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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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FILE NO. OPA-PA: 11-002

IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT PETITION

In the Petition of)	
)	MOTION TO DISCLOSE
)	PROCUREMENT FILE
TOWN HOUSE DEPARTMENT STORES,)	
INC., dba)	
ISLAND BUSINESS SYSTEMS)	DOCKET NO. OPA-PA-11-002
& SUPPLIES,)	
APPELLANT)	
)	

Appellant IBSS hereby brings Motion to Disclose certain material in the Procurement Record alleged to be proprietary information.

On February 2, 2011, DOE filed with the OPA, in this matter, its Procurement Record, consisting of two voluminous binders of documents. In Exhibit/Tab 6, there is material identified by DOE as "Proprietary Documents from Xerox". Appellant asks that the Hearing Officer or the Public Auditor review that material to determine de novo whether it is truly non-public matter, and to the extent it is not, that such matter be immediately made public and available to Appellant. (See, 2 GAR § 3109(l)(3).)

Appellant has reasonable suspicion that it is non-public information. The alleged proprietary material follows immediately after certain material that is part of the Xerox bid in IFB 022, the subject matter of this Appeal. The revealed material contains a cover letter from Xerox dated October 26 which accompanies and frames its bid. The cover letter says that their bid response includes, among other matters, Xerox proposed pricing, Xerox Response to Specifications for Base Bid ..., Xerox Response Clarifications, and a Xerox Services & Solutions Agreement. The cover letter makes no claim to any proprietary nature of such documentation.

Some or all of this material is not revealed in the Procurement Record and can only be presumed to be part of the alleged proprietary documents. All of it concerns the specifications, terms and conditions of Xerox' bid and can hardly be considered trade secret or proprietary.

"Trade secret" is defined in 9 GCA § 43.10(f) to mean "the whole or any portion of [sic] phase of any scientific or technical information, design, process, procedure, formula or improvement which is secret and is not generally available to the public, and which gives one who uses it an advantage over actual or potential competitors who do not know of or use the trade secret, or the contents of private and unpublished records used in the business of examining, certifying or insuring titles to real property."

This definition does not describe the terms or conditions of a bid, nor would it describe the specifications of the bid in this instance as the items bid by Xerox are all standard commercially available products whose brochures and specifications are published and freely available. The definition can certainly not apply to Xerox' "clarifications" and "responses" to specifications because those matters are meant to be disclosed to all bidders as part of the bidding process. (See, e.g., Item No. 3 in the "Sealed Bid Solicitation Instructions" to IFB 022.)

This information was submitted in Xerox' bid submission for IFB 022, which has been opened and the contract awarded, but stayed in part. The basis of Appellant's protest was that there was strong indication in the variances from the IFB specifications to the P/O specifications which suggested DOE and Xerox agreed to material, substantial and unfair changes to the terms and conditions of the IFB after notice of intent to award was given. Revelation of the specifications, terms and conditions of Xerox' bid are absolutely essential to this Appeal; indeed, they are absolutely essential to the de novo determination whether Xerox' bid was responsive to the IFB in the first place.

This Appeal is taking on many of the hallmarks of OPA-PA-10-010, including the appearance that the Xerox "bid" was in fact an RFP *proposal*. It looks very likely that Xerox conditioned ("based") its bid on unilateral "clarifications" and acceptance of its own terms of contract, as was explicitly apparent from an examination of its submission in IFB 006. It appears Xerox' submission laid the basis for a negotiated change to the IFB specifications. This appearance could be dispelled, or confirmed, by disclosure of the secreted information.

The "Procurement Meeting Notes" of date December 17, 2010 included with the Procurement Record make it absolutely clear that negotiations did in fact take place between Xerox and DOE, subsequent to the Notice of Intent to Award, to alter the equipment specifications. The material requested to be disclosed herein will shed light on whether Xerox' bid *invited* those negotiations.

Another similarity to this Appeal is that, in OPA-PA-10-010, DOE sought to shield bid information as "proprietary". However, the Hearing Officer ruled that the bid documents were not proprietary. (See, *Order Denying Purchasing Agency's Request to Seal Portions of Procurement Record*.)

The documents described in the cover letter for IFB 022 sound like the same type of documents submitted in the Xerox submission for IFB 006, which the Hearing Officer found were not trade

secrets or proprietary confidential matters.

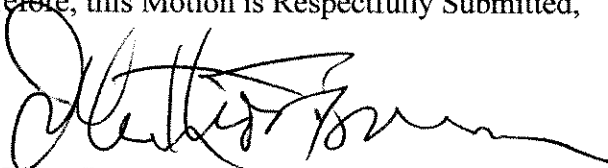
“Each procurement officer shall maintain a complete record of each procurement.” (5 GCA § 5249.) The record required by § 5249 of this Chapter is a public record and, subject to rules promulgated by **the Public Auditor**, any person may inspect and copy any portion of the record.” (5 GCA § 5251.) The rules promulgated pursuant to § 5251 of this Chapter shall: (a) protect the integrity of the bidding process; (b) protect the confidentiality of trade secrets; ... (e) require public access to the record at the earliest possible time....”

Although it does not appear the Public Auditor has yet promulgated such rules, the legislative standards would serve as a guide to determining here whether the information claimed to be proprietary “promote[s] the integrity of the procurement process and the purposes of [the Procurement Act]” (5 GCA § 5703), or whether such information serves to shield reasonable inquiry into the obvious irregularities in this bid.

The Hearing Office determined, “[u]pon written request, the Office of Public Accountability shall 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 or required to be withheld by law or regulation. 2 G.A.R., 9 Div. 4, Chap. 12, §12106.”

Appellant hereby makes such written request, to review the so-called proprietary information in the Procurement Record herein, and to release all public information contained therein .

Wherefore, this Motion is Respectfully Submitted,



John Thos. Brown
For Appellant
February 10, 2011