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

Appellant.

DOCKET NO. OPA-PA-11-002

**XEROX CORPORATION'S HEARING  
BRIEF**

Xerox summarizes its position on the issues in this case as follows:

1. The increase in quantities is valid because DOE had the legal authority to increase and decrease the quantities of machines.

IBSS incorrectly contends that the solicitation's provisions allowing for the increase and decrease of solicited quantities are invalid under Guam law. While it is not certain whether IFB 22 is a definite quantity or indefinite quantity bid, the quantity increase has been proper in either situation.

Under a definite quantity bid, an increase of up to 10% in the quantity of supplies is acceptable as long as unit prices remain the same. 2 GAR Div. 4 § 6101(5)(a). The total quantity of supplies in this case increased by just 3%. The solicitation may also qualify as an indefinite quantity contract, providing an approximate quantity but also having flexibility in

quantities. DOE's objectives in the IFB22 in fact reflect the policy of an indefinite quantity contract, particularly obtaining maximum competition and the best bargain. DOE had the flexibility to order more machines under Guam law, and properly did so.

2. The increase in quantities is valid because the bidders had knowledge that DOE intended to increase and decrease the quantities of machines.

In at least five places in the IFB and its amendments, DOE advised bidders that quantities would increase and decrease for the first three years of the contract. IBSS failed to protest DOE's stated ability to increase and decrease quantities, and in fact, IBSS bid on the options to add quantities. As all bidders knowingly accepted DOE's terms that quantities might be increased and decreased, and waived the ability to protest these provisions, the increase in quantities is valid.

3. The increase in quantities is valid because they fall within the scope of IFB22.

When a bidder protests a modification to a contract award, the tribunal must examine whether the change materially departs from the original solicitation. *Northrop Grumman Corp. v. U.S.*, 50 Fed. Cl. 443, 465 (2001). DOE made clear to the bidders in several portions of the bid that quantities would be increased and decreased. DOE also advised bidders that it needed more faster machines. DOE also decreased the overall number of machines in the school system, meaning that to match and even exceed the prior copying, scanning, and faxing capabilities, the machines would generally need to be more rather than less robust. The increase and decrease in quantities reflected in the Purchase Order (Exhibit X8), which increased some of the faster machines and markedly decreased slower machines, falls within the scope of IFB22. Moreover, the increase of just 5 machines, out of 144 machines solicited, is far below the 10% threshold in the event the OPA applies 2 GAR Div. 4 § 6101(5)(a).

4. The increase in quantities, even though authorized under Guam law and the language of the solicitation, occurred through DOE's internal error of inputting additional quantities, and not due to any intentional conduct of Xerox's.

DOE admits in its Agency Report, Exhibit G, that the increase in quantities resulted from a series of irregularities. Those internal regularities included DOE's failure to input the quantities of items in its computer system. Xerox had no involvement in DOE's internal processing and is not at fault in DOE's errors.

DOE asked Xerox to recommend which machines would be best used in which locations. Xerox made those recommendations in its Equipment Recommendation Summary, Ex. X6. Xerox expected that DOE would give Xerox direction on installing the various machines in the various school and administrative locations, however, when it did not, Xerox assumed that DOE utilized its authority under Guam law and the language of IFB22 to increase and decrease quantities. Also upon request, Xerox produced a sample purchase order to DOE reflecting the changes in quantities. DOE always had the ability to reject Xerox's recommendations. The recommendations were never unilaterally imposed upon DOE, or negotiated in any way. Xerox has always acted in good faith throughout this procurement process.

5. Xerox is a responsive bidder.

Xerox reserves comment on this point, as the OPA has not ruled on whether confidentially marked documents should be released. Should such documents be released, Xerox will present evidence that it is a responsive bidder.

6. IBSS has not submitted a timely protest.


IBSS complains that the solicitation and its provision on increasing and decreasing quantities is invalid on its face. However, IBSS failed to protest within 14 days of the issuance of the IFB, and instead protest after award.

Moreover, IBSS protests certain terms of Xerox's bid which have been marked confidential. The time to discover such terms occurred at the bid opening, 2 GAR Div. 4 § 3109 (1)(3). By waiting until the bid award to protest, IBSS was untimely.

The protest must be dismissed in its entirety.

DATED: Hagåtña, Guam, June 25, 2012.

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