



OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEALS

IN THE APPEAL OF,
TOWN HOUSE DEPARTMENT STORES,
INC., dba ISLAND BUSINESS SYSTEMS &
SUPPLIES,

Appellant

APPEAL NO: OPA-PA-08-012

**FINDING AND RECOMMENDATIONS
OF HEARING OFFICER**

I. INTRODUCTION

This is the Finding of the Hearing Officer, ANTHONY R. CAMACHO, ESQ., on an appeal filed on September 12, 2008, by TOWN HOUSE DEPARTMENT STORES, INC., dba ISLAND BUSINESS SYSTEMS & SUPPLIES, (Hereafter "IBSS") regarding the GENERAL SERVICES AGENCY, Government of Guam's (Hereafter "GSA") September 9, 2008, denial of IBSS' May 20, 2008, protest concerning GSA's Request for Quotation Nos. 08002241, 08002249, 08002251, 08002252, 08002255, and 08002256 for Multi-Function Copiers (Hereafter "RFQs"). The Hearing Officer recommends that the Public Auditor hold that this matter is not moot and that the procedures GSA used to solicit the copier equipment and ancillary services sought by the RFQs was not in accordance with Guam Procurement Laws and Regulations. Accordingly, the Hearing Officer recommends that IBSS' appeal be sustained.

II. FINDINGS OF FACT

These findings are based on the Procurement Record and all documents submitted by the parties, as well as all testimony and arguments presented at the January 7, 2009 Hearing in this matter.

IBSS's request that notice be taken of the Federal Acquisition Regulations (FARs).

¹ Appellant's Request for Notice to be Taken Re Federal Acquisition Regulations, dated December 29, 2008.

1 IBSS argues that the purpose of examining these federal regulations is to illustrate that the RFQ
2 procedures adopted by GSA do not comply with the FARs and must be considered as a
3 preliminary matter.² The Hearing Officer recommends that the Public Auditor find that whether
4 GSA's purchasing activity complies with the FARs is not relevant to the main issue here. The
5 main issue here is whether the RFQs in this matter comply with Guam's Procurement Laws and
6 Regulations. Therefore, the Hearing Officer recommends that IBSS' request that notice be taken
7 of the FARs be denied and not considered in this matter.
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10 Based on the aforementioned record in this matter the Hearing Officer recommends that
11 the Public Auditor make the following findings of fact:

12 1. On May 15, 2008, GSA issued six RFQs for multi-function copiers to include:

- 13 a) RFQ No. 08002241 for the lease of one (1) Xerox Model 4127 Copier or equivalent
- 14 b) RFQ No. 08002249 for the lease of one (1) Xerox Model Workcentre 5687 or equivalent
- 15 c) RFQ No. 08002251 for the lease of one (1) Xerox Model W5050PHGC Copier or equivalent
- 16 d) RFQ No. 08002252 for the lease of one (1) Xerox Model W5030PG Copier or equivalent³
- 17 e) RFQ No. 08002255 for the lease of one (1) Xerox Model W7675PGC Copier or equivalent and
- 18 f) RFQ No. 08002256 for the lease of one (1) Xerox Model W5030PG Copier or equivalent,

19 GSA sent all six RFQs to Docu Center, IBSS, Quality Business Systems, and Xerox Corporation.

20 2. On May 16, 2008, IBSS requested for an extension of time to respond to RFQ Nos.
21 08002241, 08002249, 08002251, 08002252, 08002255, and 08002256, on the grounds that more
22 time was needed due to the quantity GSA was requiring.⁴ GSA responded that same day by
23 extending the deadline to respond to the RFQs to May 27, 2008.⁵
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26 ² Id., Page 1.

27 ³ RFQ No. 08002252, GSA Procurement Record, Tab 9.

28 ⁴ IBSS Letter to GSA dated May 16, 2008, Tab 7, Id.

⁵ GSA Letter dated May 16, 2008, Tab 6, Id.

1 3. On May 20, 2008, IBSS protested RFQ Nos. 08002241, 08002249, 08002251,
2 08002252, 08002255, and 08002256 alleging violations of Guam's Procurement Laws and
3 Regulations because: (1) The RFQ procedure used by GSA was not an appropriate method of
4 source selection; and (2) The specifications used in the RFQs were overly restrictive; and (3) The
5 RFQs' requirement that the suppliers must provide federal GSA pricing and terms and
6 conditions.⁶

7 4. On May 21, 2008, Xerox Corporation responded to five of the six RFQs to include:

- 8 a) RFQ No. 08002241 by submitting a quote for \$1,378.64 per month for a total of \$5,514.56 for the
9 first four (4) lease months
10 b) RFQ No. 08002249 by submitting a quote for \$621.09 per month for a total of \$2,484.36 for the
11 first four (4) lease months
12 c) RFQ No. 08002252 by submitting a quote for \$173.99 per month for a total of \$695.96 for the
13 first four (4) lease months
14 d) RFQ No. 08002251 by submitting a quote for \$363.87 per month for a total of \$1,455.48 for the
15 first four (4) lease months, and
16 e) RFQ No. 08002255 by submitting a quote for \$611.87 per month for a total of \$2,447.48 for the
17 first four (4) lease months.⁷

18 5. On May 22, 2008, Xerox Corporation responded to RFQ No. 08002256 by submitting
19 a quote for \$167.84 per month for a total of \$671.36 for the first four (4) months of the lease.⁸

20 6. On September 9, 2008, GSA denied IBSS' protest due to GSA's belief that it had the
21 authority to purchase supplies from the Federal Supply Schedule Program (FSSP) pursuant to 5
22 G.C.A. §5122 using the RFQ method. In their denial letter, GSA stated that the RFQ method was
23 developed by GSA pursuant to 5 G.C.A. §5113 and its practice was affirmed by an opinion from
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27 ⁶ IBSS Protest dated May 20, 2008, Tab 5, Id.

28 ⁷ Xerox Corporation Quotes for RFQ Nos. 08002241, 08002249, 08002251, 08002252, and 08002255, Tab 8, Id.

⁸Xerox Corporation Quote for RFQ No. 0800256, Tab 8, Id.

1 the Attorney General of Guam dated June 16, 2008, through a separate procurement, GSA-07-
2 1084.⁹

3 7. Three (3) days later, on September 12, 2008, IBSS appealed GSA's denial of IBSS'
4 protest to the Office of Public Auditor.

5 8. On December 19, 2008, GSA issued Invitation for Bid (Multi-Step) No. GSA-010-09
6 (60 Month Lease Agreement Inclusive of Equipments, Services, Related Consumables, and
7 Software Solutions for Digital Multifunctional Systems) seeking 60 month lease agreements on
8 numerous copiers with various specifications.¹⁰ Multi-Step Bid No. GSA-010-09 contained, in
9 part, solicitations for the same copier equipment and supplies it was soliciting in the RFQs.

11 III. ANALYSIS

12 IBSS appeals GSA's denial of IBSS' May 20, 2008, protest. IBSS argues that GSA's
13 denial of their protest is without merit because: (1) 5 G.C.A. §5122 does not create an exception
14 to the source selection methods specified in Guam Procurement Laws and Regulations; and (2)
15 5 G.C.A. §5113 does not give GSA the authority to create alternative methods of source
16 selection such as the RFQ procedure developed by GSA to purchase supplies from the FSSP; and
17 (3) The GSA RFQs at issue in this matter violate Guam's Procurement Laws and Regulations.¹¹
18 GSA responded by agreeing that the acquisition of the six (6) copiers should be made using
19 competitive sealed bidding method of source selection, and by agreeing that non-proprietary
20 commercial specifications should be used in the solicitation of the copiers.¹² Further, GSA
21 argued that this matter should be dismissed as moot because IBSS obtained the relief that it was
22 seeking.¹³ The issue of whether this matter is moot is a threshold issue that should be examined
23 first.

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25 ⁹ GSA Letter to IBSS dated September 9, 2008, Tab 1, Id.

26 ¹⁰ Respondent's Hearing Materials, Exhibits A and B, dated December 29, 2008.

27 ¹¹ IBSS Notice of Appeal, Pages 8, 11, and 16.

28 ¹² Agency Report, Page 2, Lines 20 and 25.

¹³ Id., Page 4, Line 3, and GSA Rebuttal to Comment on Agency Report, Page 4, Line 19.

1 **A. This matter is not moot.**

2 GSA argues that this matter is moot because IBSS has been accorded every remedy it has
3 requested in its Notice of Appeal and there are no longer any adverse interests between IBSS and
4 GSA.¹⁴ In addition, GSA argues that there are no questions of fact or law left to be determined.¹⁵
5 It is a well-settled general rule that the existence of an actual controversy is an essential requisite
6 to appellate jurisdiction and that a claim becomes moot only when the issues are no longer live
7 or the parties lack a cognizable interest in the outcome. *Tumon Partners, LLC and Hee K. Cho v.*
8 *Kevin Shin*, 2008 Guam 15 ¶37 (Supreme Court of Guam, 2008). The test for mootness is
9 whether the issues no longer exist because intervening events have rendered it impossible for the
10 reviewing court to grant the complaining party effectual relief. *Id.* An appeal is considered moot
11 when it presents or involves no actual controversy, interests or rights of the parties, or where the
12 issues have ceased to exist. *Id.* Thus, an appeal is dismissed as moot when by virtue of an
13 intervening event, the appellate court cannot grant effectual relief whatever in favor of the
14 appellant. *Id.* Here, the issue of whether the specifications used in the RFQs violate Guam's
15 Procurement Laws and Regulations is moot because of GSA's admissions. GSA admitted that
16 the specifications used in all the RFQs were proprietary and violate Guam's Procurement Laws
17 and Regulations. Thus, there is no actual controversy between the parties concerning the RFQ
18 specifications for the Public Auditor to decide. Therefore, the Hearing Officer recommends that
19 the Public Auditor find that the issue of whether the specifications used in the RFQ's complied
20 with Guam's Procurement Laws and Regulations is moot and that matter should not be
21 considered.

22 However, other issues remain for review to include the issue of whether GSA's RFQ
23 procedure complies with Guam Procurement Laws and Regulations. This issue is of far greater
24 significance than the underlying requisitions at issue here. Despite GSA's admission that it
25 should and would use the competitive sealed bidding process to solicit the copiers and ancillary
26 services it was soliciting in the RFQs, this issue is capable of repetition because nothing prevents

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28 ¹⁴ GSA's Hearing Brief, Page 2, Line 23.

¹⁵ Respondent's Hearing Materials, Page 3, Line 12.

1 GSA from using the RFQ procedure again. Further, GSA's use of the RFQ method to purchase
2 from the FSSP without true competition or use of the source selection methods authorized by
3 Guam's Procurement Laws and Regulations has been questioned by independent auditors.¹⁶
4 Thus, GSA's admissions do not resolve the underlying issue of whether GSA's use of the RFQ
5 procedure it developed to solicit supplies from the FSSP pursuant to 5 G.C.A. §5122 complies
6 with Guam's Procurement Laws and Regulations. The Hearing Officer recommends that the
7 Public Auditor find that despite GSA's admissions, this issue is not moot because it remains an
8 actual controversy existing between the parties. The issue of whether GSA's RFQ procedure
9 complies with Guam Procurement Laws and Regulations will now be examined.

10 **B. GSA's RFQ Procedure is not a valid method source selection.**

11 As stated above, GSA denied IBSS's protest arguing that the RFQ procedures it used to
12 solicit the copiers was valid. IBSS argues that 5 G.C.A. §5122 does not create an exception to
13 the source selection methods specified in Guam Procurement Laws and Regulations. GSA now
14 only admits that the copiers at issue here should be solicited using the competitive sealed bid
15 method of source selection, and has stated that it will not use the RFQ procedure it developed to
16 purchase supplies from the FSSP again.¹⁷

17 GSA's RFQ procedure states, in relevant part, that GSA buyers can purchase supplies,
18 services, or equipment through federal contracts without the bidding procedure by: (1)
19 Inquiring whether the Federal GSA has contracted for the type of supply, service, or equipment
20 Guam GSA is seeking; and (2) If the Federal GSA has it, then the Guam GSA buyer will issue
21 an RFQ to at least three local vendors in order to calculate the 10% differential required by 5
22 G.C.A. §5122; and (3) If the local vendors provide a quote exceeding the 10% differential, a
23 purchase order will be prepared to obtain the requested supplies, services, or equipment from the
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27 ¹⁶ Purchasing From GSA Federal Supply Contract Procedure, Attachment A, Attorney General's Legal
28 Memorandum dated June 16, 2008, Ref: GSA 07-1084, as attached to GSA Letter to IBSS dated September 9, 2008,
Tab 1, Procurement Record.

¹⁷ Statements by Assistant Attorney General John Weisenberger, Hearing on the Merits for OPA-PA-08-012,
January 7, 2009.

1 federal contract.¹⁸ Generally, GSA shall procure supplies from the United States when the cost
2 to GSA is less by 10% than from other contractors. 5 G.C.A. §5122. However, this statute
3 merely authorizes GSA to purchase supplies, services, or equipment from the Federal
4 Government and does not create an alternative method of source selection. This is evidenced by
5 the fact that said statute does not create any method or procedure by which GSA can determine
6 whether the cost to GSA is less by 10% than from other contractors. Therefore, the Hearing
7 Officer recommends that the Public Auditor find that although GSA is authorized to purchase
8 supplies, services, or equipment from the United States Government when the cost is less by
9 10% than from other contractors, GSA is still required to use a method of source selection
10 authorized by Guam's Procurement Laws or Regulations, such as the competitive sealed bid
11 procedure GSA subsequently agreed to use to solicit the copiers at issue in this matter.

12 The methods of source selection are governed by a statute which states that unless
13 otherwise authorized by law, all Government of Guam contracts shall be awarded by competitive
14 sealed bidding except for the procurement of professional services, and except for small
15 purchases, sole source procurement, emergency procurement, competitive selection procedures
16 for services specified in 5 G.C.A. §5121, and procurement from non-profit corporations. 5
17 G.C.A. §5210(a) and 2 G.A.R., Div. 4, Chap. 3, §3108. Here, GSA's RFQ procedure does not
18 comply with any of the aforementioned methods of source selection. Thus, The Hearing Officer
19 recommends that the Public Auditor find that GSA's RFQ Procedure is not a method of source
20 selection authorized by Guam's Procurement Laws and Regulations. The issue of whether GSA
21 was authorized to adopt an alternative method of source selection to specifically procure
22 supplies, services, and equipment from the FSSP will now be examined.

23 **C. GSA does not have the authority to create alternative methods of source selection.**

24 IBSS argues that 5 G.C.A. §5113 does not give GSA the authority to create alternative
25 methods of source selection such as the RFQ procedure developed by GSA to purchase supplies
26 from the FSSP. At Hearing, GSA did state that it will not use the RFQ procedure again.

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28 ¹⁸ Purchasing From GSA Federal Supply Contract Procedure, Attachment A, Attorney General's Legal
Memorandum dated June 16, 2008, Ref: GSA 07-1084, as attached to GSA Letter to IBSS dated September 9, 2008,
Tab 1, Procurement Record.

1 However, in its initial denial of IBSS' protest, GSA did assert that it had the legal authority to
2 develop the RFQ procedure to purchase supplies, services, and equipment from the FSSP using
3 its authority to adopt operational procedures governing the internal functions of GSA's
4 procurement operations.¹⁹ The Public Auditor must determine whether this legal opinion is
5 correct. Generally, consistent with the provisions of Guam's Procurement Laws and
6 Regulations, the Chief Procurement Officer of GSA may adopt operational procedures governing
7 the internal functions of GSA. 5 G.C.A. §5113(b) and 2 G.A.R. Div. 4, Chap. 2, §2104(b).
8 Here, as stated above, the RFQ procedure does not comply with any of the methods of source
9 selection authorized by Guam's Procurement Laws and Regulations and can be distinguished
10 from "operational procedures" GSA has the authority to create and adopt. Thus, the Hearing
11 Officer recommends that the Public Auditor find that the legal opinion GSA relied upon to deny
12 IBSS' Protest is incorrect because GSA's Chief Procurement Officer does not have the authority
13 to develop alternative methods of source selection that are contrary to the methods of source
14 selection authorized by Guam's Procurement Law and Regulations.

15 **D. The RFQs must be cancelled because they violate Guam Procurement Law.**

16 The Hearing Officer recommends that the Public Auditor find that the RFQs at issue here
17 must be cancelled. If prior to award it is determined that a solicitation of a contract is in
18 violation of law, then the solicitation shall be cancelled or revised to comply with the law. 5
19 G.C.A. §5451 and 2 G.A.R., Div. 4, Chap. 9, §9104(2) and §9105. Here, there is no evidence
20 in the record in this matter that the RFQs have resulted in an award and the Hearing Officer
21 recommends that the Public Auditor find that the RFQs were in the pre-award stage of the
22 procurement process. Further, as set forth above, the Hearing Officer recommends that the
23 Public Auditor find that the RFQs violate Guam's Procurement Law because GSA's RFQ
24 Procedure is not a method of source selection authorized by Guam's Procurement Laws and
25 Regulations, and GSA's Chief Procurement Officer does not have the authority to develop
26 alternative methods of source selection that are contrary to the methods of source selection
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¹⁹ Attorney General's Legal Memorandum dated June 16, 2008, Ref: GSA 07-1084, page 7, as attached to GSA Letter to IBSS dated September 9, 2008, Tab 1, Procurement Record.

1 authorized by Guam's Procurement Law and Regulations. Also, the Hearing Officer
2 recommends that the Public Auditor find that the RFQs cannot be revised to comply with the law
3 because the RFQ procedures developed by GSA and used for the RFQs at issue here do not
4 comply with the methods of source selection authorized by Guam's Procurement Laws and
5 Regulations. Therefore, the RFQs must be cancelled.

6 **E. GSA's Violations of the Automatic Stay.**

7 The Hearing Officer recommends that the Public Auditor address GSA's continued
8 efforts to procure the copiers and ancillary services it was soliciting in the RFQs after IBSS'
9 Protest. GSA admitted that GSA Multi-Step Bid Invitation No. GSA-010-09 (Hereafter "IFB"),
10 issued on December 19, 2008, contained, in part, solicitations for the same copier equipment and
11 supplies it was soliciting in the RFQs.²⁰ At issue here is whether the automatic stay provisions
12 were triggered by IBSS's protest and subsequent appeal. Generally, in the event of a timely
13 protest, the government shall not proceed further with the solicitation or award of the contract
14 prior to the final resolution of such protest and any such further action is void. 5 G.C.A.
15 §5425(g) and 2 G.A.R., Div. 4, Chap. 9, §9101(e). These automatic stay provisions are triggered
16 when a protest is timely and the protest is filed before the award was made. *Guam Imaging*
17 *Consultants, Inc. v. GMHA*, 2004 Guam 15, ¶24 (Supreme Court of Guam, August 12, 2004).
18 As stated above, IBSS filed its protest on May 20, 2008, and the appeal in this matter on
19 September 12, 2008 prior an award being made in any of the RFQs. Thus, the Hearing Officer
20 recommends that the Public Auditor find that the automatic stay provisions apply to the copiers
21 and ancillary services solicited by the RFQs and that the portions of the IFB soliciting for the
22 same copiers and ancillary services violate the automatic stay and are void.

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24 **IV. CONCLUSION**

25 Based on the foregoing, the Hearing Officer recommends that the Public Auditor hereby
26 determine the following:
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²⁰ Respondent's Hearing Materials, Page 3, Line 8, Exhibits A and B, December 29, 2008, and Statements by Assistant Attorney General John Weisenberger, Hearing on the Merits for OPA-PA-08-012, January 7, 2009.

1 1. This matter is not moot because GSA's admissions do not resolve all the issues in this
2 matter and actual controversies between the parties still exist.

3 2. GSA's RFQ Procedure is not a method of source selection authorized by Guam's
4 Procurement Laws and Regulations. Further, GSA's longstanding use of the RFQ Procedure to
5 procure from the FSSP is a serious impairment to the integrity of the procurement system which
6 has stifled broad-based competition for government supplies and services.

7 3. GSA's Chief Procurement Officer does not have the authority to develop alternative
8 methods of source selection that are contrary to the methods of source selection authorized by
9 Guam's Procurement Law and Regulations.

10 4. GSA shall cancel the RFQs, in accordance with Guam Procurement Laws and
11 Regulations, no later than five (5) working days after GSA receives this decision.

12 5. IBSS' appeal should be sustained.

13 6. GSA shall cancel, in accordance with Guam Procurement Laws and Regulations, GSA
14 Multi-Step Bid Invitation No. GSA-010-09, no later than five (5) working days after GSA
15 receives this decision.

16 A copy of this Finding of Hearing Officer shall be provided to the parties and their
17 respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made available for review
18 on the OPA Website www.guamopa.org.

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20 **DATED** this 10th day of February, 2009.

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23 ANTHONY R. CAMACHO, ESQ.
24 Hearing Officer, Office of the Public Auditor