

CARLSMITH BALL LLP

MEREDITH M. SAYRE

*msayre@carlsmith.com*

ELYZE J. MCDONALD

*emcdonald@carlsmith.com*

Bank of Hawaii Bldg., Suite 401

134 West Soledad Avenue, P.O. Box BF

Hagåtña, Guam 96932-5027

Telephone No. 671.472.6813

Facsimile No. 671.477.4375

Attorneys for Party-in-Interest  
XEROX CORPORATION

**RECEIVED**  
OFFICE OF THE PUBLIC AUDITOR  
PROCUREMENT APPEALS

AUG 22 2008

TIME: 3:20 PM  
BY: Raz Perez ley  
FILE No. OPA-PA -08-011

OFFICE OF THE PUBLIC AUDITOR  
TERRITORY OF GUAM

IN THE APPEAL OF

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

Appellant.

DOCKET NO. OPA-PA-08-011

**XEROX CORPORATION'S  
COMMENT ON THE AGENCY  
REPORT**

Party-in-Interest Xerox Corporation ("Xerox") hereby submits its comments on the Agency Report issued by the Guam Public School System ("GPSS") in connection with this case.

Pursuant to 2 GAR § 12105, the Agency Report shall include the following information:

(a) A copy of the protest.

Xerox comment: The Agency Report complies with this requirement.

(b) A copy of the bid or offer submitted by the Appellant and a copy of the bid or offer that is being considered for award or whose bid or offer is being protested, if any had been submitted prior to the protest. The Agency Report is correct that Appellant did not submit a bid.

**COPY**

Xerox comment: The Agency Report correctly states that Appellant did not submit a bid.

- (c) A copy of the solicitation, including the specifications or portions thereof relevant to the protest;

Xerox comment: The Agency Report references GPSS's Procurement Record. However, GPSS's Procurement Record does not contain a solicitation for Copier Machines, Copier Products, Copier Supplies and Related Services by GPSS.

- (d) A copy of the abstract of bids or offers or relevant or portions thereof relevant to the protest;

Xerox comment: The Agency Report references GPSS's Procurement Record. Xerox wishes to point out that while no abstract per se is contained in the Procurement Record, all relevant copies of contracts between GPSS and Xerox, which form the basis of this Appeal are in the Procurement Records.

- (e) Any other documents which are relevant to the protest; including the contract, if one has been awarded, pertinent amendments, and plans and drawings;

Xerox comment: The Agency Report references GPSS's Procurement Record, which appears to be compilation of all relevant documents to this Appeal.

- (f) The decision from which the Appeal is taken, if different than the decision submitted by Appellant;

Xerox comment: The Agency Report references the same protest response as submitted by Appellant. The instant Appeal arises from a previous appeal, Appeal No. OPA-PA-08-003. The Public Auditor issued a Decision dated July 11, 2008, wherein the Public Auditor dismissed the Appeal for lack of jurisdiction. GPSS issued a Response to Protest on July 22, 2008 wherein GPSS officially denied the Protest of Appellant.

- (g) 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;

Xerox comment: In the Agency Report, GPSS stated that Appellant's protest was

untimely since Appellant did not file its protest within 14 days of GPSS and Xerox signed the contract for copier services on December 16, 2004. Pursuant to 5 GCA § 5425, protest shall be submitted in writing within fourteen (14) days **after such aggrieved person knows or should know of the facts giving rise thereto.** (Emphasis added.) Xerox asserts that regardless if Appellant did not have to file within 14 days after the award of the copier contract, Appellant's filing of its protest was still untimely. While Appellant points out that the 14-day period need begin on the date the contract was signed, pointedly missing is the exact date that the 14-day period *should have begun*. The 14-period certainly should not begin whenever Appellant feels it should begin. The 5-year contract between GPSS and Xerox was entered into on December 16, 2004. *See* Procurement Record. Appellant first inquired into GPSS's copier service arrangement in February, 2007 yet did not file a protest until December 4, 2007. *See* Appellant's Notice of Protest dated December 4, 2007. Xerox asserts that the 14-day period should be established prior to November 20, 2007, 14 days prior to the date Appellant filed its protest.

Even assuming that GPSS was initially unresponsive to Appellant's inquiries, it is unreasonable to accept waiting 10 months to realize something might be amiss before filing a protest. Appellant could have easily researched public records such as local newspapers for invitations for bids for copier services to confirm whether any such invitations for bids were actually published by GPSS without any assistance from GPSS. Appellant should not be allowed to forsake diligence without taking more affirmative steps. Allowing Appellant to wait until after receiving certain information from the procurement record of the first appeal equates to Appellant being required to have only actual knowledge, which is contrary to 5 GCA § 5425 in that Appellant should have known much sooner. Appellant had more than ample opportunity between February and December 2007 to timely file its appeal after Appellant started suspecting that GPSS did not go through a competitive bidding process. Once Appellant started suspecting,

Appellant should have done more due diligence in confirming the absence of invitations for competitive bids for copier services in the local media and thus should have known of this fact long before December 4, 2007. For this reason, Appellant was untimely in its filing of its protest.

Further, Xerox wishes to supplement the Agency Report by noting that in the event that the Public Auditor finds that GPSS violated Guam Procurement Law, the appropriate remedy is governed by 5 GCA § 5452 since Xerox has already been awarded the copier services contract. If Xerox has not acted fraudulently or in bad faith: (i) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Territory; or (ii) the contract may be terminated and Xerox shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination. 5 GCA § 5452. Xerox maintains that it has acted appropriately and in good faith throughout the formation and performance of its copier service contract with GPSS and that the Procurement Record is void of any evidence otherwise.

- (h) If the award was made after receipt of the protest, the report will include the determination required under 2 GAR §9101(e); and

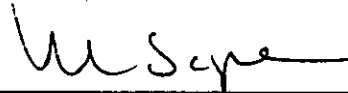
Xerox comment: Xerox agrees with the Agency Report that this requirement is inapplicable.

- (i) A statement in substantially the same format as Appendix B to this Chapter, indicating whether the matter is the subject of a court proceeding.

Xerox comment: A copy of GPSS's Declaration Re Court Action in same format as Appendix B is also available in the Procurement Record.

DATED: Hagåtña, Guam, August 22, 2008.

CARLSMITH BALL LLP



---

MEREDITH M. SAYRE  
ELYZE J. MCDONALD  
Attorneys for Party-in-Interest  
XEROX CORPORATION

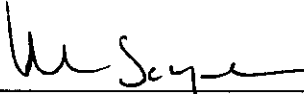
**DECLARATION OF SERVICE**

The undersigned hereby declares under penalty of perjury of the laws of the United States, that on the 22nd day of August, 2008, I will cause to be served, via hand delivery, a true and correct copy of the XEROX CORPORATION'S COMMENT ON THE AGENCY REPORT; DECLARATION OF SERVICE upon Plaintiff's Counsel of record as follows:

John Thos. Brown  
General Counsel  
545 Chalan Machaute  
Route 8, Biang Street  
Maite, Guam 96910  
Telephone No.: (671) 477-7293  
Facsimile No.: (671) 472-6153  
[ingoz@ozemail.com.au](mailto:ingoz@ozemail.com.au)

Fred Nishihira  
Legal Counsel  
Guam Public School System  
Post Office Box DE  
Hagåtña, Guam 96932  
Telephone No.: (671) 475-0658  
Facsimile No.: (671) 472-5003

EXECUTED: Hagåtña, Guam, August 22, 2008.

  
\_\_\_\_\_  
MEREDITH M. SAYRE  
ELYZE J. MCDONALD