



Office of the Attorney General
Elizabeth Barrett-Anderson
 Attorney General of Guam
 Solicitor Division
 590 S. Marine Corps Drive
 Tamuning, Guam 96913 • USA
 (671) 475-3324 • (671) 472-2493 (Fax)
 mwolff@guamag.org
 Attorneys for Purchasing Agency

RECEIVED
 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS

DATE: 1/13/16
 TIME: 1:12 AM PM BY: AG
 FILE NO OPA-PA: 15-015

**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

IN THE APPEAL OF:)	DOCKET NO. OPA-PA: 15-015
)	
TRIPLE J MOTORS)	
)	REBUTTAL OF COMMENTS
Appellant.)	ON AGENCY REPORT
)	

COMES NOW, the Purchasing Agency, General Services Agency, and through its undersigned counsel, herein files its Rebuttal of Comments on the Agency Report in the above-captioned matter.

I. UNTIMELY PROTEST AND APPEAL

5 G.C.A. § 5425 states:

“Authority to Resolve Protested Solicitations and Awards: (a)
 Right to Protest. Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract, may protest to the Chief Procurement Officer, the Director of Public works or the head of a purchasing agency. The protest shall be **submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto.**”

Emphasis added.

2 G.A.R., Div. 4, §9101(c)(1) states, “Protests filed after the 14 day period shall not be considered.”

As evidenced by the 2:00pm, Sept. 25, 2015 bid deadline in the Invitation for Bid (Tab 5 of Procurement Record, pg. 3, midpage) and the Government of Guam Abstract of IFB (Tab 6 of Procurement Record, pg. 6), all bids were opened under supervision and made public on Sept. 25th, 2015. That is when the 14-day 5 G.C.A. §5425 clock started ticking since Triple J had the chance to and did review all bids that day. This means that Appellant took forty-seven (47) days to file its Protest (9-25-15 to 11-11-15), which is thirty-three (33) days late. To be charitable, one can extend the 14-day starting point to Charlie Reynold’s Oct. 5th, 2015 letter in which he knew enough about CarsPlus’ bid to complain about the seat specifications (and thus, *should have known* enough about the column shift specifications as well). By both starting points, Triple J’s Nov. 11th, 2015 Bid Protest where they finally allege an objection about the column shift fails to meet the 14-day requirement under §5425 and thus the column shift issue must be stricken for untimeliness. Since Triple J has repeatedly claimed (first line of Section A in Notice of Appeal, pg. 2; and second line of Section A in Appellant’s Comments on the Agency Report, pg. 1) that their first protest (Procurement Record, Tab 1) was the Nov. 11th letter labeled “Protest of GSA-135-15 Guam Police Dept (Sports Utility Vehicle-Police Interceptor)”, they should additionally be estopped from claiming that the Oct. 5th, 2015 letter was an official protest with regards to the seat issue. Thus, the seat issue must also be dismissed as untimely. Much like a 12(b)(1) situation in Superior Court for lack of subject matter jurisdiction, the jurisdiction of the Public Auditor is limited to matters properly submitted to her. *TRC Environmental Corporation v. Office of the Public Auditor*, SP160-07, Decision and Order on Petition for Writ of Mandate dated November 24, 2008 (Superior Court of Guam); Guam R. Civ. P. (12)(b)(1) and (12)(h)(3). With no issues properly brought before the OPA, this Appeal fails.

It is inequitable for other bidders and GSA to keep waiting for one bidder’s multiple bites at the protest apple. Where would the slippery slope end? If a late protest is allowed, then nothing stops Triple J from filing another protest today. The integrity and finality of the procurement process must be respected so that all parties are treated fairly and know what is needed to move forward. 5 G.C.A. § 5001 and 5003; 2 G.A.R., Div. 4, §1102 and 1105. The regulations are followed for all bidders’ sakes and to dispel any image of impropriety. *Id.* Nothing in 5 G.C.A. § 5425 or 2 G.A.R., Div. 4, §9101(c)(1) suggests that a finding of merits in

the protest trumps the 14-day cutoff. Furthermore, Triple J is a longtime bidder, having filed several protests and appeals, and thus is well aware of the regulatory procedures and deadlines.

Triple J received GSA's decision on Nov. 4, 2015 (Tab 8 of Procurement Record) and waited till Dec. 9, 2015 to file its Appeal. This, too, fell outside its fifteen (15)-day Appeal deadline and thus must be dismissed as untimely. 5 G.C.A. §5425(c) and (d); 2 G.A.R.R., Div. 4, Chap. 9, §9101(g).

II. REAR SEAT

If all the specifications are met, then the bid is decided by lowest price. When the bids were submitted, all documents were present and nothing stood out as amiss, so on or about Sept. 28, 2015 (*see* Procurement Record, Tab 9), GSA sent the lowest-priced responsible and responsive package to the using agency for review and concurrence. GSA received approval of CarsPlus' bid from the using agency and Appellant's protest, primarily regarding the rear seat, was lodged shortly thereafter.

Triple J argues that CarsPlus did not meet the page 30 rear seat specifications because only a hard plastic seat cover was offered and because the proper rear seat must replace, not just cover, the entire rear seat (be "integrated"). When CarsPlus stated, "yes, rear plastic covers" (Exhibit E of Notice of Appeal, Procurement Record Tab 4), they were describing the material of the seat, which is plastic. CarsPlus is not simply placing a hard plastic seat cover. *Decl. Eugene Rios*, Jan. 4, 2016, ¶4-9. Rather, the Dodge Durango's rear prisoner transport seat is fully integrated, is specially designed for law enforcement purposes, will prevent the hiding of weapons and contraband, allows for easy cleaning, and has been used by GPD before. *Id.* CarsPlus president, Joseph Crisostomo, reiterated in his Nov. 18, 2015 letter (Correspondence Tab) that the CarsPlus rear seats are comparable in function and durability to what Triple J is offering. CarsPlus, via its outfitter, selected vinyl as its rear seat material, which is exactly the same material offered in Triple J's rear seat. *Id.* Triple J has no proof that CarsPlus' seat will not be to specifications. CarsPlus represented under penalty of perjury that the Durango's rear seats comply with the specific seat specifications, and GSA and GPD confirmed compliance. *PR* Tab 4 and 13; Oct. 19, 2015 Acfalle-Crisostomo Letter.

The rear seat specifications in this IFB were brief and general, which serves the best interests of the Territory in that it allows maximum practical competition and minimizes the chance of the specifications being geared toward any one bidder. Since both Triple J and CarsPlus had won bids using similar or identical seat specifications (CarsPlus for GPD sedans, and Triple J in GSA097-13 and GSA041-14), the rear seat specifications were not geared toward any one party.

III. PREVIOUS STANDARD FLEXIBLE

On page 4 of their Notice of Appeal and in their Exhibit K, Triple J implies that the previous seat requirements in their winning GSA097-13 and GSA041-14 bids should apply in the instant case. The actual seat specifications in those previous IFBs were identical to the present IFB except in the last two (2) sentences. GSA097-13's last sentences state, "The front and rear seat upholstery shall be woven synthetic cloth fabric. Rear seat, prisoner transport plastic or similar design." GSA041-14's last sentences state, "The front seat upholstery shall be woven synthetic cloth fabric. Rear seat shall be a prisoner transport plastic with cargo barrier or similar design." The present IFB's last sentences state, "The front seat upholstery shall be woven synthetic cloth fabric. Rear seat, prisoner transport hard plastic." One difference was that in GSA097-13, it states that "the front *and rear* seat upholstery shall be woven synthetic cloth fabric". It is unclear how a rear seat can be both woven synthetic cloth fabric *and* "prisoner transport plastic", but the point is that there is no such ambiguity in the current IFB. In both GSA097-13 and GSA041-14, there was a catch-all provision ("or similar design") that was deleted from the current IFB. Moreover, the current IFB is the only one of the three that specifies "hard" plastic. So it is meaningless for Triple J to hold CarsPlus to the previous standard(s) which, due to the catch-all provisions and lack of "hard" plastic specificity, were more flexible than the current IFB's standards that CarsPlus explicitly already met according to the Durango's plain appearance and witness-declarant Eugene Rios.

IV. ISSUES NOT BROUGHT UP DURING QUESTION PERIOD

Triple J asks for the bid process to be redone. In essence, this would be a rejection of all bids. 2 GAR, Div. 4, §3115(d)(2)(A). However, if a bid was in total conformity, or if specifications were clear and unambiguous, then such a rejection is unwarranted. *Id.* The only issues that should really be discussed in an Appeal are what is contained in the Nov. 11, 2015 Protest (rear seat and column shift). Appellant failed to submit any questions alleging seat or column shift specification ambiguity within the designated time period. The Bid Solicitation, on page 26, paragraph 3, states in pertinent part:

EXPLANATION TO BIDDERS: Any explanation desired by a bidder regarding the meaning or interpretation of the Solicitation, drawings, specifications, etc., must be submitted in writing and with sufficient time allowed for a written reply to reach all bidders before the submission of their bids.

Page 2 of the IFB (Procurement Record, Tab 5) also states that all questions or concerns in regards to the bid are due by 5:00pm on Sept. 17, 2015. Triple J did submit questions on Sept. 16, 2015 regarding delivery date extension, repair training, loaner fleet, and 4-to-5 passengers, and GSA properly responded with Amendment 1 and a Sept. 18, 2015 Response by Claudia Acfalle. There is a process for questions on specification ambiguity. That process was not followed by Triple J, and it is inequitable to all other bidders to give one bidder preferential treatment. Therefore, since no arguments of ambiguity were made, the specifications were clear and unambiguous and a rejection of all bids (“re-bid”) would be unwarranted.

Triple J argues that if they had been properly instructed that they could have submitted a mere plastic seat cover, they would have had the lowest bid. This “proper instruction” argument could be construed as an ambiguous specifications argument, and if so, then it should have been brought by Sept. 17, 2015. Even so, it is an inaccurate assertion because, as explained in the Rear Seat section above, CarsPlus is not merely providing a plastic seat cover. Triple J does explicitly argue ambiguity of specifications in its January 4, 2016 Comments on the Agency Report. Appellant cannot use the avenue of Comments to get over the hurdle of missing the explicit Sept. 17, 2015 question deadline.

V. GPD COMMITTEE DRAFTED SPECIFICATIONS

The last line of the Seats specifications section on page 30 states, “Rear seat, prisoner transport hard plastic”. No other specification is given for rear seats. Charlie Reynolds implies in his Nov. 11, 2015 letter that previous rear seat specifications apply to the current case. However, the current IFB contained no specific requirements for rear seat other than hard plastic. Triple J’s vehicle may meet all GPD requirements for previous IFBs, but that is not what was asked for here. Nowhere does this IFB state that it must meet previous IFB standards.

Triple J continues by arguing that, based on previous GPD vehicle bids which Triple J won, the seats in the current IFB must be easily-washed-down and be able to prevent contraband from being hidden in its crevices, or else it would hamper GPD’s function. To respond to this, we first look to 2 G.A.R., Div. 4, §4108 which states:

Publication of Specification Sources. The specifications contained in any invitation for bids or request for proposals, and any amendment thereto, for the procurement of supplies shall identify the person responsible for drafting the specifications and any persons, technical literature or manufacturer’s brochures relied upon by the responsible person in drafting the specifications.

Accordingly, Tab 10 of the Procurement Record (“Draft Specifications”) shows how an eight (8)- member committee in 2015, under the direction of the Chief of Police and pursuant to Special Order 15-072, conducted a police official vehicle specifications study in congruence with market research. It was in August of 2015 when the Committee obtained quotes from CarsPlus, AK, and Triple J as part of its market research. According to GPD’s market research, CarsPlus can comply. GSA put this specifications report information into the form of an IFB. This committee came up with the current specifications for seats and column shift, including the general specifications at the top of page 29 which states, “Note: All vehicles shall be certified by the vehicle manufacturer as “Police Package”, “Police Interceptor”, “Police Pursuit”, “Special Service Vehicle”, or “Suitable for Law Enforcement Service”. The vendor must be able to provide proof of designation for all vehicles delivered to GPD.” Members of this same committee, especially Lt. M.A.A. Arcangel, who was the chairperson of the specifications study, affirmed with GSA upon inquiry that the Dodge Durango met all specifications. This, in effect, deems the Durango as “equipment necessary to carry out the mission of the [Guam Police] Department”. 10 G.C.A. §77124. The “Police Package” aspect encompasses the wash-down

and contraband specifications implied (but not existent) by Triple J. Any other previous specifications implied by Triple J, even if previously required by GPD, were superseded by the more-recent 2015 Specifications Study which gave rise to the specifications that CarsPlus met. Approval by this Committee and by its chairperson, Lt. Arcangel, is evidence of full material conformity of CarsPlus' bid with the IFB. 5.G.C.A. §5201(g).

VI. COLUMN SHIFT

Triple J argues that a column shift transmission is not offered in the latest model of the Dodge Durango. Though the Nov. 16, 2015 email from GPD's Sean Untalan to GSA's Robert Kono says, "does not meet bid spec", this was later retracted and clarified in Untalan's Nov. 20, 2015 email after having reviewed the column shift clarification response. When GSA asked CarsPlus for clarification on this issue after the Nov. 11, 2015 protest, CarsPlus provided GPD and GSA with a brochure with images showing how the latest model of Durango comes with both a rotary e-shifter and a column shifter on the steering wheel- thus creating a central console area where there is abundant room for computers, radio equipment, and law enforcement tools. This "modern" and "advance[d]" rotary e-shifter "improves fuel economy up to 10%" according to the Nov. 18, 2015 correspondence between Claudia Acfalle and Joseph Crisostomo. The Nov. 20, 2015 email from Sean Untalan to Anita Cruz and Robert Kono showed that GPD was satisfied with the clarification and agreed that this is a column shift they found desirable and falling within what they considered for their scope of needs. *PR*, Tabs 4 and 13.

VII. MODIFICATION

Triple J argues that GSA has accepted a materially-altered bid in violation of procurement law. Under the statute, the purchasing agency can request clarification from the bidder. Clarification is not the same as modification. A modification is when a material term is changed which prejudices a party, whereas clarification is just the provision of supplemental details that broaden the understanding of the product already offered. In the instant case, nothing was changed about the Dodge Durango. A GSA and GPD exercise of due diligence through inspection of the updated model and brochure review revealed hard plastic seats and column

shifters and thus showed full compliance regarding both the seat and shift specifications. There was nothing incorrect in the brief response that CarsPlus will comply. This allegation of modification is totally unfounded because there is no proof that the actual CarPlus bid was changed.

VIII. OBJECTIONS TO AGENCY REPORT

Triple J argues that the Procurement Record was untimely and lacks a Certification of Record and Communication Log. They also argue that the Agency Report lacked a fully-responsive 2 G.A.R., Div. 4, §12105(g) statement and was not in chronological order and lacked tabs and indexing. First, to be thorough, the §5249(d) brochures and submittals are in the parties' respective bid sections (Procurement Record Tabs 3 and 4). There are no §5249(c) sound recordings to include. Chronological order is not mandatory. All §5249(d) Draft Specification materials are in Procurement Record Tab 10. The using agency's §5249(e) determination of need is embedded in its signaling GSA to continue with the bid process at several stages, and in the lack of any GPD request to cancel, rebid, or change specifications. Section 5249(a) and (b) communications and meeting participant information are in Procurement Record Tab 13. GSA thanks the OPA for leave to amend the Procurement Record, especially to include a log of such communications if the communications themselves are insufficient. Tab 1 of the Agency Report does contain a succinct statement answering appeal allegations. To summarize such statement, the seat specifications argued were not part of the instant IFB, and a due diligence clarification with the provider and using agency confirmed conformity and acceptance.

IX. FAULTY PRAYER

In the 4th paragraph of its prayer, Triple J requested costs and attorneys' fees regarding the bid preparation, the protest, and the appeal. 5 G.C.A. § 5425(h) states, in pertinent part:

[W]hen a protest is sustained, the protestant shall be entitled to the reasonable costs incurred in connection with the solicitation and protest, including bid preparation costs, *excluding attorney's fees*, if: (1) the protestant should have been awarded the contract under

the solicitation but was not; or (2) there is a reasonable-likelihood that the protestant may have been awarded the contract but for the breach of any ethical obligation imposed by Subarticle B of Article 11 of this Chapter or the willful or reckless violation of any applicable procurement law or regulation. The Public Auditor shall have the power to assess reasonable costs including reasonable attorney fees *incurred by the government*, including its autonomous agencies and public corporations, *against a protestant* upon its finding that the protest was made fraudulently, frivolously, or solely to disrupt the procurement process. *Emphasis added.*

Guam procurement law specifically disallows an award of attorney's fees for a non-government Appellant. If Triple J prevails, it may only be considered for reasonable costs.

Paragraph 3 of Triple J's prayer requests a re-bid. A re-bid is not in the best interests of the Territory. In addition to the grounds stated above based on lack of ambiguity, there has to be reason for the using agency, via Lt. Michael Arcangel's Sept. 17, 2015 email to Anita Cruz, without any GSA prodding for or against, to have held firm to its 120-day delivery date. To grant a re-bid would frustrate the intent behind this communication and would hinder GPD's and any using agency's ability to, in good faith, hold firm to its clearly-stated delivery date. A re-bid would also defeat the purpose of AK's bid rejection for failure to meet this delivery date. Furthermore, to grant this paragraph's prayer of brand name designations would frustrate the Territory's policy of maximum practical competition.

X. CONCLUSION

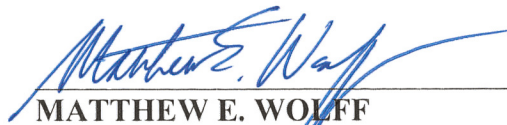
GSA does not dispute the Factual and Procedural Background stated in CarsPlus' Comments on the Agency Report. With all facts brought to light, Triple J's arguments are premature and are more appropriately lodged by GSA as a breach of contract claim if and when CarsPlus' products fail to conform upon delivery. The fact that CarsPlus' bid is in complete conformity eliminates the need to address Triple J's Alternate Bid argument. One cannot have a protest without a good-faith belief in one's allegations. 5 G.C.A. § 5003. With full knowledge of compliance on both main issues, that good faith belief is dispelled. Paying nine thousand eighteen dollars (\$9,018.00)ⁱ less per vehicle for a CarsPlus Dodge Durango that "improves fuel economy up to 10%" is in the best interests of the Territory. Triple J was actually the highest

bidder, higher than AK as well. There is no blunder or resulting unfair competition in a GSA award of a fully-compliant CarsPlus Dodge Durango bid. The using agency confirmed that the Durango's column shift fully complies (Procurement Record, Tab 9), and multiple witnesses verify that CarsPlus' seat fully complies by being integrated, hard plastic, and providing easy washdown and prevention of contraband hiding. Thus, it remains in the Territory's best interests to reject Triple J's bid and affirm GSA's intent to award CarsPlus.

Respectfully submitted this 12th day of January, 2016.

OFFICE OF THE ATTORNEY GENERAL
Elizabeth Barrett-Anderson, Attorney General

By:



MATTHEW E. WOLFF
Assistant Attorney General

ⁱ \$9,018.00: Per the Procurement Record, Tab 6, CarsPlus' bid is \$36,072.00 less than that of Triple J = \$9,018.00 less per car. CarsPlus' bid is also over \$30,000.00 less than that of its closest competitor (AK) = roughly \$8,000.00 less per car.