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THE OFFICE OF PUBLIC ACCOUNTABILITY

IN THE MATTER OF APPEAL OF) **APPEAL NO. OPA-PA-15-015**
)
TRIPLE J MOTORS,) **APPELLANT TRIPLE J MOTORS'**
) **OPPOSITION TO DISMISSAL**
Appellant.)
)
)
_____)

Appellant Triple J Motors ("Triple J"), through undersigned counsel and pursuant to the Notice of Hearing re Motions and Motion Briefing Schedule received via fax on January 13, 2016, hereby respectfully submits its Opposition to the arguments regarding dismissal that are set forth in Cars Plus LLC's ("Cars Plus") Comments to the Agency Report By Interested Party filed on January 4, 2016 [cited "Cars Plus' Mot."]¹ and in the General Services Agency's ("GSA") Rebuttal of Comments on Agency Report filed on January 13, 2016 [cited "GSA's Rebut."]²

¹ On January 15, 2016, Car Plus filed a document titled "Motion to Dismiss" that is "based on arguments presented in the Comments on Agency Report by Interested Party filed on January 4, 2016." (Cars Plus' Mot. to Dismiss (Jan. 15, 2016).)

² GSA's Rebuttal of Comments on Agency Report also contains many arguments that either should have been presented in its Agency Report, see 2 GAR 4 - § 12105(g), or are in response to Triple J's Comments on Agency Report. (See, e.g., GSA's Rebut. at 4 (discussing a comparison made in the Notice of Appeal regarding previously issued invitations for bids). Because such arguments are rather convoluted, or untimely presented, or superfluous to those clearly relating to dismissal, they are not addressed herein for the sake of brevity as this brief must oppose both Cars Plus' and GSA's obvious arguments to dismiss. Importantly, however, Triple J does not concede any comment or argument that is not addressed herein and looks forward to visiting all of the relevant issues presented in GSA's Rebuttal at the hearing on appeal.

INTRODUCTION

In their briefs, Cars Plus and GSA challenge the Office of Public Accountability's ("OPA") jurisdiction to decide the instant appeal and, essentially, argue for a summary disposition on the merits. As explained below, these challenges and arguments for dismissal are unavailing. Both Cars Plus and GSA's requests for dismissal should therefore be denied.

BACKGROUND

On September 10, 2015, GSA issued Invitation for Bid No. GSA-135-15 ("IFB"). (See Procurement Record ["PR"] at Tab 5.) The IFB states that it is for "SPORT UTILITY VEHICLE GASOLINE, FIVE (5) PASSENGER (LATEST MODEL)" with a destination of "GUAM POLICE DEPARTMENT." (*Id.*)

Three dealerships — Triple J, Atkins Kroll, and Cars Plus — submitted bids in response to the IFB offering the following vehicles and prices.

Dealership	Make	Model	Year	Price
Triple J	Ford	Police Interceptor	2016	\$58,795
Atkins Kroll	Chevy	Tahoe PPV	2016	\$57,726
Cars Plus	Dodge	Durango Special Service	2015	\$49,777

(See PR at Tabs 3, 4 & 14 (pp. 29 & 34).) Noticeably, two dealerships — Triple J and Atkins Kroll — offered 2016 models and one dealership — Cars Plus — offered a 2015 model.

Among other specifications, the IFB directed that the vehicle's transmission "[s]hall be a column shift" and directed for the vehicle's seats: "Rear seat, prisoner

transport hard plastic.” (PR at Tab 5, pp. 29-30.) For these specifications, the three dealerships' bids responded as follows.

Dealership	Column Shift Response	Prisoner Seat Response
Triple J	“Comply”	“Comply”
Atkins Kroll	“As Requested”	“As Requested”
Cars Plus	“8-Speed Automatic Transmission”	“Yes – Rear Plastic Covers”

(PR at Tabs, 3, 4 & 14 (pp. 29-30.) Noticeably, only two dealerships — Triple J and Atkins Kroll — provided unequivocal responses of compliance with these specifications.

GSA opened the three bid packages on September 25, 2015. (See PR at Tab 6.) Soon thereafter, Triple J requested to view the bid packages and, on October 5, its Commercial Sales Manager, Charlie Reynolds, wrote to GSA expressing concerns about the bids:

It seems Triple J may have been the only responsible bidder in the above procurement for police SUV's. Upon review of the bid packages it's apparent that Plus did not meet the Plastic Rear Transport Seat Requirement, page 30 in “Seat Specifications” If I'm not mistaken they offered a Plastic Seat Cover instead.

In addition, if I'm not mistaken AK did not comply with the 120 delivery time.

(PR at Tab 13 (letter from C. Reynolds to GSA (Oct. 5, 2015).)

Apparently, GSA also was concerned about the compliance of Cars Plus' bid because on October 19, it wrote to Cars Plus:

After reviewing your bid submittal, clarification is being requested in regards to the “SEATS” On the “Bidding On/Remarks it indicated “Yes, Rear Plastic Covers”.

Clarification is being requested on the following:

[] Yes, Rear seat, prisoner transport hard plastic; If yes, please concurred with your signature below.

(PR at Tab 13 (letter from GSA to Cars Plus (Oct. 19, 2015) (emphasis in original).)

Cars Plus “concurred” with its president’s signature. (*Id.*)

On November 4, GSA responded to the concerns about the bids raised by Triple J’s Mr. Reynolds.

. . . This is in reference to your memo received on October 05, 2015, regarding the above bid number GSA-135-15 for the Sports Utility Vehicles for Law. The requirement of delivery was 120 days upon receipt of purchase order.

In regards to the offer from Cars Plus for “Rear seat prisoner transport hard plastic”. Clarification was requested in regards to their offer which states “**YES**, rear plastic covers” and has stated that they are complying with the requirements of this bid.

If you requirement further clarification please contact Ms. Anita Cruz at 475-1713 or by facsimile at 475-1727 thank you and have a great day.

(PR at Tab 13 (letter from GSA to Triple J (Nov. 4, 2015) (emphasis in original).) Also on November 4, GSA notified Triple J and Atkins Kroll that their bids were rejected and that Cars Plus’ bid would be “recommended for award.” (PR at Tab 8.)

Seven days after learning that GSA intended to award the contract to Cars Plus, Triple J lodged a bid protest, which stated:

This letter is an official protest of the “Intent of Award” to Cars Plus LLC. the above procurement. This protest is based on our Oct 05, 2015 letter to GSA regarding the “Plastic Seat Covers” offered in the bid package submitted by Cars Plus LLC on Sept 25, 2015. Based on the response to this letter, it was apparent to us that the specifications were not met by Cars Plus.

Although Cars Plus may have eventually stated they will meet the specifications, their bid offer did not comply. With reference to Page 30 under SEATS: “Rear Seat, Prisoner Hard Plastic” — this is a special type of seat currently being utilized, and required by GPD for most of their patrol vehicles. This Prisoner Transport seat is an expensive piece of specialty equipment that replaces the entire rear standard vehicle seat.

Triple J has provided this seat type on this, and previous, bids, when required by GPD. This special rear police seat package is in no way comparable in function or cost to the "Plastic Seat Covers" provided for in the Car Plus bid package.

In addition to the above non-compliance, it is our understanding the Dodge Durango is not equipped with a "Column Shift" Transmission as required on page 29 under the transmission specifications. The Column Shift feature is unique to actual purpose built Police Vehicles like the Ford Interceptor. It is typically not available on less expensive general purpose Special Service Vehicles for Police use such as the vehicles provided by Cars Plus.

Considering the above information, we feel it is clear that Triple J was the only responsive bidder for this procurement and should be awarded accordingly.

(PR at Tab 1 (Protest (Nov. 11, 2015).)

Apparently concerned again about Cars Plus' bid, on November 18, GSA again sought clarification with a letter to Car Plus stating

Clarification is being requested on the following:

[] 8 Speed Automatic Transmission, Shall be column shift; If yes, please concurred with your signature below.

(PR at Tab 13 (letter from GSA to Cars Plus (Nov.18, 2015) (emphasis in original).)

Cars Plus "concurred" with its president's signature. (*Id.*) Then, on November 19, GSA sought confirmation from GPD that Cars Plus' clarification complied with the bid. (See PR at Tab 13 (email from A. Cruz to S. Untalan (Nov. 19, 2015).) GPD replied in the affirmative on November 20. (See *id.*)

After this second round of clarification from Cars Plus, on November 23, Triple J received from GSA a protest decision dated November 19 that curtly denied Triple J's protest. (See PR at Tab 2.) On December 9, Triple J timely filed the instant appeal with OPA.

ARGUMENT

With their requests for dismissal, Cars Plus and GSA argue that: OPA lacks jurisdiction to entertain the instant appeal; both the protest and the appeal are untimely; Cars Plus' bid satisfied the IFB's specifications; and, in any event, the award to Cars Plus should be affirmed or ratified in the best interests of the Territory. As explained below, each of these arguments lacks merit. Accordingly, the Public Auditor should deny Cars Plus and GSA's requests to dismiss and proceeding to a hearing on the merits.

A. CAR PLUS AND GSA'S POSITIONS REGARDING OPA'S JURISDICTION SHOULD NOT BE WELL TAKEN BECAUSE THEY ARE UNTIMELY

Cars Plus and GSA posit that OPA lacks jurisdiction to entertain the instant appeal. (See Cars Plus' Mot. at 3-4 (propounding arguments under the heading "The OPA Lacks Jurisdiction to Hear This Matter Because Triple J Failed to Submit a Timely Protest and or Appeal"); GSA's Rebut. at 2 ("Much like a 12(b)(1) situation in the Superior Court for lack of subject matter jurisdiction, the jurisdiction of the Public Auditor is limited to matters properly submitted to her.") Their positions should not be well taken because they are untimely.

Pursuant to the Procurement Regulations, "[a]ny objection or motion addressed to the jurisdiction of the Public Auditor . . . shall be filed within seven (7) days after the notice of Appeal is filed." 2 GAR 4 - § 12104(c)(9). Triple J filed its Notice of Appeal on December 9, 2015. (See Notice of Appeal.) Therefore, any challenge to OPA's jurisdiction should have been filed by December 23, 2015. See 2 GAR 4 - § 12104(c)(9); *id.* at § 12102(g) (providing for the computation of time). Notably, Cars Plus presented its challenge to OPA's jurisdiction on January 4, 2016, when it filed

its Comments on Agency Report. (See Cars Plus' Mot.) And GSA did not posit any jurisdiction challenge until it filed its Rebuttal to Comments on Agency Report on January 13, 2016. (See GSA's Rebut.) In other words, Cars Plus' and GSA's jurisdictional challenges are, respectively, twelve and twenty-one days too late.

B. IN ANY EVENT, TRIPLE J TIMELY FILED BOTH ITS PROTEST AND ITS APPEAL

Both Cars Plus and GSA argue that Triple J untimely protested and appealed. They are both wrong on both accounts.

1. Triple J Timely Protested Once It Became "Aggrieved"

Cars Plus maintains that Triple J untimely protested because it reviewed the bid packages and sent a letter to GSA on October 5, 2015 questioning whether Cars Plus met the bid specifications. (See Cars Plus' Mot. at 4.) And, according to GSA, Triple J is untimely either because the bid packages were opened on September 25, 2015 or because of Triple J's October 5 letter. (See GSA's Rebut. at 2.)

Both Cars Plus and GSA rely on 5 GCA § 5425(a) for their untimeliness arguments; both also selectively read § 5425(a). In its entirety, 5 GCA § 5425(a) provides:

§ 5425. 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.

Cars Plus and GSA cherry-pick the phrase "knows or should know of the facts giving rise" to the protest and conveniently ignore the term "aggrieved person" that precedes this phrase. To be sure, Triple J knew the contents of Cars Plus' bid

submission when Triple J sent a letter to GSA on October 5, 2015, and probably could have known the bid submissions' contents when the bids were made public on September 25. Most importantly, however, *Triple J did not know it was "aggrieved" by Cars Plus' questionable submission until November 4 when GSA informed Triple J that Cars Plus clarified the prisoner transport seat in its bid and would be awarded the contract.* (See PR at Tab 8 (Notice of Bid Status faxed from GSA to Triple J on Nov. 4, 2015); *id.* at Tab 13 (letter faxed on Nov. 4, 2015 from GSA to Triple J re Cars Plus' clarification of prisoner transport seat).) Furthermore, it appears that up until November 20, 2015, GSA was not even certain Cars Plus would be awarded the contract — thereby rendering Triple J aggrieved — because GSA had continued to seek clarification that Cars Plus' bid was in compliance with the IFB. (See PR at Tab 13 (emails between S. Untalan and A. Cruz re clarification on compliance of column shifter (Nov. 19-20, 2015)); *id.* (fax from GSA to Cars Plus re clarification on prisoner transport seat on Oct. 19, 2015).) In other words, given that Atkins Kroll's bid was rejected,³ GSA could have awarded the contract to Triple J up to and until November 20 based on Cars Plus' failure to comply with the bid specifications.

In short, while it was aware of the contents of Cars Plus' bid submission in October, Triple J had no reason to know that GSA would honor Cars Plus' questionable bid until November 4, 2015 when GSA informed that Cars Plus clarified its bid and would be awarded the contract. And within seven days of receiving this information

³ In its October 5 letter, Triple J highlighted Atkins Kroll's non-compliance with the 120-day delivery time. (See PR at Tab 13.) AK's bid was rejected due to, inter alia, its failure to comply with the delivery requirement. (See PR at Tab 8 (Notice of Bid Status faxed to AK.) Given that AK's pricing was the second lowest, this further shows that Triple J could not have known that it was "aggrieved" until it learned that GSA intended to award the contract to Cars Plus and that Atkins Kroll's bid was rejected.

from GSA, Triple J filed its protest (see PR at Tab 1) — i.e., well within fourteen days of knowing that it was actually “aggrieved” under 5 GCA § 5425(a). Accordingly, Triple J’s protest was timely.

2. Triple J Timely Appealed the Denial of Its Timely Protest

Like with their inaccurate characterization of the timing of Triple J’s protest, Cars Plus and GSA both insist that Triple J’s appeal is untimely because GSA responded to Triple J’s October 5 letter on November 4 and Triple J filed its appeal on December 9. (See Cars Plus’ Mot. at 4; GSA’s Rebut. at 2-3.) Again, Cars Plus and GSA are wrong.

First, as discussed above, Triple J timely filed its protest on November 11 — i.e., within fourteen days of being “aggrieved” by GSA informing of its intent to award the contract to Cars Plus, despite Cars Plus’ questionable bid.

Second, as Cars Plus states, Triple J’s October 5 letter is aptly described as a “complaint” to GSA about Cars Plus’ bid submission. (Cars Plus’ Mot. at 4.) The Procurement Regulations distinguish a “complaint” from a “protest.” *Compare* 2 GAR 4 - § 9101(b) (“Complaint to Procurement Officer”) *with id.* at § 9101(c) (“Filing of Protest”); *see In re Kim Brothers Const. Corp.*, Appeal No. OPA-PA-11-017, Dec. & Order re Purchasing Agency’s Mot. to Dismiss (Feb. 22, 2012) at 3-6 (analyzing the difference between a complaint and a protest under the Department of Education’s procurement regulations, which mirror those governing the instant matter). And, contrary to Cars Plus’ and GSA’s assertions, GSA’s November 4 letter responding this complaint was in no way a “protest decision” from which Triple J could have appealed. As the Public Auditor explained in *In the Matter of Kim Brothers Const. Corp.*:

GDOE's October 27, 2011 letter was GDOE's response to Appellant's written complaint and not a protest decision. Generally, if GDOE's Superintendent is unable to resolve a protest by mutual agreement, the Superintendent shall promptly issue a decision in writing stating the reasons for the actions taken and informing the protestant of its right to administrative and judicial review. Chapter IX, Section 9.2.7, GDOE Procurement Regulations. Here, GDOE's October 27, 2011 letter is from GDOE's Supply Management Administrator and not GDOE's Superintendent. Further, said letter expressly states that it received Appellant's letter of complaint, and the letter does not include the mandatory language for procurement protest decisions advising the protestor of its right to administrative and judicial review. Thus, the Public Auditor finds that GDOE's October 27, 2011 letter is not a protest decision and is in fact letter responding to Appellant's written complaint.

Appeal No. OPA-PA-11-017, Dec. & Order re Purchasing Agency's Mot. to Dismiss (Feb. 22, 2012) at 4-5.

Here, like *In the Matter of Kim Brothers Construction* where the agency's response was not a protest decision, GSA's November 4 letter states that it is responding to Triple J's "memo" regarding the IFB and states that Cars Plus clarified compliance with the prisoner transport seat specification. (PR Tab 13 (letter to Triple J from GSA (Nov. 4, 2015).) And, most notably, GSA's November 4 letter "does not include the mandatory language for procurement protest decisions advising the protestor of its right to administrative and judicial review." *In the re Kim Brothers Construction*, Appeal No. OPA-PA-11-017, Dec. & Order re Purchasing Agency's Mot. to Dismiss (Feb. 22, 2012) at 4.

Accordingly, even assuming arguendo that Triple J's October 5 letter was a protest — which it was not — Triple J could not have appealed from GSA's November 4 letter because this letter was not a protest decision. Therefore, Triple J timely and rightfully appealed when, on November 23, it received GSA's decision on its timely protest and filed its notice of appeal on December 9. See 5 GCA § 5425(e) ("A

decision under Subsection (c) of this Section [i.e., a protest decision] including a decision there under regarding entitlement to costs as provided by Subsection (h) of this Section, may be appealed by the protestant, to the Public Auditor within fifteen (15) days after receipt by the protestant of the notice of decision.”).

3. Triple J Timely Raised the Column Shifter Issue

Cars Plus and GSA argue that the column shift issue is untimely because Triple J did not mention the column shifter in its October 5 letter. (See Cars Plus' Mot. at 6; GSA's Rebut. at 7.) Their arguments lack merit. As discussed above, Triple J timely protested on November 11, and one of the issues raised in its timely protest was the column shifter. (See PR at Tab 1.)

C. CARS PLUS' BID WAS NON-RESPONSIVE BID AND TRIPLE J SHOULD HAVE BEEN AWARDED THE CONTRACT AS THE ONLY RESPONSIVE BIDDER

Cars Plus and GSA both insist that the instant appeal should be dismissed because, after two rounds of clarifications, Cars Plus will ultimately supply the item specified in the IFB. Such insistence is misguided because the ends cannot justify the means. In other words, Cars Plus' bid was non-responsive and should have been rejected outright by GSA.

First, Cars Plus' bid was non-responsive because this bid materially deviated from the IFB by offering a 2015 model vehicle instead of a 2016, which is the “latest model.” And, second, because Cars Plus' bid twice required GSA to seek clarification, the bid was non-responsive. In sum, Cars Plus' bid submission should have been rejected and, given that Atkins Kroll's bid was rejected, Triple J should have been awarded the contract as the only responsive bidder.

1. *Cars Plus' Non-Responsive Bid Materially Deviated from the IFB and Required Clarifications on Two Key Specifications*

As Cars Plus points out (Cars Plus' Mot. at 4), a "Responsive Bidder means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids." 5 GCA 5201(g). Both Cars Plus and GSA argue that Cars Plus' bid was responsive simply because it will ultimately comply with the IFB's specifications. (See Cars Plus' Mot. at 4-6; GSA's Rebut. at 6-7.) Both are incorrect.

In fact, Cars Plus' bid was non-responsive in, at least, two respects: (1) it offered a 2015 model vehicle when the IFB called for the "Latest Model" and (2) GSA had to twice seek clarification on two of the specifications — the prisoner transport seat and the column shifter.⁴

a. The "Latest Model" Offered by Cars Plus Is One Year Older Than the Model Offered by Triple J

The IFB, issued in mid-September 2015, stated that GSA was seeking bids for the "Latest Model" of a Sport Utility Vehicle for the Guam Police Department ("GPD"). (See PR at Tab 5.) Triple J's bid submission offered a 2016 model. (See PR at Tab 3.) Atkins Kroll's bid submission offered a 2016 model. (See PR at Tab 14.) Cars Plus' bid submission, however, offered a 2015 model. (See PR at Tab 4.) Given that GSA issued the IFB in the ninth month of 2015 for the "latest model" and called for a 120-day delivery — i.e., approximately February 2016 — and given that new vehicle models are generally released at the end of the year, Cars Plus offering a 2015 model as the "latest model" for a 2016 delivery cannot be deemed responsive. Indeed, the vehicle offered

⁴ Curiously, GSA asserts that "[u]nder the statute, the purchasing agency can request clarification from the bidder" (GSA's Rebut. at 7), but fails to cite "the statute" that provides as such.

by Cars Plus would be, at least, one year old before it was even delivered to GPD. A one-year-old vehicle is far from the "latest model."

What is more, Cars Plus' deviation from the "latest model" no doubt impacted the difference in pricing between the bidders as Triple J's and Atkins Kroll's bids offering 2016 models were about \$8,000 higher than Cars Plus' bid offering a 2015 model. As Hawaii's Supreme Court observed:

"Where a government contract is awarded under competitive bidding, 'deviations [from advertised specifications] may be waived by the contracting officer provided they do not go to the substance of the bid or work an injustice to other bidders. A *substantial deviation* is defined as one which affects either the price, quantity, or quality of the article offered.' . . .

. . . .

. . . The requirement that a bid be responsive is designed to avoid unfairness to other contractors who submitted a sealed bid on the understanding that they must comply with all of the specifications and conditions in the invitation for bids, and who could have made a better proposal if they imposed conditions upon or variances from the contractual terms the government had specified."

Southern Foods Grp., L.P. v. Haw. Dep't of Educ., et al., 974 P.2d 1033, 1046 (Haw. 1999) (quoting *Toyo Menka Kaisha, Ltd. v. United States*, 597 F.2d 1371, 1376-77 (Ct. Cl. 1979)) (first alteration and emphasis in original; internal citations omitted).

Here, there is little doubt that Cars Plus offering a 2015 model for the IFB's "latest model" specification effected the price it offered and thereby resulted in unfairness to the other bidders who offered a 2016 model — namely, Triple J. In short, Cars Plus' material deviation rendered its bid non-responsive and unfair.

b. Twice, GSA Had to Seek Clarification Because Cars Plus' Bid Inadequately Responded to Key Specifications

In addition to offering a 2015 model as the "latest model," Cars Plus' bid was also non-responsive in that two key specifications in the IFB could not be determined from the contents of Cars Plus' bid package. Importantly, GSA undoubtedly shared Triple J's concerns regarding Cars Plus' bid submission because GSA *twice* contacted Cars Plus seeking clarification on whether its offer actually conformed to the IFB. See *Tel-Instrument Elecs. Corp. v. United States*, 56 Fed. Cl. 174, 177-78 (2003) *aff'd*, 87 F. App'x 752 (Fed. Cir. 2004) (citations omitted) ("Clarifications or corrections after the bids are opened do not convert a non-responsive bid into a responsive one."); *Honeywell, Inc. v. United States*, 870 F.2d 644, 648-49 (Fed. Cir. 1989) (citations omitted) ("Responsiveness is determined by reference to the bids when they are opened.").

Regarding Cars Plus's response to the prisoner transport seat specification — "Yes – Rear plastic covers" (PR at Tab 4) — this response obviously was inadequate because, when Triple J questioned it prior to the Notice of Intent to Award (see PR at Tab 13 (letter from C. Reynolds to GSA (Oct. 5, 2015))), GSA could not determine from the submission whether Cars Plus' bid met the specification. Rather, GSA had to seek clarification from Cars Plus. (See PR at Tab 13 (letter from GSA to Cars Plus (Oct. 19, 2015) (requesting clarification that prisoner transport seat met the IFB's specification).)

Then, after GSA notified the bidders that Cars Plus would be awarded the contract and after Triple J alerted of Cars Plus' inadequate response to the column shift specification — "8 Speed Automatic Transmission" — (see PR at Tab 1 (Protest (Nov.

11, 2015); (PR at Tab 8 (rejections of bids and notices of intent to award (Nov. 4, 2015)), GSA again could not discern from Cars Plus' bid whether a material specification was met and GSA was required to again seek clarification (see PR at Tab 13 (letter from GSA to Cars Plus (Nov.18, 2015) seeking clarification on the column shift)). In fact, GSA initially agreed that Cars Plus' bid submission did not meet column shifter specification (see PR at Tab 13 (email from S. Untalan to R. Kono (Nov. 16, 2015) ("it does not meet the bid spec"))) and was required to "research" the issue after it had already declared that Cars Plus would be awarded the contract (*id.* (emails between S. Untalan and A. Cruz (Nov. 19-20, 2015))).

A truly responsive bid should not require the offeree to seek clarification from the offeror — let alone, twice require clarification to be sought. In short, even assuming arguendo that it can ultimately satisfy the IFB's specifications, Cars Plus' bid was non-responsive and therefore should have been rejected by GSA. See *Northeast Const. Co. v. Romney*, 485 F.2d 752, 759-60 (D.C. Cir. 1973) ("Questions of the 'responsiveness' of the bid . . . relate to 'conformity with the invitation' and are generally not curable after bid opening.").

Accordingly, Cars Plus' bid was non-responsive because it did not "conform in all material respects" to the IFB, 5 GCA § 5201(g), and should have been rejected.

D. PURCHASING OLD VEHICLES AND CONDONING THE PRACTICE OF ACCEPTING NON-RESPONSIVE BID SUBMISSIONS ARE NOT IN THE BEST INTERESTS OF THE TERRITORY

Both Cars Plus and GSA posit that the award to Cars Plus should proceed in the best interests of the Territory. (See Cars Plus' Mot. at 6-7; GSA's Rebut. at 4.) Such a position cannot be condoned by OPA.

In part, 5 GCA § 5452 provides:

(a) If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(1) if the person awarded the contract has not acted fraudulently or in bad faith:

(A) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Territory; or

(B) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.

5 GCA § 5452(a). Contrary to the beliefs of Cars Plus and GSA, the instant case does not present a situation in which the award can be affirmed or ratified under 5 GCA § 5452(a).

At the outset, and to be very clear, Triple J is not asserting that either Cars Plus or GSA acted fraudulently or in bad faith during the IFB process. Nonetheless, the Procurement Record demonstrates that awarding the contract to Cars Plus is not in the Territory's best interest.

First, as discussed above, the vehicles offered by Cars Plus are 2015 models rather than 2016. How could it be in the Territory's best interest for its Police Department to purchase vehicles that will be one-year old before any officer even sits behind the wheel?

Second, Guam's procurement laws cannot condone accepting offers that require the purchasing agency to multiple times seek clarification on the bid submission. Such a practice not only places an unreasonable and unnecessary burden on the agency, it also delays the procurement process and undermines the mandates for confidence and fairness. See 5 GCA § 5001(b) (providing for the "Purposes and Policies" of the

Procurement Code). Rather, the procurement process demands that offers be assessed and accepted only on the contents of the bid submission. And should a submission be inadequate, it should be rejected.

Accordingly, accepting Cars Plus' offer of a one-year-old vehicle with a bid that required GSA to expend additional resources is not in the best interests of the Territory. Therefore, the award to Cars Plus cannot be affirmed or ratified.

CONCLUSION

For the foregoing reasons, Cars Plus' and GSA's arguments for dismissal lack merit. The Public Auditor should therefore deny their requests to dismiss the instant appeal.

Respectfully submitted this 22nd day of January, 2016.

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By:


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