



OFFICE OF PUBLIC ACCOUNTABILITY  
Doris Flores Brooks, CPA, CGFM  
Public Auditor

**PROCUREMENT APPEALS**

IN THE APPEAL OF,	)	<b>APPEAL NO: OPA-PA-11-02</b>
TOWN HOUSE DEPARTMENT STORES,	)	
INC, dba ISLAND BUSINESS SYSTEMS &	)	<b>DECISION</b>
SUPPLIES,	)	
Appellant	)	

**I. INTRODUCTION**

This is the Decision of the Public Auditor for an appeal filed on January 27, 2011, by TOWN HOUSE DEPARTMENT STORES, INC., dba ISLAND BUSINESS SYSTEMS & SUPPLIES (Hereafter referred to as "IBSS") regarding the DEPARTMENT OF EDUCATION's, (Hereafter referred to as "DOE") denial of IBSS's December 16, 2010 protest concerning DOE's solicitation of Invitation for Bid No. GDOE-IFB-022-2010 (Document Management Services) (Hereafter referred to as "IFB.") The Public Auditor holds that IBSS' Protest was timely, DOE Purchase Order No. 201100024 increased the quantities stated in the IFB in violation of Paragraph 22 of the IFB's General Terms and Conditions, and that the Purchase Order's reference to XEROX Response and Services & Solutions Agreement No. 7099405 was improper because DOE had not executed said agreement. Accordingly, IBSS's appeal is GRANTED.

1  
2 **II. FINDINGS OF FACT**

3 The Public Auditor in reaching this Decision has considered and incorporates herein the  
4 procurement record and all documents submitted by the parties, and all evidence submitted and  
5 arguments made during the hearing for Appellant's Appeal held on July 5, 6, and 9, 2012. Based  
6 on the aforementioned record in this matter, the Public Auditor makes the following findings of  
7 fact:  
8

9 1. On or about September 10, 2010, DOE issued the IFB and the deadline for potential  
10 bidders to submit bids in response to the IFB was September 30, 2010 at 2:00 p.m..<sup>2</sup>

11 2. The IFB requested bids, in relevant part, for the following seven (7) items:

12 a. Item No. 1: Five (5) units of high volume, multifunction copier/printer/scanners;

13 b. Item No. 2: Forty-Four (44) units of high volume, multifunction  
14 copier/printer/scanners with Fax for three (3) machines;

15 c. Item No. 3: Forty-Seven (47) units of mid-volume multifunction  
16 copier/printer/scanners with Fax for nine (9) machines;

17 d. Item No. 4: Forty-eight (48) units of mid-volume multifunction  
18 copier/printer/scanner/ faxes;

19 e. Item No. 5: Ninety-four (94) units of low volume multifunction  
20 copier/printer/scanner/faxes;

21 f. Item No. 6: Software for working with scanned images, performing Optical  
22 Character Recognition and working/creating PDF's; and  
23

24  
25  
26  
27  
28 <sup>2</sup> DOE Invitation for Bid, excerpt from the Marianas Variety Guam Edition dated September 10, 2010, Exhibit 2, Procurement Record filed on February 8, 2011. However, issued IFB noted the submission due date of October 1, 2010.

1 g. Item No. 7: Network Device Management Software for monitoring networked  
2 multifunction devices and printers on the network.<sup>3</sup>

3 3. The IFB stated, in relevant part, that:

4 a. The government reserves the right to increase or decrease the quantity of the items  
5 for award and make additional awards for the same type items and the vendor agrees to such  
6 modifications and additional awards based on the bid prices for a period of thirty (30) days after  
7 original award.<sup>4</sup>

8  
9 b. DOE will have at its discretion the ability to add additional equipment on to the  
10 proposed plan as needed based on the quoted Incremental Additional cost per month per item  
11 and that ability to add additional equipment will be in effect for the first three (3) years of the  
12 proposed plan.<sup>5</sup>

13  
14 4. On September 17, 2010, DOE issued Amendment No. 1 to the IFB which scheduled a  
15 mandatory pre-bid conference on September 21, 2010 at 1:00 p.m. and which set the deadline for  
16 the potential bidders to submit their post-pre-bid conference questions for September 23, 2010 at  
17 12:00 p.m.<sup>6</sup>

18  
19 5. On September 21, 2010, DOE held the pre-bid conference for the IFB and IBSS was  
20 represented at said conference by Raul Del Valle, IBSS's Project Manager, and Roland  
21 Franquez, IBSS's General Manager.<sup>7</sup>

22 6. On September 21, 2010, IBSS submitted its pre-bid conference questions to DOE.<sup>8</sup>

23  
24 7. On September 23, 2010, Interested Party XEROX (Hereafter Referred to as

25  
26 <sup>3</sup> Hardware Specifications, pages 25 to 30, IFB, Id.

<sup>4</sup> Award Cancellation and Rejection, paragraph 22, page 16, IFB, Id.

<sup>5</sup> Incremental Additions, page 23, IFB, Id.

<sup>6</sup> Amendment No. 1 dated September 17, 2010, Exhibit 2, Id.

<sup>7</sup> Pre-Bid Conference Sign In Sheet dated September 21, 2010, Id.

<sup>8</sup> Letter from Roland R. Franquez to DOE Supply Management Administrator Brian Mafnas dated September 21, 2010, Exhibit 3, Id.

1 “XEROX”) submitted its pre-bid conference questions to DOE.<sup>9</sup>

2 8. On September 23, 2010, DOE issued Amendment No. 2 for the IFB which amended  
3 Page 31 of the IFB pertaining to Device Management Services Specifications.<sup>10</sup>

4 9. On September 30, 2010, DOE issued Amendment No. 3 for the IFB which changed  
5 the deadline to submit bids in response to the IFB from October 1, 2010 to October 15, 2010 at  
6 10:00 a.m.<sup>11</sup>

7  
8 10. On October 5, 2010, DOE issued Amendment No. 4 for the IFB which answered the  
9 questions submitted by IBSS and XEROX.<sup>12</sup> The amendment stated, in relevant part, that:

10 a. When asked how many units are installed at each school, DOE’s answer was  
11 that multiple units, in excess of three (3), are installed at each school and the number of units  
12 depends on school size with the larger schools (with more students or physically larger campus)  
13 having more machines and that DOE’s anticipated breakdown was as follows:

14 (1) Elementary School: One (1) main unit (Item 2), one (1) mid-size unit  
15 (Item 3 & 4), and one (1) or two (2) smaller units (Item 5);

16 (2) Middle School: One (1) main unit (Item 2), one (1) or two (2) mid-  
17 size units (Items 3 & 4), and one (1) to four (4) smaller units (Item 5); and

18 (3) High School: Two (2) main units (Item 1 & 2), one (1) to four (4)  
19 mid-size units (Item 3 or 4), and one (1) to four (4) smaller units (Item 5).<sup>13</sup>

20  
21 b. DOE clarified that the IFB does not request a one (1) to one (1) replacement of  
22 existing machines.<sup>14</sup>

23  
24  
25  
26 <sup>9</sup> Letter from Mike Salas to Brian Mafnas dated September 23, 2010, Id.

27 <sup>10</sup> Amendment No. 2 dated September 23, 2010, Exhibit 3, Id.

28 <sup>11</sup> Amendment No. 3 dated September 30, 2010, Id.

<sup>12</sup> Amendment No. 4 dated October 5, 2010, Exhibit 4, Id.

<sup>13</sup> Page 2, paragraph 4, Id.

<sup>14</sup> Page 2, paragraph 4, Id.

1 c. DOE stated that it estimated that two (2) high volume machines were to be  
2 located at DOE's administrative offices.<sup>15</sup>

3 d. DOE clarified that bidders could bid on only one (1) of the items solicited by  
4 the IFB, and that they could submit multiple bids, for example, one (1) bid for all the items and  
5 another bid for only one (1) item.<sup>16</sup>

6 e. DOE clarified that vendors need to only meet the minimum specifications set  
7 forth in the IFB.<sup>17</sup>

8 f. DOE clarified that the Incremental Additions, as stated on page 23 of the IFB,  
9 were not limited by the thirty (30) day period language in paragraph 22 of the IFB's General  
10 Terms and Conditions, and that the incremental additions will be in effect for three (3) years.<sup>18</sup>

11 11. On October 12, 2010, DOE issued Amendment No. 5 for the IFB, which changed the  
12 deadline to submit bids in response to the IFB from October 15, 2010 to October 26, 2010 at  
13 10:00 a.m.<sup>19</sup>

14 12. On October 14, 2010, DOE issued Amendment No. 6 for the IFB which answered  
15 some additional questions from potential bidders that were not answered in Amendment 4.<sup>20</sup> The  
16 amendment stated, in relevant part, that:

17 a. The IFB amounts were reduced as follows:

18 (1) Item No. 1 was reduced from five (5) to three (3) units.

19 (2) Item No. 2 was reduced from forty-four (44) to zero (0) units.

20  
21  
22  
23  
24  
25  
26 <sup>15</sup> Page 3, paragraph 4d, Id.

<sup>16</sup> Page 5, paragraphs 1, 2, and 3, Id.

<sup>17</sup> Page 6, paragraph 8, Id.

<sup>18</sup> Page 9, Question 4, Id.

<sup>19</sup> Amendment No. 5 dated October 12, 2010, Exhibit 5, Id.

<sup>20</sup> Amendment No. 6 dated October 14, 2010, Id.

1 (3) Item No. 3 was reduced from forty-seven (47) to zero (0) units.<sup>21</sup>

2 b. DOE clarified that the two (2) high volume machines that would be located in  
3 DOE's administrative offices were to be Item 1 type machines.<sup>22</sup>

4 13. On October 21, 2010, DOE issued Clarification No. 1 for the IFB which answered  
5 some additional questions potential bidders submitted after Amendment No. 4 & 6 were issued.<sup>23</sup>

6 The clarification stated, in relevant part, that:

7 a. One (1) of the units in DOE's administrative offices must be able to connect to  
8 DOE's AS/400 system for printing.<sup>24</sup>

9 b. DOE reaffirmed that the number of Item 1 machines was reduced from five (5)  
10 to three (3).<sup>25</sup>

11 c. DOE stated that the number of fax board features for the items were as follows:

12 (1) Item No. 1: Three (3) each.

13 (2) Item No. 2: Forty-five (45) each

14 (3) Item No. 3: Twenty-Two (22) each

15 (4) Item No. 4: Nine (9) each

16 (5) Item No. 5: Three (3) each.<sup>26</sup>

17 14. On October 22, 2010, DOE issued Clarification No. 2 for the IFB which, in relevant  
18 part, stated that the machines required for each of the items in the IFB were as follows:

19 a. Item No. 1: Three (3)

20 b. Item No. 2: Forty-five (45)

21 \_\_\_\_\_  
22 <sup>21</sup> Page 1, paragraph 1, Id.

23 <sup>22</sup> Page 1, paragraph 3, Id.

24 <sup>23</sup> Clarification No. 1 dated October 21, 2010, Exhibit 5, Id.

25 <sup>24</sup> Page 1, DOE Answer to Question 9, Id.

26 <sup>25</sup> Page 2, DOE Answer to Question 9a, Id.

27 <sup>26</sup> Page 5, DOE Answer to Question 4b, Id.

1 c. Item No. 3: Twenty-Two (22)

2 d. Item No. 4: Nine (9)

3 e. Item No. 5: Three (3)<sup>27</sup>

4 15. On October 22, 2010, DOE issued Clarification No. 3, which, in relevant part,  
5 verified the revised quantities for each item set forth in Clarification No. 2, and which required  
6 all machines for each item to have booklet finishing with folding and saddle stapling, and which  
7 required all machines for Item No. 1 to have an output tray plus a convenience stapler.<sup>28</sup>

9 16. On October 26, 2010, XEROX and IBSS submitted bids in response to the IFB.<sup>29</sup>

10 17. XEROX's bid included XEROX's clarifications to the IFB's general terms and  
11 conditions, XEROX Response, and Xerox's Services and Solutions Agreement No. 7099405.<sup>30</sup>

12 XEROX's bid, in relevant part, the following monthly amounts:

13 a. Item No. 1: Five (5) units for three-thousand-five-hundred-eighty-three-dollars  
14 (\$3,583).

15 b. Item No. 2: Forty-Four (44) units for thirty-one-thousand-four-hundred-  
16 twenty-one-dollars-and-fifty-cents (\$31,421.50).

17 c. Item No. 3: Forty-Seven (47) units for sixteen-thousand-five-hundred- fifty-  
18 five-dollars (\$16,555).

19 d. Item No. 4: Forty-Eight (48) units for eight-thousand-nine-hundred-seventy-  
20 four-dollars (\$8,974).

21 e. Item No. 5: Ninety-Eight (98) units for six-thousand-five-hundred-seventy-  
22 eight-dollars (\$6,578).

23  
24  
25  
26  
27 <sup>27</sup> Page 1, Clarification No. 2 dated October 22, 2010, Exhibit 6, Id.

28 <sup>28</sup> Clarification No. 3 dated October 22, 2010, Id.

<sup>29</sup> Abstract of Bidders, Exhibit 7, Id.

<sup>30</sup> XEROX's Bid, Exhibit 6, Id.

1 f. Item No. 6: One-hundred (100) seats of scanned image software for one-  
2 hundred-seventeen-dollars (\$117).

3 g. Item No. 7: Network Device Management Software for free.<sup>31</sup>

4 18. IBSS bid, in relevant part, the following monthly amounts:

5 a. Item No. 1: Five (5) units at three-thousand-seven-hundred-ninety-four-  
6 dollars-and-fifty-cents (\$3,794.50).

7 b. Item No. 2: Forty-four (44) units at forty-thousand-thirty-eight-dollars-and-  
8 sixty-two-cents (\$40,038.62).

9 c. Item No. 3: Forty-seven (47) units at eighteen-thousand-nine-hundred-fifty-  
10 dollars-and-forty-cents (\$18,950.40).

11 d. Item No. 4: Forty-eight (48) units at twelve-thousand-eight-hundred-eighty-  
12 dollars-and-twelve-cents (\$12,880.12).

13 e. Item No. 5: IBSS did not submit a bid for this item.

14 f. Item No. 6: IBSS did not submit a bid for this item.

15 g. Item No. 7: Network Device Management Software for free.<sup>32</sup>

16 19. On October 29, 2010, DOE issued a Bid Status recommending XEROX for award of  
17 Items 1, 2, 3, 4, 6, and 7 of the IFB.<sup>33</sup> DOE also issued a Letter of Intent stating that as a result  
18 of DOE's bid evaluation, XEROX has been determined to be the lowest responsive and  
19 responsible bidder and that DOE intends to award the IFB to XEROX, and that the letter was  
20 only a notice of possible intent to award and should not be construed as an award by DOE.<sup>34</sup>

21 20. On November 16, 2010, DOE issued Purchase Order No. 201100024 (Hereafter

22  
23  
24  
25  
26  
27 <sup>31</sup> Abstract of Bidders, Exhibit 7, Id.

<sup>32</sup> Id.

<sup>33</sup> Bid Status dated October 29, 2010, Exhibit 7, Id.

<sup>34</sup> Letter of Intent dated October 29, 2010, Id.



1 Referred to as "P/O"), which referenced the IFB and XEROX Response and Services &  
2 Solutions Agreement No. 7099405, and which was for the total amount of eight-hundred-five-  
3 thousand-three-hundred-ninety-seven-dollars (\$805,397) for, in relevant part, the following IFB  
4 items:

- 5 a. Item No. 1: Fourteen (14) Xerox 4112CP machines.
- 6 b. Item No 2: Fifty-five (55) Xerox 3CQ9201 machines.
- 7 c. Item No. 3: Twenty-nine (29) Xerox W7545P machines.
- 8 d. Item No. 4: Thirty-two (32) Xerox W7435P machines.
- 9 e. Item No. 6: One-hundred (100) seats of scanned image software.
- 10 f. Item No. 7: One (1) Xerox Centreware Web Software.
- 11 g. Device Management Services.<sup>35</sup>

12  
13  
14 21. On December 16, 2010, IBSS filed its protest alleging: (1) The P/O's quantities of  
15 machines exceeded the IFB quantities in that the difference in these amounts and timing are not  
16 incremental; and (2) That the contract awarded was according to the standard terms of a XEROX  
17 dictated contract which contained provisions not authorized by the IFB and which violate  
18 procurement law.<sup>36</sup>

19  
20 22. On December 17, 2010, DOE issued a Stop Work Order, effective for thirty (30)  
21 days, for the equipment and software that XEROX was providing DOE pursuant to its award,  
22 except as to the original bid award items which were as follows:

- 23 a. Item No. 1: Five (5) Xerox 4112 machines
- 24 b. Item No. 2: Forty-four (44) Xerox CQ9201 machines.
- 25 c. Item No. 3: Forty-seven (47) Xerox WC7545 machines.

26  
27  
28 <sup>35</sup> P/O, Exhibit 7, Id.

<sup>36</sup> Protest Letter dated December 16, 2010, Exhibit 8, Id.

1 d. Item No. 4: Forty-eight (48) Xerox 7435 machines.

2 e. Item No. 6: One-hundred (100) seats Xerox Scan to PC Desktop Suite  
3 software.

4 f. Item No. 7: One (1) Xerox Centware Software

5 g. Item No. 8: One (1) Optional Device Management Services.<sup>37</sup>

6  
7 23. On January 14, 2011, DOE issued a fourteen (14) day extension to its December 17,  
8 2010 Stop Work Order.<sup>38</sup>

9 24. On January 26, 2011, DOE issued its decision denying IBSS's December 16, 2010  
10 protest on the sole ground that IBSS failed to file its protest within fourteen (14) working days  
11 after IBSS received the aforementioned bid status on October 29, 2010.<sup>39</sup>

12  
13 25. On January 27, 2011, one (1) day after DOE issued its decision denying its protest,  
14 IBSS filed this appeal.

15 26. On January 28, 2011, DOE issued another fourteen (14) day extension to its Stop  
16 Work Order.<sup>40</sup> Although this extension has expired, DOE continues to refuse delivery of any  
17 machines in excess of the quantities of the machines listed in the IFB and its stop work order.<sup>41</sup>

18  
19 27. On March 26, 2012, DOE issued Purchase Order No. 201200367 (Hereafter Referred  
20 to as "P/O 2") for the amount of seven-hundred-eighty-one-thousand-eight-hundred-thirteen  
21 dollars-and-sixty-eight-cents (\$781,813.68) for, in relevant part, the following IFB items:

22 a. Item No. 1: Five (5) Xerox 4112 machines

23 b. Item No. 2: Forty-four (44) Xerox CQ9201 machines.  
24

25  
26 <sup>37</sup> Stop Work Order dated December 17, 2010, Id.

27 <sup>38</sup> Notice of Extension of Stop Work Order dated January 14, 2011, Exhibit 9,  
28 Id.

<sup>39</sup> DOE Protest Decision dated January 26, 2011, Exhibit 10, Id.

<sup>40</sup> Notice of Extension of Stop Work Order dated January 28, 2011, Id.

<sup>41</sup> July 5, 2012 Testimony of Marcus Pido, DOE Supply Management Administrator,  
Hearing Re Appellant's Appeal.

1 c. Item No. 3: Forty-five (45) Xerox WC7545 machines.

2 d. Item No. 4: Thirty-three (33) Xerox WC7435 machines.

3 e. Item No. 6: One-hundred (100) seats Xerox Scan to PC Desktop Suite  
4 software.

5 f. Device Management Services.<sup>42</sup>  
6  
7

### 8 III. ANALYSIS

9 The Public Auditor must decide an appeal regarding a procurement method, solicitation,  
10 or award, or entitlement to costs by determining whether the purchasing agency's decision on the  
11 protest of the method of selection, solicitation, or award of the contract, or entitlement to costs is  
12 in accordance with the statutes, regulations, and the terms and conditions of the solicitation. 2  
13 G.A.R., Div. 4, Chap. 12, §12201(a). The Public Auditor will review whether DOE's January  
14 26, 2011 decision denying IBSS's December 16, 2010 protest is in accordance with the relevant  
15 procurement statutes, regulations, and the terms and conditions of the IFB. The Public Auditor  
16 will review DOE's decision *De Novo*. 5 G.C.A. §5703 and 2 G.A.R. Div. 4, Chap. 12,  
17 §12103(a).  
18  
19  
20

#### 21 A. IBSS's Protest is Timely.

22 DOE admits that it erred by finding that IBSS' protest was untimely.<sup>43</sup> The Public  
23 Auditor agrees. The Public Auditor must consider two (2) issues regarding the timing of the  
24 filing of the protest, the first being its timeliness in relation to the underlying facts, the second  
25

26  
27 <sup>42</sup> P/O 2 dated March 26, 2012, Exhibit J, DOE's Supplemental Exhibit List  
filed on July 6, 2012.

28 <sup>43</sup> July 5, 2012 Testimony of Marcus Pido, DOE Supply Management Administrator,  
Hearing Re Appellant's Appeal.

1 being whether it was filed before the award was made. *Guam Imaging Consultants, Inc. et. al.*,  
2 *v. Guam Memorial Hospital Authority, et. al.*, 2004 Guam 15, ¶24, (Supreme Court of Guam).

3 As to whether IBSS's protest concerning its alleged irregularities in the P/O was timely,  
4 generally, a protest must be submitted in writing within fourteen (14) days after an aggrieved  
5 person knows or should know of the facts giving rise thereto. 5 G.C.A. §5425(a) and Chapter  
6 IX, §9.2.3.1., DOE Procurement Regulations.<sup>44</sup> Here, IBSS filed its protest on December 16,  
7 2010, approximately forty-eight (48) days after DOE issued its October 29, 2010 bid status  
8 recommending XEROX for award of Items 1, 2, 3, 4, 6, and 7 of the IFB, and approximately  
9 thirty (30) days after DOE issued P/O on November 16, 2010. However, despite receiving the  
10 bid status on October 29, 2010, IBSS was not aware that that DOE had actually awarded  
11 XEROX the IFB because the language of the bid status stated that the IFB was only  
12 "recommended" for award to XEROX.<sup>45</sup> Further, IBSS did not actually receive a copy of the  
13 P/O until December 3, 2010.<sup>46</sup> DOE considered the issuance of the P/O the actual award of the  
14 IFB to XEROX.<sup>47</sup> IBSS's December 16, 2010 protest was filed thirteen (13) days after it  
15 received the P/O. Therefore, the Public Auditor finds that IBSS's appeal was timely because it  
16 was filed within the fourteen (14) day period required by 5 G.C.A. §5425(a) and Chapter IX,  
17 §9.2.3.1., DOE Procurement Regulations. Concerning the second issue of whether IBSS made  
18 its protest in the pre-award or post award period, as stated above, DOE awarded the IFB to  
19  
20  
21  
22

---

23  
24 <sup>44</sup> The Public Auditor has previously determined that the conflict in the  
25 language "fourteen days" in 5 G.C.A. §5425(a) and "fourteen working days" in  
26 Chapter IX, §9.2.3.1, is resolved in the favor of the use of the statutory  
27 language of "fourteen days" as set forth in 5 G.C.A. §5425(a). See Line 20,  
28 Page 6, Decision in OPA-PA-08-011 dated November 28, 2008.

<sup>45</sup> July 5, 2012 Testimony of Roland Franquez, IBSS General Manager, Hearing Re Appellant's Appeal.

<sup>46</sup> Id., and Paragraph 5, Pages 1-2, IBSS's Admissions of Fact filed on June 18, 2012.

<sup>47</sup> July 5, 2012 Testimony of Marcus Pido, DOE Supply Management Administrator, Hearing Re Appellant's Appeal.

1 XEROX on November 16, 2010 when it issued the P/O and IBSS filed its protest approximately  
2 thirty (30) days later on December 16, 2010. Thus, the Public Auditor finds that IBSS's protest  
3 was made post-award. The significance of this issue is that when a protest is timely and made  
4 pre-award, the automatic stay authorized by 5 G.C.A. §5425(g) and Chapter IX, §9.2.5., DOE  
5 Procurement Regulations is triggered. *Guam Imaging Consultants, Inc. et. al., v. Guam*  
6 *Memorial Hospital Authority, et. al.*, 2004 Guam 15, ¶40, (Supreme Court of Guam). The Public  
7 Auditor finds that although IBSS' protest was timely, it was filed post-award and did not trigger  
8 the automatic stay provisions of 5 G.C.A. §5425(g) and Chapter IX, §9.2.5., DOE Procurement  
9 Regulations.  
10

11 The Public Auditor will now review whether DOE's denial of IBSS's protest allegations  
12 concerning the P/O's quantities and that a contract was awarded was according to the standard  
13 terms of a XEROX dictated contract were in accordance with the relevant procurement statutes,  
14 regulations, and the terms and conditions of the IFB.  
15  
16  
17

18 **B. The P/O increased quantities in violation of Paragraph 22, of the IFB's General Terms  
and Conditions.**

19 The Public Auditor agrees with DOE's admission that DOE erred by increasing the P/O  
20 quantities of the machines in excess of the machine quantities stated in the IFB.<sup>48</sup> The IFB stated  
21 that **the government** reserves the right to increase or decrease the quantity of the items for  
22 award and make additional awards for the same type items and the vendor agrees to such  
23 modifications and additional awards based on the bid prices for a period of thirty (30) days after  
24  
25  
26  
27

28 <sup>48</sup> Page 1, DOE Response to Appeal, Exhibit G, Agency Report filed on February 11, 2011.

1 original award (bold emphasis added).<sup>49</sup> DOE could have increased the quantities set forth in the  
2 IFB for the same type of items its specifications required from November 16, 2010, the date  
3 DOE awarded the IFB, until December 16, 2010, the end of the thirty (30) day period allowed by  
4 the IFB. However, it was not DOE that increased the P/O quantities to exceed the IFB  
5 quantities. On November 12, 2010, XEROX prepared a sample purchase order template for  
6 DOE to use in its development of the P/O.<sup>50</sup> The Public Auditor finds that this template matches  
7 the language of the P/O nearly verbatim to include the item quantities that exceed the IFB  
8 quantities. DOE did not request an increase in the quantities from what was stated in the IFB.<sup>51</sup>  
9 Despite the discrepancy regarding the P/O's increased quantities, it was approved and issued  
10 with DOE's Deputy Superintendent of Finance and then acting Supply Management  
11 Administrator merely assuming that the quantities drafted by XEROX were correct.<sup>52</sup> Thus, the  
12 Public Auditor finds that XEROX, instead of DOE, increased the P/O quantities in excess of the  
13 IFB quantities in violation of paragraph 22 of the IFB's general terms and conditions. As will be  
14 discussed below, this increase in quantities was exacerbated by DOE, who, through its own  
15 negligence and lack of due diligence, unwittingly accepted the increased quantities provided by  
16 XEROX.  
17  
18  
19  
20  
21  
22

---

23 <sup>49</sup> Award Cancellation and Rejection, paragraph 22, page 16, IFB, Id.

24 <sup>50</sup> July 6, 2012 Testimony of Mike Salas, XEROX Services & Solutions Executive, Hearing Re Appellant's Appeal, and November 12, 2010 e-mail from Mike Salas  
25 to Deputy Superintendent of Finance Taling Taitano with attached DOE Managed  
26 Services Sample PO Template 2010, Exhibit 6, IBSS' Schedule of Exhibits filed  
27 on June 18, 2012.

28 <sup>51</sup> July 5, 2012 Testimony of Albert Garcia, DOE Buyer Supervisor, Hearing Re Appellant's Appeal

<sup>52</sup> July 5, 2012 Testimony of Taling Taitano, DOE Deputy Superintendent of Finance, and Albert Garcia, DOE Buyer Supervisor, Hearing Re Appellant's Appeal.

1 **C. The P/O's reference of the XEROX Agreement was improper.**

2 The Public Auditor agrees with DOE's admission that it erred by referencing XEROX  
3 Response and Services & Solutions Agreement No. 7099405 in the P/O.<sup>53</sup> Generally, invitation  
4 for bids must include all contractual terms and conditions applicable to the procurement. 5  
5 G.C.A. §5211(b) and Chapter III, Section 3.9.3.2, DOE Procurement Regulations. The IFB  
6 stated that the bidders shall comply with all specifications and other requirements of the IFB and  
7 the bidder awarded a contract shall comply with the applicable standard provisions and  
8 stipulations of federal or Guam laws, rules, and regulations relative to the performance of the  
9 contract and the furnishing of goods.<sup>54</sup> Finally, the successful bidders for DOE solicitations have  
10 responsibilities concerning guarantees of the equipment, labor, workmanship, and performance,  
11 they have responsibilities regarding the development of delivery schedules with DOE, and they  
12 have responsibilities regarding marking all supplies delivered to DOE. Chapter III, Section 3.28,  
13 DOE Procurement Regulations. The Public Auditor finds that XEROX's sample purchase order  
14 template, also included a reference to XEROX's Response and Services & Solutions Agreement  
15 No. 7099405 and DOE's blind acceptance of this template, described above, also caused the  
16 aforementioned agreement to be referenced in the P/O. IBSS argues that the inclusion of the  
17 agreement and XEROX's clarifications in its bid renders XEROX's bid non-responsive. This  
18 argument is based on the numerous provisions of the agreement and the clarifications that  
19 contradict the terms of the IFB and Guam Procurement Law and DOE's Procurement  
20 Regulations. However, after reviewing the agreement and the clarifications, the Public Auditor  
21 finds that they also include many provisions regarding various guarantees concerning XEROX's  
22  
23  
24  
25  
26

27 <sup>53</sup> DOE Response to Appeal, Exhibit G, Agency Report filed on February 11,  
2011.

28 <sup>54</sup> Paragraphs 6 and 34, General Terms and Conditions, IFB, Exhibit 1,  
Procurement Record filed on February 8, 2011.

1 equipment and performance, and that they also include various provisions regarding the delivery  
2 of the supplies and services. These later provisions conform to the aforementioned  
3 responsibilities of successful bidders for DOE contracts and negotiations concerning such  
4 provisions with DOE are required by Chapter III, Section 3.28, DOE Procurement Regulations.  
5 Further, other than the erroneous reference in the P/O, XEROX's clarifications and its agreement  
6 were not accepted by DOE.<sup>55</sup> The Public Auditor finds that XEROX remains bound to the  
7 contractual terms and conditions set forth in the IFB, and that XEROX's clarifications and  
8 agreement submitted with its IFB were mere offers concerning the XEROX's post award  
9 responsibilities that DOE appropriately rejected due to their numerous provisions that contracted  
10 the governing terms of the IFB and Guam Procurement Law and DOE's procurement  
11 regulations.  
12  
13

14 **D. DOE's P/O and P/O 2 are Terminated .**

15 IBSS argues that XEROX's contract with DOE should be terminated.<sup>56</sup> Generally, if  
16 after an award, it is determined that the award of a contract is in violation of law and that the  
17 person awarded the contract has not acted fraudulently or in bad faith, the contract may be  
18 terminated, after DOE consults with the Attorney General, and the person awarded the contract  
19 shall be compensated for the actual expenses reasonably incurred under the contract, plus a  
20 reasonable profit, prior to termination.. 5 G.C.A. §5452(a)(1)(ii) and Chapter IX, Section  
21 9.7.1.1, DOE Procurement Regulations. The Public Auditor must first determine whether  
22 XEROX acted fraudulently or in bad faith. Bad faith or fraud shall not be assumed. Chapter IX,  
23 Section 9.5.3., DOE Procurement Regulations. Specific acts of reckless disregard of clearly  
24  
25  
26

27 <sup>55</sup> July 6, 2012 Testimony of Mike Salas, XEROX Services & Solutions Executive,  
28 Hearing Re Appellant's Appeal.

<sup>56</sup> Page 8, Notice of Appeal filed on January 28, 2011.



1 applicable laws or regulations must support a finding of bad faith. Id. A finding of fraud must  
2 be supported by specific findings showing knowing, willful acts, in disregard of such laws and  
3 regulations. Id. Here, the evidence of possible bad faith or fraud is XEROX's submission of the  
4 purchase order template that increased the P/O quantities in excess of the IFB quantities, and  
5 referenced the XEROX agreement that DOE did not accept. The evidence indicates that  
6 XEROX increased the quantities in the P/O after DOE officials requested a comprehensive plan  
7 for the installation of the copiers in DOE's schools, and that XEROX prepared the purchase order  
8 template after DOE officials requested it.<sup>57</sup> As stated above, DOE's acting Superintendent and  
9 acting Supply Management Administrator, the only two (2) officials with the authority to  
10 contractually obligate DOE, did not request for the increase in the copiers or sign XEROX's  
11 agreement. Further, given the size, comprehensive scope, and multi-million dollar cost to  
12 Guam's taxpayers, DOE should have included a formal contract in its bid instead of merely using  
13 a purchase order. The use of a purchase order to finalize the agreement between XEROX and  
14 DOE, and the lack of oversight and due diligence over the costs of the contract by DOE, which  
15 was greatly enhanced by the fact that neither DOE's superintendent, or deputy superintendent  
16 approved the P/O, has resulted in monthly copying costs, especially for color printing, that have  
17 skyrocketed with little to no control.<sup>58</sup> Hence, in light of the strong evidence that senior DOE  
18 officials blindly accepted the P/O with its increased quantities and its reference to XEROX's  
19 agreement without performing a diligent review of the P/O to ensure it complied with the IFB's  
20  
21  
22  
23

---

24 <sup>57</sup> July 6, 2012 Testimony of Mike Salas, XEROX Services & Solutions,  
25 Executive, Hearing Re Appellant's Appeal.

26 <sup>58</sup> DOE Supplemental Exhibit List, Exhibit J, PO No. 201200367 dated March 3,  
27 2012 changed the estimated excess usage of black and color prints  
28 significantly. This resulted in a 279% increase in annual costs or \$190,371.  
For example: Color Prints (Tier 3) for models CQ9201, WC7545, & WC7435  
increased by 258% in estimated excess copies, from 60,250 to 647,000 copies  
per month at \$0.085, for an increase in annual costs of \$158,525.

1 requirements, the Public Auditor finds that the errors in the P/O occurred due to DOE's  
2 negligence and lack of oversight and not through the bad faith or fraudulent acts of XEROX.  
3 However, the evidence strongly suggests that XEROX took advantage of DOE's negligence.  
4 Specifically, the terms of the P/O template would have resulted in XEROX obtaining more  
5 profits than they otherwise would have obtained if they had stayed within the parameters of the  
6 IFB quantities. Therefore, the Public Auditor finds that termination of the contract is justified  
7 and necessary.  
8

#### 10 IV. CONCLUSION

11 Based on the foregoing, the Public Auditor hereby determines the following:

- 12 1. IBSS' December 16, 2010 Protest was timely.
- 13 2. The quantities stated in Purchase Order No. 201100024 increased the quantities stated  
14 in the IFB in violation of Paragraph 22 of the IFB's General Terms and Conditions.
- 15 3. DOE Purchase Order No. 201100024's reference to XEROX Response and Services  
16 & Solutions Agreement No. 7099405 was improper because DOE had not executed said  
17 agreement.
- 18 4. DOE Purchase Order Nos. 201100024 and 201200367 are hereby terminated and  
19 DOE shall compensate XEROX for the actual expenses XEROX reasonably incurred under the  
20 contract, plus a reasonable profit, prior to termination, pursuant to 5 G.C.A. §5452(a)(1)(ii) and  
21 Chapter IX, Section 9.7.1.1., DOE Procurement Regulations.
- 22 5. IBSS's Appeal is GRANTED.
- 23 6. The Public Auditor finds that IBSS is not entitled to its reasonable costs, pursuant to 5  
24 G.C.A. §5425(h) (2), because, as IBSS was the second lowest bidder and it was not reasonably  
25 likely that IBSS could have been awarded the contract. .

26 This is a Final Administrative Decision. The Parties are hereby informed of their right to  
27  
28

1 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with  
2 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative  
3 Decision. 5 G.C.A. §5481(a).

4 A copy of this Decision shall be provided to the parties and their respective attorneys, in  
5 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website  
6 [www.guamopa.org](http://www.guamopa.org).

7  
8 DATED this 8th day of August 2012.

9  
10   
11 \_\_\_\_\_  
12 DORIS FLORES BROOKS, CPA, CGFM  
13 PUBLIC AUDITOR  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28