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IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

In the Appeal of	APPELLANT'S REMEDIES BRIEF
TOWN HOUSE DEPARTMENT STORES, INC., dba ISLAND BUSINESS SYSTEMS & SUPPLIES, APPELLANT	DOCKET NO. OPA-PA-11-002

Appellant hereby submits its brief of available remedies, and concludes with its suggested appropriate remedy.

DOE specifically mentioned in the stop work orders it issued that Appellant's was "a post award protest ... and *this Stop Work Order is to Stay*[1] *any matters except those stated above*." (See, Appellants Exhibits 16, 17.) DOE argues the Public Auditor should continue that status for the remainder of the contract term.

In effect, then, DOE put in place an injunctive "stay". DOE asks the Public Auditor to continue to enforce it. However, equitable remedies, including stays and other forms of injunctive relief, are only available in the Superior Court, not in an administrative context. (*Compare*, 5 GCA § 5480(a) – "jurisdiction in actions at law or in equity ... or other equitable relief" – and (c) –

[1] However laudable DOE's efforts to contain the situation, stop work orders were not intended to be used as an intended or defacto injunction of the procurement process; they are intended for use "for reasons such as advancements in the state-of-the-art, production modifications, engineering changes, or realignment of programs" (2 GAR § 6101(4)(a)). If the Legislature had intended the automatic stay pending resolution of a solicitation controversy, as provided in 5 GCA § 5425 (g), to be extended to stay post-award protests of the solicitation and award, it could easily have done so.

"jurisdiction to grant injunctive relief", *with* 5 GCA § 5452(a)(1) – ratify or terminate.) It is beyond the remedial power of DOE *and* the Public Auditor *to stay or enjoin* this contract, in whole or part, after award (or otherwise).

DOE wants a remedy that divides the baby: don't go back to the original bid amounts, but carry on with the decreased quantities specified in the Stop Work Order. DOE thus wants to terminate the contract award but make yet another contract, using some of the Xerox bid for quantities, but still inconsistent with the IFB quantities. To do so the Public Auditor must ratify a contract not yet made and non-conforming to the IFB (Xerox did not bid on or agree to the stop work order quantities).

The law allows an existing contract to be ratified as a remedy when the solicitation or award was made in violation of law (5 GCA § 5452(a)(1)(i)), but the procurement law does not provide a remedy for the making of a new contract out of a defective award, whether agreeable or not to the parties. Contract reformation, like injunctive relief, is an equitable remedy not available to DOE or the Public Auditor.

If Xerox' bid is found to have been non-responsive, as Appellant protested, the award must be void *ab initio*. Award can only be made "to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids." (5 GCA § 5211(g).) For the nonresponsive bidder there is no remedy, no contract to ratify. As Xerox itself has stated in its Motion to Dismiss Appeal filed herein, "Bidders who fail to submit responsive bids cannot be considered for award." Further, "non-responsiveness takes it out of consideration for award."

The "remedy" would be to declare Xerox' bid is non-responsive and ineligible for award (as protested) and return the matter to DOE to determine to award to the lowest remaining responsible and responsive bidder, if any. If it finds it cannot, DOE must re-solicit.

There is further evidence in the case that there is no contract to ratify because of the apparent failure of the parties to come to mutual understanding of an essential element of the contract: the number of machines intended to be awarded. The testimony of both the Deputy Superintendent and Procurement Officer was that they were unaware that the bid quantities had been changed from the IFB to the Purchase Order; the Purchase Order Template Mike Salas provided simply asked DOE to "use the PO verbiage as written in order to prevent delays in the order process." There is testimony from Mr. Salas that he did not particularly discuss the changed quantities with either of them and simply "assumed" DOE was aware that he changed the quantities.

Mutual misunderstanding is not a violation of law implicating remedies under 5 GCA § 5450. It is a general contract law condition, which the procurement law takes note of (5 GCA § 5002). Under general contract theory, mutual mistakes might be corrected and the contract made whole by the equitable remedy of contract reformation, but as already noted, that is a remedy unavailable in this tribunal. The only practical remedy would be to find that there is no enforceable contract to either ratify or terminate. The failed award would have to be started anew; it would be illegal to continue to acquire the equipment without a contract properly solicited and awarded.

Violations of law having been obvious in the solicitation and award, the Public Auditor has limited choices under law: to either ratify (if determined to be in the best interests of the Territory), or terminate the contract actually awarded. (5 GCA §5452(a)(1).)

When DOE undertook to issue the Stop Work Order, it cast the best interest of the Territory behind an election to terminate the contract. 2 GAR § 6101(4)(b) regulates the use of Stop Work Orders. Subsection 6101(4)(b)(3) requires "[a]s soon as feasible after a stop work order is issued: *(i) the contract will be terminated*; or (ii) the stop work order will be cancelled or extended *in writing* beyond the period specified in the order. *In any event, some such action must be taken before the specified stop work order expires.*"

In this case the record reveals several extensions were undertaken, but no cancellation, nor any termination. The testimony of Mr. Pido was that the order was simply allowed to expire. There is no current order or agreement in effect as to the ongoing efficacy of the award *or* the stop work order. Invoking the stop work order clause evidences the interest of the Territory to satisfy the condition giving rise to the order, or terminate the contract as soon as feasible. Since the stated cause for the stop work order (the controversy raised by protest) continued after expiration of the order (and has proven to be true), the alternative of termination as soon as feasible must be on the table. After award, where performance has begun, if violations of law cannot be waived without prejudice to the Territory or other bidders[2], "[t]ermination is the preferred remedy". (2 GAR § 9106(c)(3) [3].)

The interest of the Territory is to provide for increased public confidence in GovGuam procurement procedures. Will ratifying one more blatant failure increase, or will it decrease, the public's confidence in DOE's stewardship of the procurement process? To ratify this contract would be to affirm the many errors and irregularities admitted and revealed. To ratify this award would do nothing to promote the integrity of the procurement law or the quality of the procurement system.

It cannot be forgotten that DOE would have been blissfully unaware of the changes in quantity and continued to pay for equipment it did not solicit had it not been for Appellant's protest. To ratify this award would deny Appellant the opportunity to fairly and equitably compete against a

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[2] "Insignificant" mistakes made after bid opening but before award may be waived only when "without prejudice to other bidders; that is, the effect on price, quantity, ... or contractual conditions is negligible". (2 GAR § 3109(m)(4)(B).) Presumably the same description of bidder prejudice is at least partly apt for describing prejudice to the Territory.

[3] This regulation is identified on the Compiler's website as being part of a "2002 Update". Appellant has not raised or pursued any argument that this regulation is or is not authorized, but see 5 GCA §§ 5102 ("the Policy Office shall have the authority and responsibility to promulgate regulations ...."), 5130(a) ("[r]egulations shall be promulgated by the Policy Office...."), 5130(b) ("[t]he Policy Office shall not delegate its power to promulgate regulations"), and 5131 ([e]ach governmental body and each named body in § 5125 of this Chapter shall adopt the procurement regulations promulgated pursuant to § 5130(a)...."). Since, however, the cited regulation is consistent with the ABA Model Procurement Regulation, it should be, at least, pursuasive.

responsive bidder. Ratifying this award in the face of a successful protest would put a chilling effect on the willingness of bidders to come forward and endure the arduous process of protesting, with the result that more errors and irregularities will go undetected and uncorrected.

Do we just continue to shrug our shoulders and let the circus carry on, letting costs mount without scrutiny or correction? Is that what the public expects? Or do we impose the remedy contemplated by the law, termination, that sends the clear signal that "irregularities" will not be condoned, and slipshod management of procurement and equipment is just not on.

The status quo *cannot* be ratified since it amounts to either contract reformation or an injunction, nor can the original bid amounts be ratified since they were not awarded, and neither should the contract *actually* awarded be ratified with its material variations in bid quantities and contract price that DOE was obviously not expecting and admitted as not having been solicited.

Appellant is not unmindful of the need, and therefor the interest, of DOE for copiers (even though DOE itself has failed, under the stop work order, to avail of the full number of copiers sought in the IFB). However, Appellant believes the remedy of "termination" actually provides the means of accommodating that need without ratifying a clearly irregular situation.

The regulations contemplate "termination" of contract, including termination for default and termination for convenience. Section 5452 similarly allows contract "termination"; it does not define or spell out how termination might be implemented, but other regulations do.

Termination for default is appropriate when due to the default of the contractor (2 GAR § 6106(8). Termination for convenience is implicated when it is in the interest of the government (2 GAR § 6101(10), such as, it is suggested here, when there have been "irregularities" and errors found in this case. These other "termination" remedies provide a useful guide to the scope of the meaning of "termination" under 5 GCA § 5452.

Even in the context of the remedies in § 5452(a), "termination" does not necessarily imply immediate contract cessation; it might reasonably include transition or winding down considerations to mitigate costs and damages of a hasty cessation of contract benefits and obligations. Contrast that with the remedy of 5 GCA § 5452(a)(2), allowing the contract to be declared "null and void". That is an immediate and comprehensive result by definition. "Termination" thus is not the draconian remedy intended when fraud or bad faith are present.

Taking a clue from the regulation on termination for convenience, the Public Auditor could determine "when termination becomes effective"(see, 2 GAR § 6101(10)(a)). It is suggested that the award could be terminated effective in 90 or 120 or days, for instance, to give DOE time to issue and conduct a new solicitation, on terms *it* demands and for equipment *it* determines it needs [4].

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[4] Surely DOE has learned a thing or two about that over the course of this controversy. It *must* be made to learn in order to level the field between the incumbent, with its exclusive inside knowledge, and potential competitors, otherwise *effective* competition will never be fostered.

The Termination for Convenience regulation also suggests the contract could be terminated "*in whole or in part*" (*id*). (See to same effect, "termination" for default, 2 GAR § 6101(8)(a), which also contemplates a winding down (§ 6101(8)(b)), such as requiring the contractor to continue to take timely, reasonable, and necessary action to protect and preserve property in which the territory has an interest.)

The termination remedy must be granted unless ratification of the awarded contract, with all its flaws, is in the "best" interests of the Territory: not simply a "good" interest, and not the "better" interest as compared to termination, but only the "best", *superlative*, interest of all interests of the Territory.

The best interests of the Territory must not be reduced to some mindless mantra. Factors have to be considered and the determination must be made by the head of the purchasing agency, in writing, whether it is in the best interest. (2 GAR § 9106(1)(c)(3); see footnote 3 above.) Among the "pertinent" factors to be considered is "the possibility of obtaining a more advantageous contract by resoliciting" (*id.*), emphasizing that it is the best interest of the Territory, not the contractor, that is due consideration. Provision is made in § 9106(1)(d) for termination "at no cost to the territory, if possible" (though Xerox' bid contains provisions speaking for itself negating or blunting that effect, which should also be weighed in assessing the Territory's best interest to ratify the contract).

SUGGESTED REMEDY:

Appellant has argued the contract should be terminated. Appellant respectfully suggests that the appropriate remedy in this Appeal would be to immediately terminate the contract in part (the part of the contract excluding the equipment already delivered and installed and subject to the expired stop work order), and terminate the remainder in, say, 90 or 120 days.

Such reasonable use of the termination remedy, as suggested by other termination provisions, would surely be consistent with the Public Auditor's duty to use her jurisdiction to promote the integrity of the procurement process and the purposes of the Procurement Act. Her constructive interpretation and application of the termination remedy would be entitled to great weight if judicially reviewed (5 GCA § 5704).

If, however, the Public Auditor determines to ratify the whole or any part of the award reflected in the original Purchase Order, Appellant respectfully suggests the Public Auditor clarify that which she is ratifying.

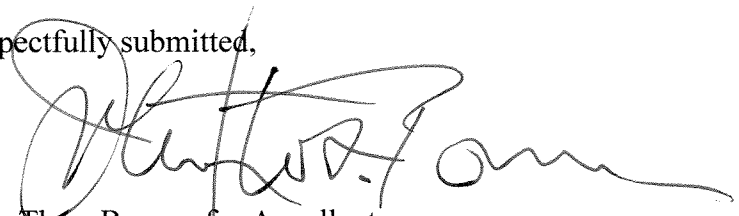
First, the Public Auditor should determine if the various inconsistent terms and conditions imposed by Xerox' bid remain part of the award: Mr. Pido testified it is error to include them. Second, the Public Auditor should determine if the Incremental Additions clause is consistent with the regulations (¶ 22 is past its use-by date, without need of comment). The Additional Incremental clause is expressly conditioned on "need", and 2 GAR § 3109(i) clearly describes an

"as needed" provision as an indefinite quantity requirements contract, which the terms of this IFB do not meet.

It is respectfully suggested that if the contract is in any way ratified, the Public Auditor excise, by partial termination, those clauses, or declare them to be without legal effect, or at least expressly state that she neither expresses nor implies any opinion as to the legal efficacy of the provisions.

Appellant has not received from DOE the relief it sought, its claims to the contrary. Appellant did not seek a dubious stay of only part of the award. It very specifically asked that the contract be terminated, and so should it be.

Respectfully submitted,



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