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PROCUREMENT APPEALS

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FILE NO OPA-PA: 15-015

**THE OFFICE OF PUBLIC ACCOUNTABILITY**

IN THE MATTER OF APPEAL OF	)	<b>APPEAL NO. OPA-PA-15-015</b>
	)	
TRIPLE J MOTORS,	)	<b>APPELLANT TRIPLE J MOTORS'</b>
	)	<b>COMMENTS ON THE AGENCY</b>
Appellant.	)	<b>REPORT</b>
	)	
_____	)	

COMES NOW, Appellant Triple J Motors (hereinafter "Triple J"), through undersigned counsel, pursuant to Section 12104(c)(4) of the Guam Administrative Rules and Regulations (hereinafter "GAR"), and hereby respectfully submits its comments to the Agency Report filed by the General Services Agency (hereinafter "GSA") on December 24, 2015 in the above-captioned matter.

**A. FACTUAL BACKGROUND**

The facts relevant to these Comments are mostly contained by Triple J's November 11, 2015 bid protest for IFB No. GSA-135-15 and the subsequent Office of Public Accountability ("OPA") Appeal lodged in the above-captioned matter by Triple J on December 9, 2015. Both of the two issues raised by Triple J's protest and subsequent OPA Appeal concern explicit specifications of the IFB that Triple J avers were not complied with by Cars Plus' bid submittal, resulting in improper post-opening modification by Cars Plus and/or improper post-opening waiver or acceptance of a changed bid by GSA. Specifically, the first issue concerns the specifications located on

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page 30 of the IFB, under the heading "Seats," which requires a "[r]ear seat, prisoner transport hard plastic." See Agency Report, Tab 6, p. 30. The second issue concerns the specifications located on page 29 of the IFB, under the heading "Transmission," which requires that the transmission "[s]hall be column shift." *Id.*, p. 29.

## **B. ANALYSIS**

First, Triple J respectfully points out that GSA submitted an untimely and incomplete Procurement Record on December 17, 2015. GSA's Procurement Record is incomplete on its face as the Agency has failed to provide a Certification of Record as required by 5 GCA § 5250. GSA's Procurement Record is also missing a log of all communications between its government employees and bidders, including Cars Plus and Triple J.

On December 24, 2015, GSA supplemented the Procurement Record with the Agency Report. The Agency Report is also flawed and incomplete. Pursuant to 2 GAR, Div. 4 § 12105, GSA was required to compile its Agency Report in chronological order where practicable, sequential numbering, and tabbing and indexing for properly identifying the contents of the file. The Agency Report, like the Procurement Record, contains several errors with the indexing and tabs, and there is no sign that an attempt was made to put the documents in chronological order, making it difficult to decipher what really happened in this case temporally.

Despite the incomplete, disorganized, and haphazardly compiled Procurement Record and Agency Report submitted by GSA, Triple J proceeds with the submission of these Comments on the Agency Report in order to rebut GSA's ambiguous and erroneous assertions that seem to imply that: (1) a review of the specifications

provided by the bidder did not incorporate those specifications that Triple J is stating are required; and (2) Cars Plus' clarification regarding its "8 Speed Automatic Transmission" meets the purpose of the column shift and that, therefore, the specifications for the column shift transmission are somehow met without material prejudice to Triple J.

Triple J asserts in response that the specifications for a prisoner transport seat to replace the back seat, as opposed to a mere cover, is required by the IFB, as this was clarified when GSA issued Amendment #1 in response to Triple J's concerns about the seating arrangement (i.e., 4-passenger capacity instead of 5-passenger capacity) that logically results from this particular specification. See, e.g., Agency Report, tab 8, p. 1; see also *id.*, tab 14, "Questions submitted by Triple J dated September 16, 2015," Response to Question 4 (Sept. 18. 2015). Moreover, Triple J asserts that the column shift requirement cannot be waived without material prejudice to Triple J, and GSA's inadequate explanation that the "purpose" of the column shift is met does not undo the violation of Guam's procurement law, as GSA's action would allow for an improper modification after bid opening that had a material, prejudicial effect on Triple J.

Had Triple J been clearly instructed—after its request for clarification and timely questions—that (1) a rear prisoner transport seat cover, as opposed to a fully-replaced back seat, was sufficient, and (2) that an alternative to a column shift transmission—which is an expensive piece of specialty equipment—was sufficient, then Triple J could have tailored its bid price and offer accordingly, and its bid would not have been rejected due to high price. Triple J stands by its assertions in its OPA Appeal that these errors in this procurement process call for and result in Cars Plus' bid being rejected for

non-responsiveness, and for Triple J to be the awardee of the contract under this IFB. Alternatively, these errors are sufficient enough to warrant a re-bidding of this IFB, in order to protect the procurement process and to ensure that GSA cannot simply waive its requirements without adequate justification under applicable law. Nor is GSA allowed under the procurement law to proffer ambiguous or otherwise incomplete answers to serious questions about the process, a process that Triple J has respected and continues to respect as a long-standing bidder for Guam's procurement contracts.

Triple J respectfully submits that GSA's Agency Report is inadequate in that it does not cogently respond to the concerns raised by Triple J's OPA Appeal. See 2 GAR, Div. 4, § 12105(g) ("A statement answering the allegation of the Appeal and setting forth findings, actions, and recommendations in the matter together with any additional evidence or information deemed necessary in determining the validity of the Appeal. *The statement shall be fully responsive to the allegations of the Appeal*" (emphasis added)). Again, GSA must be required to adequately explain whether and how Cars Plus was able to sufficiently demonstrate, under applicable law, that its bid was conforming to the specifications and responsive *at the time of submittal*, and that no material, prejudicial changes were improperly accepted, or specifications otherwise improperly waived, by GSA after the time of bid opening.

Triple J has serious questions about the actual make and model Cars Plus is offering (e.g., 2015 vs. 2016), including whether Cars Plus will be offering a vehicle that has only 4-passenger capacity and a fully-replaced rear prisoner transport seat (as opposed to a mere cover), and Triple J is generally of the belief that this procurement suffers fatal flaws of ambiguous specifications, or worse, improper acceptance of post-

opening changes to Cars Plus' bid submittal, respecting both the prisoner transport rear seat and the column shift transmission requirements of the IFB.

Triple J can only believe that GSA did not intentionally waive any material bid requirements, to the prejudice of Triple J, and that GSA did not intentionally accept changes to Cars Plus' bid after bid opening. Nevertheless, in an abundance of caution, Triple J reserves its rights to assert bad faith, and is skeptical of whether GSA has given due care and consideration to this procurement and Triple J's formal protest and OPA Appeal concerns, in part due to the seemingly strategic ambiguity GSA has chosen to employ in putting together its one-page Agency Report (tab 1) and because GSA continues to dance around these issues despite repeated requests for clarification and Triple J's expressed desire to get to the heart of the matter. The Agency Report even suggests that Triple J's OPA Appeal has merit. See, e.g., Tab 14, Email from Sean Untalan to Robert Kono (Nov. 16, 2015) ("In regards to your question, *it does not meet bid spec.*" (emphasis added)).

As Triple J has been forced to formally respond with litigation, Triple J reserves all rights under applicable law, and looks forward to visiting these issues at the upcoming OPA Hearing. That being said, Triple J is hopeful that GSA will do the right thing and find that Cars Plus' bid was non-responsive and therefore must be rejected, and that Triple J, in turn, be declared the awardee for this procurement. Alternatively, if this procurement suffers from fatal flaws, then a re-bidding is in order. Finally, Triple J remains open to settlement discussions with GSA and Cars Plus to make *good-faith* efforts to resolve this procurement, in the best interests of the Territory (which requires these key goods for its public safety needs), to save on unnecessarily protracted

litigation and the attendant taxing costs of time, money, and energy for bidders and the Territory alike, and in the sincere interests in advancing and strengthening the application of the explicit underlying purposes and policies of Guam's procurement law in situations such as these. These considerations should guide the OPA, GSA, and all bidders in Guam's procurement process, so as to ensure that confidence in the integrity of the procurement system here on island is properly maintained and the rules of fair competition are strictly adhered to in the interests of all parties hereto.

Respectfully submitted this 4<sup>th</sup> day of January, 2016.

**CABOT MANTANONA LLP**  
*Attorneys for the **Appellant***



By:

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**MATTHEW S. KANE**