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GUAM DEPARTMENT OF EDUCATION

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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

IN THE APPEAL OF

OPA-PA-16-010

XEROX CORPORATION,

**GDOE'S REBUTTAL TO APPELLANT'S
COMMENTS**

Appellant.

Comes now the Guam Department of Education ("GDOE"), by and through GDOE Legal Counsel James L.G. Stake, and hereby files its Rebuttal to Comments pursuant to 2 Guam Administrative Rules and Regulations ("GAR") § 12105(c)(4) filed by Appellant Xerox Corporation ("Appellant").

I. INTRODUCTION

This appeal involves GDOE IFB 004-2016, which is a solicitation for the lease of multifunction (copy, print, scan, and fax) devices. Relevant to this appeal, GDOE stated in the IFB that it would consider bids that offered federal GSA pricing and its terms and conditions. See Ex. 7 GDOE bate stamp p. 40.

On November 18, 2015, GDOE published IFB 004-2016. On January 25, 2016, GDOE issued a notice of intent to award for IFB 004-2016.

On June 28, 2016, GDOE received an Agency Communication from Assistant Attorney General Laura Mooney ("AAG Mooney") of the Office of the Attorney General of

1 Guam (the "AG's Office"). The AG's Office is the approving entity for GDOE's procurement.
2 In the Agency Communication, AAG Mooney stated that there is no express legal authorization
3 for GDOE to procure using GSA pricing, and GDOE is prohibited under the Guam Procurement
4 Law and Regulations from doing so at this time. GDOE p. 949-950.
5

6 Consequently, on July 5, 2016, GDOE issued a notice of rejection of all bids to Xerox.
7 On July 18, 2016, Xerox protested GDOE's decision to reject all bids. On August 4, 2016,
8 GDOE denied Xerox's protest in its entirety.

9
10 **II. GUAM PROCUREMENT LAW AND REGULATIONS AUTHORIZE GDOE THE**
11 **ABILITY TO REJECT ALL BIDS AND CANCEL IFB 004-2016**

12 On November 18, 2015, GDOE published IFB 004-2016. Section 3.9, Right of GDOE to
13 cancel or reject invitation for bids of IFB 004-2016, states GDOE reserves the right to cancel this
14 IFB at any time when it is in the best interest of the Department, in accordance with 5 GCA
15 §5225 and 2 GAR Div. 4 §3115(c). GDOE 303.
16

17 Title 5 GCA §5225, Cancellation of invitations for bids or requests for proposals, states
18 an invitation for bids, a request for proposals, or other solicitation may be cancelled, or any or all
19 bids or proposals may be rejected in whole or in part as may be specified in the solicitation,
20 when it is in the best interests of the Territory in accordance with regulations promulgated by the
21 Policy Office. Title 2 GAR Div. 4 §3115(b) states that although issuance of a solicitation does
22 not compel award of a contract, a solicitation is to be cancelled only when there are cogent and
23 compelling reasons to believe that the cancellation of the solicitation is in the territory's best
24 interest. As previously mentioned in GDOE's Agency Statement, Title 2 GAR
25 §3115(d)(2)(A)(iii) states all bids or proposals may be rejected in whole or in part when the
26 Chief Procurement Officer or the head of the Purchasing Agency determines in writing that such
27

1 action is in the territory's best interest for reasons the solicitation did not provide for
2 consideration of all factors or significance to the territory.

3 In regards to the case at hand, IFB 004-2016 included language that permitted GSA or
4 Federal pricing guidelines to be considered. However, there is no express legal authorization
5 within Guam Procurement Law or Regulations that allows for GDOE to utilize these federal
6 pricing guidelines. Based on that fact, it is a compelling and cogent reason to cancel IFB 004-
7 2016 because GDOE wrongfully requested for GSA pricing when there was no legal
8 authorization to do so. Because GDOE does not have the ability to use GSA pricing it would
9 therein be an illegal agreement, and it would be in the best interest of the Territory to cancel IFB
10 004-2016, reject all bids, and issue an IFB in accordance with Guam Procurement Law and
11 Regulations.
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13
14 As stated above the issuance of a solicitation does not compel an award of a contract. 2
15 GAR §3115(b). Appellant incorrectly argues that the Attorney General's Office has waived their
16 objections it raised post-award, and stating that the AG cannot interject an objection after an
17 award has been issued. See Appellant's Comments p. 1-2. GDOE has issued an intent to
18 award to Xerox for IFB 004-2016, however this contract cannot be considered awarded until the
19 Contract associated with the IFB is fully executed which would require the Attorney General's
20 signature as well as the Governor of Guam's. Section 2.4.3 of IFB 004-2016, Notice of Award,
21 states any award pursuant to this IFB will not be complete until an agreement is fully executed
22 by the selected bidder, GDOE, and other required parties. GDOE 297. Therefore, IFB 004-
23 2016 was not awarded and GDOE gave proper notice within the IFB to the Appellant that GDOE
24 reserves the right to reject all bids and cancel the IFB if in the best interest of the territory.
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1 Other Courts have held that a Government agency is granted broad authority when
2 cancelling an invitation for bids. In *Caddel Construction vs. United States*, low bidder *Caddel*
3 sought injunctive and declaratory relief related against the contracting entity, or the U.S. in
4 *Caddel*, from canceling an IFB. 7 Cl.Ct. 236 (1985). The Court held that the authority vested in
5 the contracting officer to decide whether to cancel an IFB and re-advertise is extremely broad.
6
7 *Id. at 7*. Defective specifications, mistaken contractual provisions and erroneous specifications,
8 in appropriate cases, may be compelling reasons within the discretion of the contracting officer
9 for rejection of all bids. *Id.*; *American Gen. Leasing Inc. v. United States*, 587 F.2d 54 (1978).
10 Based on *Caddel*, GDOE properly canceled IFB 004-2016 because GDOE included erroneous
11 specifications that amounted to a compelling reason enabling the contracting officer to use their
12 discretion and thereafter reject all bids.

13
14 The Court in *Caddel*, held that a preliminary injunction will not be granted unless there is
15 a showing that the harm to be suffered by plaintiff outweighs the harms to the Government and
16 third parties. In regards to this Appeal before the OPA, Appellant has requested for an injunction
17 so that GDOE be stopped from cancelling IFB 004-2016, but Appellant has not demonstrated nor
18 argued any of the applicable requirements associated with an injunction. Also, because GDOE
19 has mistakenly included erroneous specifications that are not provided by Guam Procurement
20 Law, even had the Appellant met the burden required for injunctive relief, GDOE has
21 sufficiently demonstrated a compelling reason that would be in the best interest of the Territory
22 to cancel IFB 004-2016.

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24 In *First Enterprise v. United States*, plaintiff sought a permanent injunction because
25 contracting officer canceled the IFB after the lowest bidder withdrew. 61 Fed.Cl. 109 (2004).
26 The authority vested in a contracting officer to decide whether to cancel an IFB and re-advertise

1 is extremely broad. *Id* at 2. *See Also* 48 C.F.R. §14.404-1(c). Similarly, in the matter of
2 *Garrison Construction Company*, the Government Accountability Office (GAO) stated that
3 contracting officers have broad discretion in deciding whether to cancel a solicitation, and the
4 GAO will not overturn such a decision unless there is an abuse of that discretion. *See Garrison*
5 *Construction Company*, B-211359 (1983) at 1. The GAO referred to Defense Acquisition
6 Regulations (DAR) §2-404(1)(b) which provides a list of reasons sufficiently compelling to
7 justify cancellation of a solicitation. *Id*. Included among those reasons are that inadequate or
8 ambiguous specifications were cited in the invitation, specifications have been revised and for
9 other reasons, cancellation is in the best interest of the Government. The GAO held that
10 Contracting officers have broad discretion in deciding whether to cancel a solicitation, and “we
11 will not overturn such a decision unless there is an abuse of that discretion.” *Id*. Therefore,
12 Federal Courts have held that the contracting entities are afforded discretion when canceling an
13 IFB, particularly when in the best interest of the Government and this is supported by Federal
14 Regulations as well. 48 C.F.R. §14.404-1(c). Based on aforementioned cases, GDOE should be
15 afforded discretion to cancel IFB 004-2016 because there is a compelling reason that serves the
16 Territory’s best interest.

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19 Appellant argues that GDOE’s rational to reject bids is unsupported by the language of
20 the Procurement Law. *See* Appellant’s Comments p. 11. However, Guam Procurement Law and
21 Regulations, 5 GCA §5225, 2 GAR §§ 3115(b) and (d)(2)(A)(iii), specifically enable GDOE the
22 power to reject all bids in an IFB and to cancel an IFB in its entirety. In addition, IFB 004-2016
23 Section 3.9, Right of GDOE to cancel or reject invitation for bids, put Appellant on Notice since
24 the issuance of the IFB of GDOE’s ability to cancel or reject the IFB at any time in the best
25 interest of the Territory. GDOE 303. Federal Courts and Regulations have held similarly that a
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1 contracting entity is entitled to cancel an IFB if the reason is in the best interest of the entity.
2 Therefore, because IFB 004-2016 included bid specifications that GDOE does not have the
3 express authority to use based on Guam Procurement Law, it is in the best interest of the
4 Territory to cancel the IFB and reissue in a manner that GDOE could properly use.
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6 Appellant has argued that AG's analysis is incorrect and that the AG is unable to point to
7 a law that prohibits DOE from using the Federal Supply Schedules. GDOE may not be able to
8 provide a specific law that prohibits GDOE from using Federal Supply Schedules, however
9 Appellant has not refuted the argument that there is no law that expressly enables GDOE to use
10 the Federal Supply Schedules either. There are, however, specific laws that authorize and
11 empower GDOE to cancel an IFB and reject all bids in the best interest of the Territory.
12

13 In Conclusion, because GDOE is not expressly authorized by Guam Law to use GSA
14 pricing or Federal Supply Schedules, it is in the best interest of the Territory to cancel IFB 004-
15 2016 and reissue specifications in compliance with the Guam Procurement Law and Regulations.
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17 Dated this 13th day of September, 2016.

18 Respectfully submitted,

19 **GUAM DEPARTMENT OF EDUCATION**

20 By: 
21 **JAMES L.G. STAKE**
22 *Legal Counsel*