

**RECEIVED**

OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

DATE: 10-24-13

TIME: 2:23 AM PM BY: del

FILE NO OPA-PA: 13-012

**CABOT  
MANTANONA LLP**  
Edge Building, Second Floor  
929 South Marine Corps Drive  
Tamuning, Guam 96913  
Telephone: (671) 646-2001  
Facsimile: (671) 646-0777

**THE OFFICE OF PUBLIC ACCOUNTABILITY**

In the Matter of Appeal of	)	<b>APPEAL NO. OPA-PA-13-012</b>
	)	
Triple J Motors,	)	<b>APPELLANT TRIPLE J MOTORS</b>
	)	<b>COMMENTS ON THE AGENCY</b>
Appellant.	)	<b>REPORT AND MOTION TO COMPEL</b>
	)	<b>PRODUCTION OF ENTIRE</b>
	)	<b>PROCUREMENT RECORD</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 respectfully submits its comments to the Agency Report filed by the General Services Agency (hereinafter "GSA") in OPA-PA-13-012. Triple J further moves the OPA for an order compelling the production of the entire Procurement Record of IFB Bid No. GSA-172-13.

**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

*ORIGINAL*

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 for OPA-PA-13-011 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.

The following day, on September 20, 2013, Ford Motor Company wrote two letters to Triple J, one confirming that the warranty coverage for the 2014 model year Police Interceptor Sedans is identical to the 2013 warranty coverage, and the other confirming that Ford Motor Company was unable to cancel the orders made for the customized police interceptor vehicles and that its policy requires Triple J Motors to sell these vehicles to the Guam Police Department or an approved Guam Law Enforcement Agency, not to retail customers or wholesalers.

On September 25, 2013, Triple J formally protested the opening of IFB No. GSA-172-13 for the purchase of 2013-2014 police interceptor vehicles. GSA denied this protest on October 1, 2013, erroneously determining that the protest lacked merit on the grounds that Triple J Motors failed to pursue its administrative remedies to appeal GSA's cancellation of GSA-097-13 after an award was made and a binding contract was formed, and advised Triple J Motors of its right to pursue any administrative or judicial review authorized by law.

Triple J filed a Notice of Appeal with the OPA, appealing GSA's decision on October 1, 2013 to deny Triple J's protest of the bid opening of Bid No. GSA-172-13.

## **B. ANALYSIS**

GSA submitted an untimely and incomplete Procurement Record on October 15, 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 15, 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 two signed and confirmed key Purchase Orders, P136A05480 and P136A05640, and yet true copies of these Purchase Orders, which evidence the contractual relationship of the parties, are absent from the Agency Report, excluding the copies provided by Triple J as exhibits appended to its formal protest letter.

Despite the incomplete 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 plainly erroneous position that Triple J filed an untimely protest.

According to GSA's Agency Report, Triple J's "appeal is untimely as they had 14 days to file an appeal and failed to do so." Triple J contends with and is confused by GSA's position. Pursuant to 5 GCA § 5425(e), a decision made by the purchasing agency on a formal protest in accordance with § 5425(e) may be appealed to the Public Auditor within fifteen (15) days after the protestant receives that decision. Triple J received GSA's decision on its formal protest on October 1, 2013, and appealed to the OPA the very next day on October 2, 2013, well within the 15-day limit.

Triple J's protest of the rebidding stemmed from that fact that it became an aggrieved contractor and prospective bidder on September 19, 2013 when it learned that its two purchase orders were cancelled. On September 25, 2013, Triple J filed its timely protest within fourteen (14) days after receipt of this notice of cancellation, and took careful measures to do so before the opening of the new bid.

Triple J also finds that the Agency Report mischaracterizes Triple J's appeal by stating that it is attempting to bring in the cancellation of GSA Bid No. 097-13 as the basis of their appeal. Rather, the crux of Triple J's appeal in OPA-PA-13-012 is that the rebidding is injurious to Triple J, damaging to the procurement process, and antithetical to the best interests of the Territory. As Triple J has already stated in its protest letter, Triple J's bid prices have already been exposed and its competitors can now strategically find a way to underbid Triple J for this procurement. Moreover, GSA was careless with Triple J's binding agreements and decided to cancel its purchase orders on August 31, 2013 and then waited almost three weeks to notify Triple J of this decision. This marks the latest sequence in a pattern of misdirection, obfuscation, and mishandling on the part of GSA. In light of these careless, deliberately indifferent, and disingenuous actions, and the Guam Police Department's cry for swift action to assuage its shortage of functional police interceptor vehicles at a time when crime is on the rise, Triple J chose to file a timely protest and a subsequent appeal of GSA's denial of its protest to seek immediate relief from this unnecessary charade.

This Agency Report provides Triple J with its first glimpse of the gravity of injury this rebidding will cause. For example, the new specifications now only require that certification of warranty and its limitations are provided upon delivery of the vehicle, rather than as part of the bid submittal. This comes after Triple J has shown that it was able to comply with this requirement at the time of bid submittal, yet Cars Plus was unable to do so. The specifications should not pander to the needs of one bidder over the other or drafted in fear of a potential protest from an unsuccessful bidder; instead, they should be drafted with the best interests of the Territory in mind.

This new specification may also lead to potential delay, as Cars Plus sought and obtained GSA's approval to change the required delivery date from 90 days to up to 180 days upon Receipt of the Purchase Order, as reflected in Amendment #2. Query: Should Cars Plus be the winning bidder for IFB Bid No. GSA-172-13, this means that after a whole new bidding process, and up to 180 days after Cars Plus receives the Purchase Orders, GSA could learn that upon delivery Cars Plus failed to submit the required certification. Accordingly, this change to the specifications does less to protect the interests of the Territory and does more to produce more and unnecessary delay.

While Cars Plus seeks to delay this process, Triple J has been ready, willing, and able to fulfill its promises under its contract, and to provide the Guam Police Department with the most up-to-date police interceptor vehicles that fit the specifications of the original bid, GSA-097-13. Upon learning that its purchase orders were cancelled, after repeatedly informing GSA that it could not cancel its orders made pursuant to GSA's signed and confirmed purchase orders, Triple J brings this appeal to look out for the Territory while GSA turns a callous blind eye toward the damage it inflicts upon the people of Guam. In addition, Triple J brings this appeal to protect the integrity of the procurement process. GSA's careless conduct is hurting local businesses and citizens on Guam who are bidding for government contracts, conduct that is offensive to the basic tenet of Guam procurement law: to secure the best price on quality products for the Government of Guam through fair and efficient procedures.

Respectfully submitted this 24th day of October, 2013.

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

By: Matthew S. Kane  
**MATTHEW S. KANE**