



OFFICE OF THE PUBLIC AUDITOR
Doris Flores Brooks, CPA, CGFM
Public Auditor

September 26, 2013

Claudia S. Acfalle
Chief Procurement Officer
General Services Agency
P.O. Box 884
Hagatna, Guam 96932
VIA FACSIMILE: (671) 472-4217

Re: Notice of Receipt of Appeal – OPA-PA-13-011

Dear Ms. Acfalle,

Please be advised that Triple J Motors filed an appeal with the Office of Public Accountability (OPA) on September 25, 2013 regarding the General Services Agency (GSA) procurement actions related to GSA-097-13 for Police Patrol Vehicle 2013-2014 Interceptors. OPA has assigned this appeal case number OPA-PA-13-011.

Immediate action is required of GSA pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA's office and on its website at www.guamopa.org. The notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeals. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(c)(3), please submit one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated, to OPA by **Thursday, October 3, 2013**, five work days following receipt of this notice of appeal; and one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Div. 4, Chap. 12, §12105, by **Wednesday, October 16, 2013**, twenty calendar days following receipt of this notice of appeal.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to Triple J Motors. OPA respectfully asks that GSA provide one original and two copies of the procurement record as the Guam Procurement Law and Regulations require only one copy. The three procurement record copies requested by OPA are

distributed as follows: Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Joy Bulatao at 475-0390 ext. 216, or jbulatao@guamopa.org, should you have any questions regarding this notice.

Sincerely,



Rodalyn Gerardo, CIA, CGFM, CPA, CGAP, CGMA
Audit Supervisor

Enclosure: Notice of Appeal – OPA-PA-13-011

Cc: Rawlen M.T. Mantanona, Esq. and Matthew S. Kane, Esq., Attorneys for Triple J Motors

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

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 09/25/13
TIME: 4:25 AM PM BY: JB
FILE NO OPA-PA: B-011

THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Matter of Appeal of)
Triple J Motors,)
Appellant)
_____)

NOTICE OF APPEAL

Docket No. OPA-PA _____

I. APPELLANT INFORMATION

Name: Triple J Motors

Mailing Address: C/O CABOT MANTANONA LLP
EDGE BUILDING, SECOND FLOOR
929 S. MARINE CORPS DRIVE
TAMUNING, GUAM 96913

Business Address: Triple J Motors
470 N. Marine Corps Dr.
Tamuning, Guam 96931

Daytime Contact No.: (671) 646-2001

Contact Person:
Rawlen Mantanona, Esq.
Matthew Kane, Esq.

II. APPEAL INFORMATION

- (A) Purchasing Agency: General Services Agency o/b/o Guam Police Department.
- (B) Identification/Number of Procurement, Solicitation, or Contract: IFB NO.: GSA-097-13 for Police Patrol Vehicle, 2013-2014 Interceptors.
- (C) Decision being appealed was made on September 11, 2013 by Claudia S. Acfalle, Chief Procurement Officer, GSA, and received by Triple J Motors the same day.
- (D) Appeal is made from: Decision on Contract or Breach of Contract Controversy
- (E) Names of Competing Bidders, Offerors, or Contractors known to Appellant:
 - (i) Atkins Kroll, Inc.
 - (ii) Cars Plus

A. STATEMENT OF GROUNDS FOR APPEAL

1. This Appeal arises out of the General Services Agency ("GSA") decision on Triple J Motors' breach of contract controversy. Specifically, Triple J Motors appeals GSA's determination that Title 2 Guam Administrative Rules and Regulations ("GAR") Section 9101(c)(1) precluded Triple J Motors from challenging GSA's decision to cancel IFB Bid Number GSA-097-13.¹ Triple J's completed IFB form² is attached as Exhibit "1".

2. On June 13, 2013, GSA amended the bid opening time from 10:00am on June 18, 2013 to 9:00am on June 28, 2013. The Amendment is attached as Exhibit "2".

3. On July 17, 2013, GSA awarded Triple J Motors the contract and called Triple J Motors to pick up Purchase Order P136A05480 for eight (8) units of customized police interceptor vehicles. Triple J Motors picked up this confirmed and signed Purchase Order on July 17, 2013. Purchase Order P136A05480 is attached as Exhibit "3".

¹ In some of the correspondence between Triple J Motors and GSA, both parties incorrectly referred to Bid Number GSA-092-13 instead of Bid Number GSA-097-13. This is believed to be a typographical error.

² Triple J Motors' completed IFB form acts as their bid for GSA-097-13.

4. After receiving Purchase Order P136A05480 on July 17, 2013, Triple J Motors informed Ford Motor Company of the award and initiated the process of tendering 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.

5. By letter dated July 30, 2013 and received July 31, 2013, GSA informed GSA that Cars Plus filed a protest on the bid and requested that GSA stop all activities related to the bid until the protest is resolved. This letter is attached as Exhibit "4".

6. On July 31, 2013, GSA called Triple J Motors to pick up Purchase Order P136A05640 for two (2) additional units of customized police interceptor vehicles as part of the same bid. Triple J picked up this confirmed and signed Purchase Order on July 31, 2013. Purchase Order P136A05640 is attached as Exhibit "5".

7. On July 31, 2013, then equipped with P136A05480, Triple J Motors finalized its tendering of a binding allocation, securing a slot in the production line for the purchase of a total of eight (8) units of customized police interceptor vehicles. Again, Triple J Motors was now committed to the purchase of these vehicles.

8. By its letter dated July 31, 2013 and received August 1, 2013, Triple J Motors informed GSA that its instructions to stop all activities related to the bid cannot be followed because it understood that the GSA Purchase Order dated July 17, 2013 constitutes a contract, the rescission of which requires legal due process, and it also informed GSA that it received and was processing GSA Purchase Order P136A05640. This letter is attached as Exhibit "6".

9. On August 7, 2013, Triple J Motors, already contractually obligated, finalized the orders from Ford Motor Company for the customized police interceptor vehicles.

10. GSA, by its letter dated August 8, 2013, notified Triple J Motors that the bid is cancelled and the award to Triple J Motors is cancelled because GSA determined that Cars Plus' protest had merit. This letter is attached as Exhibit "7".

11. By letter dated August 8, 2013 and faxed the same day, Triple J Motors acknowledged receipt of GSA's notice of cancellation of the bid, expressed that it considers GSA's cancellation a breach of contract and will be seeking compensation for

any damages suffered, informed GSA that it was in contact with Ford Motor Company in an effort to cancel the orders and the allocation committed in order to mitigate damages, and requested that GSA provide the details of the protest warranting cancellation and breach of contract. This letter is attached as Exhibit "8".

12. By letter dated August 12, 2013 and faxed August 14, 2013, GSA acknowledged receipt of Triple J Motors' August 8 letter, advised that the Government of Guam will not bear any costs incurred after the notice of cancellation, and explained that Cars Plus' protest had merit but only specified one of the grounds for protest, namely, that Triple J Motors failed to specify whether it would be providing 2013 or 2014 interceptor vehicles and to provide a brochure for the 2014 interceptor vehicles containing a statement regarding the limited warranty required by the bid. This letter is attached as Exhibit "9".

13. By letter dated August 13, 2013 and received August 15, 2013, Triple J Motors stated its policy to place orders immediately upon receipt of purchase orders due to the delivery time requirements, requested clarification on GSA's authority to cancel a bid after an award in lieu of 2 GAR § 3115, explained that the bid specifications and purchase orders to not specify whether the 2013 or 2014 models were ordered and that the brochure for 2013 interceptor vehicles, which is attached as Exhibit "10", was included in the bid and contained the same warranty contained in the brochure for 2014 interceptor vehicles, which is attached as Exhibit "11", but that the 2014 models were first produced in July 2013 and 2014 brochures were not available until August 2013, after the bid opening in June 2014, and criticized GSA for cancelling the bid rather than requesting clarification on this matter, resulting in further delays and rebidding after Triple J Motors' bid prices have been publicized. This letter is attached as Exhibit "12".

14. By letter dated September 10, 2013 and received September 11, 2013, Triple J Motors formally objected to GSA's cancellation of the bid, citing 2 GAR § 3115(d)(2)(A) to support its argument that a bid cannot be cancelled after an award is made, reiterated why the 2013 brochure and not the 2014 brochure was submitted as part of the bid, advising that its interpretation of the procurement rules do not

necessarily render a responsible bidder "unresponsive," attached an email excerpt from Ford Motor Company explaining that Triple J Motors cannot cancel its orders for ten (10) customized police interceptor vehicles despite its previous attempts to do so, and restated its intention to seek damages from GSA for the full amount of these ten (10) customized police interceptor vehicles if GSA does not accept delivery when they arrive. This letter is attached as Exhibit "13".

15. By letter dated September 11, 2013 and received the same day, GSA acknowledged receipt of Triple J Motors' September 10 letter, determined that the letter constituted an untimely protest pursuant to 2 GAR § 9101(c)(1), denied this "protest" as being "without merit," and advised Triple J Motors of its right to seek administrative or judicial review. This letter is attached as Exhibit "14".

16. On September 12, 2013, GSA ran an advertisement in the Marianas Variety Guam Edition for IFB No. GSA-172-13 for the procurement of Police Patrol Vehicles, 2013-2014 Interceptors, setting the opening date at 10:00am on September 27, 2013. The excerpted page from the Marianas Variety containing this advertisement is attached as Exhibit "15".

17. On September 19, 2013, Triple J Motors received two letters from GSA cancelling both purchase orders "due to error in award." These letters are attached as Exhibit "16".

18. By letter dated September 20, 2013, Ford Motor Company confirmed that the warranty coverage for the 2014 model year Police Interceptor Sedans is identical to the 2013 warranty coverage. This letter is attached as Exhibit "17".

19. By its letter to Triple J Motors dated September 20, 2013, Ford Motor Company confirmed that it 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. This letter is attached as Exhibit "18".

20. By letter dated September 25, 2013, Triple J Motors formally protested the opening of IFB No. GSA-172-13 for the purchase of 2013-2014 police interceptor vehicles. This formal protest letter is attached as Exhibit "19".

Jurisdiction for Appeal

21. Triple J Motors appeals the GSA's determination pursuant to Title 5 Guam Code Annotated ("GCA") § 5706 (2005), or, in the alternative, pursuant to 5 GCA § 5425(e) (2005).

Jurisdiction under 5 GCA § 5706

22. Triple J Motors is an actual contractor, aggrieved by GSA's determination that its objection to GSA's cancellation of IFB GSA-097-13 was untimely and lacked merit. Triple J Motors had already won the bid, was awarded the bid, and entered into a binding contract with GSA before GSA improperly sought to cancel the bid. As the winning bidder who received an award before this contract controversy arose, Triple J Motors was not constricted by the deadlines set by 5 GCA § 5425(a) and 2 GAR § 9101(c)(1), which provisions only concern the imposition of deadlines on protests to be waged by aggrieved bidders, those who are not winning bidders and awardees of a procurement contract.

23. Triple J Motors and GSA mutually assented to and formed a binding contract on July 17, 2013 when GSA signed and confirmed Purchase Order P136A05480 after awarding IFB No. GSA-097-13 to Triple J Motors, and Triple J Motors reasonably relied on this contract to tender an irrevocable allocation for the purchase of eight (8) customized police interceptor vehicles from Ford Motor Company. Basic contract principles dictate that a bargained-for exchange of promises furnished consideration for this contract, which followed from a clear offer and acceptance of that offer. See, e.g., *Mobil Oil Guam, Inc. v. Tendido*, 2004 Guam 7 ¶ 34 ("The three recognized elements of a contract are an offer, acceptance, and consideration."); *id.* ¶ 35 ("An offer is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.") (internal quotation marks and citations omitted); see also Source to 5 GCA § 5121(c) (noting routine purchase orders are contracts).

24. Despite the fact that a binding contract had already been formed and the award had already been made, despite the fact that Triple J Motors and Ford Motor

Company had already started performing under this binding contract, and despite GSA's authority under 5 GCA § 5427(b) to settle and resolve this contract controversy, GSA chose instead to inform Triple J Motors that its award was "now cancelled" on August 8, 2013.

25. Title 5 GCA § 5427(c) requires that a written decision on a contract controversy shall both state the reasons for the action taken and inform the contractor of its rights to judicial or administrative review. GSA did not issue a written decision that complied with this provision until its letter dated September 11, 2013. In that written decision, GSA erroneously determined that Triple J Motors was required to object to GSA's action on August 27, 2013 due to Triple J Motors' acknowledgment of receipt of GSA's notice of cancellation. This determination was erroneous because the 60-day clock that runs on the Appellant's appeal of a purchasing agency's decision on a contract controversy decision did not start to run until September 11, 2013.

26. Upon information and belief, November 10, 2013 is the correct deadline for Triple J Motors to appeal GSA's written decision on September 11, 2013, the first that complied with the requirements of 5 GCA § 5427, and, accordingly, this appeal is timely and not otherwise foreclosed by GSA's erroneous determination.

Jurisdiction under 5 GCA § 5425(e)

27. Alternatively, Triple J Motors did submit a timely protest and GSA should be equitably estopped from determining that Triple J Motors failed to submit a timely protest as required by 2 GAR § 9101(c)(1), because Triple J Motors was not aware of the facts giving rise to its protest and Triple J Motors did, in fact, wage a formal protest once it knew or should have known of the facts giving rise thereto.

28. Under 5 GCA § 5425(a) and the mirror provisions contained in 2 GAR § 9101(c)(1), an aggrieved contractor has fourteen (14) days to submit a formal protest in writing to the purchasing agency after receiving actual or constructive knowledge of the reasons underlying a protest.

29. Despite Triple J Motors' numerous requests and diligent efforts to obtain GSA's decision on Cars Plus' protest and to learn of all the reasons why GSA was

cancelling Triple J Motors' award, so that Triple J Motors could wage its own complete and effective protest, GSA waited until August 12, 2013 to explain only *one* of these reasons, and to date has not furnished Triple J Motors with more of the reasons, let alone all of them.

30. GSA sent mixed signals when it signed and confirmed Purchase Order P136A05480 after instructing Triple J matters to stop all activities in relation to IFB Bid No. GSA-097-13, which further convoluted the matter, bringing uncertainty to Triple J Motors as to GSA's commitment to proceed with its award and contract, and further evidenced that Triple J Motors was not in the position to wage an effective protest at that time, given GSA's vacillation between stopping and going on the award.

31. GSA's failure to render a formal, written decision on Cars Plus' protest was an act of bad faith that denied Triple J Motors its due process rights and prevented Triple J Motors from learning all of the facts necessary to wage its protest effectively.

32. GSA never determined that Triple J Motors' correspondence letters, wherein Triple J Motors clearly objected to the action taken by GSA, were mere complaints. There is no determination made by GSA that the record is bereft of a formal protest; instead, GSA merely challenges the date on which Triple J Motors "knew or should have known" of cancellation.

33. The dearth of information GSA provided to Triple J Motors on August 12, 2013 regarding GSA's intention to cancel the award did not furnish Triple J Motors with the requisite number of *facts* giving rise to the protest for Triple J Motors to wage an effective protest. GSA did not formally cancel the purchase orders until August 31, 2013, but more importantly, did not notify Triple J Motors until September 19, 2013.

34. Upon information and belief, Triple J Motors has arguably not yet been placed in the position to actually or constructively know of GSA's clear intention to proceed with cancelling its award to Triple J Motors, and, at best, Triple J Motors was first placed in that position on August 31, 2013 when GSA formally cancelled the purchase orders.

35. Pursuant to 2 GAR § 9101(c)(1), Triple J Motors submitted a timely formal protest on September 10, 2013, within fourteen (14) days of knowing, actually or

constructively, of the facts giving rise to its protest, which knowledge was only accessible on August 31, 2013, and, accordingly, GSA erroneously determined that Triple J Motors failed to file a timely protest.

B. PRAYER FOR RELIEF

Appellant seeks injunctive relief in the form of specific performance and a decision and order that rectifies GSA's erroneous determination that 2 GAR § 9101(c) barred Triple J Motors from objecting to GSA's decision to cancel its award and that GSA has breached its contract. In addition to other remedies that the OPA may deem are warranted, Appellant also respectfully requests that OPA order the following actions of GSA:

1. That GSA rescind its cancellation of its award and reaffirm its award of the contract to Triple J Motors by issuing a formal, written "Notice of Intent to Award."
2. That GSA specifically perform on the contract by reinstating the two purchase orders it has already signed and confirmed, and by nullifying its cancellation of the same.
3. That OPA issue a determination that GSA violated the procedure for the remedies available to the purchasing agency after an award is made and that it did so in breach of a binding contract with Triple J Motors.
4. That GSA withdraw and cancel IFB No. GSA-172-13 before its opening at 10:00am on September 27, 2013 in an effort to mitigate damages for the Territory and protect the integrity of the procurement process.
5. That GSA issue and immediately mail or otherwise furnish Triple J Motors with a formal, written decision on Cars Plus' protest as required by 5 GCA § 5425(e) and provide Triple J Motors with all of the reasons why it initially cancelled the award.
6. That OPA grant a preliminary injunction enjoining GSA from moving forward with IFB No. GSA-172-13 as respectfully requested and urged in Triple J Motors' Motion to Stay.
7. That OPA award to Triple J Motors its costs involved in its objection and appeal.

C. SUPPORTING EXHIBITS, EVIDENCE OR DOCUMENTS

Exhibit "1"		Completed IFB No. GSA-097-13
Exhibit "2"	June 13, 2013	Amendment #1
Exhibit "3"	July 17, 2013	Purchase Order P136A05480
Exhibit "4"	July 30, 2013	GSA Letter to Triple J Motors
Exhibit "5"	July 29, 2013	Purchase Order P136A05640
Exhibit "6"	July 31, 2013	Triple J Motors Letter to GSA
Exhibit "7"	August 8, 2013	GSA Cancellation of Award
Exhibit "8"	August 8, 2013	Triple J Motors Objection Memo
Exhibit "9"	August 12, 2013	GSA Letter to Triple J Motors
Exhibit "10"		Brochure for 2013 Interceptor Vehicles
Exhibit "11"		Brochure for 2014 Interceptor Vehicles
Exhibit "12"	August 13, 2013	Triple J Motors Letter to GSA
Exhibit "13"	September 10, 2013	Triple J Motors Objection Memo
Exhibit "14"	September 11, 2013	GSA Denial of Objection
Exhibit "15"	September 12, 2013	Advertisement for GSA-172-13
Exhibit "16"	August 31, 2013	GSA Cancellation of Purchase Orders
Exhibit "17"	September 20, 2013	Ford Warranty Confirmation Letter
Exhibit "18"	September 20, 2013	Ford Letter to Triple J Motors
Exhibit "19"	September 25, 2013	Formal Protest of GSA-172-13

D. DECLARATION RE COURT ACTION

Pursuant to 5 GCA Chapter 5, unless the court requests, expects or otherwise expresses interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned does hereby confirm that to the best of its knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this 25th day of September, 2013.

By:



JEFF JONES

Appellant's Duly Authorized Representative
P.O. Box 6066, Tamuning, Guam 96931
(671) 646-9126

By:



**RAWLEN M.T. MANTANONA and
MATTHEW S. KANE**

Attorneys for the Appellant
Edge Building, Second Floor
929 S. Marine Corps Drive
Tamuning, Guam 96913
(671) 646-2001



Transmission Report

Date/Time
Local ID 1
Local ID 2

09-22-2013
4727951

10:57:42 a.m.

Transmit Header Text
Local Name 1
Local Name 2

OFFICE OF PUBLIC AUDITOR

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

Suite 401 DNA Building
238 Archbishop Flores St.
Hagåtña, Guam 96910



FAX

To:	Claudia S. Acfalle Chief Procurement Officer General Services Agency	From:	Doris Flores Brooks Guam Public Auditor Office of Public Accountability
Phone:	(671) 475-1707	Pages:	14 (including cover page)
Fax:	(671) 472-4217		
CC:		Date:	September 26, 2013
Phone:		Phone:	475-0390 x. 216
Fax:		Fax:	472-7951

Re: OPA-PA-13-011 Notice of Receipt of Appeal

Urgent
 For Review
 Please Comment
 Please Reply
 Please Recycle

Comments:

Please acknowledge receipt of this transmittal by re-sending this cover page along with your firm or agency's receipt stamp, date, and initials of receiver.

Thank you,
Joy Bulatao
Auditor I
jbulatao@guamopa.org

This facsimile transmission and accompanying documents may contain confidential or privileged information. If you are not the intended recipient of this fax transmission, please call our office and notify us immediately. Do not distribute or disclose the contents to anyone. Thank you.

Total Pages Scanned : 14

Total Pages Confirmed : 14

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
01	178	671 472 4217	10:48:34 a.m. 09-22-2013	00:04:58	14/14	1	EC	HS	CP14400

Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fail

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

