



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

**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

IN THE APPEALS OF

MORRICO EQUIPMENT, LLC,

Appellant.

Docket No. OPA-PA-14-011

Docket No. OPA-PA-14-012

DECISION

I. INTRODUCTION

This is the Decision of the Public Auditor for consolidated appeal numbers OPA-PA-14-011 and OPA-PA-14-012 regarding MORRICO EQUIPMENT, LLC's ("Morrico") Appeals of the GENERAL SERVICE AGENCY's ("GSA") denial of procurement protest dated November 12, 2014, and response to procurement protest dated December 1, 2014, concerning Invitation for Bid No. GSA065-14 ("the IFB"), which solicits bids for 60-passenger school buses.

This matter came before Public Auditor Doris Flores Brooks and Hearing Officer Delia Lujan Wolff for Hearings on January 28 and February 11, 2015. Present at the Hearings were Kevin J. Fowler, counsel for Morrico, Morrico representative Allan Morrison, Shannon Taitano, counsel for GSA, and Anita Cruz, GSA Buyer Supervisor. In reaching this Decision, the Public Auditor has considered and incorporates herein the procurement record and all documents submitted by the parties, and all arguments made during the Hearings on Morrico's Appeals. Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

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II. FINDINGS OF FACT

1. On July 1, 2014, GSA issued the IFB, which solicits bids for school buses. (Procurement Record, Tab 5, Invitation for Bid.)

2. On July 11, 2014, GSA issued Amendment #1 to the IFB, to include a new page 22, "GOVERNMENT OF GUAM, GENERAL TERMS AND CONDITIONS." (Procurement Record, Tab 7.)

3. On July 14, 2014, GSA issued Amendment No. 2 to the IFB, which changed the Bid number to read from GSA-068-14 to GSA-065-14. (Procurement Record, Tab 7.)

4. On July 15, 2014, GSA issued Amendment No. 3 to the IFB, which changed the bid opening date to July 30, 2014, at 11:00 a.m. (Procurement Record, Tab 7.)

5. On July 25, 2014, GSA issued Amendment 4 to the IFB, which changed the required delivery date; changed the IFB's Item 1.1, "SPECIFICATIONS" regarding engine, doors, and required accessories; and added verbiage to page 47 of the IFB under "NOTE." (Procurement Record, Tab 7.)

6. On July 28, 2014, GSA issued Amendment 5 to the IFB, which changed the bid opening date to August 5, 2014, at 10:00 a.m.. (Procurement Record, Tab 7.)

7. On July 29, 2014, GSA issued Amendment 6 to the IFB, which changed the bid opening date to August 12, 2014, at 2:00 p.m. (Procurement Record, Tab 7.)

8. The amended IFB includes General Terms and Conditions which provide in relevant part:

DESCRIPTIVE LITERATURE: Descriptive literature(s) as specified in this solicitation must be furnished as part of the bid and must be received at the date and time set for opening Bids. The literature furnished must clearly identify the item(s) in the Bid. The descriptive literature is required to establish, for the purpose of evaluation and award, details of the product(s) the bidder proposes to furnish including design, materials, components, performance characteristics, methods of

1 manufacture, construction, assembly or other characteristics which are considered
2 appropriate. Rejection of the Bid will be required if the descriptive literature(s) do
3 not show that the product(s) offered conform(s) to the specifications and other
4 requirements of this solicitation. Failure to furnish the descriptive literature(s) by
5 the time specified in the Solicitation will require rejection of the bid.

6 (Procurement Record, Tab 5, IFB General Terms and Conditions ¶ 19 (bold in original).)

7 9. The amended IFB further provides in relevant part: “**An Updated, Original**
8 **Manufacture’s brochure** of product being offered shall be furnished with this bid proposal
9 including drawings\ seating plans for buses to be provided.” (Procurement Record, Tab 5, IFB at
10 page 28 (emphasis in original).)

11 10. The specifications of the IFB require in relevant part: “All exterior body panels, skirts
12 and rub rails shall be fastened With **anti-corrosive rivets.**” (Procurement Record, Tab 5, IFB
13 Specifications at page 33 (bold in original).)

14 11. Morrico and Triple J Enterprises, Inc. (“Triple J”) submitted bids in response to the IFB.

15 12. On August 12, 2014, GSA conducted a bid opening.

16 13. On or about September 9, 2014, GSA sent Morrico a Bid Status advising that Morrico’s
17 bid was rejected due to non-conformance with the specifications, particularly noncompliance with
18 the following “All exterior body panels, skirts and rub rails shall be fastened with Anti-Corrosive
19 Rivets” and that “Thomas Built uses a combination of Structural adhesives, anti-corrosive
20 conventional style rivets, anti-corrosive self-piercing rivets and anti-corrosive fasteners are used to
21 adhere to the exterior body panels, skirts, and rub rails to the bus structure.” The Bid Status further
22 advised that “A RE-BID WILL BE SCHEDULED AT A LATER DATE AND TIME.”
23 (Procurement Record, Tab 9.)

24 14. On September 9, 2014, GSA sent Triple J a Bid Status advising that Triple J’s bid was
25 rejected due to non-conformance with the specifications, particularly noncompliance with the
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1 following “An Updated, Original Manufacture’s brochure of product being offered shall be
2 furnished with this bid proposal including drawings/seating plans for buses to be provide” and that
3 “[t]he drawings/seating plans for buses were not submitted in bid package.” The Bid Status further
4 advised that “A RE-BID WILL BE SCHEDULED AT A LATER DATE AND TIME.”
5 (Procurement Record, Tabs 9 & 16.)

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7 15. On September 23, 2014, Triple J filed with GSA a Protest, in which Triple J protested
8 the Bid Status received by Triple J, GSA’s decision to reject Triple J’s bid, and GSA’s decision to
9 cancel and re-bid the procurement. (Procurement Record, Tab 16.) Triple J asserted that its failure
10 to provide the drawings/seating plans for the buses was a non-material mistake that amounts to a
11 minor informality which GSA should have waived or Triple J should have been permitted to
12 correct. (Id.)

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14 16. On September 26, 2014, GSA issued a Memorandum denying Triple J’s protest.
15 (Procurement Record, Tab 16.)

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17 17. On October 21, 2014, GSA informed Triple J of its decision denying Triple J’s protest,
18 as contained in the Memorandum by GSA dated September 26, 2014. (Procurement Record, Tab
19 16.)

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21 18. On October 29, 2014, Triple J filed an appeal to the OPA, with respect to GSA’s
22 September 26, 2014, denial of Triple J’s protest. Triple J appealed GSA’s determination that Triple
23 J’s failure to submit drawing/seating plans for the buses was not a “minor informality” that could
24 be waived under 2 GAR §3109(m)(4)(B). The appeal is docketed OPA-PA-14-009. (Procurement
25 Record, Tab 16.)

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27 19. On November 7, 2014, GSA, through Assistant Attorney General Fred Nishihira,
28 contacted Morrico through Torgun Smith and informed Morrico of the settlement negotiations

1 between GSA and Triple J to resolve Triple J's appeal in OPA-PA-14-009. Nishihira told Smith
2 that the terms being discussed were that Triple J would be awarded nine (9) buses and that Morrigo
3 would be awarded three (3) buses at Triple J's lower sale price, and that, if Morrigo protested, then
4 Morrigo would receive nothing. Smith informed Nishihira that Morrigo did not agree to those
5 terms.

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7 20. On November 7, 2014, GSA filed with OPA in OPA-PA-14-009 a Settlement
8 Agreement signed by Triple J and GSA, which provides in relevant part that GSA agrees to award
9 the sale of nine (9) buses to Triple J and three (3) buses to Morrigo; GSA will use Triple J's
10 drawing/seating plan, which is attached to its protests and the appeal as an exhibit, to evaluate
11 whether Triple J's schematic meets the specifications of the IFB; if the schematics are determined
12 to not meet the IFB's specifications, then award would not be made to Triple J or Morrigo and GSA
13 will instead cancel and re-bid the procurement; and if Morrigo protests the settlement terms then
14 all buses shall be awarded to Triple J. (Procurement Record, Tab 4, Settlement Agreement.)

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16 21. On November 10, 2014, the Public Auditor signed the Settlement Agreement to grant
17 GSA's and Triple's J's request to dismiss with prejudice Triple J's appeal in OPA-PA-14-009.
18 (Procurement Record, Tab 4, Settlement Agreement at page 3.)

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20 22. On November 10, 2014, Morrigo learned that Triple J and GSA entered into the written
21 Settlement Agreement to resolve Triple J's appeal in OPA-PA-14-009. (Notice of Procurement
22 Appeal, OPA-PA-14-011, ¶ 5.)

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24 23. On November 10, 2014, Morrigo filed with GSA a Procurement Protest, in which
25 Morrigo protests any award of a contract to Triple J for the reasons that Triple J's bid was non-
26 responsive at bid opening for failure to provide the required literature, including a drawing/seating
27 plan, Triple J's bid had a material omission in that it did not include any specifications that would

1 allow GSA to determine whether Triple J was offering what GSA was soliciting, and the Bluebird
2 bus offered by Triple J fails to meet the exterior rivet specifications of the IFB (“the first protest”).
3 (Procurement Record, Tab 1, Procurement Protest at page 2.)

4 24. GSA denied Morrigo’s protest via letter dated November 12, 2014, which was received
5 by Morrigo on November 13, 2014. (Procurement Record, Tab 2, Memorandum re Protest.) GSA
6 denied Morrigo’s protest on the basis that GSA settled and resolved Triple J’s appeal in OPA-PA-
7 14-009 pursuant to 5 G.C.A. § 5425(b), which authorizes the Chief Procurement Officer, prior to
8 commencement of a court action concerning the controversy, to settle and resolve a protest of an
9 aggrieved bidder concerning the solicitation or award of a contract. (Id.)

10 25. On November 18, 2014, Morrigo filed a procurement appeal with the OPA, appealing
11 GSA’s November 12, 2014, denial of Morrigo’s protest. That appeal is docketed OPA-PA-14-011.
12 (Notice of Procurement Appeal in OPA-PA-14-011.) In this first appeal, Morrigo requests that the
13 OPA rule that GSA’s denial of Morrigo’s protest was arbitrary, capricious, and an abuse of
14 discretion, and that GSA’s agreement to award a contract to Triple J be set aside. (Id. ¶ 10.)

15 26. On November 21, 2014, Morrigo filed with GSA another procurement protest, in which
16 Morrigo protests any award of a contract to Triple J because its bid was nonresponsive at bid
17 opening for failure to provide the required literature and failure to submit the mandatory
18 drawings/seating plans, and Morrigo protests GSA’s rejection of Morrigo’s bid for failure to meet
19 the exterior rivet specification (“the second protest”).

20 27. GSA responded to Morrigo’s second protest on December 1, 2014, stating that
21 Morrigo’s protest is stayed pending the outcome of Morrigo’s appeal in OPA-PA-14-011. (Notice
22 of Procurement Appeal, OPA-PA-14-012, Ex. F.)

1 Before turning to the merits of Morrigo’s appeals, the Public Auditor first addresses the
2 jurisdictional issues raised by GSA.

3 **A. Jurisdiction.**

4 The jurisdiction of the Public Auditor is set forth in 5 G.C.A. § 5703, which states in relevant
5 part:

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7 The Public Auditor shall have the power to review and determine de novo any matter
8 properly submitted to her or him. ... Notwithstanding § 5245 of this Chapter, no
9 prior determination shall be final or conclusive on the Public Auditor or upon any
10 appeal from the Public Auditor. ... The Public Auditor’s jurisdiction shall be
11 utilized to promote the integrity of the procurement process and the purposes of 5
12 GCA Chapter 5.

13 5 G.C.A. § 5703; see also 2 G.A.R. § 12103(a). As Morrigo’s appeals are made from a decision on
14 protest of method, solicitation, or award, (Notice of Procurement Appeal, OPA-PA-14-011, ¶ D;
15 Notice of Procurement Appeal, OPA-PA-14-012, ¶ D), 5 G.C.A. § 5425(a) sets forth the relevant
16 deadline for filing such protests:

17 Any actual or prospective bidder, offeror, or contractor who may be aggrieved in
18 connection with the method of source selection, solicitation or award of a contract,
19 may protest to the Chief Procurement Officer, the Director of Public Works or the
20 head of a purchasing agency. The protest shall be submitted in writing within
21 fourteen (14) days after such aggrieved person knows or should know of the facts
22 giving rise thereto.

23 5 G.C.A. § 5425(a). Upon timely receipt of such appeal, “[t]he Public Auditor shall determine
24 whether a decision on the protest of method of selection, solicitation or award of a contract ... is in
25 accordance with the statutes, regulations, and the terms and conditions of the solicitation.” 2
26 G.A.R. § 12201(a).

1 Jurisdiction issues may be raised at any time. Pac. Rock Corp. v. Dep't of Educ., 2001
2 Guam 21 ¶ 18. The Public Auditor is authorized at any time to raise the issue of its jurisdiction to
3 proceed with an Appeal and shall do so by an appropriate order. 2 G.A.R. § 12104(c)(9).

4 GSA contends that Morrico's protests were filed beyond the 14 days of when Morrico knew
5 or should have known of the facts giving rise to the protests. Specifically, GSA contends that
6 Morrico should have filed its protests within 14 days of the following events: (1) the August 12,
7 2014, public opening of bids, at which time Morrico should have known the content of Triple J's
8 bid, including any failure to provide the required schematics, whether Triple J buses use screws
9 instead of the required rivets, and whether use of rivets on Triple J's buses is proprietary; (2)
10 Morrico's review of Triple J's bid packet at GSA on October 14, 2014; and (3) Morrico's receipt
11 of notice on September 10, 2014, that its bid was rejected by GSA. Additionally, GSA argues that
12 Morrico's protests of GSA's intent to award the bus contract to Triple J are not ripe since no award
13 has been made yet, and any such award is contingent upon GSA's review and determination that
14 Triple J's schematics comply with the IFB's specifications. Lastly, GSA asserts that the Public
15 Auditor lacks statutory authority to set aside the terms of the Settlement Agreement.

16 The Public Auditor disagrees with GSA that Morrico's protests are time-barred for failure
17 to file such protests within 14 days of the bid opening on August 12, 2014, or review of Triple J's
18 bid packet on October 14, 2014. GSA's argument that Morrico's protests are unripe also lacks
19 merit. Although not clearly stated, Morrico is protesting the Settlement Agreement which allows
20 Triple J to modify its bid by providing the drawings/seating plans that were not submitted at bid
21 opening, and which provides that GSA will award buses to Triple J upon GSA's determination that
22 the schematics comply with the IFB specifications. As Morrico first learned of the terms of the
23 Settlement Agreement on November 10, 2014, Morrico had 14 days thereafter, until November 24,
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1 2014, to protest the terms of that Agreement. Accordingly, Morrico's first protest on November
2 10, 2014, and second protest on November 21, 2014, are timely, with respect to Morrico's protests
3 of the terms of the Settlement Agreement.

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5 However, the Public Auditor agrees with GSA that Morrico's protest of GSA's rejection of
6 Morrico's bid is untimely. As Morrico had notice of rejection of its bid on September 9, 2014,
7 Morrico had 14 days thereafter, until September 23, 2014, to file its protest of the rejection. GSA's
8 notification to Morrico that it would re-bid the procurement cannot toll the deadline for filing the
9 protest. If Morrico believed that it should have been awarded the bus contract and that GSA's
10 rejection of Morrico's bid was in error, then Morrico should have protested the rejection within the
11 statutory timeframe. This is what Triple J did. Thus, Morrico's protest of GSA's rejection of
12 Morrico's bid is untimely and not properly submitted to the Public Auditor.

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14 As to ripeness, GSA is correct that a protest of an award to Triple J would be unripe, as
15 there has been no actual award made to Triple J. Nonetheless, the Public Auditor construes
16 Morrico's protest as a protest of the Settlement Agreement terms which allow Triple J to make a
17 late modification of its bid by submitting the missing drawings/seating plans, and which require
18 GSA to award Triple J the bus contract if GSA determines that the schematic complies with the
19 IFB specifications. Since the Settlement Agreement was actually entered by Triple J and GSA on
20 November 7, 2014, Morrico's protest of the terms therein is ripe.

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22 Regarding Morrico's request to set aside the Settlement Agreement terms, GSA argues that
23 5 G.C.A. § 5425(b) empowers it to resolve Triple J's protest by entering into the Settlement
24 Agreement, and that no Guam statute allows the Public Auditor to invade the Settlement
25 Agreement. Morrico counters that the Settlement Agreement was not a resolution of a protest made
26 in accordance with section 5425(b) since GSA instead acted pursuant to 5 G.C.A. § 5425(c) by

1 issuing a written decision denying Triple J's protest. As Morrico's protest of the terms of the
2 Settlement Agreement is in connection with the method of source selection, solicitation, or award
3 of a contract, Morrico's protest is authorized by 5 G.C.A. § 5425(a). Since GSA decided to deny
4 Morrico's protest, as permitted in 5 G.C.A. § 5425(c), Morrico's appeal of the denial of its protest
5 to the Public Auditor is authorized by 5 G.C.A. § 5425(e). Also, 2 G.A.R. § 12201(a) empowers
6 the Public Auditor to determine whether a decision on the protest of method of selection,
7 solicitation, or award of a contract is in accordance with the statutes, regulations, and the terms and
8 conditions of the solicitation. This is consistent with the statutory mandate that the Public Auditor's
9 jurisdiction be utilized to promote the integrity of the procurement process and the purposes of 5
10 GCA Chapter 5. 5 G.C.A. § 5703. Thus, the Public Auditor concludes it is within her authority
11 and jurisdiction to review and set aside any terms of the Settlement Agreement which violate
12 Guam's procurement law.

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15 **B. Standard of Review.**

16 The Public Auditor shall have the power to review and determine de novo any matter
17 properly submitted to her. 5 G.C.A. § 5703; 2 G.A.R. § 12103. The Public Auditor's determination
18 of an issue or finding of fact shall be final and conclusive unless arbitrary, capricious, fraudulent,
19 clearly erroneous, or contrary to law. 5 G.C.A. § 5704. Any decision by the Public Auditor,
20 including as to the application or interpretation of procurement law or regulations, shall be entitled
21 to great weight and the benefit of reasonable doubt, although such decision shall not be conclusive
22 on any court having competent jurisdiction. Id.

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24 **C. OPA-PA-14-011.**

25 Morrico argues that an award to Triple J pursuant to the Settlement Agreement between
26 Triple J and GSA would violate Guam's procurement laws in light of Triple J's failure to provide
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1 at bid opening the descriptive literature required by the IFB, and Morrico's assertion that the
2 Bluebird bus offered by Triple J fails to meet the exterior rivet specifications of the IFB.

3 Contract principles apply to the interpretation of settlement agreements. Leon Guerrero v.
4 Moylan, 2000 Guam 28 ¶ 8 (citing Camacho v. Camacho, 1997 Guam 5 ¶ 32). Guam law defines
5 a contract as "an agreement to do or not to do a certain thing." 18 G.C.A. § 85101. The essential
6 elements of a contract are (1) parties capable of contracting; (2) their consent; (3) a lawful object;
7 and (4) a sufficient cause or consideration. See 18 G.C.A. § 85102. A contract consists of an offer,
8 acceptance, and consideration. See Mobil Oil Guam, Inc. v. Tendido, 2004 Guam 7 ¶ 34 (citing,
9 e.g., Magill v. Nelbro Packing Co., 43 P.3d 140, 142 (Alaska 2001) ("In order to meet their burden
10 in establishing the existence of a contract, ... plaintiffs must show: 'an offer encompassing all
11 essential terms, unequivocal acceptance by the offeree, consideration, and an intent to be bound.'")
12 (citation omitted)). Mutual consent is required for the formation of a contract. 18 G.C.A. § 85316.
13 The consent of a party to a contract must be free, mutual, and communicated by each party to the
14 other. 18 G.C.A. § 85301. Accordingly, the Public Auditor finds that the Settlement Agreement is
15 null and void.

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18 In this case, the Settlement Agreement purports to be a contract that requires not only the
19 signing parties, GSA and Triple J, to do or not do a certain thing; it also requires that Morrico do
20 or not do a certain thing. Specifically, Morrico, once GSA makes an award to Morrico, must
21 perform on a contract for 3 buses and forebear on protesting the Settlement Agreement or else lose
22 the bus contract. However, Morrico never agreed to any of the terms of the Settlement Agreement,
23 including those terms which require performance by Morrico. When GSA discussed with Morrico
24 the possibility of a settlement agreement whereby Triple J would be awarded some buses and
25 Morrico would be awarded some buses, Morrico, through Torgun Smith, communicated to GSA
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1 that it disagreed with such an agreement. Lacking Morrico's consent, the Settlement Agreement
2 cannot stand.

3 The Public Auditor finds that the Settlement Agreement also goes against the spirit of
4 Guam's procurement law. 5 G.C.A. § 5425(a) empowers any actual or prospective bidder who
5 may be aggrieved in connection with the method of source selection, solicitation, or award of a
6 contract, to protest to the Chief Procurement Officer, the Director of Public Works, or the head of
7 a purchasing agency. The protest mechanism is critical to ensuring the integrity of the procurement
8 process. It promotes and serves the purposes of Guam's procurement statute in providing increased
9 public confidence in the procedures followed in public procurement, ensuring fair and equitable
10 treatment of all persons who deal with the procurement system in Guam, and providing safeguards
11 for the maintenance of a procurement system of quality and integrity. 5 G.C.A. § 5001(b)(3), (4),
12 (7). However, the Settlement Agreement, by its terms, purports to discourage and penalize Morrico,
13 a nonparty to the Agreement, from lodging any protest or else it loses the award of 3 buses. This
14 restriction and penalty on protesting imposed upon a nonparty to a settlement agreement is improper
15 and not in the best interests of the Territory.
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18 Further, the Public Auditor is troubled that the Settlement Agreement intended to bind
19 Morrico to perform, yet Morrico was not made a party to the Agreement. This misstep has resulted
20 in the filing of two separate protests and appeals. Valuable time and resources have been expended
21 to rectify this issue. The Public Auditor rules that all actual or prospective bidders, offerors, or
22 contractors who are affected and intended to be bound to perform by a settlement agreement must
23 be made signatories to that agreement.
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25 Based on the foregoing, the Public Auditor concludes that the Settlement Agreement
26 between Triple J and GSA is null and void and set aside for lack of Morrico's consent and for
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1 penalizing nonparty Morrigo for exercising its statutory power to protest, in contravention of Guam
2 law which authorizes protests to ensure the integrity of the procurement process. Morrigo's other
3 arguments need not be addressed.

4 **D. OPA-PA-14-012.**

5 In light of the Public Auditor's determination that the Settlement Agreement shall be set
6 aside, the issue of whether GSA should be compelled to either grant or deny Morrigo's second
7 protest is moot.
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10 **IV. CONCLUSION**

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

12 1. In accordance with 5 G.C.A. § 5425(a), Morrigo timely filed protests of the terms of the
13 Settlement Agreement and the OPA therefore has jurisdiction over the appeals of GSA's denial or
14 refusal to grant or deny those protests.
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16 2. Morrigo untimely filed with GSA its protest of GSA's rejection of Morrigo's bid and the
17 OPA lacks jurisdiction over the appeal related to that protest.

18 3. The Settlement Agreement between Triple J and GSA is null and void for lack of
19 Morrigo's consent and for imposing a penalty on protesting upon nonparty Morrigo in
20 contravention of Guam law which enables protests to ensure the integrity of the procurement
21 process.
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23 4. Morrigo's request that GSA be compelled to either grant or deny Morrigo's second protest
24 is denied as moot.

25 5. Accordingly, Morrigo's procurement appeal is hereby GRANTED IN PART and
26 DENIED IN PART.
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1 6. The Public Auditor hereby GRANTS GSA's request that it be permitted to cancel and
2 rebid the procurement for school buses.

3 This is a Final Administrative Decision. The Parties are hereby informed of their right to
4 judicial review in the Superior Court of Guam of a Decision of the Public Auditor under 5 G.C.A.
5 Chapter 5, Article 9 (Legal and Contractual Remedies) of the Guam Procurement Law. In
6 accordance with 5 G.C.A. § 5481(a), such action shall be initiated within fourteen (14) days after
7 receipt of a Final Administrative Decision. A copy of this Decision shall be provided to the Parties
8 and their respective attorneys, in accordance with 5 G.C.A. § 5702, and shall be made available for
9 review on the OPA website at www.opaguam.org.

11 SO ORDERED this 16th day of March, 2015.

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15 DORIS FLORES BROOKS, CPA, CGFM
16 Public Auditor of Guam
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