John Thos. Brown
General Counsel for Appellant
545 Chalan Machaute (Route 8 @ Biang St),
Maite, Guam 96910
Mail to: P.O. Box 7, Hagåtña, Guam 96932
Ph: 477-7293; Fax: 472-6153
jngoz@ozemail.com.au

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS
FEB 27 2008
TIME: 1:23 PM
BY: AC
FILE No. OPA-PA 08-003

OFFICE OF THE PUBLIC AUDITOR

In the Appeal of TOWN HOUSE DEPARTMENT STORES, INC., dba ISLAND BUSINESS SYSTEMS & SUPPLIES, APPELLANT	DOCKET NO. OPA-PA 08-003 COMMENT ON AGENCY REPORT

Appellant's comment in brief (see index, last page):

At long last, GPSS has produced a collection of documents termed the Procurement Record and all has now been revealed. But it is worse than imagined: it reveals the Emperor has no clothes.

Procurement law and regulation is intended to make sure that government agencies and employees, including the heads of agencies, do not simply buy, *or contract to buy*, whatever they want, whenever they want and from whomever they want, however they want, ad hoc, particularly when, as in this case, the purchase involves spending millions and millions of dollars of GovGuam taxpayer funds over a course of untold years.

The "Procurement Record" submitted is replete with the stuff of *contract* -- endless purchase orders and amendments and modifications to contract -- and totally remiss with the stuff of *procurement* -- solicitations, expressions of interest, requests for proposals, public notices, written determinations, needs assessments, negotiations, pre-bid conferences, certifications, using agency requests, bids, awards, specifications.

In fact, the record provided by GPSS utterly fails under the Procurement Law description of a "procurement record".[1] In law, the collection of documents presented under the guise of "Procurement Record", does not rise to that legal definition of procurement record.

[1] See, for starters, 5 GCA § 5249, set out in the Conclusion, below.

ORIGINAL

Its "fully non-responsive"[2] and unilluminating Answer is an unsatisfactory, brief one-liner: "GPSS denies any allegation of improperly procuring copier services".[3]

Unconvincingly, it fails to identify what *procurement* method of source selection it has relied upon for the well-documented *purchase* of millions of dollars worth of copiers. And it has provided no evidence that would substantiate any other effort to abide by the requirements of the procurement law.

Bare contracts, which is all the so-called Procurement Record contains, do not constitute procurement[4]. Indeed, procurement law is intended to effect a carefully managed and accountable system to avoid bare contracts.

Procurement in the context of government purchasing is a term of art, relegated to a carefully crafted scheme of acquisition set out in detailed law and regulation.

Procurement, when effected as required by the law and regulation, is intended to promote economy through competition and fair and equitable treatment of all persons dealing with the government, with safeguards to assure integrity and transparency to assure public access to the procurement system.[5]

It is the express policy of the Procurement Law to have *planned* procurement, not ad hoc procurement.[6] Consistent with this policy, 5 GCA § 5010 requires that procurement of supplies and services shall

> "be made sufficiently in advance of need for delivery or performance to promote

---

[2] 2 GAR § 12105(g) requires that the Agency Report contain "[a] statement answering the allegation of the Appeal and setting forth findings, actions, and recommendations in the matter together with any additional evidence or information deemed necessary in determining the validity of the Appeal. The statement shall be fully responsive to the allegations of the Appeal."

[3] Agency Report at subparagraph (g), page 1.

[4] Compare the definitions of "procurement" (5 GCA §5030(o)) and "contract" (§ 5030(d). Procurement is not limited to the simple act of purchasing but "includes all functions that pertain to the obtaining of any supply, service or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration."

[5] See, 5 GCA § 5001(b); 2 GAR § 1102.

[6] See, 5 GCA § 5010; 2 GAR § 1102.03.

> maximum competition and good management of resources. Publication of bids and requests for proposals shall not be manipulated so as to place potential bidders at unnecessary competitive advantage", etc.

GPSS has not fathomed the distinction between procurement and purchasing, between award and contract. GPSS has not managed their procurement of copiers, they have mangled it. GPSS has exhibited a complete dereliction of the duties of proper procurement and procurement management and accountability, with the result that Xerox Corporation has been handed a defacto monopoly supply of copiers to GPSS for nearly twenty years.

5 GCA § 5250 requires that "[n]o procurement award shall be made unless the responsible procurement officer certifies in writing under penalty of perjury that he has maintained the record required by § 5249 of this Chapter and that it is complete and available for public inspection. The certificate is itself a part of the record."

No such certificate, nor any other evidence of procurement beyond the bare contract, has been made part of the Procurement Record in this matter, thus no procurement award and no contract implementing any purported award could properly have been made. GPSS' purchase of copiers was not properly procured, therefore GPSS representatives acted beyond the scope of their authority in signing any contract, which makes any contract, as to GPSS, voidable.

GPSS complains the protest was not filed within 14 days of the "award" [7]. GPSS complains that this Appeal should be dismissed because it has been instituted three years after the "award" to Xerox Corporation.

Award? What award? Awards are not contracts. Awards are part of a procurement process [8]; they evidence intent to contract, after solicitation, after an evaluation of some sort, after documented specifications and negotiations in some instances, depending on the authorized method of source selection. Awards can be cancelled without liability to the government, contracts not so, as Xerox so clearly threatens in this case [9].

IBSS, in its Notice of Appeal (at page 9), anticipated GPSS' taking issue with the 5 GCA § 5425 issue, and repeats its rebuttal that since they concealed the contract and any purported award, they should not be allowed to raise the bar of time for bringing protest.

---

[7] Agency Report at subparagraph (g), page 2.

[8] See footnote 4, above.

[9] See letter from Xerox to GPSS dated February 2, 2006, at Tab 12 of the Supplemental Procurement Record: "Should the Guam Public School System wish to early terminate this agreement prior to December 31, 2009 it is subject to both termination and buyout charges...."

GPSS has produced a collection of documents, not a Procurement Record, revealing nought but bare contract. The contract is unclothed by the garb of procurement; not so much as one of Lady Godiva's hairs to adorn it and hide its shame.

Discussion.

Introduction to the Procurement Record and what it reveals.

The only "procurements"[10] evidenced in the record are two Xerox supplied contracts[11], on its own company forms, spanning a time period of almost two decades, signed by an habituated GPSS that unquestionably accepted the monopoly terms, specifications and demands of its supplier, who told them what they needed and what they could get for their money, turning the normal procurement process on its head: there is no evidence in the Procurement Record that GPSS instigated any solicitation of any procurement.

If the procurement record reveals anything, it raises the implication that it was Xerox Corporation that solicited and procured GPSS rather than the other way around.

First Contract: The Blanket Procurement Agreement of 1989

The first contract provided as part of the Procurement Record was a Blanket Purchase Agreement submitted and signed on a Xerox Corporation form of agreement.

Tab 1 of the Procurement Record contains the "Xerox Blanket Purchase Agreement For Copiers And Duplicators..." identified by "BPA 070036600". (Tab 2 also consists of a copy of the Xerox BPA.)

---

[10] Appellant here emphasizes the distinction between contract and procurement. GPSS has amended, modified and renewed the Xerox *contract* numerous times in ways which should constitute independent *procurements*, under the rubric and alleged authority of these seminal contracts.

[11] See, first, the 1989 Blanket Purchase Agreement at Tab 1 and 2 of the Procurement Record, referred to herein as the "Xerox BPA", and, second, the "2001" Xerox Document Service Agreement No. 7002364 at Tab 3 (actually this contract was signed in December 2000, and which, by the Purchase Order also appearing in Tab 3, included the period preceding (backdating) the date of the contract from October 1 to December 31, 2000); this second contract is referred to herein as the "2001 Xerox DSA". The Xerox BPA was signed by GSA, the 2001 Xerox DSA by GPSS.

Tab 1 further contains correspondence between the GSA Chief Procurement Officer and the Attorney General's Office. The CPO indicated he was considering a letter from Xerox, with no indication it was solicited from or otherwise sought by or in response to any request from the CPO, presumably offering an unsolicited agreement[12] to supply copiers, and sought an opinion from the AGO "whether it would be appropriate for me to sign the contract due to the price breaks being offered."

The AG, unhelpfully, "reviewed the proposed agreement for the Xerox Corporation" and, referring to the "substantial savings in costs for the copiers" and the policy of the Procurement Act "to provide increased economy..." together with GSA Regulation 3-103.02 which authorizes the CPO "to determine contractual provisions, terms and conditions", advised that "the agreement would not inhibit nor interfere with your normal competitive bidding procedures...."

But this questionable bit of advice from the Attorney General's Office came with a caveat:

> "This memorandum is informational only and is not issued as an opinion of the Attorney General."

With special reference to that Memorandum typed onto the Xerox form of BPA just below the CPO's signature, the GSA CPO (who has the delegable authority to purchase supplies and services for the Executive Branch) executed the Blanket Purchase Agreement April 12, 1989, to involve the purchase of a wide number and range of copiers and ancillary products for GPSS, as detailed on the attached Exhibit 1, in total amount of approximately $1,225,000.00.

There is no procurement evidence in the Procurement Record that GPSS acquired any copier from any source other than Xerox Corporation after the commencement of that Xerox BPA, handing Xerox an effective monopoly on the GPSS copier business for twenty years or so, perhaps longer.

Importantly, section 5 of the Xerox BPA stated, "[t]he term of this Agreement shall be twelve-months from the date this Agreement is accepted by Xerox[13] and shall expire on the last day of

---

[12] The memorandum from the CPO to the AG is found at Tab 1 of the Procurement Record. It refers to an "attached" copy of "a letter *from* Xerox Corporation in reference to a Blanket Purchase Agreement", but the attached letter was not included as part of the Procurment Record. Also, note that this BPA required Xerox' acceptance, not GSA's, as mentioned in footnote 13, below. See discussion of PL 25-31 and the 2001 Xerox DSA as an unsolicited offer at page 8, below.

[13] This is a curiosity from a government procurement standpoint. Normally, it is the government which specifies the terms and conditions which, by bid, the contractor either accepts or doesn't bid upon. This format where Xerox prescribes the terms of the contract is the

the twelfth-month." The BPA was signed by Xerox Corporation, Western Region, in California but was not dated when accepted.

Taking the only date on the contract, April 12, 1989, the contract should have expired of its own terms in April 1990. There is nothing in the Procurement Record indicating any further contract or procurement action in respect of copiers until the 2001 Xerox DSA contract discussed below.

Improper use of the Blanket Purchase Agreement method of source selection.

Blanket Purchase Agreements (2 GAR § 3112.1) are one authorized method of source selection which fall outside the strict requirements of the preferred competitive sealed bidding method of source selection (2 GAR § 3108(c)). Nevertheless, even with a BPA,

> "[a]ll competitive sources should be given an equal opportunity to furnish supplies or services under BPAs. Therefore, if not impossible, then to the extent practical, BPAs for items of the same type should be placed concurrently with at least three separate suppliers to assure equal opportunity." (§ 3112.12 (e).)

The Procurement Record contains no evidence of such placement, nor any attempt to do so.

There are many more restrictions to the use of BPAs, some more relevant to this case than others, but some of the most obvious restrictions are in 2 GAR §3112.13:

> (b) "Individual purchases under BPAs shall not exceed $15,000 for supplies or services...."
>
> (c) "The existence of a BPA does not justify purchasing from only one source. Whenever possible, the Chief Procurement Officer ... must provide for equal distribution of the blanket purchase to at least three separate vendors."

The Public Auditor examined BPAs undertaken by GSA, and was critical of the improper use of them, in her Audit Report No. 04-08 July 2004 (http://www.guamopa.org/docs/OPA0408.pdf). Among abuses of this method of source selection, the Public Auditor noted failure to obtain three vendors, failure to maintain adequate records and failure to provide periodic reviews, as well as the following improper procurement:

> GSA issued purchase order P036X00043 to vendor X0012204 in the amount of $197,675 **for copier supplies**, which is 13 times

---

antithesis of the usual position of the parties in government contracting and procurement.

more than the $15,000 limitation. (Page 20)[14]

The Second Contract: The 2001 Xerox DSA

The 2001 Xerox DSA was signed by GPSS December 15, 2000 and thereafter accepted [15] by Xerox Corporation December 18, 2000.

There is a ten year black hole in the Procurement Record after the Xerox BPA in 1989 until the appearance of the 2001 Xerox DSA, but at some point between the Xerox BPA (Tabs 1 and 2) and the end of the year 2000, GPSS and Xerox Corporation determined, for whatever undisclosed reason, to abandon the GSA BPA format and go for the Xerox Document Service Agreement ("DSA") format (see, Tab 3) [16].

The term of this 2001 Xerox DSA is not entirely explicit from the Procurement Record provided, however, there is a pricing schedule which reasonably implies a five-year multi-term contract (see discussion "Improper use of multi-term provisions", below) to run from January 1, 2001 to December 31, 2005; but then Amendment No. 1 included with it in Tab 3 refers to a period of April 1, 2001 to March 3, 2006, at least in respect of the separate procurement of the new equipment items purchased by way of that "amendment", which should have constituted a new and independent procurement action [17].

---

[14] And compare that amount to the far greater $1,225,000.00 amount under the Xerox BPA.

[15] See footnote 13, above.

[16] The documentation of the Xerox DSA at Tab 3 is confusing in that it suggests the possibility that parts are missing. The Purchase Order only contains the first and third pages of an apparent three-page document, and the Xerox DSA incorporates an additional Xerox form, by the 'x' mark before "Agreement Addendum Attached: 52083" on the signature page, whereas there is no Xerox form 52083 submitted with the material provided.

[17] Compare procurement of "a wide variety of items [plural] in *a broad class of goods*" under a Blanket Purchase Agreement (2 GAR § 3112.12(1)) with Sole Source procurement of an "item" [singular], with no reference to the "broad class of goods" allowed under BPAs (2 GAR § 3112). Note, also, the admonition, under the "Small Purchase" procurement source selection method (2 GAR § 3111(b)(5), that "[p]rocurement requirements shall not be artificially divided to avoid using the other source selection methods....') Finally, note that the Public Auditor has criticized the arbitrary splitting of purchase orders in Performance Audit Report 04-14, at Page 7-8, which report is more fully cited in the discussion below, which is the other side of the same coin of arbitrarily aggregating purchase orders, when done to circumvent the competitive sealed

<u>The 2001 Xerox DSA should reasonably be considered an illegal contract based on an unsolicited offer.</u>

Given that both the BPA and DSA contract formats were selected by Xerox, and recalling Xerox Corporation's overtures to GSA with its Xerox BPA, it could be surmised that this DSA format was suggested by Xerox. Moreover, given the utter lack of any solicitation or any other evidence in the Procurement Record that GPSS did anything to solicit the bid or proposal for copiers from Xerox Corporation, the only rational explanation for the appearance of the 2001 Xerox DSA contract is that it was the result of an unsolicited offer from Xerox Corporation.

Normally, the government procures its needs by soliciting bids or proposals from sellers. Occasionally, sellers hawk their goods to the government, and in that case the approach is considered to be an "unsolicited offer".[18] There are procurement laws and regulations governing both such circumstances.

Prior to the enactment of PL 25-31 in 1999, unsolicited offers were required to be evaluated pursuant to the Sole Source procedures, provided certain other conditions and requirements were met, among which included the requirement that the offer must be "unique or innovative to territorial use". (See, 2 GAR § 3104 (which does *not* reflect the changes made by PL 25-31).)

However, PL 25-31 made wholesale major changes to the handling of unsolicited offers by the enactment of 5 GCA § 5219[19] to the Procurement Act, requiring unsolicited offers to be put to competitive sealed bidding procedures, which changes have not yet been reflected in any amendments of the Procurement Regulations.

The Legislative Statement to PL 25-31 notes that the CPO and heads of agencies had been given very broad discretion under the applicable Regulation, and that the arbitrary application of that discretion may be "misperceived by the public." Continuing, it said,

> "To ensure fair competition among qualified businesses, opportunity first must be provided by way of a public notice of solicitation for bids. Competitive bidding ensures the transparency of the process to the public and allays any misgiving that may arise if done otherwise.

---

bidding method of source selection.

[18] 5 GCA § 5219(a): "An unsolicited offer is any offer <u>other than one submitted in response to a solicitation</u>."

[19] Enacted as § 5218 but renumbered by the Compiler of Laws as 5 GCA § 5219.

> It is the intent of *I Liheslaturan Guåhan* to require all unsolicited offers to undergo the competitive selection procedures, specifically the competitive sealed bidding, which is designed to obtain the benefits of awarding the contract to the lowest responsive and responsible bidder...."

The Procurement Record contains no evidence of any IFB, public solicitation or other indicia of a competitive sealed bid being undertaken. If the 2001 Xerox DSA is determined, by the Public Auditor, based on the Procurement Record and the inferences reasonably drawn therefrom, to be an unsolicited offer, it must conclude, by the complete absence of the evidence of any competitive sealed bidding, that the purchase of copiers under that contract is improper, illegal and without authority.

The 2001 Xerox DSA is an illegal contract even if not considered an unsolicited offer

We do not know what brought about the change of format from the Xerox BPA to the Xerox DSA in 2001, whether it was suggested by Xerox, and thereby constituted an unsolicited offer which should have been sourced by competitive sealed bidding, or sought by GPSS (it was certainly not "solicited", as that term is used in procurement law, by anything appearing in the Procurement Record): there is simply no evidence of the context or antecedents to the making of the 2001 Xerox DSA in the Procurement Record.

The only hint we get as to the method of source selection that *may* have been used by GPSS in the 2001 Xerox DSA is the annotation of the Purchase Order (produced with the Procurement Record at Tab 3: the copy produced contains only two pages of an apparent 3 page document).

The unsigned annotations appearing on page 3 of that Purchase Order, first, incorporate the superceding terms and conditions of the 2001 Xerox DSA and, second, note simply:

> "DOEPR 3.12.2(1) Sole Source: compat. of equipment, accessories or replacement parts"

If GPSS selected the sole source method of source selection as a result of the unsolicited offer of the DSA from Xerox, then it was clear error in violation of 5 GCA § 5219, as discussed above. *If* it intended the sole source method of source selection by virtue of 5 GCA § 5214, the Procurement Record shows it did not follow the Procurement Act or Procurement Regulations to implement it, and, thus, failed to procure the copiers properly.

But the point to remember here is this is conjecture; both options mentioned in the paragraph above are prefaced with "if". GPSS' brief and unresponsive answer failed to identify exactly which method of source selection it is relying upon to validate its claim that its procurement of the copier is proper.

GPSS' nonresponsive answer continues to leave Appellant, and the Officer hearing this Appeal, in the dark as to the essential question: what is the legal basis, what method of source selection was chosen, supporting the contracts and Purchase Orders appearing in the Procurement Record?

This is entirely an unsatisfactory response and continues the contempt GPSS has had towards Appellant's attempts to find out, over the last two years, what pea is under what shell?

We don't know if the P/O annotation was an afterthought or if any step was taken purposefully to undertake a sole source procurement. The Procurement Record contains nothing, absolutely nothing, that the Procurement Act and Regulations require to effect a sole source procurement.

We are ascribing a benefit of doubt to GPSS, we are imputing an intent, even to consider the *possibility* that they *may* have desired to implement a sole source procurement; the *record* just as readily, and more reasonably, supports the inference the 2001 Xerox DSA was the result of an unsolicited offer, which should have been subjected to the competitive sealed bid method of source selection required by PL 25-31.

Improper use of sole source method.

In any event, the 2001 Xerox DSA does not legally qualify as a sole source method of selection because, before any sole source solicitation can be legally effected, "the head of a purchasing agency, or a designee ... above the level of the Procurement Officer *determines in writing that there is **only one source*** for the required supply...."[20]

There is no such written determination in the Procurement Record, and the annotation on the Purchase Order cannot be construed as such, so any purported sole source procurement is improper and without necessary legal condition.

Indeed, given the presence in the Guam market of Xerox competitors[21], no such determination

---

[20] So essential is this requirement that the Procurement Regulation reiterates it in 2 GAR § 3112, and again in subsection (b):

> "The determination as to whether a procurement shall be made as a sole source shall be made by the ... the head of a Purchasing Agency, or designee of such officer. Such determination and the basis therefore shall be in writing.... In cases of reasonable doubt, competition should be solicited. Any request by a using agency that a procurement be restricted to one potential contractor shall be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need."

[21] Which the Public Auditor acknowledged in Report 04-05, discussed below at page 17.

could, in good faith, be made. **It is not only the *writing* that is absent from the Procurement Record; also absent is the conditional single-source basis for the choice of that method of source selection. It is not only a *procedural* defect, it is a core substantive defect.**

These are not minor omissions easily overlooked and cast aside. These are essential ingredients of the relevant procurement law if sole source selection is to be legally utilized. It is improper to contract for supplies under the auspices of sole source if all necessary conditions have not been met, and on the Procurement Record before us, these conditions have patently not been met.

The 2001 Xerox DSA has no justifiable basis in law and GPSS was acting beyond its authority to enter into it, let alone continue to operate under it since 2001 up to this very present day in 2008, which it does with apparent impunity, unless and until the Public Auditor takes the actions it is authorized to take to terminate this illegal arrangement and replace it with properly procured copier acquisition measures.

The Procurement Regulations provide further conditions and requirements for a sole source solicitation, none of which were observed based on any evidence in the Procurement Record.

The Public Auditor canvassed much of the law and regulation regarding the sole source method of source selection in her 2004 Performance Audit of GSA, " Competitive Sealed Bidding, Sole Source, and Emergency Procurement Functions Government of Guam, General Services Agency" OPA Report No. 04-14 (http://www.guamopa.org/docs/OPA0414.pdf), and in her 2006 Decision in The Appeal of RadioCom, OPA-PA-003-06 (http://guamopa.com/docs/procurement_appeals/06-003_Decision.pdf).

In her GSA Performance Audit Report, the Public Auditor said.

> "Pursuant to 2 G.A.R. § 3112, sole source is permissible only if the requirement is available from a single supplier, the CPO shall determine in writing that there is only one source, and in cases of reasonable doubt, competition should be solicited. Additionally, it is good business practice to include a certification from the vendor, on comp available only through a single supplier." (Page 6)

Also noted was that,

> "[T]he former GPD Chief recommended the sole source method because there was only one authorized local vendor that could order and sell this particular [vehicle] model based on GPD's specifications.
>
> "We determined that these specifications, which implied a "brand name," were restrictive; thus, excluding all other possible vendors. This practice of specifying a "brand name" should be discouraged because it inherently prohibits competition

> and violates Guam procurement regulations, which require that all specifications shall seek to promote overall economy, encourage competition, and shall not be unduly restrictive in satisfying the Territory's needs." (Page 7).

The Public Auditor summarized,

> "Guam procurement laws and regulations generally discourage the use of sole source, and in cases of reasonable doubt, competition should be solicited. GSA, however, relied exclusively on the requesting agencies' rationale without independently verifying the justifications. We concluded that the justifications used to support sole source procurement were not warranted because they lacked sufficient facts to prove that the goods and services were unique and only available through a single supplier.

At least, in the incidents cited in the Public Auditor's 04-14 Report, there were justifications contained in the file, suggesting the semblance of abiding by the procurement law. In the instant case, the Procurement Record contains no such justification, valid or not, providing no semblance of abiding by or acknowledgment of the procurement law.

The regulations also require that, under sole source procurement, the procurement officer shall "conduct negotiations" regarding the purchase (2 GAR § 3112(c)). There is no record of any negotiations contained in the Procurement Record, as would be required under 5 GCA § 5249.

Strike three is the requirement "[f]or <u>the purpose *of complying* with</u>" the sole source method of source selection, that the agency make a record listing the sole source contract, containing, the contractor's name, the amount of <u>each</u> contract, a list of the supplies covered, and the identification number of the contract file, which "shall be submitted to the Legislature on an annual basis." There is no record of any such submittal ever having been made, nor any such record having been made, in the Procurement Record produced herein. (2 GAR § 3112(d).)

GPSS has struck out on every requirement for conducting a proper "Sole Source" procurement.

<u>Improper uses of contract forms</u>:

A. <u>Improper use of option to purchase provisions</u>.

The 2001 Xerox DSA and many of its multiple so-called amendments, allow for an effective lease (usage) of the copier equipment during the term of the contract, with an option to purchase the equipment ("buyout" right). But, 2 GAR § 3119(k)(3) provides as follows:

> "A purchase option in a lease may be exercised only if the lease containing the purchase option was awarded under competitive sealed bidding ... or the leased supply or facility is the only supply or facility that can meet the territory's

> requirements, as determined in writing by an officer above the level of the Procurement Officer. Before exercising such an option the Procurement Officer shall:
>
> (A) investigate alternative means of procuring comparable supplies or facilities; and
> (B) compare estimated costs and benefits associated with the alternate means ...."

There is no evidence that any of those requirements were met.

B. <u>Improper use of multi-term provisions.</u>

The 2001 Xerox DSA was, apparently, intended to cover several years (which began to overlap with the various amendments issued). Thus, it was a "multi-term" contract (see, 2 GAR § 3121), being one intended to obtain "uninterrupted services extending over more than one fiscal period."

Such a contract is required to contain a specific provision "that, in the event that funds are not available for any succeeding fiscal period, the remainder of such contract shall be cancelled and the contractor shall be reimbursed the reasonable value of any nonrecurring costs incurred but not amortized ...." (2 GAR § 3121(a).) It is evident by the threat of accelerated penalties and payments made by Xerox in its letter to GPSS found at Tab 12. that such a provision was not contained in the 2001 Xerox DSA.[22]

Moreover, "[t]he objective of the muli-term contract is to promote economy and efficiency in procurement by ... increasing competitive participation in procurement...." (2 GAR § 3121(b).) Here, everything was done to avoid even the appearance of competition.

Other provisions relative to multi-term contracts were violated:

- Multi-term contracting applies "only to contracts for [the purchase of] supplies or services ... and does not apply to any other contract including, but not limited to leases ...." (§ 3121(c). (Note: leases with purchase options are governed by § 3119(k), discussed above; § 3119(j)(1).)
- The use of the multi-term contract requires its own determination, which GPSS never seems capable of giving or keeping in the record. (§ 3121(d).)

---

[22] Certain amendments (e.g., Amendment No. 1, paragraph 3, at Tab 3) and the General Terms of the agreement (paragraph 10 of the 2001 Xerox DSA, also at Tab 3) specify that the equipment is provided for the <u>entire term</u> of the agreement and any early termination would result in accelerated payments of certain charges, disengagement charges, and the like, as well as possible buy-out charges (paragraph 14).

• Use of a multi-term contract requires solicitation, an evaluation and an award, all of which implies it is to be effected with the competitive sealed bidding method of source selection. (§ 3121(e).)

C. Improper use of Indefinite Quantity provisions.

If the 2001 Xerox DSA was intended to operate as an indefinite quantity contract (see, 2 GAR § 3119(i)(2)), it, again, failed to abide by the requirements applicable to that contract type (and again we speculate as to what GPSS was, in fact, doing because they fail to tell us). In order to use that contract form, that section requires:

> "Each indefinite quantity contract proposed to be entered into by the ... head of the purchasing agency [should make a written determination] indicating the rationale for using this type of contract and the reasons why another contract form will not suffice. Such contracts will be reviewed every 6 months for a determination of the continued need for such a contract.
>
> "In an effort to ascertain that supplies and services are procured competitively, indefinite quantity contracts shall not be used more than twice per fiscal year for such supplies and services. Should the department or agency continue to require the supplies or services, the procurement for such supplier or services must comply with §3109 (Competitive Sealed Bidding) or §3111 (Small Purchases)."

Further, indefinite quantity contracts are intended, at the outset, to establish "unit prices of a fixed-price type" (id.). Here, equipment prices and descriptions changed consistently throughout the term of the contracts. Substantively as well as procedurally, it is improper to rely on the authorized form of indefinite quantity contract.

But contract forms do not negate the need for a method of source selection.

These violations of the purchase option provisions and the multi-term provisions and the indefinite quantity provisions should not distract from *the essential fault*, which is this: a purchase option and a multi-term contract and an indefinite quantity contract are merely authorized forms of contract (2 GAR § 3119(a)). They are not methods of source selection.

Regardless of the form of the contract, procurement law requires, before contract, compliance with one of the authorized methods of source selection to constitute a proper procurement (2 GAR § 3108).

And, as repeatedly shown, the Procurement Record contains no evidence that any copier purchase contract, in authorized or unauthorized form, was ever cloaked in the garb of

procurement.

There is no other contract in the Procurement Record, only another Amendment (No. 17).

GPSS would have us believe that "[t]he current five year contract with Xerox was signed on December 16, 2004." (Agency Report Answer, at paragraph (g).)

But what does that document signed December 16, 2004 say? This document, produced at Tab 8 of the Procurement Record, is on Xerox Corporation's form 52120. It was first signed by GPSS Superintendent Juan P. Flores on December 16, 2004 and thereafter, in the acceptance format seen before[23], signed by Xerox Corporation on 18 December 2004. It is described as follows:

> "Document Services Agreement
> Renewal Amendment
>
> This amendment Number 17 (the "Amendment") sets forth the terms and conditions upon which Department of Education, Guam ("Customer" or "you") and Xerox Corporation ("Xerox"), have agreed for Xerox **to continue** to provide Services ("Services") to you under the Agreement Number 7002364 (the "Agreement") between you and Xerox."

Since the document itself refers to this agreement as "Amendment 17", that is how we will refer to the document herein.

Amendment 17 not a new agreement. It is the very same 2001 Xerox DSA, right down to the agreement number 7002364. It is simply a "continuation" of that agreement and suffers from all the deficiencies of that contract mentioned above, as well as to the renewals mentioned below.

At Tab 8, there is a letter dated September 28, 2007 from GPSS to Xerox Corporation. It recites:

> "This letter is to notify you of the Guam Public School System's intend [sic] to extend your company for the continuance of providing document services ...."

In the same letter it expressly states:

---

[23] See discussion at footnotes 13 and 15, above. Also note Amendment 17 contains the provision, in paragraph 14, "any terms on your ordering documents shall be of no force or effect." This again suggests that GPSS did not solicit this contract, as that term is commonly used to include notions of setting needs, specifications and terms and conditions of contract, etc.

> "This *letter of continuation* shall incorporate all the **General Conditions, General Provisions, Specification/Performance Standards, Scope of Work** as stipulated in **Agreement 7002364.**" (Bold emphasis in original, italics added.)

That particular agreement 7002364 is the identification number given to the 2001 Xerox DSA.

Appellant is not placed to fully analyze the differences between all the equipment initially specified under the 2001 Xerox DSA and the equipment identified to Amendment 17, but a casual comparison between the two lists suggest substantial differences; it suggests that materially different equipment is being purchased and serviced than originally contracted for, yet there is no evidence whatsoever in the Procurement file of an independent determination of "single source" availability and no evidence that any effort was made to solicit any competing bids or otherwise publicize this new purchase under the "amendment".

Improper use of renewal of current territorial contract method.

There is no exception from the requirement for competitive sealed bidding when there is a "renewal" of the sort seen in Amendment 17. The 2001 Xerox DSA does not, by its terms, offer any option to renew, which is the only situation in the procurement regulations even mentioning the possibility:

> "Before exercising any *option* for renewal... the Procurement Officer should attempt to ascertain whether a competitive procurement is practical.... A written record of the Procurement Officer's findings and determinations shall be made and maintained as part of the contract file." (2 GAR § 3119(k)(2).)

Once again, no such record has been produced herein.

Such a determination is expressly made a condition precedent for renewal, so any purported renewal was without authority.

And there is no renewal in any event if the substance of the original contract is materially changed, as it was. It is a new acquisition, demanding a new procurement, however it is entitled. Nothing in law or regulation supports the "continuation" of GPSS' purchase of copiers from Xerox Corporation.

With all the requirements and conditions for such a renewal missing from the Procurement Record, the only choice available was for GPSS to procure copiers under the competitive sealed bid method of source selection. Of course, there is no evidence of that.

There is another method of source selection mentioned in the Procurement Regulations that has

been abused in the past to "justify" the continuation or renewal of "existing" or "current territorial contracts", should we wish to engage in further speculation as to what GPSS was trying to accomplish. The key phrase seized upon to avoid competitive sealed bidding is "[s]upplies ... which may be obtained under current territorial contracts shall be procured under such agreements in accordance with the terms of such contracts". This is the "Small Purchase" method of source selection. (See, 2 GAR § 3111(b)(3).)

There are, however, conditions and requirements of this method of source selection which render it inapplicable to the GPSS/Xerox Corporation copier arrangement. First, this section implies that the "current territorial contract" was lawfully executed in the first place, and, as detailed above, that is not the case here.

Second, this method of source selection is limited to purchases of supplies, "not artificially divided to avoid using other source selection methods", less than $15,000.00. (§ 3111(b)(1) and (5).)

The use and abuse of this "Small Purchase" method of source selection was examined in yet another OPA Performance Audit of GSA in 2004, Report No. 04-05. Among the abuses found:

> "During the scope of our audit, vendor X0012204 was issued the most POs for the lease and maintenance of copier machines [reference omitted]. In FY 2002, 31 agencies issued a total of 214 POs ($794,601) to this vendor. In FY 2003, this vendor received a total of 146 POs ($705,046) from 29 agencies. The top 5 agencies that issued small purchases to this vendor are listed in [reference omitted]. **There are other vendors offering copier machine lease and maintenance, however, government agencies chose to issue small purchases to vendor X0012204.** The aggregate amounts of $794,601 (FY 2002) and $750,046 (FY 2003) provide evidence that may suggest a government-wide artificial division of the procurement and circumvention of the competitive sealed bid requirement."
> (At pages 16-17. See, http://www.guamopa.org/docs/OPA0405.pdf.)

Apart from the abuse of using the Small Purchase method in the manner mentioned in Report 04-05, the Public Auditor mentioned, in the context of her report into abuse of competitive sealed bidding, Report 04-14 (see, discussion re Sole Source above, page 10), the Public Auditor found:

> GSA processed 146 POs, totaling $6 million, utilizing "existing territorial contract" for goods and/or services in excess of $15,000. Of the 146 POs, 45 Pos, totaling $2.5 million, did not undergo the competitive sealed bidding process. We also found the following during our review:
>
> • Lease/Purchase of Copier Machines. From January 2000 through June 2003,

> GSA made unauthorized payments, estimated at $5.1 million, [footnote omitted] on two expired existing territorial contracts to a local vendor to provide for lease/purchase of copier machines "government-wide" and continues to award POs to this vendor despite the fact that the contracts for the two bids had expired in September1999. [The scope of the audit report did not go back to the 1989 Xerox BPA period.]
>
> Our review of the procurement files disclosed that the bids were initially awarded for $20,000 each in1995. The contract terms were for an "indefinite quantity" for a period of one year with an option to renew for three additional years. We determined that the bids were vague and open-ended because they were extended beyond the maximum 90-day extension limit on an "indefinite quantity" contract, as established by 2 G.A.R. § 3102(b). [footnote omitted.] We also determined that the files lacked pertinent supporting documentation of GSA's option to renew for the additional three years or whether GSA had properly monitored and/or evaluated the various price increases and product substitutions submitted by the vendor [reference omitted].
>
> We concluded that because GSA did not properly monitor and/or perform an evaluation of these procurement contracts, GSA circumvented the preferred method of competitive sealed bidding by continuing to award these lucrative contracts to this particular vendor. We considered the payments made from January 2000 through June 2003 to this vendor, totaling $5.1 million, improperly authorized.

A series of multiple acquisitions, none of which were proper procurements.

As mentioned above at footnote 17 and the accompanying discussion, GPSS has engaged in a series of purchases of copiers over the course of time, not just one purchase. And as the discussion above describes, nothing appears in the Procurement Record to substantiate that any of the so-called contracts (the Xerox BPA, the 2001 Xerox DSA and Amendment 17) ever rose to the definition of proper procurement.

What we find when we go through the documents submitted in the Procurement Record is that each of the purchases in the series were improperly made. As explained in footnote 17 above, each should have been conducted as an independent procurement, but GPSS improperly aggregated all of them under the banner of one or the other of the 2001 Xerox DSA or the Amendment 17, which is by its terms derived from the seminal 2001 Xerox DSA.

These additional procurements start right off in Tab 3, soon after the 2001 Xerox DSA was signed. Amendment 1was for the purchase of three additional copiers, with total annual charges in excess of $22,000. It was signed by GPSS on March 30, 2001, and thereafter accepted by

Xerox on April 14, 2001. It has its own "non-coterminous" term, from April 1, 2001 through March 31, 2006, expiring *after* the 2001 Xerox DSA. By its express terms, the provisions of this Amendment No. 1 supercede the provisions of the 2001 Xerox DSA (paragraph 6).

There can hardly be anything more carefully described to constitute a separate procurement, but there was no competitive sealed bid or any other method of source selection undertaken to effect this purchase, not even (as near as can be discerned) a purchase order with "sole source" annotation. This was another bare purchase contract with no cloak of procurement. It couldn't be more improper.

Coincident with that one, Tab 3 contains Amendment No. 2, which provides for some price adjustments to the base contract and correction to equipment identification numbers. It contains a pricing provision significantly different from the one in Amendment No. 1, "[e]xcluding any pricing associated with Non-Coterminous Amendments...." Apparently, "non-coterminous amendments" refers to the type found in Amendment No. 1 and are the code words for independent procurements concealed under the seminal contract.

Apart from amendments, which appear on Xerox forms, the proffered Procurement Record contains a number of "Modification of Purchase Order" forms. Many of these also procure additional supplies and should have been independently conducted by way of one of the authorized methods of source selection. For instance, the modification at Tab 4 adds a new piece of equipment not previously identified to any of the prior contracts.

Some modifications so totally expand beyond the scope of the 2001 Xerox DSA that there can be no question of any kind that the purchase should have been conducted by a separate competitive sealed bid method of source selection.

For instance, the modification at Tab 5 added over $64,000.00 in one year to the contract for the purchase of ***paper***, which was never identified in the 2001 Xerox DSA as a purchase item. There is, further, nothing in the Procurement Record authorizing the procurement of this paper, only a "Price Quotation" from Xerox Corporation, bearing the instruction to "attach copy of this price quotation ... to ensure expeditious processing of your purchase order."

And that's the extent of the "purchase": a price quotation and a purchase order. That is not procurement. That is ad hoc, bare, unauthorized contracting. Since IBSS is not in the paper business, it is not, strictly speaking, aggrieved by that purchase, but the public certainly is.

The modification appearing at Tab 7 adds another piece of equipment, priced at $14,970.00. Was this justified as a small purchase or sole source or renewal or amendment of existing contract, or what? We don't know and GPSS has produced no evidence that it was any of those things, simply another bare purchase.

Neither do we know what the substance is of Amendments Nos. 3 to 16, nor if there are any

amendments made after No. 17, "under" the 2001 Xerox DSA: they aren't in the Procurement Record.

Adding to the ongoing series of improper acquisitions of copiers is the series of Purchase Orders appearing at Tabs 9, 10, 11, 13 and 14. These additional purchases purport to be "renewals" of the 2001 Xerox DSA , e.g., P/O # 200500350, at Tab 9: "Issued to cover the cost of renewal of XBS Service agreement 7002364" and "Renewal of the Xerox Document Services Number 7002364". Those references are expressly to the 2001 Xerox DSA, not Amendment 17, and clearly relate back <u>over five years</u> to the seminal agreement, which has been shown above to be improperly "procured" in the first place.

And then there's the trade-in "addendum" to Amendment 17, which facilities even more new equipment, which, financially, "incentivates" GPSS to constantly roll-over equipment back to Xerox, outside the parameters of procurement regulation, including the protocols for sales of excess government property.

<u>Putting it in the context of the relevant time frame and revealing an anomoly</u>.

As IBSS chronicled in its Notice of Appeal, it began to keep records and document its efforts to become involved as a bidder for the GPSS copier business back in <u>July 2005.</u>

The seminal 2001 Xerox DSA (to the extent, and accepting solely for the point of argument, it was a "procurement" under the relevant procurement laws and regulations), was issued for a term comprised of five annual periods, commencing January 1, 2001 and ending five years later, <u>December 31, 2005.</u>

Thus, IBSS' interest to be involved in any procurement of copiers was well known to GPSS, from the Superintendent down through the ranks, approximately six months prior to the specified expiration of that contract.

But the Superintendent dissembled and his staff let nothing out of the bag to reveal what GPSS was actually doing with its copier purchases.

And what was it doing?

You get a hint, but more of a misrepresentation, from GPSS's answer herein. What you find is that **the original five year 2001 Xerox DSA was not allowed to run its course**. But you don't discover why.

What you find is that, in <u>2004</u>, one year *before the DSA expired*, by Amendment 17, GPSS continued the 2001 Xerox DSA, *not* for the term of the "<u>five year contract</u>" described at

paragraph (g) of its Agency Report Answer, but for a total of **<u>over eight years</u>** of successive periods (not forgetting the pre-dated period in the year 2000 mentioned above), when including the period of the 2001 Xerox DSA, which a continuation of that contract implies.

GPSS is not currently operating under a five year contract as it claims in its Answer, but <u>a eight year plus contract</u>!

At this point, it becomes quizzically suspicious.

Why would GPSS and Xerox decide to cut short, by one year, the five year original term of the 2001 Xerox DSA in 2004 and enter into a five year "renewal" of it?

Why would GPSS officials go all the way through the year 2005 giving IBSS the continued impression that GPSS would be issuing a bid solicitation come the next fiscal year if it had already signed a six year renewal in 2004?

Why is the only copy of Amendment 17 placed in the Procurement Record at Tab 8 behind a letter dated September 28, 2007 rather than the chronological order of the other documents?

What ever happened to amendments 3 to 16 of the 2001 Xerox DSA, and what were the dates on those amendments, and their substance?

Is there any limit to the number of years that a vendor can tie down a government agency under one contract with or without a proper procurement?

From day one of its pursuit to engage with the procurement of copiers from GPSS, , IBSS has found this GPSS/Xerox copier business to raise more questions than GPSS has deigned to answer. The so-called Procurement Record produced in the Appeal, and the non-responsive and misleading Anwer only adds to the confusion.

Xerox Corporation's sales of copiers to the Government of Guam were critically implicated in every one of the Performance Audit reports in 2004 cited above. As argued above, much of those criticisms fit in the mold of the GPSS situation. That does not, of course, imply or express any impropriety by Xerox Corporation in either this case or any of the instances mentioned in those Audit Reports. However, it may be that the Public Auditor could find answers to some of those questions, if GPSS is unable to answer them, if it determined to audit Xerox Corporation's dealings with GPSS, as authorized by the relevant procurement law and regulations.

<u>Conclusion</u>:

The government procurement process begins in every case other than an unsolicited offer with

the selection of a method of source selection.

Procurement law prescribes competitive sealed bidding as the preferred method of source selection, and sets out a limited number of carefully prescribed alternative methods of source selection. Appellant has had to canvass all of these alternatives because it is obvious from the documentation presented as a so-called procurement record, that there was no competitive sealed bid ever instigated by GPSS for the procurement of copiers: no needs determination, no specifications, no published notice of the bid or the award, no Invitation for Bids or Request for Proposals, etc.[24].

Appellant has had to canvass all these alternatives because GPSS has still failed to identify which method of source selection it purports to have based its purchase decision on. The record reveals it made no such selection of method because there is nothing in any document that all the available alternative methods require which would indicate whether any such alternate method was chosen or utilized.

As far as clearly deciding on a method of source selection, GPSS has decided, again, not to decide.

GPSS has not pointed to anything in the record that would portray the copier purchases as any kind of procurement, other than an ad hoc collection of contracts, amendments and modifications continued over numerous years, under the apparent guiding contract forms if not hand of Xerox Corporation, presented to GPSS for its signature, which it obliged.

This is not government procurement under any stretch of the imagination. It is not even the semblance of procurement. It is a mockery of procurement.

The collection of documents GPSS produced is not a Procurement Record, either. 5 GCA § 5249 sets out the requirements for, and a non-exclusive catalogue of, a Procurement Record:

> "§ 5249. Record Of Procurement Actions.
> Each procurement officer <u>shall</u> maintain a complete record of <u>each</u> procurement. The record shall <u>include</u> the following:
>
> (a) the date, time, subject matter and names of participants at <u>any</u> meeting including government employees that is in <u>any way related</u> to a particular procurement;
>
> (b) a log of all communications between government employees and any member

---

[24] See outline of requirements for Competitive Sealed Bid method at page 1 of 3 in Appendix 4, OPA Report No. 04-14, page 21.

of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement;

(c) sound recordings of all pre-bid conferences; negotiations arising from a request for proposals and discussions with vendors concerning small purchase procurement;

(d) brochures and submittals of potential vendors, manufacturers or contractors, and all drafts, signed and dated by the draftsman, and other papers or materials used in the development of specifications; and

(e) the requesting agency's determination of need."

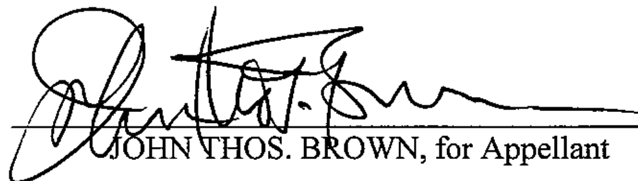
The record presented by GPSS herein reveals nothing but bare contract.

It suggests a complete evasion or abdication of anything even remotely required by the law and regulations relative to method of source selection, which is the beginning of the procurement process. It contains nothing of the certifications and notifications that are necessary to substantiate a proper procurement under any of the contract forms or methods of source selection authorized in the procurement law and regulation. It does not even contain the written determination of 5 GCA § 5250, which is an express statutory condition precedent to *making* any procurement award[25] and providing the transparency and accountability necessary for proper procurement and expenditure of taxpayer funds.

GPSS has not presented anything that would sway Appellant from its Protest: as explained both in its Notice of Appeal and in the comments above, GPSS' purchase of copiers from Xerox Corporation has been and continues to be improperly sourced and improperly procured.

Respectfully submitted,

Dated: February 27th, 2008



JOHN THOS. BROWN, for Appellant

[25] And while it may be difficult to craft a penalty for failure to do so, in a case such as this, such failure, at a minimum, should act to toll the 14 day protest period which GPSS complains of. See also discussion accompanying footnotes 7 - 9, above.

ORIGINAL

Index of Arguments

Page No.

Appellant's comment in brief: 1

Discussion. 4

Introduction to the Procurement Record and what it reveals. 4

First Contract: The Blanket Procurement Agreement of 1989 4

Improper use of the Blanket Purchase Agreement method of source selection. 6

The Second Contract: The 2001 Xerox DSA 7

The 2001 Xerox DSA should reasonably be considered an illegal contract based on an unsolicited offer 8

The 2001 Xerox DSA is an illegal contract even if not considered an unsolicited offer 9

Improper use of sole source method. 10

Improper uses of contract forms: 12

A. Improper use of option to purchase provisions. 12

B. Improper use of multi-term provisions. 13

C. Improper use of Indefinite Quantity provisions. 14

But contract forms do not negate the need for a method of source selection. 14

There is no other contract in the Procurement Record, only another Amendment (No. 17). 15

Improper use of renewal of current territorial contract method. 16

A series of multiple acquisitions, none of which were proper procurements. 18

Putting it in the context of the relevant time frame and revealing an anomoly. 20

Conclusion: 21