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**In re:** ) **APPEAL NO. BP-A089**  
)  
**Appeal of Island Business Systems** ) **ITB16-MEDICAID-108**  
**& Supplies** )  
) **"Medicaid Office Copy Machine"**  
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### **BACKGROUND**

On April 16, 2016, the Director of Procurement and Supply ("the P&S Director" or "the Director") solicited sealed bids for a 48 month lease of a Digital Color Copier Machine/Network Printer/Scanner for the Office of the Governor, Medicaid Agency ("the ITB"). The ITB also included two pages of specifications. On April 28, 2016, Xerox Corporation – Saipan ("Xerox") submitted a sealed proposal in response to the solicitation. On April 29, 2016, Island Business Systems & Supplies ("IBSS") submitted a sealed proposal in response to the solicitation. On May 2, 2016 bids were opened and reviewed. Xerox was the lowest bidder. On May 10, 2016, the State Medical Director sent a letter to the P&S Director selecting Xerox as the lowest responsible bidder meeting all of the required specifications. On May 16, 2016, the Director faxed a notice of intent to award to Xerox and faxed notice to IBSS that they were not selected.<sup>1</sup>

On May 31, 2016 IBSS lodged a written protest with the Director claiming the Xerox bid was non-responsive.<sup>2</sup> *IBSS Protest Letter*, at pp. 1-2 (May 30, 2016) ("Protest"). At some point between May 31, 2016 and June 12, 2016, the Director denied IBSS's protest. OPA was never provided any copy of the Director's protest decision despite requests.

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<sup>1</sup> The notice letter submitted to OPA is dated May 11, 2016, but the fax transmission sheet provided by the P&S Director indicates the letter was transmitted on May 16, 2016.

<sup>2</sup> The protest letter submitted to OPA is dated May 30, 2016, but in its Appeal IBSS states the protest was transmitted by email and fax on May 31, 2016.

On June 12, 2016, IBSS appealed the P&S Director's protest decision to OPA. *IBSS Appeal*, (June 12, 2016) ("Appeal"). OPA sent notice of the Appeal to the Director, requesting the Director's report on June 12, 2016. On June 16, 2016, the P&S Director submitted his report to OPA. Due to an oversight, OPA sent a letter to the P&S Director requesting his report on July 11, 2016.

OPA has jurisdiction to decide this appeal pursuant to NMIAC § 70-30.3-505 (a).

## **DISCUSSION**

The threshold issue in IBSS's Appeal is timeliness. According to the Appeal and cover sheet for the Director's report, IBSS's Appeal was denied for untimeliness. Having disposed of the Protest on the threshold issue of timeliness, the Director declined to rule on IBSS's three main substantive claims that Xerox's proposal non-responsive to the requirements of the ITB.

The Commonwealth procurement regulations provide that protests "shall be received by the P&S Director in writing within ten days after such aggrieved person knows or should have known of the facts giving rise thereto." NMIAC § 70-30.3-501 (a)(1). Pursuant to NMIAC § 70-30.3-501

(d):

(1) Except as otherwise specified, all "days" referred to in this part are deemed to be working days of the Commonwealth government. The term "file" or "submit" except as otherwise provided refers to the date of transmission.

(2) In computing any period of time prescribed or allowed by these procedures, the day of the act or event from which the designated period of time begins to run shall not be included.

Reviewing the timeline for the Protest, OPA finds it was timely. NMIAC sections 70-30.3-501 (a)(1) and 501 (d) appear in the same "part" and the computation of days for the purposes of notice is not otherwise specified in section 501 (a)(1), thus "days" refers to working days of the Commonwealth government. Additionally, the date of transmission shall not be included per

section 501-30.3-501 (d)(2). Accordingly, the time for submitting a protest starts on May 17, 2016 and excludes weekend days and any recognized Commonwealth Holidays. May 30, 2016 is an official Commonwealth Holiday pursuant to 1 CMC § 311, as the last Monday in May.

Applying the above standards to the calculation of time, IBSS submitted their appeal on the tenth and final day to submit a timely appeal. Using the “working day” approach as opposed to the “calendar day” approach is consistent with earlier decisions under CNMI procurement regulations. *See generally, In re: Appeal of Island Business Systems & Supplies*, OPA Appeal No. BP-AO57, p. 4 (February 10, 2009); *In re: Appeal of Bolis-R-Us Catering*, OPA Appeal No. BP-AO54, p. 3 (February 15, 2008). It appears as if the Director inadvertently relied upon a strict calendar day approach in calculating timeliness.

While IBSS’s challenges to the responsiveness of Xerox’s bid remains undecided, OPA restricts its review to the issue of timeliness. Where a decision below is limited to a threshold issue, OPA will not act as procurement officer and decide the merits of a protest in place of the responsible agency or Division of Procurement and Supply absent compelling reasons. *In Re: Appeal of KuTH Energy, Inc*, BP-AO75, p. 8 (July 26, 2013).

#### DECISION

For the reasons set forth above, IBSS’s appeal is GRANTED. The matter sent to the Director of Procurement and Supply for a decision on the merits of IBSS’s appeal.

**Dated this 29<sup>th</sup> Day of August, 2016.**

BY:

CONCUR:



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JOSEPH J. PRZYUSKI  
OPA Legal Counsel



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MICHAEL PAI, CPA  
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