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THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Matter of Appeal of)	APPEAL NO. OPA-PA-13-011
)	
Triple J Motors,)	APPELLANT TRIPLE J MOTORS
)	COMMENTS ON THE AGENCY
Appellant.)	REPORT AND MOTION TO COMPEL
)	PRODUCTION OF ENTIRE
)	PROCUREMENT RECORD
)	
)	
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)	

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 respectfully submits its comments to the Agency Report filed by the General Services Agency (hereinafter "GSA") in OPA-PA-13-011. Triple J further moves the OPA for an order compelling the production of the entire Procurement Record of IFB Bid No. GSA-097-13.

A. FACTUAL BACKGROUND

On June 18, 2013, Triple J submitted its timely bid in response to IFB Bid No. GSA-097-13 for Police Patrol Vehicle, 2013-2014 Interceptors.

On July 17, 2013, GSA awarded Triple J the contract and called Triple J to pick up Purchase Order P136A05480 for eight (8) units of customized police interceptor

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vehicles. That same day, Triple J picked up this confirmed and signed Purchase Order. Also that same day, GSA called Atkins Kroll and Cars Plus, the two other bidders for GSA-097-13, to pick up their bid statuses, which would notify them that their bids were unsuccessful and that the contract was awarded to Triple J.

Unbeknownst to Triple J at the time, on July 23, 2013, Cars Plus, an unsuccessful bidder, wrote a letter to Claudia S. Acfalle, GSA's Chief Procurement Officer, alleging that on June 28, 2013, Cars Plus was determined to be the lowest and most responsive bidder, and responding to its Bid Status, received on July 18, 2013, which rejected Cars Plus' bid due to non-compliance with bid specifications. Cars Plus subsequently submitted a formal protest to GSA on July 30, 2013, thirteen (13) days after GSA awarded the contract to Triple J. GSA did not acknowledge receipt of Cars Plus' protest until August 16, 2013, approximately one month after awarding the contract to Triple J Motors.

Triple J did not learn about Cars Plus' protest until July 30, 2013, which is when GSA requested that Triple J "stop all activities in relation to fulfilling this bid until the resolution of the protest." Yet the following day, GSA called Triple J to pick up Purchase Order P136A05640 for the purchase of two (2) additional police interceptor vehicles.

Meanwhile, between the time Triple J received a second and separate Purchase Order P136A05480 and the time Triple J received GSA's notice of cancellation on August 8, 2013, several developments had already ensued. On July 17, 2013, Triple J, based on the award, informed Ford Motor Company of its award and tendered a binding allocation in order to secure a slot in the production line for the purchase of

eight (8) units of customized police interceptor vehicles, committing Triple J Motors to the purchase of these vehicles. Triple J finalized this allocation on July 31, 2013, the same day GSA called Triple J to pick up the second Purchase Order and one week before GSA's notice of cancellation. By the time GSA sought to notify Triple J that it was cancelling Triple J's award of the contract, Triple J had already finalized its binding allocation and orders of the police interceptor vehicles from Ford Motor Company.

As early as August 8, 2013, the same day that GSA issued its notice of cancellation, Triple J wrote GSA to express that it considers GSA's cancellation a breach of contract and to request the details of Cars Plus' protest. Rather than providing Triple J all the details of Cars Plus' protest, GSA provided one of the grounds of the protest in a letter to Triple J on August 12, 2013. Four days later, GSA wrote Cars Plus to acknowledge receipt of its protest letter and to notify Cars Plus that its protest had merit.

Triple J did not have a chance to review the full details of Cars Plus' protest until it was submitted as part of the Procurement Record on October 3, 2013. Notwithstanding, Triple J submitted a letter to GSA on September 10, 2013 to follow up on its objections to GSA's actions. It was not until the following day, on September 11, 2013, that GSA advised Triple J of its rights to seek administrative or judicial review. The very next day, GSA placed an advertisement in Marianas Variety to rebid for the contract.

As late as September 19, 2013, GSA notified Triple J that it had formally cancelled Triple J's two Purchase Orders, more than two months after Triple J made binding arrangements with Ford Motor Company for these cars to be built.

Triple J filed a Notice of Appeal with the OPA, appealing GSA's decision on September 11, 2013 to deny Triple J's objection to GSA's actions on the grounds that this objection constituted an untimely protest.

B. ANALYSIS

GSA submitted an incomplete Procurement Record on October 3, 2013. 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 Triple J, including emails exchanged between Anita Cruz and Charlie Reynolds from August 3, 2013 to August 5, 2013.

On October 10, 2013, GSA supplemented the Procurement Record with the Agency Report. The Agency Report is also flawed and incomplete. Pursuant to 2 GAR § 12105(e), GSA was to provide a copy of any relevant documents, including a contract if one has been awarded. In this case, GSA asked Triple J to pick up the first of two signed and confirmed Purchase Orders, P136A05480, and yet a true copy of this Purchase Order is absent from Tab 7 ("Copy of Purchase Order") and in its stead, conveniently, is only the second Purchase Order from July 29, 2013.

Moreover, 2 GAR § 12105 mandates a 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, showcases a plethora of 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 bald assertion that Triple J filed an untimely protest and that OPA does not have jurisdiction over this matter.

According to GSA's Agency Report, Triple J filed its appeal "after the 15 day period after notification of the decision of the protest and that the government was going to re-bid this procurement." As Triple J clearly explained in its Notice of Appeal, Triple J objected to GSA's determination in a contract controversy, and under 5 GCA § 5427, GSA was required to issue a written decision on such an determination stating the reasons for the action taken and informing the contractor of its administrative or judicial rights. GSA first informed Triple J of its administrative or judicial rights on September 11, 2013. On September 25, 2013, before expiration of the 15-day period after valid notification was provided, Triple filed a timely appeal to the OPA. Nonetheless, and more importantly, Triple J also clearly explained that, in accordance with 2 GAR § 12301, the appropriate time limit for an appeal is 60 days after receipt of a decision on a contract controversy, not 15 days.

Triple J also finds that the Agency Report mischaracterizes Triple J's appeal by stating that its remedies are for a "breach of contract," which is "not in the jurisdiction of the OPA." Under 2 GAR § 12104(c)(9), any objection or motion addressed to the jurisdiction of the Public Auditor must be promptly filed within seven (7) days of the filing of the Notice of Appeal. This challenge to the OPA's jurisdiction is therefore untimely.

Of greater import, however, is that such a claim is baseless and defiant of the black letter of the law. Triple J seeks for its contract to be ratified and affirmed. Title 5 GCA § 5452 explicitly provides for the remedies after an award of a contract, including ratification and affirmance. Likewise, this claim in the Agency Report stands in direct disregard of the language of the regulation that deals with this issue, so it is worth inserting that language here plainly and conspicuously:

§ 12301. Appeal to the Public Auditor of *Contract and Breach of Contract Controversies*.

(a) Pursuant to 5 GCA § 5706, Appeals shall be made in writing to the Public Auditor within 60 days after receipt by an aggrieved contractor of a decision on a *contract or breach of contract controversy* pursuant to 5 GCA § 5427; within 60 days of the failure to render a timely decision as provided in 5 GCA § 5427; or within 60 days of the time established by the parties for a decision to be rendered. Disputes having to do with money owed to or by the government of Guam shall not be submitted.

2 GAR § 12301 (emphasis added).

This language speaks for itself.

Respectfully submitted this 21 day of October, 2013.

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By: 
MATTHEW S. KANE