

AUG 01 2008

TIME: 3:35 PM
BY: [Signature]
FILE No. OPA-PA 08-011

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4 **PROCUREMENT APPEAL**

5
6 In the Appeal of) **AGENCY REPORT**
7)
8 TOWN HOUSE DEPARTMENT STORES,)
9 INC., dba ISLAND BUSINESS SYSTEMS)
& SUPPLIES,)
Appellant.) **Docket No. OPA-PA-08-011**

10 Pursuant to 2 GAR, 12105, the Guam Public School System hereby submits the
11 Agency Report.

12 (a) See Attachment A. Notice of Protest dated 12/4/07

13 (b) Appellant did not submit a bid.

14 (c) See GPSS's Procurement Record.

15 (d) See GPSS's Procurement Record.

16 (e) See GPSS's Procurement Record.

17 (f) Same Protest Response as submitted by Appellant.

18 (g) GPSS denies any allegation of improperly procuring copier services. GPSS further
19 moves for dismissal of the above captioned case as Appellant has filed a protest three years
20 into an existing contract. The current five year contract with Xerox was signed on December
21 16, 2004. Approximately six (6) months prior to the expiration of existing contract GPSS will
22 issue either a request for proposal or an invitation for bid for copier services.
23


24 4 GCA § 5425 is very clear; protest must be filed within 14 days of award. (See also
25 GPSS Procurement Rules and Regulation 9.2.3.1) If Appellant's case is entertained every

1 contract within the government of Guam would be open to challenge, in essence creating an
2 administrative nightmare.

3 (h) Non-applicable.

4 (i) Appendix B, see attached.

5 Respectfully submitted this 1st day of August, 2008.

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8 FRED NISHIHIRA
9 GPSS Legal Counsel
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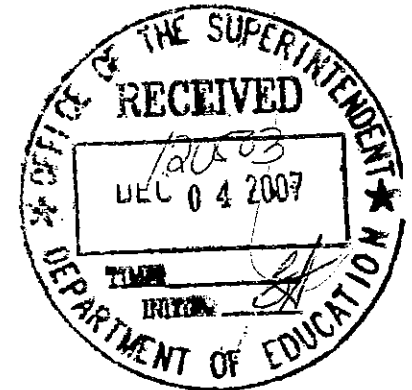
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4 December, 2007

Mr. Luis S.N. Reyes
Superintendent of Education
Guam Public School System
PO Box DE
Hagåtña, Guam 96932



NOTICE OF PROTEST
COPIER MACHINE PROCUREMENT

Dear Supt. Reyes,

Please consider this letter to be a formal protest of the apparently improper procurement of copier machine products and related services by GPSS. IBSS (Island Business Systems and Supplies), a division of Town House Department Stores, Inc., a J&G affiliate, is a locally owned and operated Canon imaging products representative, offering copier products and services. IBSS has for several years made known to GPSS its ability, willingness and desire to be considered as a prospective provider of copier supplies to GPSS.

It is obvious from public reports that GPSS is paying Xerox for copier supplies. It is also apparent that GPSS has not acquired the copier supplies by way of any public, competitive bidding process. I would guess that the amount paid Xerox exceeds \$130,000 per month, and is one of the largest recurring costs to GPSS outside of personnel costs and expenses.

What is not obvious is the actual method of source selection, nor of the time when the decision - or decisions - to acquire this supply from Xerox was made, nor has it been disclosed by GPSS what contract or other arrangement was entered into to acquire the copier supplies, notwithstanding repeated requests from IBSS and myself to ascertain these matters.

I wrote a letter to you in February this year, outlining the history of this issue from IBSS' perspective. I noted that there appeared to be an ongoing renewal of some kind of Xerox arrangement, but we could not determine when it started nor when it would expire nor the procurement method. I specifically asked you "[d]o you know what the current status is, with respect to the supply of copier products and services" I noted that we had information, but no confirmation from GPSS, that there appeared to be a P/O for copier supplies that was to expire in

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June 2006 and other information suggested the possibility that the procurement was by either sole source or existing contract renewal or both. I include a copy of that letter herewith.

Neither your office nor any representative from GPSS ever responded to my inquiry.

Having grown impatient waiting to hear from you, the General Manager of IBSS, Roland Franquez, scheduled a time with your office to meet with you to discuss the matter on September 18, 2007. You failed to attend, but several staff members did meet with him to hear his entreaties.

At the meeting Acting GPSS Administrator, Supply Management, Mr. Roque Alcantara, advised Mr. Franquez that the prior Superintendent, Mr. Flores, had extended a prior agreement made with Xerox in December 2004. Mr. Santos advised that GPSS was riding on an agreement made between Guam GSA and Xerox which allowed GPSS to by-pass the bid process.

Mr. Franquez requested that GPSS give him a written response detailing the nature of the contract and its status, and Mr. Santos advised he would consider it. Whether or not he considered it, he did not respond any further.

Subsequent to that, I wrote to the Chief Procurement Officer at GSA asking for information about the procurement by letter dated October 10, 2007. Copy of that letter is also included.

In that letter, bearing the reference "RE: Procurement of Copier Machines; Request for procurement record", I asked:

"Just so that we know the true lay of the land, can you explain any agreement that Guam GSA has that would allow GPSS to by-pass the procurement process, and your policies implemented in 2003?"

"Since GPSS has been entirely unforthcoming with any copy of any part of any record dealing with the procurement of copier products, are you in a position to provide IBSS with a complete record¹ of the copier procurement if it was, as Mr. Franquez was advised, arranged through Guam GSA?"

"If you are in such a position, please consider this a formal request for a copy of the procurement record² or advise me where and when and under what conditions I can inspect and/or make copies of it myself.³"

¹ 2 GAR § 3129

² 5 GCA § 5250: "No 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."

³ 2 GAR § 3031

The response I got from that letter was a another dead end. Assistant Chief Procurement Officer Anita T. Cruz advised, by letter dated October 15, 2007, that she would forward my request to GPSS Legal Council (sic) "for appropriate steps to be taken." I was advised to direct any further questions or concerns to Mr. Fred Nishihira.

I awaited a response from Mr. Nishihira as to some indication that "appropriate steps" were being taken, but have heard nothing.

Having heard nothing from him, I directly wrote to him a letter of date October 26, 2007. In my letter, a copy of which is also included, I offered,

"In the context of trying to work out a solution to this issue that falls short of guns at six paces, I would welcome a chance to sit and chat with you about this, with the object of bringing about an immediate change in the status quo.

"May I hear from you?"

True to GPSS's form in dealing with this issue, I did not hear from him.

Competitive sealed bidding is the preferred method of procuring supplies. (5 GCA § 5210(a).) This method requires public notice of the bid, which helps to fulfil the public policy and purpose of the Procurement Act, "to foster effective broad-based competition within the free enterprise system", as well as "to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory".

The Public Auditor has determined that the "renewal" of "existing territorial contracts" is only allowed when the procurement amount is less than \$15,000. (See, OPA Report 04-14.) In that 2004 Report, the Public Auditor advised that the GSA CPO had, in response to the Public Auditor's procurement audit, agreed to discontinue the renewal of existing contracts and to issue, where appropriate⁴, "multi-term contracts"⁵. These contracts also require public competition⁶.

⁴ "A multi-term contract is appropriate ... where the performance of such services involves high start-up costs, or where a changeover of service contractors involves high phase-in/phase-out costs during a transition period.." (2 GAR § 3121(a).) "Care should be taken when evaluating multi-term prices against prices for the first fiscal period that award on the basis of prices for the first period does not permit the successful bidder or offeror to 'buy in', that is, give such bidder or offeror an undue competitive advantage in subsequent procurement." (2 GAR § 3121(e)(2).)

⁵ 2 GAR § 3121

⁶ "The objective of the multi-term contract is to promote economy and efficiency in procurement ... by increasing competitive participation in procurement...." (2 GAR § 3121(b).) It should be noted that the description of a "multi-term contract" refers only to the type of contract, not to the method of solicitation. It should be used in conjunction with a competitive sealed bid method.

And multi-term contracts are not generally applicable for the lease of equipment⁷.

Bearing in mind the 2004 date on that Public Auditor Report, it is worth pointing out a letter that IBSS (then) General Manager Roland Franquez wrote to (then) Superintendent Juan Flores in November 2005 regarding the status of the GPSS Copier Bid Specifications for FY2006. In that letter, Mr. Franquez recalled an informal discussion with the Superintendent at a Rotary Meeting, wherein the Superintendent evidently informed Mr. Franquez that GPSS had extended an expired contract with Xerox rather than issue a new bid, but only for a couple of months to allow FY 2006 funds to be transferred. A copy of that letter is also enclosed.

The Public Auditor has also criticized procurement by sole source, particularly where there has been no attempt on the part of the agency to solicit multiple bidders. In the 2004 Report noted above, which was particularly critical of GSA procurement of copier machines, 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.”

More recently, in the Radiocom Procurement Appeal OPA-PA-06-003 decision, the Public Auditor held,

“Pursuant to 5 GCA §5214 and 2 GAR §3112, GSA must make an independent assessment [as a condition of sole source procurement] of the availability of potential suppliers based on appropriate methods, such as a survey of the local businesses, or inquiry with the using agency and other procuring entities as to any known interest in bidding for this or similar projects on Guam.”

But all this discussion of the methods of procurement is simple conjecture, because GPSS steadfastly refuses, in spite of the requests detailed above and the procurement law requirements⁸, to provide any information about the acquisition of Xerox copier machines that it is paying millions of dollars for, nor to even discuss it on the record with a ready, willing and able prospective bidder. Such information as is given to IBSS is typically cryptic, inconsistent and obfuscating..

For instance, IBSS has seen copies of Purchase Orders issued to Xerox but has no way to determine the basis of or the method of procurement for the P/Os. One P/O, for a time frame ending September 2005, indicated it was based on a “sole source” bid method, but this was followed by another P/O for a time frame beginning January 2006, with indicated it was based on a “renewal” of an existing contract. By all appearances, the P/Os were simply issued ad hoc without any planned, formal method of procurement authorized.

⁷ 2 GAR § 3121(c).

⁸ See, 5 GCA §§ 5248, 5249, 5250, 5251, 5252.

5 GCA § 5425 gives “any ... prospective bidder ... who has been aggrieved in connection with the method of source selection, solicitation or award of a contract” the right to “protest to the head of a purchasing agency.” Due to the stonewall of silence put up by GPSS, IBSS is unable to determine when or how it has been aggrieved, but it has been aggrieved by the repeated failure of GPSS, for the last several years, to “properly” procure copier machine supplies and its failure to include IBSS, and any other potential supplier, in its procurement process. There has been no publicly noticed procurement “trigger”, only the carefully obscured lack of competitive procurement which has over time left IBSS with no option but to bring this protest.

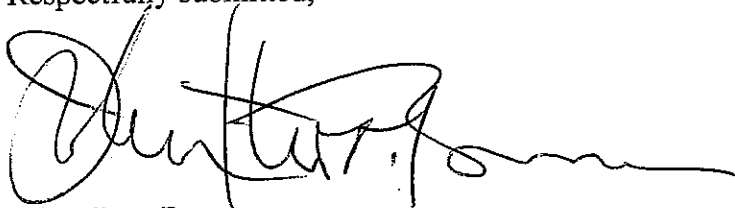
It cannot be in the best interests of the Territory of Guam that GPSS continue to avail itself of the improper procurement of copier supplies by methods thoroughly canvassed and criticized by the Public Auditor years ago. It cannot be in the best interests of the Territory of Guam to pay millions of dollars for copier supplies without any competitive bid. Yet, IBSS protests that this is exactly what is happening.

IBSS adopts the recommendations of the Public Auditor in OPA Report 04-14 and requests that GPSS

“(1) immediately discontinue leasing and/or purchasing equipments under ... expired contracts and ..., (2) immediately issue invitations for bid (IFBs) to solicit for ... lease and/or purchase of copier machines ..., and (3) discontinue the practice of utilizing “existing territorial contracts,” determine the expiration dates of all procurement citing existing territorial contracts, and begin to plan and execute IFBs for all such procurements.”

IBSS has no way of knowing whether the acquisition of copier supplies is pursuant to bid, award or contract, or other arrangement, and therefore seeks whatever remedies might be appropriate under either 5 GCA § 5451 or 5452. If the acquisition of such supplies is pursuant to award, IBSS asks that the contract “be terminated” pursuant to 5 GCA § 5252(a)(1)(ii) or to “be declared null and void” pursuant to 5 GCA § 5252(a)(2)(i).

Respectfully submitted,



John Thos. Brown
General Counsel
for IBSS