John Thos. Brown
General Counsel for Appellant
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
jngoz@ozemail.com.au

BEFORE THE OFFICE OF THE PUBLIC AUDITOR

In the Appeal of TOWN HOUSE DEPARTMENT STORES, INC., dba ISLAND BUSINESS SYSTEMS & SUPPLIES, APPELLANT	DOCKET NO. OPA-PA 08-011 REBUTTAL TO INTERESTED PARTY'S COMMENTS ON AGENCY REPORT

As specified in the Request for Rulings and Decision filed herewith, on the condition that the Hearing Officer accepts for filing Interested Party Xerox' Comments on Agency Report, Appellant IBSS hereby submits its rebuttal to those comments.

Xerox' comments add nothing of substance to this Appeal other than to attempt to shore up GPSS' defective argument that IBSS' Protest was untimely.

Evidentiary comments:

Rather than adding any evidence to fill in the blanks in the procurement record, and to cleverly skirt any admission that the copier contracts were improperly procured, Xerox merely notes that "GPSS's (sic) Procurement Record does not contain a solicitation" and points "out that ... all relevant copies of contracts ... are in the Procurement Records." (Xerox comments to ites (c) and (d) of the Agency Report.)

However, as IBSS has pointed out in its arguments in the original Appeal, which are reiterated by incorporation herein, IBSS' protest and appeal are not about the contracts, as such, but about the method by which they were procured.

Xerox comes close to admitting that there was no proper procurement of the contracts, but does not clearly admit the issue, by stating GPSS' Procurement Record "appears to be compilation of all relevant documents to this Appeal." To the extent this may be taken to mean that, to the best of its own knowledge and procurement records, the GPSS procurement record provides no evidence that the contracts were properly procured, then this is indeed a significant contribution

to the resolution of this Appeal, including the remedies; but, IBSS is not prepared to draw such a long bow without a more definitively stated admission.

In this regard, recall that the record does *not contain* the full sequence of numbered amendments to the contract (as noted in Appellant's Comment on Agency Report, in the original Appeal, at page 21), nor is there any significant amount of correspondence between GPSS and Xerox, as might be expected from such a long and entangled relationship.

IBSS would be happy to admit Xerox' comment if it included an unequivocal statement that there is not and never has been any evidence that the contracts were procured in accordance with the law and regulations, and Xerox has no evidence to adduce which would indicate otherwise. IBSS feels, however, that Xerox has left itself "wiggle" room on that.

"Untimely" arguments:

Apart from the evidentiary aspects, IBSS takes issue with Xerox' arguments that the Protest was untimely filed. Xerox agrees with IBSS that GPSS' argument that the Protest must have been filed within 14 days of the contract award is flawed[1]. Xerox then tries to say that the 14 day period is triggered by the passage of time, but can't identify how much time[2]. It's argument is also flawed.

Xerox argues that IBSS should have protested *sometime* between December 16, 2004 ("GPPSS and Xerox signed the contract for copier services on December 16, 2004"; Xerox Comments, page 3) and November 20, 2007 (see footnote 2). As IBSS' original Notice of Appeal chronicled, during all of calendar year 2005, at least, GPSS was indicating to IBSS that a copier procurement was forthcoming, but even in that face of that, Xerox is here arguing that IBSS should have filed its protest in that timeframe.

Moreover, if Xerox' logic were to be followed, IBSS should have filed as far back as 2001 since, as IBSS has pointed out in its original Appeal, the contract signed in 2004 was simply a renewal of the 2001 DSA. Indeed, it is one of the mysteries of the Xerox/GPSS association that the 2001 contract was renewed at the end of 2004 rather than at the end of 2005 when the 2001 contract was intended to expire, as pointed out in the original Appeal.

---

[1] "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." (Xerox Comments, page 3.)

[2] "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".

Xerox claims "Appellant first inquired into GPSS's (sic) copier services arrangement in February, 2007 yet did not file a protest until December 4, 2007. ... Even assuming that GPSS was initially unresponsive to Appellant's inquiries, it is unreasonable to accept waiting 10 months to realize that something might be amiss before filing a protest". (Xerox Comments, page 3).

That claim simply misrepresents the events as chronicled in the original Appeal. Appellant was not "waiting" those 10 months. In August, IBSS scheduled a meeting with the Superintendent, and in September, when the appointed time came, the Superintendent failed to attend, but his underlings continued to advise that they were doing everything properly, advising there was some kind of arrangement with GSA that allowed them to purchase the copiers.

Following the meeting, in October, IBSS counsel wrote to GSA to determine if and how that arrangement could exist. GSA subsequently referred IBSS counsel to GPSS counsel, with instructions to GPSS counsel to "take appropriate steps". On October 26th, having not heard any response from GPSS counsel, IBSS counsel wrote to GPSS counsel seeking to resolve the stand-off. It was only after that that IBSS filed its protest, after GPSS failed to respond to IBSS' efforts to resolve the dispute.

These efforts were not mere "waiting". They were evidence of diligence and good faith attempts to come to understand if there were any grounds for a protest because IBSS has claimed that it did not and could have not known of any facts by which it was aggrieved, and to resolve the matter if there were any such grounds.

These diligent efforts stand in stark contrast to Xerox' demands that "Appellant should not be allowed to forsake diligence without taking more affirmative steps", and the fantastically preposterous claim that "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 by GPSS." (Id.)

This demand is nonsensical for at least two reasons. First, *if*, as was indicated on one page of a copy of a purchase order that was shown to IBSS, the method of source selection was intended to be sole source, there would have been no published IFB.

Second, if, as appears from Xerox' comments on the evidentiary aspects of the Agency Report, it was never likely that the procurement record would contain any evidence of publication of an IFB, requiring IBSS to conduct a search for something Xerox knew would not exist is a demand that is not merely mischievous, it is malevolent[3]. "The law neither does nor requires idle acts"

[3] "No one can take advantage of his own wrong." 20 GCA § 15109.

and "[t]he law never requires impossibilities."[4]

The reason Xerox is having trouble identifying a date that triggers the 14 day protest period is that Xerox is focusing on the time element and on the conditional "knew or should have known" element and not the trigger element. The trigger is "the **facts** giving rise thereto", and the "thereto" is that the protestor "may be aggrieved". The filing period is not triggered until the aggrieved person knows or should know of **the facts** by which she **may be aggrieved**.

And what is the fact that aggrieved IBSS? Xerox is reticent to admit it if it knows what it is. If you can identify that fact you can then make some kind of assessment of if the aggrieved person knew or should have known it.

Xerox suggests that the aggrieving fact was "*something might* be amiss" and that "Appellant *started suspecting* that GPSS did not go through a competitive bidding process", but that is not a fact; that is a supposition, a paranoia, an opinion, a feeling. If potential bidders were meant to bring protest on suppositions, paranoia, feelings or opinions, the system would be overwhelmed with false challenges. The rules are intended to require a protester to be able to base its complaint on facts, not suppositions.

The problem here is that the fact which aggrieved and continues to aggrieve IBSS, and the larger public, is a nullity. The aggrieving fact here is that there is no fact in evidence that the copiers were ever procured in accordance with any method of source selection.[5]

And when is a person charged with knowing or "should knowing" that something doesn't exist? You might surmise that something is wrong, but, unless the Public Auditor wants to make the rule that a government agency is *presumed* to be acting wrongly when they are non-responsive to inquiry, at what point can you ever say that you should know of *facts* that you are aggrieved when all you know is that you are being stonewalled?

Different people in different circumstances will likely come to different conclusions as to when they will finally protest, but it has to do with when it is that they come to the reasonable but subjective conclusion that it is not the stonewalling that is aggrieving them, but some unknown fact or absence of fact behind the stonewall that is aggrieving them. This type of determination may only be made on a case by case basis, based on all the circumstances, and IBSS would assert that in this case, in the uncontroverted circumstances, where the government agency clearly

---

[4] 20 GCA §§ 15123 and 15124.

[5] Indeed, IBSS' suspicions were that GPSS might have abused a method of source selection; it had no idea that GPSS had never even chosen or tried to implement any method of source selection, which the revealed procurement record shows to be the case, as Xerox admits.

obfuscated and misrepresented its actions and intentions, the burden must be placed on the government or interested party to present a prima facie case identifying the aggrieving fact and the manner in which, and the time in which, the protester knew or should have known thereof.

Xerox complains that "[a]llowing 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." (Id.) IBSS makes no demand.

IBSS did not "receive certain information" from the procurement record. The record did not reveal any information that GPSS did anything wrong. The record revealed a complete absence of any evidence that GPSS had done anything right. The record revealed a nullity and, as IBSS has argued, when dealing with assessing at what point a protester should know of something that just doesn't exist requires a degree of flexibility, not rigidity. If we were to adopt a rigid analysis in that circumstance, Xerox should be able to point to a specific day between December 16, 2004 and November 20, 2007 when the filing deadline was triggered, but it cannot.

On the other hand, Xerox is attempting to introduce a notion of a statute of limitations or laches scheme where there is none. Xerox wants to introduce a rule that it is unreasonable to accept waiting a 10 month period even if, at the end of that period, the prospective bidder does not have and can not have knowledge of any facts by which it is aggrieved. However laudable a rule that may or may not be, that is not the law. The law is plain, if not always simple of application: a person who may be aggrieved must file protest within 14 days after such aggrieved person knows or should know of "the facts give rise thereto". There is no other time limit.

Untimeliness claim barred by its own time limit:

IBSS further rebuts Xerox' right to raise this timing issue at all. The timeliness issue was raised by GPSS in its Agency Report, which was filed August 1, 2008, on the seventh day after the Notice of Appeal was filed on July 24th.

The essence of this claim is that the Public Auditor has no jurisdiction to hear this Appeal because the protest was invalidated by the lateness of its filing. This s a claim that goes to the jurisdiction of the Public Auditor.

The regulations require that "[a]ny objection or motion addressed to the jurisdiction of the Public Auditor shall be promptly filed. Objection to the Public Auditor hearing the Appeal shall be filed within seven (7) days after the notice of Appeal is filed." (2 GAR §12104(c)(9).)

Xerox raised its objection to the timeliness of the protest, and thus to the jurisdiction of the

Public Auditor to hear this Appeal, much, much later, on August 22nd.

Xerox, who claims IBSS' claim should be barred by time, has made its claim untimely. It's timeliness arguments in its Comments on Agency Report should not be heard.

Additional evidence:

Finally, Xerox goes beyond commenting on the Agency Report and wishes to "supplement" the record, via the Agency Report commentary, to claim "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".

IBSS finds this claim hard to square with Xerox' evidentiary comments discussed above and the observations made in the original Appeal[6] that Xerox was implicated in every procurement audit of GSA undertaken by the Public Auditor in 2004.

IBSS has also raised the issue of remedies in its Statement Specifying Ruling Requested in its Notice of Appeal in the within matter, suggesting that if the Public Auditor finds that the contracts have been improperly procured, then a hearing be conducted to determine remedies, including the question whether Xerox has acted in bad faith.

Dated: September 2, 2008

JOHN THOS. BROWN
General Counsel for Appellant

ORIGINAL

[6] See Appellant's Comment on Agency Report, in the original Appeal, at page 21.