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BEFORE THE OFFICE OF THE PUBLIC AUDITOR

In the Appeal of)	APPELLANT'S RESPONSE
)	IN THE NATURE OF OPPOSITION
)	TO APPEARANCE OF XEROX
TOWN HOUSE DEPARTMENT STORES,)	CORPORATION AND ITS REQUEST
INC., dba)	FOR EXTENSION OF TIME TO FILE
ISLAND BUSINESS SYSTEMS)	COMMENTS ON AGENCY REPORT
& SUPPLIES,)	
APPELLANT)	DOCKET NO. OPA-PA 08-011
)	
)	

Once again Xerox Corporation arrives late to the party in this continuing dispute.¹ It implicitly admits that the time allowed for filing any comment it may wish to make on GPSS' Agency Report is past. For that reason alone, Appellant IBSS objects to the Xerox motion for more time.

The Agency Report was filed August 1, 2008.

Xerox admits that "GPSS informed Xerox of the appeal August 4, 2008".

"Comments on the agency report by ... an Interested Party, including testimony and evidence by any competing bidder, offeror or contractor of the Appellant, shall be filed with the Public Auditor within ten (10) days after the Public Auditor's receipt of the report..." (2 GAR § 12104(c)(4).) (Underlining added.)

If the Hearing Officer is prepared to relax the rules to allow this late entry, which it is not obliged to do (2 GAR § 12104(c)(5)), parity and justice would limit any such time to the ten day period after Xerox was informed of the Appeal, which would include the Agency Report. That would be a period ending on August 14, 2008.

¹ See Appellant's Opposition to Entry of Appearance of Xerox Corporation filed April 14, 2008, OPA-PA-08-003.

But, rather than facilitate the “the expeditious resolution of controversies” as required by the procurement regulations (2 GAR § 12101), Xerox did not file its comments on the agency report on August 14th. What did it do instead on that day? It sought further delay.

Xerox could, instead, have supplied its comments on the Agency Report on August 14, ten days after it became aware of the Agency Report. The Agency Report was brief enough (unless Xerox seeks to comment on matters beyond the Agency Report, which Appellant certainly objects to) and it did not raise one new issue from that already known to Xerox in the original Appeal (OPA-PA-08-003), in which it had already sought appearance, as noted in footnote 1 above.

It might be noted that Xerox’ counsel has taken GSA to task and sought to strictly enforce the time limitations of the procurement regulations in another matter currently pending before the Public Auditor.² Now that the shoe is on the other foot, counsel finds the fitting too tight.

Appellant IBSS would point out that extending the resolution of this dispute is in the interest of Xerox and GPSS. GPSS has clearly expressed its intention to run out this Xerox contract and to issue a Request for Proposals at some point before its expiration.³

This plan is highly prejudicial to IBSS as well as evidencing a clear disregard to the legality of a contract GPSS seems never to have fully understood (see footnote 5 below).

This is not a simple copier equipment and maintenance contract. The procurement record reveals that GPSS has for all intents and purposes out-sourced and privatized the entire management of copier supplies and services to Xerox, and GovGuam is prejudiced by allowing this unauthorized privatization to continue.

Within the web of entanglements of the Xerox contract are provisions that, in effect, allow,

² See, Appellant’s Opposition to Request for Extension of Time etc., OPA-PA-08-007, IN THE APPEAL OF GUAM PUBLICATIONS, INC.

³ In its Response to [Appellant’s] Protest, GPSS advised: “Notwithstanding the decision above [denying Appellant’s protest], the current copier service contract will expire on December 21, 2009. GPSS will be publishing a request for proposal before the expiration date and invites your client to submit a proposal at that time.” (Response to Protest appended to Appellant’s Notice of Appeal herein.)

perhaps require, GPSS to borrow money from Xerox⁴ to purchase the equipment! That is one of the provisions which make it so difficult for GPSS (and perhaps other GovGuam agencies) to extricate themselves from the Xerox arrangements, as Xerox threatened in its reminder to GPSS in one letter appearing in the procurement record⁵.

Purchases of GovGuam equipment are intended to be funded by the government, not by allowing the various agencies to go out and borrow to their hearts' content. By what plausible authority is GPSS allowed to obligate the borrowing capacity of the Government? Certainly there is no such authority in the procurement regulations, but the Xerox arrangement, which GPSS is adamant about continuing, binds GPSS and, by extension, GovGuam to such unauthorized activity, and this distraction over making untimely comments simply exacerbates Appellant's attempts to bring this matter to a close.

The contract also has provisions giving Xerox priority buy-back rights⁶ to excess or retired

⁴ See, e.g., paragraph 5 of the Amendment 17 contract, which reads, in part, "Xerox has provided these funds ("Buyout Funds") to you to retire the debt on your existing equipment lease obligations.... Should the Agreement be terminated prior to expiration for any reason, you agree to pay Xerox (even if termination fees would not otherwise be due), in addition to any other amounts owed under the Agreement, an amount equal to the remaining principal balance of the Buyout Funds."

⁵ See Tab 12 of the procurement record in the instant Appeal, letter from Xerox to GPSS dated February 2, 2006, wherein it was said: "**As per your request you will find the attached copy** of the signed services agreement between Guam Public School Systems and Xerox Managed Services. ... 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 in the amount of approximately \$3,000,000. ... **To help insure you fully understand this information** and the other details associated with the agreement I would like to purpose (sic) a meeting with both yourself and the Superintendent.... I believe you will find this meeting very helpful in understanding the (sic) both the terms of the agreement and the options that would be available should you wish to make a change prior to its fulfillment date. ..." (Bold emphasis added.)

⁶ See, e.g., Addendum to the 2001 DSA, dated in December 2004, in material at Tab 8 of the procurement record in this instant Appeal, including, as part of the contract, "trade-ins" for equipment Xerox has determined to be "beyond its end of service availability". Oppressively, because Xerox had been contracted to maintain it, GPSS is obliged to warrant the equipment to be "in good working order".

equipment over other bidders or government users, in apparent contradiction to 5 GCA 5402.

GPSS should not be considering any proposal to replace the Xerox contract with its far-reaching entanglements. It should be neck-deep in planning⁷ the proper assessment of its needs, creating fair, commercially standard and competitive equipment specifications and an IFB which complies with the requirements of the regulations.⁸

Dragging this case out further only puts off the day when GPSS will take charge of its copier procurement management, including management of disposal of surplus and retired equipment as required by 5 GCA §5402 rather than the buy-back provisions of the current Xerox arrangement.

Dragging this case out further only creates the entirely foreseeable situation when the Governor must declare yet another GPSS state of emergency to allow another end run around the requirements of competitive sealed bidding for equipment solicitations.

Dragging this case out only continues to benefit Xerox, who seeks further delay herein.

For the reasons and the prejudice mentioned above, IBSS objects to Xerox' request for any extension of time.

If, however, in spite of these objections, the Hearing Officer considers it appropriate to allow this late action, IBSS would remind the Hearing Officer of his power to sanction for late filing, coupled with the exercise of discretion to allow late filings, as evidenced in the Guam Publications appeal mentioned above.

If the Hearing Officer is prepared to allow the late filing of Xerox comments on the Agency Report, IBSS respectfully requests that the Hearing Officer, as a condition of any such filing,

⁷ See 2 GAR §1102.03

⁸ See footnote 17 and accompanying comment in Appellant's Notice of Appeal in the instant Appeal. At the heart of this procurement is the purchase or lease of copiers, and equipment should be purchased by competitive sealed bidding (an IFB). Incidental to that might be the rendition of maintenance and repair services, but that is only incidental and not the primary purpose of the requisition (although GPSS could separately solicit maintenance services; most copier companies have the ability to service multi-brand machines). There should be no consideration of any proposal to finance the purchase, as there is in the existing arrangement, and any arrangement to dispose of surplus equipment should be an independent contract, most likely conducted by competitive sealed bid, required by 5 GCA §5402.

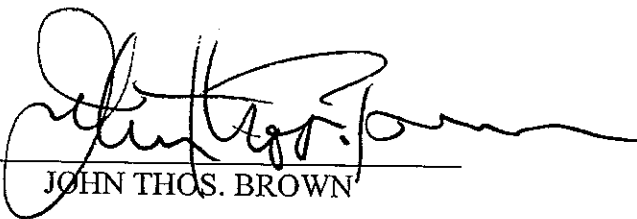
require that Xerox comply with the requirement to "include evidence"⁹ with its comments. Such evidence should include a "Procurement Record" of the sort required to be supplied by GPSS, including a complete record of Xerox' files and correspondence with GPSS concerning the seminal 2001 DSA and all amendments thereto.

If Xerox wishes to barge into this procurement dispute, it should do so in full candor of all facts and circumstances surrounding the unanswered questions relating to the origination of the 2001 DSA, the apparent early renewal of it by Amendment 17, and all other matters suggested in Appellant's Comment on Agency Report on file in the original Appeal.

While this production of evidence, and the review and consideration of it by Appellant, GPSS and the Hearing Officer, will undoubtedly add some time to the resolution of this matter, it would also assist in the determination whether there is any evidence that GPSS has not produced to support its claim that the copiers were properly procured, and, should Appellant prevail in this Appeal, in the rendition of remedies, as mentioned in the Statement Specifying Ruling Requested in Appellant's Notice of Appeal in this instant matter.

Appellant requests that Xerox' motion for more time and its entry of appearance be disallowed, but if, in the interests of justice, it is allowed, then Appellant seeks the production of all of Xerox's records concerning the relevant copier contracts, including the 2001 DSA with all its amendments, as, certainly, justice in this Appeal is best served by an open critical examination of all such records.

Dated: August 15, 2008



JOHN THOS. BROWN

⁹ As noted at the beginning, the relevant regulation allows "Comments on the agency report by ... an Interested Party, *including testimony and evidence* ..."