

COPY

John Thos. Brown  
General Counsel for Petitioner  
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  
jngoza@ozemail.com.au

RECEIVED  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS  
JAN 10 2011  
TIME 12:03 BY: [initials]  
FILE NO. OPA-PA. 10-010

IN THE OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEAL

In the Appeal of	)	DOCKET NO. OPA-PA 10-010
	)	
TOWN HOUSE DEPARTMENT STORES,	)	APPELLANT'S NON-OPPOSITION TO
INC., dba	)	DOE'S MOTION TO PARTIALLY LIFT
ISLAND BUSINESS SYSTEMS	)	STAY AND PROCEED WITH AWARD
& SUPPLIES,	)	
APPELLANT	)	
_____	)	

Appellant does not oppose DOE's Motion to Lift the Automatic Stay to Proceed with an Award to Appellant of Items #1 & #3 in IFB 006-2010.

But first, Appellant refutes the opposition of Party-in-Interest Xerox Corporation to the Motion.

Xerox' opposition is, firstly, based on its repeated assertion that Appellant's bid is non-responsive, and bases that assertion on the very same facts it cited in June 23 of this year.

It is more than clear that a protest not filed within 14 days of the time the protestor knew or should have known of facts by which it *may* be aggrieved is barred except, perhaps, in a grievous situation. That 14 day period is a limitation that cannot be raised by again asserting the same allegation in this Appeal, months later.

The time limitation for bringing protest cannot be raised by alleging a “defense” which is not a defense at all. Xerox’ opposition does not defend anything. It is not a shield but a sword, a counter-claim, a stale *protest* which, under 5 GCA § 5425(a) could not otherwise be heard. This Appeal must not be turned into a vehicle for Xerox to protest IFB 006 after it chose not to do so. This is not an inequitable bar; it waived its right of protest, choosing instead informal mischief.

Moreover, it would be grievous to hear its protest at all considering the covert efforts of Xerox to bring the same allegations to DOE’s attention in clandestine correspondence<sup>1</sup>.

In a “confidential” letter to DOE on June 23<sup>rd</sup>, Xerox’ General Manager explicitly sought to undermine the fair evaluation of Appellant’s bid in the 006 IFB. Xerox *chose not to protest* the allegation then; rather, it improperly used insinuation and mischief to malign Appellant’s bid. That behavior should not be rewarded by now giving audience to the same accusations. To do so would compromise the integrity of the procurement process.

As said before, the time for the test of that protest has come and gone. The allegation is defensible but this is not the time, place or manner in which to have to do so, and IBSS should not be drawn into the distraction.

The other reason Xerox gives for opposing the motion is that it only deals with a commitment to award 2 of the 3 three items in the IFB (the copiers and some bundled management software, as identified in Xerox’ Opposition, at footnote 1, which for purposes of this discussion can be considered only one item: copiers).

Appellant’s protest below and this Appeal hereon are only concerned with an award of the copiers. When bids were opened and announced, IBSS was the known low bidder on this item, and Xerox was the low price on the software item<sup>2</sup>. IBSS only protested the low bid copier item, because it was advised its bid on the network software item was not low bid.

As was detailed in the Notice of Appeal and other filings by Appellant herein, the only reason offered by DOE as to why it was procrastinating with an award of the copiers was funding. DOE now has evidently addressed that hurdle and it should be allowed to conclude the only disputed issue arising from the IFB which has been raised in any protest below, without further waste of OPA’s time or resources, or further delay of the emergency declarations concerning the copiers.

---

<sup>1</sup> “[T]his Section [2 GAR § 3109, implementing regulations and procedures for Competitive Sealed Bidding] does not permit negotiations with any bidder ....” (2 GAR § 3109(n)(5).)

<sup>2</sup> Appellant did not know, until after this Appeal was brought, the substance of Xerox’ “bid” submission.

Allowing DOE to proceed with its Motion will allow all, indeed *the only*, issues arising from *the Protest* and this Appeal to be resolved.

The matter of the network software item has not ever been an issue brought in any protest or by Appeal to this Office. Xerox wants to hold the copier award, for which declarations of emergency have been declared, hostage to a hearing and determination of a contentious collateral matter<sup>3</sup>. It should not be allowed to do so.

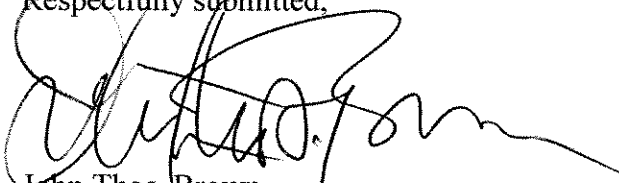
DOE has, as Xerox correctly points out, not made a formal *decision* on what it will do, if anything, as to the network software item. That is not a subject of this action, and OPA has no jurisdiction to hear any dispute regarding it without such a decision. On the other hand, in her letter of July 7<sup>th</sup>, the Superintendent advised DOE's desire to award the copier contract if funding could be obtained; that is the purpose of DOE's Motion now that funding is available.

The submissions in response to IFB 006 were opened on May 21, 2010. On the same day, the Superintendent issued her second Declaration of Emergency declaring that obtaining copiers was of the highest priority for the integral operation of DOE.

To further delay the emergency action which DOE seeks by its Motion to acquire the copiers solicited in IFB 006, while Xerox continues to try to undermine the low bid and distract from it with collateral distractions, would erode the integrity of the procurement system.

For these reasons, the Motion should be granted without further ado. Indeed, Appellant would withdraw any request for hearing, but only in respect of such Motion, all parties having already made clear their intents and arguments in submitted papers.

Respectfully submitted,



John Thos. Brown  
for Appellant, IBSS

---

<sup>3</sup> Appellant has pointed out (within 14 days of learning of the facts) and protested in its Supplemental Comments to the Agency Report, that the submission made by Xerox in IFB 006 did not amount to an unconditional acceptance, as required of an IFB, but a non-responsive offer and proposal to negotiate contrary to 2 GAR § 3109(n)(5). That matter, with the collateral issues associated with a determination of it, is not before this Office and should not be addressed herein. And, if DOE succumbs to Xerox' demand for award of that item in spite of the improper form of "bid" submission, Appellant will have to consider its options at that time, but that is an issue which should not stand in the way of expeditiously resolving the emergency copier issue.