

CARLSMITH BALL LLP

ELYZE M. IRIARTE  
*emcdonald@carlsmith.com*  
Bank of Hawaii Bldg., Suite 401  
134 West Soledad Avenue  
Hagåtña, Guam 96932-5027  
Telephone No. 671.472.6813  
Facsimile No. 671.477.4375

Attorneys for Party-in-Interest  
XEROX CORPORATION

RECEIVED  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS  
MAR 22 2011  
TIME 4:20 BY: JMW  
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 REPLY IN  
SUPPORT OF ITS MOTION TO  
DISMISS**

**I. IBSS IS A NON-RESPONSIVE BIDDER AND ITS PROTEST MUST BE  
DISMISSED.**

**A. THE IBSS AFFIDAVIT DISCLOSING OWNERSHIP AND COMMISSIONS IS  
FALSE.**

The Public Auditor could not be clearer in her Decision, *In the Appeal of Pacific Data Systems, Inc.*, OPA-PA-10-005 (Jan. 12, 2011 Decision), as to the standards of accuracy and truthfulness with respect to Affidavits Disclosing Ownership and Commission. First, the Affidavit is a condition of bidding, meaning that it is a material portion of a bid. Decision at 11-12. Second, failure to submit a valid Affidavit renders a bid non-responsive. Decision at 11. Third, "technical correctness" does not meet the standard because it falls short of compliance with 5 G.C.A. § 5233 and 2 G.A.R. Div. 4 § 3109(e)(3)(E). Decision at 9. Fourth, public policy

supports the strict enforcement of the law and regulations "requiring bidders to disclose their ownership interests at the time of bidding and the standard of awarding contracts arising from the Competitive Sealed Bidding Procedures to the lowest responsible and responsive bidder." Decision at 18. Based on these factors, the OPA ruled that GTA's Affidavit was false because it *did not accurately* disclose who held greater than 10% interest in GTA, that GTA was a non-responsive bidder, and that GTA could not receive an award.

The OPA must continue to enforce *complete accuracy* when it comes to IBSS' bid. IBSS tries to wiggle out of the inaccuracies of its Affidavit. IBSS refers to an anomalous "good faith" standard and a "due diligence" requirement, and also states that section 5233 "contains many ambiguous terms which calls into question legal intent and application." *See* Appellant's Opp. to Mot. to Dismiss. However, the OPA has already ruled that a bidder must accurately disclose *all* owners who hold more than a ten percent interest in the company at the time a bid is submitted. This standard required the IBSS representative to attest that Elaine C. Jones owns 99% of IBSS as of October 26, 2010, and that some other person or entity (i.e., Estate of Kenneth Jones or a named Trust, or Ms. Jones as surviving spouse, etc.) owned 99% interest from October 26, 2009 through June 10, 2010.

The Appellant's discourse about how section 5233 of the procurement law does not distinguish between legal interest or beneficial interest is irrelevant and an attempt to cloud the real issue in this case, that being Kenneth Jones could not own any shares of IBSS during any of the 12 months preceding the submission of IBSS' bid. The issue of transferring the "stock certificate" to Ms. Jones' name clouds the facts so as to distract from the false Affidavit. The statute is simple and clear: it mandates the disclosure of any person (or entity) that owns more than ten percent interest for the immediate 12 months preceding the submission of the bid. 5

G.C.A. § 5233.

The facts and the law confirm that Mr. Jones' death in 2008 **does** by itself make the Affidavit false because the decedent could not have held any interest in the shares of the corporation after he passed on October 30, 2008. Rather, the accurate and correct owner of the 399,999 shares of IBSS stock is the person or entity designated by Kenneth Jones in a valid document stating his intent (such as a Trust). Absent such an expression of intent, the accurate and correct owner would be determined by operation of law<sup>1</sup> (e.g., Elaine Jones as his surviving spouse, or the estate of Kenneth Jones, etc.). In any event, the accurate and correct owner would *not* be Kenneth Jones as indicated on the Affidavit.

In addition, while the Affidavit indicates Ms. Jones has some interest, the Affidavit fails to provide the number of shares or the percent interest she owned for the immediate 12 months (October 26, 2009 through October 26, 2010). Failure to accurately disclose Elaine Jones 99% interest in IBSS renders the Affidavit *false*. An accurate affidavit must state that Ms. Jones owns 99% (400,000) shares of IBSS as of June 11, 2010 and that some other person or entity (not Kenneth Jones) shared ownership of 99% (399,999) of shares of IBSS from October 30, 2008 until June 11, 2010. An affidavit that states otherwise is *false*, which is the circumstance here.

The OPA's standard is strict enforcement of the complete accuracy standard. There is no justification to deviate from that standard in this case. The public interest will continue to be best served when a bidder is required to submitting an accurate Affidavit of Disclosure of Ownership and Commissions.

B. SUBMISSION OF A FALSE AFFIDAVIT RENDERS IBSS' BID NON-RESPONSIVE.

The Affidavit of Disclosure of Ownership and Commission is required as a condition of

---

<sup>1</sup> See Division 2, Chapter 8, Subchapter A, Succession: General Provisions of Title 15 of the Guam Code Annotated.

bidding. 5 G.C.A. § 5233. The OPA has found that "failure to submit a valid [Affidavit of Disclosure of Ownership and Commissions] puts any bid's responsiveness at issue." Decision at 11. The OPA concluded that failure to submit a valid Affidavit that complies with section 5233 of the procurement law and section 3109(e)(3)(E) makes a bid non-responsive.<sup>2</sup> Decision at 12.

IFB22 required, as a condition of bidding, that all potential bidders to submit an Affidavit of Disclosure of Ownership and Commission. IBSS' submission of a false affidavit must be considered a failure to submit a valid Affidavit effectively making the IBSS bid non-responsive.

Once again, IBSS attempts to cloud the real issue and law by concocting standards that are irrelevant. It misguides the OPA from the requirements and mandates of the Guam Procurement Law and its corresponding regulations when it contends that its errors in the false Affidavit are inconsequential and lack any material legal significance. Again, no such standards exist in either the Guam Procurement Law or any of its relevant regulations as it relates to submitting a valid Affidavit.

The Appellant also erroneously relies section 3109(m) of the Guam Administrative Rules and Regulations. Section 3109(m) addresses mistakes that are considered "non-judgmental". This is the same "form versus substance" argument rejected in *Pacific Data Systems*. There, the OPA ruled that the "failure to submit a valid Major Shareholder's Disclosure Affidavit with its bid is a matter of substance and not merely a matter of form." Decision at 14. Likewise, IBSS is trying to categorize its Affidavit as a non-judgmental, "form" mistake. However, the OPA has ruled mistakes in the Affidavit to be mistakes of substance. Moreover, IBSS cannot claim that it was a non-judgment error because the attester has complete discretion as to what is stated on the Affidavit. In this case, the attester Noli Cadag, submitted different information to the

---

<sup>2</sup> A "responsive bidder" is a person who has submitted a bid which conforms in all material aspects to the Invitations to Bid. 5 G.C.A. § 5201(g) and 2 G.A.R. § 1106(28).

government just two months earlier. *See* Ex. X2. IBSS used its judgment in changing the ownership information as stated in its Annual Report, and listing Kenneth Jones as a 99% owner. This was at the least a mistake in substance, and undeniably, false.

Consistent with the fate of GTA's bid *In the Appeal of Pacific Data Systems, Inc.*, OPA-PA-10-005 (Jan. 12, 2011 Decision), the IBSS bid submission must also be deemed to be non-responsive because of its failure to submit a valid Affidavit with its bid for GDOE-IFB-22-2010 and thus, IBSS' bid must be disqualified and rejected as required by the IFB.

## **II. IBSS' PROTEST ON THE LANGUAGE OF IFB22 IS UNTIMELY**

IBSS claims that there is an unlimited period of time in which a bidder may protest a solicitation clause that is illegal on its face.<sup>3</sup> IBSS also claims that it was not required to submit a protest prior to an award because it was not aggrieved until DOE exercised the right to increase the quantities.

IBSS of course had not protested or filed any objections at the time the solicitation was issued, or when it submitted its bid.<sup>4</sup> In fact, IBSS gladly bid on Items 1 through 4 without reservation, and specifically bid on the incremental additions option. *See* Agency Rep., Ex. B1, pp. 25-30 (IBSS fills in the line items for "Option to add additional machines"). Therefore, if IBSS had won this solicitation, it would obviously have no objection to DOE's exercise of the incremental additions option. Only now that IBSS has lost the bid, and Xerox has already started performance under the award, does it claim IFB22 to be illegal.

IBSS' acceptance of the incremental addition amounts clause, and its failure to protest the alleged illegality of the incremental additions clause at the time of the solicitation, amounts to

---

<sup>3</sup> IBSS spends three and a half pages discussing the alleged illegality of the clauses at issue. These arguments are irrelevant for the purposes of this Motion, which focuses on IBSS' timeliness and standing to protest. The merits of IBSS' protest will be addressed at the hearing, should one be necessary after disposition of this Motion to Dismiss.

<sup>4</sup> IBSS objected to Item 5, and therefore knew how to state an objection when it saw one.

waiver. The general rule is that "[o]bjections to the face of a solicitation should be raised prior to submission of proposals. There is a duty to inquire and seek clarification of obvious omissions, inconsistencies, or discrepancies of significance, otherwise waiver occurs." *Allied Technology Group, Inc. v. United States*, 39 Fed. Cl. 125, 146 (1997).

Where an offeror recognizes a significant deficiency or problem in a solicitation . . . the proper procedure for the offeror to follow is not to wait and see if it is the successful offeror before deciding whether to challenge the procurement, but rather to raise objection in a timely fashion, *i.e.*, prior to the closing date for receipt of proposals or, at the latest, prior to contract award.

*North Carolina Div. of Servs. for the Blind v. U.S.*, 53 Fed. Cl. 147, 165 (2002) (finding waiver where offeror declined to raise an objection). If offerors are allowed to wait until an award, "such a practice would be disruptive, unfair to the other offerors and would serve to undermine the soundness of the federal procurement system." *Id.* IBSS' counsel agrees with these court rulings when he commented in his procurement primer, "Procurement Law or Procurement Lore?" (§ XVI.G.4), that "it is considered to be taking unfair advantage of the procurement process if you have a complaint about the conduct of the bid but do not say anything about it until you see what the other bids are or if you got the award anyway."

Disregarding the advice given in his procurement primer, IBSS' counsel tries to argue the opposite, that IBSS' conduct in taking advantage of the procurement process is acceptable. In fact, the present situation is just as IBSS' counsel had written in his primer: that waiting to protest about the language of the bid is a disruption of the procurement process.

If IBSS viewed the bid as containing illegal provisions, it had the obligation to enjoin the procurement or to seek clarifications. It could not sit on its rights and also seek to maximize on those illegalities by submitting a bid. In doing so, IBSS unfairly posits that if it had won the award, and was awarded additional quantities, such additions would be legal as to IBSS, but not

legal as to any other offeror. This is a patently unfair practice and approach that should not be tolerated by the OPA.

Concerns over the legality of a solicitation must be addressed expeditiously, otherwise they are waived. By not timely protesting, IBSS has waived its rights to contest the legality of IFB22. Its December 16, 2010 protest, raised three months after the IFB was first released, is late and must be dismissed.

### **III. IBSS' PROTEST OVER XEROX'S RESPONSIVENESS IS UNTIMELY**

In this appeal, IBSS wants to argue that Xerox is a non-responsive bidder based on certain language of Xerox's bid, which IBSS has yet to even see. In order to support its protest, IBSS asks that portions of Xerox's bid be disclosed. The OPA, however, lacks jurisdiction to hear IBSS' protest over Xerox's responsiveness because IBSS' protest is untimely, and because IBSS failed to undergo the required agency procedure to request disclosure of confidential portions of a bid.

The Procurement Administrations clearly require IBSS to submit a protest "within 14 days after [it] knows or *should have known* of the facts giving rise thereto." 2 GAR Div. 4 § 9101(c)(1) (emphasis added). The issue is when IBSS "should have known" whether or not Xerox was a responsive bidder. IBSS should have known right at the outset of the bid opening, because section 3109(l)(3) provided the process by which IBSS could have and should have sought disclosure of Xerox's bid. Had IBSS sought such disclosure, and found grounds to contest Xerox's responsiveness, it then had 14 days to do so. If DOE denied disclosure to IBSS, IBSS could have filed a protest, which the Regulation specifically provides. 2 GAR Div. 4 § 3109(l)(3).

Instead, IBSS did nothing to find out the contents of Xerox's bid. It missed the opportunity to do so before the agency as provided in section 3109(l)(3). Now, it seeks to skip

the agency request process and make a direct request to the OPA. Even if the OPA were to disclose Xerox's entire bid in this proceeding, IBSS' arguments on Xerox's responsiveness are still late because IBSS should have sought disclosure and obtained knowledge of the contents of Xerox's bid back at the bid opening.

Even further, IBSS completely missed the procedural requirement to seek disclosure of the bid at the agency level. A plain reading of section 3109(I)(3) reveals that the disclosure process is not confined to persons who designate portions of their bid as confidential. If Xerox designates a portion of their bid as confidential, the Procurement Officer then examines the bid to determine the validity of the confidentiality. As section 3109(I)(3) states, "[i]f the *parties* do not agree as to the disclosure of data," the Procurement Officer will put its determination in writing, and then the bidders can protest the determination. (Emphasis added.)

Section 3109(I)(3) is rendered meaningless if the OPA can disclose confidential portions of a bid to competing bidders without them first having to endure the agency determination process. Section 12106 of Title 2, Division 4 of the GAR, allows the OPA to make disclosures "except where the information is proprietary, confidential, or otherwise permitted or required to be withheld by law or regulation." In this case, the confidential portions of Xerox's bid have not been challenged as non-confidential by IBSS at the agency level. If the OPA disclosed the entire bid, its act would contradict the limitations under section 12106 and the jurisdiction conferred to the agencies in section 3109(I)(3).

In the end, it would be futile to allow disclosure of information to support arguments that are untimely and over which the OPA has no jurisdiction in the first place. IBSS should have sought disclosure at the time the bids were opened, and only within 14 days after disclosure would any such protest on Xerox's responsiveness have then been timely. Because IBSS failed



to seek disclosure at the bid opening, its protest over Xerox's responsiveness is late.

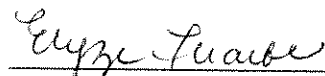
**IV. CONCLUSION**

IBSS' entire protest should be dismissed as it is a non-responsive bidder, having filed a false Affidavit Disclosing Ownership and Commissions with its bid. In addition, its arguments pertaining to the legality of IFB22 are untimely, as IBSS should have protested within 14 days of the issuance of the IFB. IBSS instead waived its grounds for protest by submitting a bid and waiting until after award to protest. Finally, its arguments pertaining to Xerox's responsiveness are untimely because IBSS is late in seeking disclosure of the bid, and because it failed to follow the procedure whereby DOE determines whether or not to disclose confidential portions of Xerox's bid.

For these reasons, IBSS' protest should be dismissed in its entirety.

DATED: Hagåtña, Guam, March 22, 2011.

CARLSMITH BALL LLP



---

ELYZE M. IRIARTE  
Attorneys for Party-in-Interest  
XEROX CORPORATION