law and its corresponding rules and regulations. *In the Appeal of Pacific Data Systems, Inc.*, OPA-PA-10-005 (Jan. 12, 2011 Decision) at pp. 10-11 (*citing* 5 G.C.A. § 5233 and 2 G.A.R. § 3109(e)(3)(E)). In the *Pacific Data Systems* case, bidder GTA had listed in its Affidavit Disclosing Ownership and Commissions its original owners, but did not list the new owners who had held shares for at least the last twelve months. The OPA found this misrepresentation, even if negligently done, to be fatal to GTA's position as a responsive bidder. The OPA subsequently disqualified GTA's bid.

In the present case, DOE instructed all bidders pursuant to section 5233 to submit an Affidavit Disclosing Ownership and Commissions. *See* Agency Rep., Ex. C, pp. 2, 7. The IFB states that "[a]ll bidders are required to submit a current affidavit as required . . . failure to do so will mean disqualification and rejection of the bid." Agency Rep., Ex. C, p.7. IBSS' submitted Affidavit Disclosing Ownership and Commissions falsely attested that as of October 26, 2010, Kenneth T. Jones *and* Elaine C. Jones own 99% of IBSS. Agency Rep., Ex. B1, p. 6. First, such a statement cannot be true because Kenneth Jones passed away on October 30, 2008<sup>2</sup>, two years prior to IBSS' bid submission on October 26, 2010. This fact alone in effect renders the

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<sup>2</sup> Kenneth T. Jones died on October 30, 2008. *See* <http://guambusinesscenter.com/kenneth.php>.

Affidavit Disclosing Ownership and Commission untrue and invalid. Second, the information on the Affidavit contradicts the IBSS 2010 Annual Report filed on August 9, 2010. As noted, the Annual Report, also prepared by Noli Cadag, stated that of the 404,400 outstanding shares, 400,000 shares or 99% are solely owned by Elaine Cruz Jones. Both documents are suspect in that the same individual prepared both documents just months apart providing two different statements to the same inquiry.

Based on the OPA's recent Decision *In the Appeal of Pacific Data System, Inc.*, the IBSS bid must suffer the same fate as GTA's bid. Just as GTA submitted false information in its Affidavit, IBSS falsely swore that 99% of its shares were held by Kenneth Jones and Elaine Jones. Just as GTA's bid was rendered non-responsive, IBSS' submission of false information deems it non-responsive. Finally, just as GTA's bid was disqualified from award, the IBSS bid must be disqualified and rejected as pursuant to the requirements set forth in IFB22 and the Guam Procurement Law.

Moreover, because IBSS submitted a nonresponsive bid, it lacks standing to protest. A person has the right to protest if it is an "actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract." 5 G.C.A. § 5425. Bidders who fail to submit responsive bids cannot be considered for award. IBSS is not aggrieved here because its non-responsiveness takes it out of consideration for award. Its protest and appeal must therefore be dismissed for lack of standing.

### **III. IBSS' UNTIMELY APPEAL ON THE LANGUAGE OF IFB22 MUST BE DISMISSED**

IBSS is untimely with respect to its protest on DOE's exercise of the various IFB22 clauses permitting DOE to increase the solicited quantities. IBSS may attempt to argue that its protest concerns DOE's actual ordering of additional quantities; however, a reading of their

protest and appeal demonstrates that its protest concerns the powers given to DOE under the language of the IFB.

For example, IBSS complains at length that the Incremental Additions clause gave DOE an option to "purchase,"<sup>3</sup> but did not meet the requirements of an indefinite quantity contract. IBSS also claims there was uncertainty as to the essential quantity term, in violation of contract law. IBSS declares that the Incremental Additions clause is nothing more than a sole source procurement arrangement. In other words, IBSS complains that the entire contract should be terminated because the language of the IFB should not have allowed DOE to order additional machines.<sup>4</sup>

IBSS' complaints over DOE's contractual rights are untimely. The OPA has jurisdiction "to review and determine *de novo* any matter properly submitted to her." 2 GAR Div. 4 § 12103. To be "properly submitted" the original protest must have been timely filed within 14 days after the protestor knows or should have known of the facts giving rise thereto." 2 GAR Div. 4 § 9101(c). "Protests filed after the 14 day period shall not be considered." 2 GAR Div. 4 § 9101(c). If IBSS believed DOE was legally prohibited from increasing quantities, it should have protested within 14 days from the moment the IFB was issued. 2 GAR Div. 4 § 9101(b). The IFB, issued on September 10, 2010, advised bidders, including IBSS, on more than one occasion that incremental additions could be made. If IBSS wished to protest any of the quantity

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<sup>3</sup> IBSS incorrectly describes the contract as a purchase, when it is in fact a lease.

<sup>4</sup> In fact, there are five instances in which IFB22 advised bidders that quantities were likely to vary: (a) paragraph 22 of the IFB ("The government reserves the right to increase or decrease the quantity of the items for award and made additional awards for the same type items . . ."); (b) page 23 of the IFB ("**Incremental Additions:** GDOE will have at its discretion the ability to add additional equipment on to the proposed plan as needed based on the quoted Incremental Additional cost per month per item."); (c) within each specific Item of the IFB is mentioned "Option to add additional machines \$ \_\_\_\_\_"; (d) under its Objectives in which it specified the need "understand the usage of office equipment including volume and reliability" and to "track and identify where and when equipment can be reassigned"; and (e) in Clarifications specifying that machines would vary in quantity depending on school size, and in giving anticipated quantities per school.

modification clauses, it had until September 24, 2010, to protest. Instead, it waited until December 16, 2010, to protest.

As IBSS did not timely protest the issue of additional quantities, its protest was properly denied, and the OPA lacks jurisdiction to hear IBSS' complaints. Its protest and appeal should be dismissed as untimely.

**IV. IBSS' UNTIMELY PROTEST AND APPEAL ON XEROX'S RESPONSIVENESS MUST BE DISMISSED**

Finally, Xerox moves to dismiss IBSS' protest and appeal with respect to the issue of Xerox's responsiveness. IBSS has filed a Motion seeking the disclosure of confidential portions of Xerox's bid. Xerox's Opposition to that Motion provides the OPA with authority showing that if IBSS wanted to see Xerox's bid, it needed to have first sought disclosure from the agency at the bid opening. Xerox addressed the same issue in its Comments, and raises it in this motion again.

Guam's Procurement Regulations establish a process allowing bidders to examine the confidential documents submitted by another bidder. At a bid opening, "opened bids shall be available for public inspection except to the extent the bidder designates trade secrets and other proprietary data to be confidential as set forth in Subsection 3109(l)(3) of this section." 2 GAR Div. 4 § 3109(l)(2). If a bidder wishes to see information designated as confidential, he must request disclosure from the Procurement Officer handling the invitation for bids.

The Procurement Officer shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidders in writing . . . what portions of the bid will be disclosed and that, unless the bidder protests under Chapter 9 (Legal and Contractual Remedies of this Guam Procurement Regulations[]), the bids will be so disclosed. The bids shall be opened to public inspections subject to any continuing prohibition on the confidential data.

2 GAR Div. 4 § 3109(l)(3). The language of section 3109(l) in no way limits the right to seek disclosure just to bidders who wish to protect submitted confidential information; it therefore extends to all bidders seeking protection or disclosure.

The process prescribed by section 3109 dictates that there shall be public inspection of bids, and that the decision as to whether designated confidential information should be disclosed must first come from the Procurement Officer. Should a bidder then be dissatisfied, it then has the remedy of a protest, and if applicable, an appeal to the OPA.

While the OPA has *de novo* review of any matter properly before her, that jurisdiction does not mean a bidder who skips the agency review process can make a first request for disclosure by the OPA. The OPA has *de novo* review of items that are first raised with the agency. Of course, the OPA "shall, upon written request, make available to any Interested Party or member of the public information submitted that bears on the substance of the Appeal except where information is proprietary, confidential, or otherwise permitted to required to be withheld by law or regulation." 2 GAR Div. 4 § 12106. Section 12106 must be read so as to be consistent with section 3109(l)(3). *Pangelinan v. Gutierrez*, 2004 Guam 16, ¶ 21 (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (provisions should be interpreted consistently and so as not to render another statutory provision, particularly one concerning the same subject, null and void. . . ."when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.")). In order to be "capable of co-existence" with section 3109(l)(3), section 12106 cannot usurp or override the agency's initial jurisdiction to determine disputes on what information is and is not confidential. In reading both sections consistently, it remains clear that the first step to obtaining the release of confidential material is to seek it from the Procurement Officer, not from the OPA.

In this case, the bid opening occurred on October 26, 2010. R., Ex. 7, p. 1 (Abstract of Bids showing bid opening date). At the bid opening, IBSS had the opportunity to seek disclosure of Xerox's entire bid and to learn of any facts that would support a protest. However, IBSS did not avail itself of its rights under section 3109, and therefore *sat on its rights* with respect to any protest-worthy grounds contained within those confidential documents. Any protest based on any information within those confidential documents is untimely and unexhausted at the agency level.

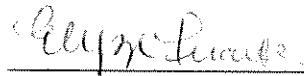
V. CONCLUSION

IBSS lacks standing to bring this appeal since it provided a false Affidavit of Ownership. Moreover, IBSS untimely raised the issues in its protest. For these reasons, the OPA should dismiss the appeal in its entirety.

Xerox asks for a hearing on this Motion.

DATED: Hagåtña, Guam, February 25, 2011.

CARLSMITH BALL LLP



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ELYZE M. IRIARTE  
Attorneys for Party-in-Interest  
XEROX CORPORATION



# EXHIBIT

## X2

A 99-105129

D-5801

DEPT. OF REVENUE & TAXATION  
GOVERNMENT OF GUAM

AUG 09 2010

(Domestic) Charter Number: 5801  
(Foreign) Registration Number: \_\_\_\_\_

BUSINESS REGISTRATION

2010  
GUAM ANNUAL REPORT  
FOR  
TOWN HOUSE DEPARTMENT STORES, INC.

1. TOWN HOUSE DEPARTMENT STORES, INC. is incorporated under the laws of the Territory of Guam.
2. The date of incorporation is JANUARY 31, 1985.
3. The registered office of the corporation in Guam is Hagatna, Guam, and the registered agent is Ms. Elaine Cruz Jones, President..
4. The physical address of the principal office is 545 Chalan Machaute, Rt. 8, Maite, and the mailing address is P.O. Box 7, Hagatna, Guam 96932.
5. The names and business addresses of the corporation directors and principal officers are as follows:

<u>Name</u>	<u>Title</u>	<u>Business Address</u>
Elaine Cruz Jones	President	P.O. Box 7, Hagatna, Guam 96932
Ramona Jones	Vice President	Same as above
Noli C. Cadag	Secretary/Treasurer	Same as above
Donna M. Jones	Director	Same as above
John Thos. Brown	Director	Same as above

6. A brief statement of the character of the business in which the corporation is actually transacted on Guam is as follows:

**Retail and Wholesale of furniture & appliances, office equipment sales and services**

7. The aggregate number of shares which the corporation has authority to issue are as follows:

<u>Number of Shares Authorized</u>	<u>Class of Stock</u>	<u>Par Value of Each Share</u>	<u>Shares Without Par Value</u>
1,000,000	Common	\$10.00	0

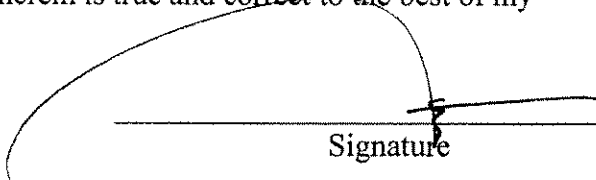
8. The aggregate number of issued and outstanding shares, itemized by class, par value of shares, shares without par value are as follows:

<u>Number of Shares Issued &amp; Outstanding</u>	<u>Class of Stock</u>	<u>Par Value of Each Share</u>	<u>Shares Without Par Value</u>
404,004	Common	\$10.00	0

9. The corporation has less than 15 shareholders, their names, citizenship, number and class of shares held are as follows:

<u>Name</u>	<u>Citizenship</u>	<u>Number of Shares</u>	<u>Class of Stock</u>
Elaine Cruz Jones	U.S.	400,000	Common
The Estate of Joann M. Sullivan, Trustee of the Residuary Trust dated 12/20/95		2,968	"
The Estate of Joann M. Sullivan Trustee of the Joann M. Sullivan Trust	"	1,032	"
The Estate of Joann M. Sullivan	"	1	"
Noli C. Cadag	"	1	"
John Thos. Brown	"	1	"
Thomas M. Jones		1	

I, NOLI C. CADAG, being duly sworn, depose and say that I am the SECRETARY/TREASURER of Town House Department Stores, Inc. and that this annual report and the information set forth herein is true and correct to the best of my information, knowledge and belief.

  
\_\_\_\_\_  
Signature

IN AND FOR GUAM, U.S.A.)  
)ss:  
HAGATNA )

Subscribed and sworn to before me this 6th day of August, 2010.



Linda R. Afaisen  
NOTARY PUBLIC  
My Commission Expires: April 7 2012

