

IRIARTE CAMACHO CALVO LAW GROUP LLC

ELYZE M. IRIARTE
eiriarTE@icclawgroup.com
134 W Soledad Ave., Suite 401
Hagåtña, GU 96910
Tel No. 671.472.6813
Fax No. 671.477.4375

Attorneys for Appellant
XEROX CORPORATION

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 09-30-16

TIME: 3:30 AM PM BY: JW

FILE NO OPA-PA: 16-018

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

XEROX CORPORATION,

Appellant.

Docket No. OPA-PA-16-010

**APPELLANT XEROX CORPORATION'S
HEARING BRIEF**

Xerox Corporation briefs five main questions at issue in this case.

I. **WHAT IS THE OPA'S STANDARD OF REVIEW?**

DOE devotes its Rebuttal to the argument that the OPA should respect DOE's decision to cancel the solicitation under an abuse of discretion standard. DOE is completely mistaken on this most fundamental point.

The OPA does not employ an abuse of discretion standard when reviewing agency procurement decisions. Rather, "The Public Auditor shall have the power to review and determine *de novo* any matter properly submitted to her or him. . . . No prior determination shall be final or conclusive on the Public Auditor." 2 GAR Div. 4 § 12103(a). Unlike the federal cases cited by DOE, in which the federal Government Accountability Office reviews contracting officer's decisions for abuse of discretion, the OPA must review this issue afresh, without being bound by any prior

determinations. In other words, the OPA stands in the shoes of the agency and considers all the issues and evidence before it, without being influenced by DOE's prior decision-making. This is simply not a case of agency deference as DOE portends.

II. UNDER WHAT STANDARD MAY DOE CANCEL IFB NO. 004-2016?

Furthermore, DOE does not have the unfettered, broad discretion it claims to have. It is important to review the *full* text of the Government's statutory policy on cancelling IFBs:

Preparing and distributing a solicitation requires the expenditure of government time and funds. Businesses likewise incur expense in examining and responding to solicitations. Therefore, although issuance of a solicitation does not compel award of a contract, a solicitation is to be cancelled only when there are cogent and compelling reasons to believe that the cancellation of the solicitation is in the territory's best interest.

2 GAR Div. 4 § 3115(b). At the outset, this procurement regulation recognizes that issuing, as well as cancelling, solicitations must not be taken lightly.

Before deciding to cancel a solicitation, there is more to consider than the simple fact that a solicitation contains errors (and as discussed in Section III below, Xerox disputes that the present solicitation was erroneous). As section 3115(b) relates, the Government must look at the big picture, taking into account the expense and investment businesses undertake when submitting a bid. In this case, Xerox's bid contained over 400 pages. GDOE 0274-0678. A bid of this magnitude takes months to prepare, as bidders analyze cost and profit projections over the four, and possibly five, year term, not to mention the mounds of paperwork and certifications that must also be included in any bid package.

This is part of the reason why the Government must provide **cogent and compelling reasons** before cancelling a solicitation. This high standard forces the Government to treat bidders and the procurement process with dignity, and instills "public confidence in the procedures followed in public procurement" and "ensur[es] the fair and equitable treatment of all persons who deal with the procurement system of this Territory." 5 GCA § 5001(b)(3) and (4). The Government must carefully weigh the impact of cancellations on bidders and potential bidders, and not just take a one-sided view of the matter.

In fact, part of the consideration must include the issues that arise when you resolicit a contract after bids have already been opened. DOE is under the impression that a new solicitation will correct purported errors, but there could be other repercussions. Keeping in mind that bidders were not required to utilize GSA pricing but could offer any pricing, and that no other bidders but Xerox submitted bids, a resolicitation may have the effect of having no bidders offering to service DOE with multifunction devices.

DOE also runs the risk of receiving bids with higher prices. As DOE's Data Processing Manager concluded, "The pricing information for IFB 004-2016 appears to be fair and reasonable. The determination is based on the fact that the pricing per month has gone down and the pricing being offered is also Federal GSA pricing which is understood to be a lower pricing for organizations GDOE's size." GDOE 0686. If DOE resolicits, it may receive no bids at all, or bids higher than what Xerox offered.

Therefore, the OPA must determine whether the reasons DOE provides are

cogent and compelling enough to justify rewiring the long and arduous process of soliciting bids with the risk of no or higher bids. Contrary to DOE's hopes, the OPA does not review for abuse of discretion.

III. HAS DOE AND THE AG WAIVED THEIR OBJECTIONS?

As a preliminary matter, the OPA need not get into the analysis of cogent and compelling reasons if it concludes the AG has waived its objections. In its Comments filed on September 6, 2016, Xerox cited the many opportunities that the AG could have interposed an objection to DOE's specification allowing bids using federal GSA pricing: (1) when the IFB was being drafted; (2) before the IFB was released and published; (3) during the question and answer phase when a question was presented directly on this issue; (4) after DOE informed bidders that "**Federal GSA contract pricing consideration will remain**" (GDOE 0090); (5) before Xerox submitted a bid using federal GSA pricing; (6) at the time bids were opened; (7) before DOE issued a Notice of Intent to Award to Xerox; and (8) before or after DOE signed a contract with Xerox. Thought of another way, that is, in the perspective of a bidder, there were ample opportunities to save bidders the time and expense of putting a bid together using DOE's specifications allowing federal GSA pricing. The dilatory manner in which the AG is now hindering the procurement process with an objection it won't even bother to defend is patently unfair to bidders and the procurement process.

Through all phases of this procurement, the AG had a designated Special Assistant Attorney General who assisted DOE with this procurement. DOE's Superintendent swore under penalty of perjury that DOE was being

advised by local counsel designated by the Attorney General (which may be an Assistant Attorney General or other legal counsel designated as Special Assistant Attorney General ("SAAG") under 5 GCA § 5150) **during each and every phase of the procurement process, beginning with the planning stage and before any request for proposal or invitation to bid is issued or notice published**

GDOE 0958 (emphasis added). DOE's Superintendent also acknowledged the penalty of not complying with the requirement of having the AG advise DOE during all phases of the procurement: the solicitation could be cancelled or the contract could be disapproved. GDOE 0958.

Notably, in all of its filings to date, DOE has never addressed this particular issue, that all along it had the counsel of an AG-designated attorney who advised it on the legality of the procurement. DOE's silence on this issue demonstrates that just like Xerox, DOE is a victim of the AG's untimely objection. Months of DOE's planning and bid analysis, let alone significant cost savings, is jeopardized by the AG's rejection of the advice given by one of its designated attorneys. The AG's conduct is unfair to bidders and the agencies it's obligated to protect from the inception of the procurement process.

By virtue of the operation of section 5150 of the Procurement Law, which requires the AG's involvement in this solicitation, the AG is deemed to have approved of the solicitation when it was published, when the terms were confirmed at the question and answer phase, when bids were opened, when Xerox was issued a Notice of Intent to Award, and when DOE signed the contract with Xerox. Through its designated agent, the AG has approved every phase of the entire process, and, importantly, DOE and the bidders have relied on the AG's sanction of the

procurement process. The AG's late objection should be deemed waived and contrary to the policies of the Guam Procurement Law.

IV. HAS DOE PROVIDED COGENT AND COMPELLING REASONS TO CANCEL THE PROCUREMENT?

DOE has proffered two main reasons for cancelling the solicitation: (1) because the solicitation did not provide consideration of all factors (2 GAR Div. 4 § 3115(d)(2)(A)(iii)); and (2) because the AG says it has to.¹ Neither of these are supported, let alone qualify as cogent and compelling.

A. DOE CONSIDERED ALL FACTORS

Xerox incorporates the discussion in pages 10 to 11 of its Comments, which discusses how DOE considered all relevant factors. Briefly, based on the regulations, "factors" references evaluation factors. See 2 GAR Div. 4 §§ 3109(c)(2)(B), 3114(f)(2). Here, DOE informed bidders of the factors it would consider (such as price, experience, and technical support) and DOE's analysis demonstrates it considered all of those factors. Therefore DOE has misapplied this rationale to cancel a solicitation. Furthermore, DOE's Rebuttal does not address this point. DOE therefore has not established this point as being accurate or a cogent or compelling reason.

B. THE AG INCORRECTLY FOUND THAT DOE CANNOT ACCEPT FEDERAL GSA PRICING

The AG and DOE wrongly conclude that DOE cannot accept federal GSA pricing. Certainly, DOE accepted the legality of this method of procurement when it considered the issue during the question and answer phase and then confirmed that

¹ DOE also claims it can cancel because it has the broad discretion to do whatever it wants. Xerox addresses this in Section II.

it will accept bids using federal GSA pricing.

Through its Rebuttal, DOE takes the stance - for the first time in this case - that because Guam law does not explicitly allow DOE to accept bids using that pricing, it must be prohibited from doing so. It is unfortunate that DOE chooses to put on blinders as to the benefits of the federal GSA supply program, a program that DOE's Data Processing Manager recognizes saves the agency significant sums of money. GDOE 0686. Using federal GSA pricing, Xerox was able to offer significant discounts, as compared to its existing contract which is not based on federal GSA pricing.

IFB 022-2010 (existing)	IFB 004-2016 (new)	Comment
\$65,151.14 per month ²	\$42,316.57 per month	This is savings of \$22,834.57 per month, which is \$274,014.84 per year, and \$1,370,074.20 over five years.
5,745,000 Quarterly Black Allowance ³	8,500,000 Quarterly Black Allowance	This means that the number of free basic black prints will increase by close to three million prints per quarter.
Black Overage = \$.008	Black Overage = \$.0075	Under the federal GSA contract, DOE will save \$0.0005 per page for basic black prints after the first 8,500,000 prints per quarter.
No Color Allowance	500,000 Quarterly Color Allowance	Under the prior contract, DOE paid additional for each color print. Under the federal GSA contract, DOE will not have to pay for the first 500,000 color prints per quarter.
Tiered Color Pricing for Overage: Tier 1/Black = \$.008 Tier 2 = \$.03 Tier 3 = \$.085	Color Pricing Overage = \$.05	Because of the functionality of the new multifunction devices, only one price will be charged beyond the first 500,000 color prints per quarter.

² DOE misstates the amount as \$61,151.14 in GDOE 0686.

³ DOE misstates this figure as 2,198,000.

IFB 022-2010 (existing)	IFB 004-2016 (new)	Comment
127 Multifunction Devices ⁴	137 Multifunction Devices	For less money, DOE will receive 10 more devices.

See GDOE 0686. The net outcome of the proposed federal GSA contract is that DOE will save money, be able to print more at less cost, and receive more machines that are newer, more reliable, more capable, more secure, and with better image quality. It is confounding that DOE wishes to abandon all of these benefits even though nothing prohibits it from doing so.

Xerox certainly is not the only vendor pre-approved under the federal program. There are over 30 vendors providing copiers using federal schedules⁵, and other prospective local bidders had the opportunity to utilize their own federal schedule. Federal GSA vets these vendors and negotiates rates not just for the federal government, but for local governments as well. DOE would be free to utilize vendors participating under the federal program for virtually every item needed to run the department.

As DOE acknowledges, Guam law does not prohibit DOE from taking advantage of the savings offered under this federal program. Guam law permits DOE autonomy over its procurements, which includes the ability to accept bids based on federal GSA pricing. 5 GCA § 5263.

DOE is however choosing to blindly follow the AG's incorrect opinion that 5 GCA § 5122 bars it from using federal pricing. As discussed in Xerox's Notice of Appeal and in its Comments, this provision concerns an outdated practice whereby

⁴ DOE misstates this figure as 126.

⁵ See www.gsaelibrary.gsa.gov/ElibMain/sinDetails.do?executeQuery=YES&scheduleNumber=36&flag=&filter=&specialItemNumber=51+100.

local government officials could avail of federally run office supply stores. That provision is antiquated and inapplicable.

Nothing in the Guam Procurement Law prohibits DOE from accepting bids based on a vendor's federal GSA contract. DOE has the autonomy to set the terms it finds acceptable, which it did in this situation. Moreover, DOE should be encouraged to take advantage of a program that saves it over a million dollars over the course of five years. Because DOE is incorrect on its authority to accept and use federal GSA pricing, it has not presented a cogent and compelling reason to cancel the solicitation.

V. WHAT REMEDY MAY THE OPA AWARD?

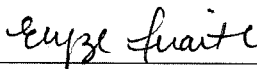
Because DOE's Rebuttal conducts an analysis on injunctive relief, Xerox finds it necessary to address how DOE has again misinterpreted the administrative review process. DOE claims that Xerox has not set forth the legal requirements for injunctive relief, specifically, compelling DOE not to cancel the solicitation. However, this is not a civil litigation whereby the Guam Rules of Civil Procedure govern requests for injunctive relief. Instead, seeking to reverse DOE's decision to cancel the solicitation is an inherent remedy in the administrative review process. As part of the requirement to exhaust its administrative remedies, Xerox filed a timely protest with DOE, challenging DOE's Amended Bid Status and Notice of Rejection of All Bids. After the protest was denied, Xerox took the next step in exhausting its administrative remedies by asking the OPA to review this matter *de novo*. The OPA has the authority to uphold or reverse DOE's decision. In compelling an agency to act, the OPA is not bound by the Rules of Civil Procedure. It is wholly

within the OPA's authority to "take appropriate action" including reversing an agency decision. 2 GAR Div. 4 § 12110(a).

Thus, the appropriate action and remedy that the OPA should administer after the conclusion of the hearing is to instruct DOE to rescind the Amended Bid Status and the Notice of Rejection of All Bids. At the Pre-Hearing Conference on September 20, 2016, DOE Attorney James Stake informed the OPA that he was a designated representative of the AG's Office. This means that should the OPA determine that the AG's objections are waived or unsupported, the OPA may order the AG to approve the Contract, and to submit the Contract to the Governor for signature.

Submitted this 30th day of September, 2016.

IRIARTE CAMACHO CALVO LAW GROUP
LLC



ELYZE M. IRIARTE
Attorneys for Appellant
Xerox Corporation