

OPA Notice of Appeal: IBSS vs DOE - copiers - DOE IFB 022 - 2010

EXHIBIT

4. Purchase Order # 201100024 to Xerox, November 16, 2010

Vendor: 10004

PURCHASE ORDER

P/O #: 201100024

BUSINESS OFFICE
DEPARTMENT OF EDUCATION
GOVERNMENT OF GUAM
P.O. BOX DE
HAGÁTÑA, GUAM 96932

IMPORTANT
PURCHASE ORDER NUMBER MUST
APPEAR ON ALL INVOICES
PACKAGES AND CORRESPONDENT

XEROX CORPORATION
137 MURRAY BLVD
HAGATNA GU 96910

SHIP TO:

FINANCIAL AFFAIRS
DEPUTY SUPT OF FINANCE & A S
P.O. BOX DE
HAGATNA GU 96932
(671) 300-1575

Fax Number: (671) 477-6421
11/16/10

ATTN: TALING TAITANO
Fax Number: (671) 472-5009

60 DAYS ARO 000000099

DATE: REQUIRED: TIME OF DELIVERY: REQ:

QTY	DESCRIPTION	DISCOUNT	UNIT PRICE	TOTAL
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REFERENCE GUAM DEPARTMENT OF EDUCATION
INVITATION FOR BID NO. 022-2010,
XEROX RESPONSE AND SERVICES & SOLUTIONS
AGREEMENT NO. 7099405

805,397.00

13.11.24.00.26.0230.0000
PURCHASE ORDER ISSUED TO COVER THE COST
OF TEN (10) MONTHS OF A SIXTY (60)
MONTH TERM FOR XEROX DOCUMENT
MANAGEMENT SERVICE BILLED AT \$80,537.70
PER MONTH TOTAL.

SERVICES & SOLUTIONS AGREEMENT NO.
7099405 WILL INCLUDE XEROX MANAGED
SERVICES AND THE FOLLOWING XEROX UNITS
AND QUANTITIES AS FOLLOWS:

- (14) XEROX 4112CP
- (57) XEROX 3CQ9201
- (45) XEROX W7545
- (33) XEROX WC7435
- (100 SEATS) SCAN TO PC DESKTOP
SOFTWARE
- (1) CENTREWARE WEB SOFTWARE

ADDITIONAL CONFIGURATION, ACCESSORY, AND
PRICING DETAIL INFORMATION ON THE ABOVE
UNITS ARE AS PER THE ATTACHED
DESCRIPTION PAGE.

PRINT ALLOWANCES FOR THE ABOVE WILL BE
COMBINED AND POOLED TO INCLUDE

(Continued)

NOTE: ALL INVOICES MUST BE CERTIFIED
Please include shipping and mailing charges. See important
notice on reverse side.

PURCHASING AUTHORITY
Albert G. Garcia, Supply Mgmt. Administrator, Acting

INSTRUCTION TO VENDOR

PRICE INCREASE OR INCREASES IN SHIPPING COST OVER TOTAL P.O. MUST
RECEIVE PRIOR SCHOOL DISTRICT APPROVAL.

EXPEDITE PAYMENT. PLEASE ATTACH ANY OF THE FOLLOWING TO
OUR SPECIFIC INVOICE.

1. SIGNED DELIVERY RECEIPT
2. INSURANCE RECEIPT/NUMBER

1. DO NOT overship or substitute without prior Purchasing Dept. Approval.
2. Send all invoices, certified original and one (1) copy only, to: BUSINESS OFFICE,
DEPARTMENT OF EDUCATION, P.O. BOX DE, HAGÁTÑA, GUAM 96932
3. A separate TAX FREE invoice set must be submitted for each order.
4. Claims for Freight Charges must be accompanied by receipt Freight Bill or
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Vendor: 10004

PURCHASE ORDER

P/O #: 201100024

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IMPORTANT
PURCHASE ORDER NUMBER MUST
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XEROX CORPORATION

SHIP TO:

FINANCIAL AFFAIRS

(Continued)

QTY	DESCRIPTION	DISCOUNT	UNIT PRICE	TOTAL
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2,740,000 BLACK PRINTS PER MONTH
RECONCILED QUARTERLY. EACH EXCESS
BLACK PRINT OVER THE ALLOWANCE WILL BE
BILLED AT \$0.008.

EACH COLOR PRINT WILL BE BILLED AS
FOLLOWS DEPENDING UPON THE UNIT ON WHICH
A COLOR PRINT IS MADE.

XEROX WC7545 AND WC7435: EACH COLOR
PRINT WILL BE BILLED AT \$0.085.

XEROX CQ9201: EACH COLOR PRINT WILL BE
BILLED ACCORDING TO THE FOLLOWING
TIERED LEVELS:

- TIER 1 - USEFUL COLOR: \$0.008
- TIER 2 - EVERYDAY COLOR: \$0.030
- TIER 3 - EXPRESSIVE COLOR: \$0.085

13.11.24.00.26.0230.0000 48,450.00
ENCUMBRANCE TO COVER THE COST OF MONTH
ESTIMATED COLOR PRINT VOLUME ON XEROX
WC7545 AND WC7435 MODELS CALCULATED AS
FOLLOWS:
* \$0.085 X 57000 COLOR PRINTS = \$4845.00

13.11.24.00.26.0230.0000 8,417.50
ENCUMBRANCE TO COVER THE COST OF MONTH
ESTIMATED COLOR VOLUME ON THE XEROX
CQ9201 MODEL CALCULATED AS FOLLOWS:
(TIER 1): \$0.008 X 65000 X 90% = \$468
(TIER 2): \$0.030 X 65000 X 5% = \$97
(TIER 3): \$0.085 X 65000 X 5% = \$276

NOTE: ALL INVOICES MUST BE
MAILED TO THE PURCHASING
OFFICE ON THE 15th OF EACH
MONTH.

PURCHASING AUTHORITY
Albert G. Garcia, Supply Mgmt. Administrator, Acting

DO NOT INCREASE OR INCREASES IN SHIPPING COST OVER TOTAL P.O. MUST
OBTAIN PRIOR SCHOOL DISTRICT APPROVAL.

EXPEDITE PAYMENT. PLEASE ATTACH ANY OF THE FOLLOWING TO
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INSTRUCTION TO (Vendor)

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Vendor: 10004

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P/O #: 201100024

BUSINESS OFFICE
DEPARTMENT OF EDUCATION
GOVERNMENT OF GUAM
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IMPORTANT
PURCHASE ORDER NUMBER MUST
APPEAR ON ALL INVOICES
PACKAGES AND CORRESPONDENT

XEROX CORPORATION

SHIP TO:

FINANCIAL AFFAIRS

(Continued)

DATE:	REQUIRED:	TIME OF DELIVERY:	REQ:
QTY	DESCRIPTION	DISCOUNT	UNIT PRICE
			841.75
			TOTAL

DETAIL INFORMATION FOR SERVICES AND EQUIPMENT DESCRIBED IN PURCHASE ORDER

- (14) XEROX 4112CP
- (57) XEROX 3CQ9201
- (45) XEROX W7545
- (33) XEROX WC7435
- (100 SEATS) SCAN TO PC DESKTOP

13.11.24.00.26.0230.0000
SOFTWARE

- (1) CENTREWARE WEB SOFTWARE

BID ITEM 1: (QUANTITY 14)
XEROX 4112CP WITH

- 4110 BYPASS-BYPASS CHUTE
- CLRSCN2-COLOR SCAN ENABLEMENT
- TKL-BOOKLET FINISHER W/ 2/3 HOLE PUNCH
- CONVENIENCE STAPLER

BILLED AT \$716.59 PER MONTH EACH.
INCLUDES AN ALLOWANCE OF 40,000 BLACK IMPRESSIONS PER MONTH ON EACH UNIT.

BID ITEM 2: (QUANTITY 55 WITHOUT FAX AND 2 WITH FAX)

- XEROX 3CQ9201 WITH
- CQHVM-HIGH VOLUME FINISHER WITH BOOKLET MAKER
- CQ3HPHVF-3 HOLE PUNCH
- CQ1LINEFAX-1 LINE FAX (FOR 2 UNITS)

NOTE: ALL INVOICES MUST BE CERTIFIED
Please provide shipping and mailing charges. See important
notes on reverse side.

BILLED AT \$699.41 FOR NO FAX AND \$712.05

PURCHASING AUTHORITY
Robert G. Garcia, Supply Mgmt. Administrator, Acting

INSTRUCTION TO (Continued)

PRICE INCREASE OR INCREASES IN SHIPPING COST OVER TOTAL P.O. MUST
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PURCHASE ORDER

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IMPORTANT
PURCHASE ORDER NUMBER MUST
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PACKAGES AND CORRESPONDENCE

XEROX CORPORATION

SHIP TO:

FINANCIAL AFFAIRS

(Continued)

DATE:	REQUIRED:	TIME OF DELIVERY:	REQ:	
QTY	DESCRIPTION	DISCOUNT	UNIT PRICE	TOTAL
	WITH FAX PER MONTH EACH. INCLUDES AN ALLOWANCE OF 25,000 BLACK IMPRESSIONS PER MONTH ON EACH UNIT.			
	BID ITEM 3: (QUANTITY 29 WITHOUT FAX AND AND 16 WITH FAX)			
	XEROX W7545P WITH			
	- 3TRAY-3 TRAY MODULE			
	- OFCFINRLX-OFFICE FINISHER			
	- FINLX-3HP-3 HOLE PUNCH			
	- FINLX-BM-BOOKLET MAKER			
	- LINE1FAK-SINGLE LINE FAX (FOR 16UNITS)			
	BILLED AT \$279.90 FOR NO FAX AND \$289.97 WITH FAX PER MONTH EACH. INLCUDES AN ALLOWANCE OF 10,000 BLACK IMPRESSIONS PER MONTH ON EACH UNIT.			
	BID ITEM 4: (QUANTITY 32 WITHOUT FAX AND 1 WITH FAX)			
	XEROX W7435P WITH			
	- PBE-3 TRAY MODULE			
	- STPLER-CONVENIENCE STAPLER			
	- SCANKIT1-SCANNING ENABLEMENT			
	- FAXLN1 - SINGLE LINE FAX (FOR 1 UNIT)			
	BILLED AT \$144.45 FOR NO FAX AND \$150.77 WITH FAX PER MONTH EACH. INCLUDES AN ALLOWANCE OF 5,000 BLACK IMPRESSIONS PER MONTH ON EACH UNIT.			
	BID ITEM 6: (QUANTITY 100 SEATS)			
	XEROX SCAN TO PC DESKTOP WITH			
	PARREPORT PROFESSIONAL 11			
	OFFICE PROFESSIONAL 16			
	- PDF CONVERTER PROFESSIONAL 5			

NOTE: ALL INVOICES MUST BE PREPARED BY PURCHASING DEPARTMENT. PLEASE PREPARE ALL SHIPPING AND MARKING INFORMATION ON THE INVOICE.

PURCHASING AUTHORITY
Albert G. Garcia, Supply Mgmt. Administrator, Acting

INSTRUCTION TO (continued)

PRICE INCREASE OR INCREASES IN SHIPPING COST OVER TOTAL P.O. MUST RECEIVE PRIOR SCHOOL DISTRICT APPROVAL.
EXPEDITE PAYMENT. PLEASE ATTACH ANY OF THE FOLLOWING TO OUR SPECIFIC INVOICE.

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- SIGNED DELIVERY RECEIPT
- INSURANCE RECEIPT/NUMBER
- ...

Vendor: 10004

PURCHASE ORDER

P/O #: 201100024

BUSINESS OFFICE
DEPARTMENT OF EDUCATION
GOVERNMENT OF GUAM
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IMPORTANT
PURCHASE ORDER NUMBER MUST
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PACKAGES AND CORRESPONDENT

XEROX CORPORATION

SHIP TO:

FINANCIAL AFFAIRS

(Continued)

QTY	DESCRIPTION	DISCOUNT	UNIT PRICE	TOTAL
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ENTERPRISE IMAGE RETRIEVER
PROFESSIONAL 9
- PSP SERVER 2

BILLED AT \$117.00 PER MONTH AS PART OF THE DOCUMENT MANAGEMENT SERVICES PLAN

BID ITEM 7: (QUANTITY 1)
XEROX CENTREWARE WEB SOFTWARE
(DOWNLOADABLE AT NO CHARGE FROM WWW.XEROX.COM)

DEVICE MANAGEMENT SERVICES WITH
- EQUIPMENT FLEET MANAGEMENT SERVICES
- MANAGED PRINT SERVICES WITH 24/7
HELP DESK
- SURVEY PROCESSING AND ANALYSIS
SERVICES

BILLED AT \$13,086.00 PER MONTH.

FINAL TOTAL BY LOCATIONS IS TO BE DETERMINED UPON FINAL PLACEMENT OF MACHINES:

****ELEMENTARY SCHOOLS****

13.11.30.01.26.0230.0000
AGANA HEIGHTS ELEM

13.11.30.02.26.0230.0000
MARCIAL SABLAN ELEM

13.11.30.03.26.0230.0000
BP CARBULLIDO ELEM

NOTE: ALL INVOICES MUST BE CERTIFIED BY PURCHASING AUTHORITY. Shipping and handling charges on reverse side.

PURCHASING AUTHORITY: Albert G. Garcia, Supply Mgmt. Administrator, Acting

INSTRUCTION TO VENDOR

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IMPORTANT
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XEROX CORPORATION

SHIP TO:

FINANCIAL AFFAIRS

(Continued)

DATE:	REQUIRED:	TIME OF DELIVERY:	REQ:	
QTY	DESCRIPTION	DISCOUNT	UNIT PRICE	TOTAL
	13.11.30.05.26.0230.0000 FQ SANCHEZ ELEM			
	13.11.30.06.26.0230.0000 FINEGAYAN ELEM			
	13.11.30.07.26.0230.0000 HS TRUMAN ELEM			
	13.11.30.08.26.0230.0000 JM GUERRERO ELEM			
	13.11.30.09.26.0230.0000 INARAJAN ELEM			
	13.11.30.11.26.0230.0000 JQ SAN MIGUEL ELEM			
	13.11.30.12.26.0230.0000 LB JOHNSON ELEM			
	13.11.30.13.26.0230.0000 MA ULLOA ELEM			
	13.11.30.14.26.0230.0000 MU LUJAN ELEM			
	13.11.30.15.26.0230.0000 MERIZO ELEM			
	13.11.30.16.26.0230.0000 ORDOT/CHALAN PAGO			

NOTE: ALL INVOICES MUST BE CERTIFIED
 Please specify shipping and billing code on reverse side.
 13.11.30.17.26.0230.0000
 PC LUJAN ELEM

PURCHASING AUTHORITY
 Albert G. Garcia, Supply Mgmt. Administrator, Acting

INSTRUCTION TO VENDOR

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(Continued)

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IMPORTANT
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XEROX CORPORATION

SHIP TO:

FINANCIAL AFFAIRS

(Continued)

DATE:	REQUIRED:	TIME OF DELIVERY:	REQ:	
QTY	DESCRIPTION	DISCOUNT	UNIT PRICE	TOTAL
	13.11.30.19.26.0230.0000 TALOFOFO ELEM			
	13.11.30.20.26.0230.0000 TAMUNING ELEM			
	13.11.30.21.26.0230.0000 UPI ELEM			
	13.11.30.22.26.0230.0000 WETTENGEL ELEM			
	13.11.30.23.26.0230.0000 DL PEREZ ELEM			
	13.11.30.24.26.0230.0000 CHIEF BRODIE ELEM			
	13.11.30.25.26.0230.0000 ASTUMBO ELEM			
	13.11.30.27.26.0230.0000 MACHANANONAO ELEM			
	13.11.30.28.26.0230.0000 LIGUAN ELEM			
	13.11.30.29.26.0230.0000 ADACAO ELEM			
	MIDDLE SCHOOLS			
	13.11.40.30.26.0230.0000 JOHNSON MIDDLE			
	13.11.40.31.26.0230.0000 VSA BENEVENTE MIDDLE			

NOTE: ALL INVOICES MUST BE CERTIFIED BY THE PURCHASING AUTHORITY AND MUST BE RECEIVED IN THE PURCHASING OFFICE ON THE REVERSE SIDE.

PURCHASING AUTHORITY: Robert O. Garcia, Supply Mgt. Admin. Acting
PRICE INCREASE OR INCREASES IN SHIPPING COST OVER TOTAL P.O. MUST RECEIVE PRIOR SCHOOL DISTRICT APPROVAL.
EXPEDITE PAYMENT. PLEASE ATTACH ANY OF THE FOLLOWING TO OUR SPECIFIC INVOICE.

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XEROX CORPORATION

SHIP TO:

FINANCIAL AFFAIRS

(Continued)

DATE:	REQUIRED:	TIME OF DELIVERY:	REQ:	
QTY	DESCRIPTION	DISCOUNT	UNIT PRICE	TOTAL
	13.11.40.32.26.0230.0000 FB LEON GUERRERO MIDDLE			
	13.11.40.33.26.0230.0000 INARAJAN MIDDLE			
	13.11.40.34.26.0230.0000 JLG RIOS MIDDLE			
	13.11.40.35.26.0230.0000 LP UNTALAN MIDDLE			
	13.11.40.36.26.0230.0000 OCEANVIEW MIDDLE			
	13.11.40.37.26.0230.0000 ASTUMBO MIDDLE			
	HIGH SCHOOLS			
	13.11.40.40.26.0230.0000 GEORGE WASHINGTON HIGH			
	13.11.40.42.26.0230.0000 JOHN F. KENNEDY HIGH			
	13.11.40.44.26.0230.0000 SIMON SHANCHEZ HIGH			
	13.11.40.46.26.0230.0000 SOUTHERN HIGH			
	13.11.40.48.26.0230.0000 OKKODCHESH			

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Please properly all shipping and OKKODCHESH See important
invoice on the reverse side.

PURCHASING AUTHORITY
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(Continued)

DATE:	REQUIRED:	TIME OF DELIVERY:	REQ:	
QTY	DESCRIPTION	DISCOUNT	UNIT PRICE	TOTAL
	OTHER SCHOOLS			
	13.11.40.47.26.0230.0000			
	JP TORRES ALTERNATIVE SCHOOL			
	OTHERS			
	13.11.10.00.26.0230.0000			
	GUAM EDUCATION BOARD			
	13.11.11.00.26.0230.0000			
	SUPERINTENDENTS OFFICE			
	13.11.24.00.26.0230.0000			
	FEDERAL PROGRAMS OFFICE			
	13.11.15.00.26.0230.0000			
	RESEARCH PLANNING AND EVALUATION OFFICE			
	13.11.16.00.26.0230.0000			
	FSAIS OFFICE			
	13.11.20.00.26.0230.0000			
	CIRRUCULUM AND INSTRUCTIONAL OFFICE			
	13.11.21.00.26.0230.0000			
	CHAMORRO STUDIES OFFICE			
	13.11.22.00.26.0230.0000			
	FINANICAL AFFAIRS OFFICE			
	13.11.23.00.26.0230.0000			
	PERSONNEL SERVICES OFFICE			
	13.11.25.00.26.0230.0000			
	FACILITIES AND MAINTENANCE OFFICE			

NOTE: ALL INVOICES MUST BE CERTIFIED

Please check shipping and handling charges on reverse side.

PURCHASING AUTHORITY
Albert G. Garcia, Supply Mgmt. Administrator, Acting

INSTRUCTION TO VENDOR

PRICE INCREASE OR INCREASES IN SHIPPING COST OVER TOTAL P.O. MUST RECEIVE PRIOR SCHOOL DISTRICT APPROVAL.
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Vendor: 10004

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XEROX CORPORATION

SHIP TO:

FINANCIAL AFFAIRS

(Continued)

DATE:	REQUIRED:	TIME OF DELIVERY:	REQ:	
QTY	DESCRIPTION	DISCOUNT	UNIT PRICE	TOTAL
	13.11.26.00.26.0230.0000 FOOD AND NUTRITION SERVICES OFFICE			
	13.11.28.00.26.0230.0000 PROCUREMENT OFFICE			
	13.11.31.00.26.0230.0000 HEADSTART OFFICE			
	13.11.40.00.26.0230.0000 EDUCATIONAL SUPPORT AND COMMUNITY OFFICE			
	13.11.50.00.26.0230.0000 SPECIAL EDUCATION OFFICE			
	13.11.55.00.26.0230.0000 GIFTED AND TALENTED OFFICE (THEATER)			
			TOTAL	862,264.50 *****

~~XXXXXXXXXXXX~~

DOEPR 3.9 COMPETITIVE SEALED BIDDING
"ALL LATE DELIVERIES AND ACCEPTANCE
SUBJECT TO LIQUIDATED DAMAGES"

NOTE: ALL INVOICES MUST BE CERTIFIED
Please prepay all shipping and mailing charges. See important
notice on reverse side.

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Albert G. Garcia, Supply Mgmt. Administrator, Acting

INSTRUCTION TO VENDOR

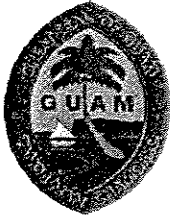
PRICE INCREASE OR INCREASES IN SHIPPING COST OVER TOTAL P.O. MUST
RECEIVE PRIOR SCHOOL DISTRICT APPROVAL.
EXPEDITE PAYMENT. PLEASE ATTACH ANY OF THE FOLLOWING TO
YOUR SPECIFIC INVOICE.

- DO NOT overship or substitute without prior Purchasing Dept. Approval.
- Send all invoices, certified original and one (1) copy only, to: BUSINESS OFFICE, DEPARTMENT OF EDUCATION, P.O. BOX DE, HAGÁTÑA, GUAM 96932
- A separate TAX FREE invoice set must be submitted for each order.
- Claims for Freight Charges must be accompanied by receipt Freight Bill or Postal Receipt.
- Purchase Order Number and Ship to Name must appear on all document

- SIGNED DELIVERY RECEIPT
- INSURANCE RECEIPT/NUMBER
- AIR BILL WAYBILL BILL OF LADING

EXHIBIT

5. Payment Receipt for copies 12.3.10



**DEPARTMENT OF EDUCATION
OFFICE OF SUPPLY MANAGEMENT**

www.gdoe.net
Manuel F.L. Guerrero / Administration Building
2nd Floor, Suite B-202
Hagatna, Guam 96932
Telephone: (671) 300-1580 Fax: (671) 472-5001
Email: procurement@gdoe.net

PAYMENT RECEIPT

Date: 12.03.10

Name of Vendor: IBSS

IFB RFP

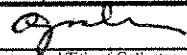
Bid Document(s) Copies of IFB
022-2010

Fee: \$ 30.⁷⁴
Fee: \$ _____
Fee: \$ _____
Fee: \$ _____

TOTAL: \$ 30.⁷⁴

FIELD RECEIPT

**Department of Education
Business Office
P.O. Box DE
Agana, Guam 96932**

Name: <i>IBSS</i>		Date: <i>12/03/10</i>
Address:		
<i>Copies of IFB</i>		<i>\$ 20.74</i>
<i>022 2010</i>		
		<i>S</i>
Revenue Acct. No.	Period Covered	How Paid (Cash, M.O., etc.)
		<i>C</i>
		TOTAL <i>\$ 30.74</i>
 Signature and Title of Collector		DOE-196252

OPA Notice of Appeal: IBSS vs DOE - copiers - DOE IFB 022 - 2010

EXHIBIT

6. Xerox response to Appellant's Protest, December 30, 2010

CARLSMITH BALL LLP

A LIMITED LIABILITY LAW PARTNERSHIP

134 W. SOLEDAD AVE

BANK OF HAWAII BLDG., SUITE 401

HAGATNA, GUAM 96910

TELEPHONE 671.472.6813 FAX 671.477.4375

WWW.CARLSMITH.COM

EMCDONALD@CARLSMITH.COM

scan → *procurement*
Legal
TMT

December 30, 2010

VIA HAND DELIVERY

Nerissa Bretania Underwood, Ph.D.
Superintendent
Department of Education
P.O. Box DE
Hagatna, Guam 96932

GUAM DEPARTMENT OF EDUCATION
Office of the Superintendent
Rec'd by: *Nerissa*
Special Date: 1/2/11

Re: DOE IFB022-2010

Dear Dr. Underwood:

Xerox Corporation hereby responds to the December 16, 2010 letter from Island Business Systems & Supplies (IBSS) to you regarding its objections to DOE IFB022-2010. Xerox received a copy of the letter on December 22, 2010, in response to a Freedom of Information Act request.

IBSS complains that the award accounts for quantities beyond the quantities indicated in the Invitation for Bids, and that the variance cannot be considered "incremental." In response, Xerox points out the following points:

(1) The IFB gives DOE the ability to add incremental quantities. In several places of the IFB, the IFB allows for additional increments.

(a) Paragraph 22 of the IFB states: "The government reserves the right to increase or decrease the quantity of the items for award and made additional awards for the same type items"¹

(b) Page 23 of the IFB states: "Incremental Additions: GDOE will have at its discretion the ability to add additional equipment on to the proposed plan as needed based on the quoted Incremental Additional cost per month per item."

¹ The timeframe for increasing or decreasing quantities was clarified in a later amendment.

(c) Within each specific Item of the IFB is mentioned "Option to add additional machines \$_____." Accordingly, within each specific item of the Bid, DOE reserved the right to add additional machines for a certain cost.

These several provisions give DOE the ability to add increments, and also indicate to bidders that the quantities could be adjusted. In addition, IBSS does not argue that increments are not allowed by the IFB. Instead, IBSS argues, without citing any authority, that the quantities cannot be considered in good faith to be "incremental."

The IFB does not define "incremental," and the term is open-ended in the three places referenced above. It is also not defined by statute or regulation. An entity of the size of DOE can be expected to adjust their quantities as the school year progresses and as it obtains a greater understanding regarding what would be an efficient copier system at each of the different schools.

This is reflected in the way DOE adjusted its quantities. In the larger machines ordered, DOE adjusted the quantity from 5 to 14. However, DOE also *decreased* quantities of the smaller machines such as the number of Item 1 machines (Xerox 7435) from 48 to 33, and the number of Item 3 machines (Xerox WC7545) from 47 to 45. These adjustments were made after an analysis of how the machines would be most efficiently placed. Again, the IFB allows DOE to account for these adjustments, and Xerox relied on these provisions as well in ordering the additional machines. Overall, with respect to all machines ordered (excluding software and Xerox Centroware), there is actually only an increase of five machines. That is less than 4% of the total machines ordered by DOE. This can hardly be excessive or other than incremental.

In addition, adding these machines achieves the procurement's stated objectives of improving department-wide document communications, standardizing and minimizing the number of different device models and needed supply items, and understanding the usage of office equipment including volume and reliability. See IFB at pp. 21-22. The increments comply with the IFB's stated objectives and language regarding increments.

(2) Moreover, DOE has the statutory authority to add increments, as the IFB is not a definite quantity bid. A definite quantity contract "is a fixed-price contract that provides for delivery of a specified quantity of supplies or services either at specified times or when ordered." 2 GAR Div. 4 § 3119(i)(1). On the other hand, an indefinite quantity contract

is a contract for an indefinite amount of supplies or services to be furnished at specified times, or as ordered, that establishes unit prices of a fixed-price type. Generally an approximate quantity is stated in the solicitation. The contract may provide a minimum quantity the territory is obligated to order and may also provide for a maximum quantity that limits the territory's obligation to order. . . Such contracts will be reviewed every 6 months for a determination of the continued need for such a contract.

2 GAR Div. 4 § 3119(i)(2). Unlike for definite quantity contracts, there is no proposed language for indefinite quantity contracts. Instead the agency is afforded more flexibility to order, with the contractor having more flexibility to deliver, so that the agency can attract potential contractors and "obtain maximum practicable competition in order to assure the best economy for the territory." 2 GAR Div. 4 § 6101(5)(b). An indefinite quantity contract, however, should state the minimum and maximum quantities it will order, and whether there is a quantity the territory expects to order.

The incremental additions are permitted by statute because the IFB is an indefinite quantity bid. First, there are numerous indications within the language of the IFB showing that the additional machines may be ordered on top of the specified quantity. Second, the definite quantity bid language suggested in the procurement does not exist within IFB22. Third, the quantity specified in the bid could be considered the "approximate quantity" which may be mentioned in an indefinite quantity bid. 2 GAR Div. 4 § 3119(i)(2). Fourth, a number of DOE's objectives in IFB22 reflect the policy of an indefinite quantity contract, i.e., to obtain maximum practicable competition to obtain the best economy. Those stated objectives include using economies of scale to drive the best price from interested vendors, and identifying cost savings opportunities for the Department.

Finally, we believe that IBSS' December 16, 2010 protest may be untimely. In order for its protest to be timely, IBSS needed to have submitted it within 14 days of when it knew or should have known of the grounds underlying the protest. We ask that in reviewing the Protest, DOE take note that IBSS has known of the award to Xerox since October 29, 2010, when DOE issued its Bid Status sheet. Certainly more than 14 days have elapsed since IBSS knew of the award to Xerox. IBSS, having bid on IFB22, is also aware of the several provisions which allow for incremental additions. IBSS's protest is untimely and should be rejected.

The remainder of IBSS' arguments delves into speculation, and should be disregarded.

Xerox asks for consideration of the above points as DOE reviews IBSS' objections. Thank you.

Sincerely,



Elyze McDonald Iriarte

cc: Laura Mooney, Legal Counsel, Department of Education
IBSS (John Thos Brown, Esq.)

OPA Notice of Appeal: IBSS vs DOE - copiers - DOE IFB 022 - 2010

EXHIBIT

7. Appellant's response to Xerox' comments, January 3, 2011

RECEIVED *free*
CARLSMITH BALL
DATE: 01/04/11 TIME 12:47
JOHN THOS. BROWN
ATTORNEY AT LAW *

GENERAL COUNSEL
Jones & Guerrero Co. Inc. (Guam, USA)
Its divisions, subsidiaries and affiliates[†]
J&G Corporate Office
545 Chalan Machaute, (Rte 8 @ Biang St.), Maite, Guam 96910

Telephone: +1-671-477-7293
Fax: +1-671-472-6153
email: jngo@ozemail.com.au
Mobile/Cell phone: +1-671-483-5960
POSTAL: GPO Box 7, Hagåtña, Guam 96932

GUAM DEPARTMENT OF EDUCATION
Legal Counsel
Rec'd by: RT Sablan-Jalyno
Date/Time: 1/4/11 11:29am

3 January, 2011

Mrs. Nerissa Bretania Underwood, Ph.D.
Superintendent, Guam Department of Education
P.O. Box DE
Hagåtña, Guam 96932

GUAM DEPARTMENT OF EDUCATION
Office of the Superintendent
Rec'd by: Nery
Date/Time: 1/4/2011

RE: PROCUREMENT PROTEST IFB 022-2010: Reply to Xerox letter

Dear Superintendent Underwood,

This letter is intended to reply to Xerox Corporation's letter of date December 30, 2010 raising various issues.

Xerox tries to make way too much over the professed right to make incremental changes in quantity over the life of the contract. Indeed, as will be discussed below, there is no legal basis for further purchases under the "Incremental Additions" clause and any use of it will result in an illegal sole source purchase, and exposure to a 5 GCA § 7103 claim.

First, these changes occurred *immediately after bids were open*. The incremental aspect, as explained by Xerox, was intended to cover the situation where, during the course of the contract, an additional machine here or there, now and then, was needed. As Xerox put it, "[a]n entity of the size of DOE can be expected to adjust their quantities *as the school year progresses...*"

This an *immediate* change defies the gradual, *progressive* implication of the ordinary use of the word. An immediate change is not incremental. It belies, rather, the requirements of the specifications. The quantities specified in the purchase order which emanated from the IFB were not the quantities of product that IBSS was asked to price. That is an inherently unfair change.

* Admitted to Practice: California, Guam and Commonwealth of Northern Mariana Islands, USA [Inactive in NSW, Australia]*
† Micronesian Brokers, Inc. (Guam and CNMI)/Town House Department Stores, Inc. (Guam)/J&G Distributors/Aquarius Beach Towers, (Saipan, CNMI)/Livno Holdings PTY LTD (A.C.N. 003 585 331)/Townhouse, Inc. (Saipan, CNMI)/ IBSS (Guam and Saipan)

Second, Xerox points out the term is not defined in law, which is not entirely true as will be discussed below. It is, however, generally defined in common usage as some kind of addition or subtraction on the margin; marginal. It implies unit change, not wholesale change. My dictionary defines an increment to be "amount of the quantity, usually small, by which a variable increases or is increased". It certainly does not connote the magnitude of the increases and decreases that took place in this instance.

Xerox says "the term is open-ended". If that were the case, why provide any quantities in IFBs?

Xerox tries to mask the magnitude of the changes in this case by focussing on the net change. The net change argument is just a statistical debate intended to obfuscate the reality of the magnitude of the individual changes. If, for instance, your IFB had asked for 100 quantity of machine *x* and 100 quantity of machine *y*, and then, after bids were opened, the parties agreed to supply 200 machines of the *x* variety none of the *y*, the net effect would be no change, but the configuration of the machinery was radically altered.

The notion that some of the changes were due to acceptance of "optional" items also masks the magnitude of the changes. A significant hardware change came from the addition of fax boards. Roughly, this adds about \$5,000 to the price of a machine, on average.

In this regard, it should also be remembered that, as a condition of settling a protest in March 2010, DOE agreed to issue an IFB for and procure a number of stand alone fax machines at that time. Did it fail to do so and simply rolled over that commitment to this IFB, as it tried to do with the IFB 006 copiers too?

IBSS questioned the need for so many fax boards when this IFB 22 first came out, pointing out that the specifications sought 193 fax boards (one for every machine, evidently), when there were only 41 schools to be serviced, and there was little to no need, assuming DOE had already purchased fax machines pursuant to its March commitment. In response, DOE made the boards "optional" in the IFB. DOE then issued the PO for 19 boards. What was the conversation that took place with Xerox to buy 19 boards, albeit optional, and what was the cost increase? If there was no conversation with Xerox, when did the determination to buy 19 boards change from optional to "gotta have"?

A similar situation existed as to booklet finishers, except in this case there was not even a option argument. The IFB called for 96 of them, which is about 2½

units per school. These finishers are not inexpensive items either, costing roughly \$5,000 to \$12,000 per machine, depending on the type of machine.

IBSS questioned why DOE was seeking to buy so many booklet finishers. Booklet finishers are not frequently used, and to the extent they are used, it would seem wasteful to require more than one in a school. In response, but without any explanation, by Amendment No. 6, DOE *reduced* the number of required finishers from 96 to only 3 units, to be used with only 3 of the 5 large administration machines.

But then, again, before opening, the specifications for the finishers was reinstated from the 3 machines back up to the original 96. Why? What was the conversation, and with whom, that resulted in this increase? What usage data justified this change? What cost analysis suggested it was money well spent? What happened that changed DOE's collective mind?

Furthermore, when the PO was issued, it was actually for about 20% more booklet finishers than the IFB had called for (116 rather than the 96 original number), and a reconfiguration of the types of machines with finishers other than that which the IFB had called for.

The original IFB called for 5 finishers, for instance, for item #1 (the most expensive unit), which would have cost DOE around \$59,000. When the requirement was reduced to 3 in Amendment 6, the cost dropped to about \$35,000. But the final PO was for 14 finishers, almost three times the IFB's specification, for an estimated cost of \$165,000 (\$106,000 over the IFB specifications, and \$130,000 over the 3 units that Amendment 6 had specified.

That large jump in quantity of expensive machinery, which generally have larger gross profit margins, if known to other bidders, would have allowed them to bid lower, bulk prices.

Bear in mind that the total number of finisher units specified in Amendment 6 was only three, at a total cost of some \$35,000, but the final specification of 96 units in the IFB bumped up the total cost to DOE of something in the order of \$490,000! *And*, the total *final* cost to DOE of these finishers in the issued PO was in the order of \$650,000. How does DOE account for those changes?

All in all, when the bids were opened, Xerox' pricing suggested a cost of about

\$67,500 per month on the items as specified in the IFB, over and above the one-time charges like the finishers. But, when the dust settled and all the “adjustments” were made to the bid specifications, in addition to the increases in one-time costs, based on the PO that was issued, it appears the monthly cost has also now gone up – to about \$72,250 per month. Xerox and DOE thus negotiated a 7% increase in cost for the recurring monthly portion of the bid package. Assuming no other changes over the life of the expected 5 year contract (which is not likely), that’s at least a quarter of a million dollars added to the package. Nice work if you can get it.

Xerox suggests that the government can just change quantities as they like, based on the “Incremental Additions” clause and the right to increase or decrease clause, but those provisions are not blank checks. One very fundamental element of contract law is that agreements require certainty. If the government could just make changes in quantities as they see fit, all government contracts would be illusory.

Remember, procurement is a specie of contract law, and IFBs are, in effect, auctions requiring the bidder to accept the award unconditionally (5 GCA § 5211(e)) and requiring the government to award, based on the specifications, to the low bid so long as it is responsive and the bidder responsible (§ 5211(g)).

The right to change quantities does not give the government, or a bidder, the right to ignore the specific designations of quantity and quality in the IFB.

Frankly, DOE should not have even opened the bids if it at all contemplated, or should have contemplated, the magnitude of changes reflected in the PO issued from the IFB specifications: it should have *cancelled the bid* because, as provided in 2 GAR § 3115((d)(1)(B)(iii), the “*amendments* to the solicitation would be of **such magnitude** that a new solicitation is desirable”.

Of course, DOE did not even *amend the solicitation* to allow fair bidding; it simply quietly changed the menu after deciding to award the contract to Xerox. And, it must be agreed, that Xerox itself was rewarded by the changes. Was that the result of DOE largesse or something else? Whatever it is, it is hardly “fair and equitable” treatment to other bidders.

The magnitude of change test is often applied to determine if a new solicitation is required when there has been a change in the contract from the terms as solicited in the IFB. The test is sometimes couched in changes “beyond the scope” of the original competition or “beyond the scope of work” or a “cardinal change” or a change affecting the “field of competition”. However you want to

word the test, a change of the magnitude seen here would clearly “side step the purpose and the protections of the open bidding process for government contracts”, as one Guam Superior Court Judge framed the test. (See, *L.P. Ganacia Enterprises, Inc., dba Radiocom v. GIAA and Guam Cell Communications*, Decision and Order, Hon. Joaquin V.E. Manibusan, Jr., Nov 13, 2000, CV 1787-00, page 17.)

Apart from the fact and magnitude of the changes of quantities and qualities here, and related closely to the fact that it occurred so soon after the low bid was announced, is the inference that the changes came about by way of some negotiated or mutually considered modifications. This was an IFB. It was intended to be awarded by an unconditional acceptance, not by opening the door to negotiations about changes as to the scope of the items solicited.

Xerox states, “[t]hese adjustments were made after an analysis of how the machines would be most efficiently placed.” That analysis was supposed to be made **by DOE before the bids went out**, as part of the specification drafting. How does Xerox know that “adjustments were made after an analysis of how the machines would be most efficiently place”? Who instigated that analysis? Who participated in that analysis? When? Based on what data? IBSS requires, and DOE should itself review if it truly wants to resolve the issues in this protest at the agency level, a copy of the analysis and all supporting worksheets, notes and related matter, including names of persons who took part in it.

Finally, Xerox oversteps even its own bounds by declaring “the IFB is an indefinite quantity bid”. That’s an “own goal” argument which would strip Xerox of any right to the contract.

Xerox is quite right that “IBSS does not argue that increments are not allowed by the IFB.” IBSS argues that such increments are not allowed by the procurement law and regulations.

Xerox does *almost* get it right in looking to the regulations regarding “indefinite quantity” contracts to analyse this contract, but misses, by design or otherwise, the real meat of the subject. The meat of the subject is a “requirements contract”, which is specifically a special form of “indefinite quantity” contract, and the “Incremental Additions” clause expressly prevents it from being an indefinite quantity requirements contract.

After citing to 2 GAR §§ 3119(i)(1) and (2), Xerox says “there is no proposed language for indefinite quantity contracts”. Either it did not read far enough into that section to subsection (3) or it is being disingenuous. There is very

specific language that is necessary in a contract to create a valid and enforceable indefinite quantity right that facilitates the ability of the government to purchase supplies and services "as needed". And the IFB both fails to include that language and goes further in specifically negating it.

Remember, the "Incremental Additions" clause is intended to allow "additional equipment on to the proposed plan *as needed*..." for the first three years of the contract. As Contract Law 101 reveals, any contract to provide goods or services "*as needed*" is a **requirements contract**, and, to avoid illusory and uncertain terms, there are specific legal requirements that go into giving a requirements contract teeth.

The requirements clause in subsection 3119(i)(3), is specifically founded in UCC § 2306¹. The Editorial Commentary to UCC § 2306 states a requirements agreement is one "where the quantity of goods is left open" and "measured by the buyer's needs". This is the only provision in the law that allows the "open-ended" flexibility that Xerox claims in the "Incremental Additions" clause.

2 GAR § 3119(i)(3) specifically incorporates into Guam procurement law the particular form of "indefinite quantity" contract known as "requirements contracts". It says, "[a] requirements contract is an indefinite quantity contract for supplies or services that **obligates** the territory to order *all actual requirements* of the designated using agencies *during a specified period of time*." When the government is *obligated* to buy from only one source to satisfy its future needs, that is a sole source contract.

A true requirements contract, therefore, does not run foul of the sole source restriction. This is a critical point, because that is the only type of contract that has that sole source immunity. No other form of contract, including other indefinite quantity contracts, allows the government to set up a sole source of supply or service for its future needs. *And IFB 22 did not create a requirements contract.*

This means that **should GDOE try to acquire any future equipment under the so-called "Incremental Additions" clause, or the "right to change" clause, it will do so without any**

¹ As well, "the principles of law and equity, including the Uniform Commercial Code of Guam ... shall supplement the provisions of" the Procurement Act. (5 GCA § 5002.)

authority, and illegally, in violation of the sole source provisions of the law. Any person authorizing or implementing such a purchase could have personal exposure under 5 GCA § 7103.

The Incremental Additions clause does *not* “obligate” the territory to order all, or any, of its requirements from the vendor. By its very precise use of the language, it says “GDOE will have **at its discretion** the ability to add additional equipment....” It could meet its requirements from anywhere or any one, or simply do without or with something else altogether different. It is not a specifically enforceable obligation.

The requirements clause in the regulations makes it very clear that a requirements clause is only used when the territory *must* fulfill its requirements from the one vendor. A requirements contract must contain an express “provision which *requires* the territory ... to order their actual requirements of the supplies or services covered.” (§ 3119(i)(3)(A).)

IFB 22 does not create a requirements contract because the “Incremental Additions” clause plainly gives DOE discretion, not obligation, to obtain additional equipment under the proposed plan. It’s the same difference between what it “may” do and what it “shall” do.

All indefinite quantity contracts, which includes requirements contracts, require that DOE must, at the time such a contract is “*proposed* to be entered into”, indicate “the rationale for using this type of contract and the reasons why another contract form will not suffice”. (2 GAR § 3119(i)(d)(2).) Is there any record of this in the procurement file? It’s not in the IFB. The absence does not support any argument that this is an indefinite quantity contract.

Furthermore, indefinite quantity contracts of all varieties are not preferred. “In an effort to ascertain that supplies and services are procured competitively, indefinite quantity contracts shall not be used more than twice per fiscal year”. (2 GAR § 3119(i)(d)(2).)

If, then, incremental purchases are contemplated, as the IFB asserts, and if an incremental purchase is, as Xerox claims, an indefinite quantity, then there can be no more than two incremental purchases in a year, which seems to negate the need for incremental flexibility, which as Xerox notes is an important justification for the “Incremental Additions” clause.

This is obviously not an indefinite quantity contract, nor a “requirements

contract" which would give DOE or Xerox any immunity from the requirements of the sole source method of procurement (5 GCA § 5214). GDOE does not have the authority to override the sole source procurement law and regulation by use its "Incremental Additions" clause, and any attempt to do so will be in reckless disregard of the law. Be certain that IBSS will be monitoring the situation.

In point of law, moreover, this is *not an incremental contract*, either. Xerox cannot be awarded incremental purchases under this contract, the "Incremental Additions" clause notwithstanding.

An "incremental award" is not at all what this IFB is structured to deliver, because, contrary to Xerox' contention that there is no legal definition, there is a legal definition of an incremental award. "An incremental award is an award of *portions* of a definite quantity requirement **to more than one contractor**. Each portion is for a definite quantity and the sum of the portions is the total definite quantity required. **An incremental award may be used only when awards to more than one bidder or offeror for different amounts of the same item are necessary to obtain the total quantity or the required delivery.**" (2 GAR § 3122(a)(1).) DOE's inclusion of incremental award language in this IFB is inapt, and thus, ineffective.

It is not enough to make a bald declaration that incremental purchases can be made. "If an incremental award is anticipated prior to issuing a solicitation, the territory shall reserve the right to make such an award *and the criteria for award shall be stated in the solicitation.*" (2 GAR § 3122(a)(2).) The required criteria were not stated in the solicitation.

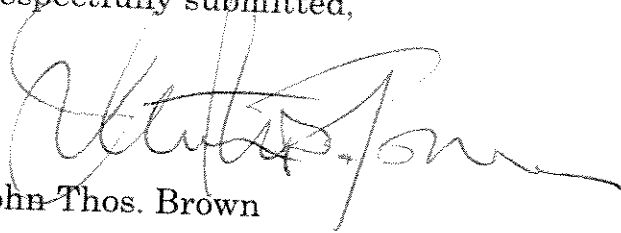
Xerox makes various arguments to support its claim that are illogical or internally inconsistent, and these will not be addressed here because it is simply wrong on the law of indefinite quantity requirements contracts: as clearly pointed out above, the IFB failed to create the obligation that is necessary for it to make any further purchase of goods under this contract "as needed". Whatever the intent *may* have been, what it plainly said was, there is no such obligation. All the argument that can be adduced to support the intent is irrelevant in the face of plain contrary language in the IFB and should be ignored.

Finally, Xerox' claim that the protest is untimely is baseless. Xerox claims IBSS must have known of the grounds for the protest when the Bid Status sheet was issued. That only showed that an award was made to the low bidder whose prices were announced at bid opening. It did not provide the details of the bid nor, more pertinent, the details of changes made to the quantities and

configuration of equipment that the *purchase order* specified. IBSS timely, indeed rapidly, protested upon obtaining a copy of the purchase order in response to its FOIA request.

Before ending this reply, please consider this also to be a formal request for a copy of the Xerox "Services & Solutions Agreement No. 7099405" referenced on the purchase order as well as an explanation as to why that is on the purchase order, and who placed it there.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Thos. Brown". The signature is fluid and cursive, with a long horizontal stroke at the end.

John Thos. Brown

cc: Elyze McDonald Iriarte, Esq., for Xerox Corporation
Laura J. Mooney, Esq., for GDOE