DANIEL J. BERMAN, ESQ.
BERMAN O'CONNOR & MANN
Suite 503, Bank of Guam Bldg.
111 Chalan Santo Papa
Hagåtña, Guam 96910
Telephone No.: (671) 477-2778
Facsimile No.: (671) 477-4366

Attorneys for Appellants:
SHANGHAI ELECTRIC POWER JAPAN CO., LTD. and TERRA ENERGY, INC.

BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM

IN THE APPEAL OF SHANGHAI ELECTRIC POWER JAPAN CO., LTD. and TERRA ENERGY, INC., Appellants.	Appeal No. OPA-PA-17-008 **COMMENTS ON AGENCY REPORT BY SHANGHAI ELECTRIC POWER JAPAN CO., LTD. AND TERRA ENERGY, INC.**

The Appellants Shanghai Electric Power Japan Co., Ltd. and Terra Energy, Inc. ("SEPJ") make the following comments on GPA's Agency Report.

I. GPA's ACCEPTANCE OF THE HANWHA BIDS VIOLATED THE IFB

In its Opening Brief, SEPJ argued that no award could be made to Hanwha for a microgrid since the bidders had done no more than submit informational bids for a microgrid at the request of GPA. GPA does not challenge that argument. GPA does state that the CCU has not approved the proposed PPA with Hanwha. However, the evidence demonstrates that GPA does intend to make an award to Hanwha for a microgrid. GPA itself points out that if the Hanwha microgrid were included and added to its 30 MW proposals, the total Hanwha price per kWh would be less than the KEPCO price. The CCU did in fact make this calculation, which is attached as Exhibit "B" to its Resolution No. 2017-25 (attached as Exhibit "7" to SEPJ's Opening Brief).

ORIGINAL

There would be no reason for GPA to make such a calculation unless it intended to award a microgrid to Hanwha as part of the award to Hanwha. The microgrids are thus an integral part of Hanwha's bids.

Further evidence of this intention is found in the Draft Renewable Energy Purchase Agreement ("PPA") dated June 19, 2017. An excerpt from this document was attached as Exhibit "8" to the SEPJ Opening Brief, and Hanwha's microgrid operation price document was an attachment to that draft. Although this document is in draft form, it is the latest draft that SEPJ could locate in the procurement record. The July 25, 2017 CCU Agenda listing the PPA for approval. *See* Exhibit "9" to the Opening Brief. GPA has not submitted or pointed to a final PPA that does not include the microgrid awards to Hanwha. The inference is thus clear that GPA intends to award a microgrid to Hanwha for each of its two 30 MW projects, which equates to an immense and highly improper $54,447,002.00 award over a 25 year period as discussed in the Opening Brief.

In addition, in the Opening Brief SEPJ pointed out that Hanwha's informational microgrid bids were three times higher than the informational bids submitted by SEPJ and KEPCO. GPA did not respond at all, much less provide any explanation for that discrepancy. This is further evidence of GPA's preferential treatment of Hanwha. The proposed award to Hanwha cannot stand, and both of Hanwha's 30 MW bids should be rejected.

The two projects awarded to Hanwha should instead be awarded to SEPJ. GPA does not contest SEPJ's argument that SolarCity's bid ranked no. 6 was not accepted by GPA, and that as a result, SEPJ's two bids were the two runner-up bids. GPA does claim that by its argument SEPJ acknowledges that GPA can award four 30 MW projects. If the Public Auditor agrees that SEPJ should be awarded two projects instead of Hanwha, then SEPJ is not in a position to complain that KEPCO will also receive awards for its two projects. However, if the Public Auditor does not agree, then it is

true that the handling of this procurement by GPA was improper and unfair to SEPJ in other respects which mandate a rebid. These improprieties will be discussed in the balance of this Brief.

II. ALTERNATIVELY, GPA's ACTION IN DOUBLING THE SIZE OF THE PROCUREMENT TO 120 MW WAS IMPROPER

It is undisputed that this procurement was for a total of 60 MW of renewable energy. As stated at p. 9 of the IFB: "In this Phase II acquisition rebid, GPA intends to acquire a total of 60 MW of renewable capacity that can meet the following established requirements". The maximum size per project was 30 MW, and the bidders each submitted two bids for 30 MW projects apiece. There was no hint in the IFB that GPA intended to procure more than 60 MW of renewable energy.

This is an important issue since GWA is in effect requesting the Public Auditor to set a precedent whereby an agency can greatly increase the size of a procurement after bid opening. As discussed in the Opening Brief, the case law uniformly condemns this practice. GPA's only attempt to distinguish the case law cited by SEPJ was GPA's reference to the *Cardinal Maintenance Service* case, which GPA claims is distinguishable since here there was no change in the requirements nor change in the contract price. In other words, according to GPA, it would be permissible for the government to issue a procurement for 1,000 computers with the award based on the price per computer, and then increase the award to the winner to 10,000 computers at that price. Moreover, GPA makes no attempt to distinguish *Krygoski Construction Co. Inc. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996), where the government acted properly in rebidding a procurement when it was discovered that the scope of asbestos removal was far greater than anticipated in the original procurement.

GPA instead focuses narrowly on SEPJ's claim that efficiencies of scale would have resulted in a lower price to GPA per unit of energy had SEPJ been aware that it

could bid up to four 30 MW projects. If necessary, SEPJ is prepared to present factual testimony on this issue. However, it is submitted that the primary goal for the Public Auditor on this important issue is to avoid setting a precedent whereby an agency is allowed to substantially increase the size of a procurement after bid opening.

III. ALTERNATIVELY, THE SPECIFICATIONS REGARDING OVERHEAD VERSUS UNDERGROUND TRANSMISSION LINES IS AMBIGUOUS AND UNFAIR TO SEPJ

In its Agency Report, GPA claims that SEPJ "... states that it didn't understand whether it could submit overhead of [sic] underground transmission lines ..." *See* GPA Agency Report at p. 7. In fact, what SEPJ understood was that GPA "strongly recommended" underground transmission lines, and bid accordingly. GPA goes on to argue that the use of underground or overhead transmission lines was not an evaluation criteria used by GPA in the bid specifications. However, that defines rather than resolves the problem. It is predictable that the more responsible bidders would heed GPA's strong recommendation for underground transmission lines, which are obviously superior given Guam's exposure to typhoons. The problem is that underground lines are far more expensive than overhead lines. As stated on p. 54 of the IFB, GPA estimated the cost of overhead transmission lines at $1,240,000.00 per mile, and $2,200,000.00 per mile for underground lines.

It may accurately be said that in a material respect, the bidders were not bidding on the same project. That result violates 5 GCA § 5211(e), which mandates that the evaluation for award shall be based on objectively measurable costs. In order to obtain apple to apple bids, GPA either had to clearly require either overhead lines or underground lines, or alternatively grant a credit to bidders who opted for underground lines. It did neither, which was highly prejudicial to SEPJ, which provided for underground lines. The only fair result is a rebid.

IV. GPA's LEAC RATE IS NOT APPLICABLE

For the first time, GPA cites 12 GCA § 8306(3) for the proposition that the price paid for alternative energy acquired by GPA shall be no more than the "... actual current avoided cost ...". GPA then erroneously equates the term "avoided cost" with its LEAC ("Levelized Energy Adjustment Clause") rate.

GPA's error is apparent for multiple reasons. First, there is no requirement in the IFB that bids must be at or below the current LEAC rate. Quite to the contrary, GPA responded to a bidder question:

> **QUESTION:**
> 29. **Volume IV, Bid Scoring Mechanism, Page 5 (Page 136 of 222).** Section 3: does the starting price have to be BELOW the then current LEAC rate?
>
> **RESPONSE:**
> No. But GPA would like to see bids close to or lower than the current LEAC.

See Amendment No. II dated July 15, 2016. This portion is attached hereto as Exhibit "1".

The Legislature could not have LEAC in mind on December 11, 1984, when it enacted 12 GCA § 8306(3). That is because GPA did not adopt LEAC until 1999. *See* Exhibit "2" attached hereto. Because GPA did not require in the IFB that bids must be at or below its current LEAC rate, it clearly did not interpret the term "avoided cost" as equal to LEAC when it prepared the IFB.

As stated in the Energy Dictionary, attached as Exhibit "3", there is both short-run avoided cost and long-run avoided cost. The LEAC rate would at most be short-run avoided cost. Since this procurement runs for 25 years, the long-run avoided cost would appear to be applicable, which would include capital expenditures necessary for the facilities and infrastructure upgrades. This is confirmed by Exhibit "4" from the Independent Energy Producers Association, where it is explained that Long-Run

Avoided Costs reflect the costs of a resource the utility would construct if the QF (Qualifying Facility) did not exist. Contracts based on Long-Run Avoided Cost have longer terms, typically between 15 and 30 years, which is applicable to the 25 year procurement here. GPA may have calculated the estimated cost of the facilities and infrastructure upgrades involved in this procurement, and its return on investment in the form of energy production, *i.e.*, its long-run avoided cost. SEPJ believes the calculation of long-run avoided cost would be substantially more than the current LEAC rate, given the cost of the facilities required by the procurement. If GPA has made a long-run avoided cost calculation, it should disclose it. If not, GPA should not be allowed to reject a bid on the ground that it is not lower than an unknown figure. In any event, the IFB does not allow GPA to reject bids on the grounds that the bids are above the current LEAC rate. There is no such requirement in the IFB.

If, however, the Public Auditor believes that GPA can equate the term "avoided cost" to its current LEAC rate, then all that can be said is that this crucial information was never disclosed to the bidders. All bidders are entitled to an opportunity to determine whether they can propose projects that will comply with this previously unknown condition. That can only be accomplished through a rebid where the requirement is clearly stated.

V. RULING REQUESTED

SEPJ requests that the Hanwha bid submission for both of its projects be disqualified and rejected, and that SEPJ as first and second runner-up be granted an award for its Site 2 and Site 1 in accordance with the terms stated in the SEPJ bid submission.

Alternatively, SEPJ requests that the Public Auditor order a rebid of this procurement due to (1) the expansion of the scope of the procurement after bid opening resulting from GPA's doubling its size from 60 MW to 120 MW, (2) the failure of GPA to

unambiguously state whether it required above ground or underground transmission lines in the IFB, and (3) the failure of GPA to disclose the requirement that bids must be at or lower than its current LEAC rate.

DATED this 18 day of September, 2017.

Respectfully submitted,

BERMAN O'CONNOR & MANN
Attorneys for Appellants
SHANGHAI ELECTRIC POWER JAPAN CO., LTD. and TERRA ENERGY, INC.

By: _____
DANIEL J. BERMAN

GUAM POWER AUTHORITY
ATURIDÅT ILEKTRESEDÅT GUAHAN
P.O. BOX 2977 • AGANA, GUAM U.S.A. 96932-2977

July 15, 2016

AMENDMENT NO.: II

TO

INVITATION FOR MULTI-STEP BID NO.: GPA-070-16

FOR

RENEWABLE ENERGY RESOURCE – PHASE II

Prospective Bidders are hereby notified of the following Bid Milestone dates and responses to the indicated inquiries from potential bidders. Please note the numbering system corresponds to the total number of questions received from all bidders in the order they were received. Additional responses shall be forthcoming.

Table 1: Bid Milestones

Bid Process Milestones		From	To
Bid Announcement		5/12/2016	6/2/2016
Submit Questions		5/12/2016	6/23/2016
Pre-Bid Conference (Non-mandatory)		5/26/2016 10:00 A.M. (Guam Standard Time)	
Cut Off Date for Receipt of Questions		06/23/2016	
GPA Review and Answer Questions		6/23/2016	7/28/2016
Bidders Prepare Technical Proposals		5/12/2016	8/18/2016
Cut Off Date for Receipt of Proposals (Unpriced)		**8/18/2016 4:00 P.M. Guam Standard Time**	
EVALUATION Step One:	Technical Proposal Evaluation	8/22/2016	9/2/2016
	Notification of Qualified Bidders (Short List)	9/7/2016	9/12/2016
EVALUATION Step Two:	**Cut Off Date for Receipt of Priced Proposals**	**10/15/2016 4:00 P.M. (GST)**	
	Opening of Priced Proposals (Public Opening)	**10/16/2016 2:00 P.M. Guam Standard Time**	
Evaluation of Priced Proposals		10/20/2016	10/31/2016
Notification of Successful Bidder(s)		11/7/2016	
System Integration Study by Others		TBD	TBD
Contract Negotiation		TBD	
Contract Approval & Recommendation to Award (GPA Mgmt. & CCU)		TBD	TBD
Public Utilities Commission Review		TBD	
Contract Signing		TBD	

QUESTION:

26. **Volume III, Draft Renewable Energy Purchase Agreement, Page 44 (Page 115 of 222).** Appendix D: can the list of qualified Independent Engineers be shared?

RESPONSE:

GPA cannot provide PROPONENTS with recommendations on independent engineer qualifications. GPA does not accept any liability for PROPONENT's choice for independent engineer. The Guam PEALS Board is the registration body administering the professional engineering qualification. The Guam PEALS roster of Professional Engineers may be found at the following URL: http://www.guam-peals.org/official-roster-coa/.

GPA lists the following firms who provided engineering or other input into the ESS and Renewables Energy Acquisition Bid development:

- Electric Power Systems, Inc. (Working under A.E. Balajadia, P.E.)
- A.E. Balajadia, PE
- LEIDOS, LEIDOS Engineering LLC, or LEIDOS Engineering.

Having these firms work for PROPONENTS may create conflicts of interest and may invalidate the PROPONENT's proposal.

QUESTION:

27. **Volume III, Draft Renewable Energy Purchase Agreement, Page 57 (Page 126 of 222).** Appendix J: does GPA have a form of Interconnection Agreement it can share with bidders?

RESPONSE:

Yes. Interconnection Agreement will be provided as part of this amendment and uploaded to GPA website – http://guampowerauthority.com/gpa_authority/procurement/gpa_current_rfps.php

QUESTION:

29. **Volume IV, Bid Scoring Mechanism, Page 5 (Page 136 of 222).** Section 3: does the starting price have to be BELOW the then current LEAC rate?

RESPONSE:

No. But GPA would like to see bids close to or lower than the current LEAC.

QUESTION:

30. Category C4 of the evaluation factors on the Qualitative Scorebook Workbook asks to discuss the contract term, but the contract term is stated as 25 years in the IFB. *Please address this discrepancy.*

ANSWER:

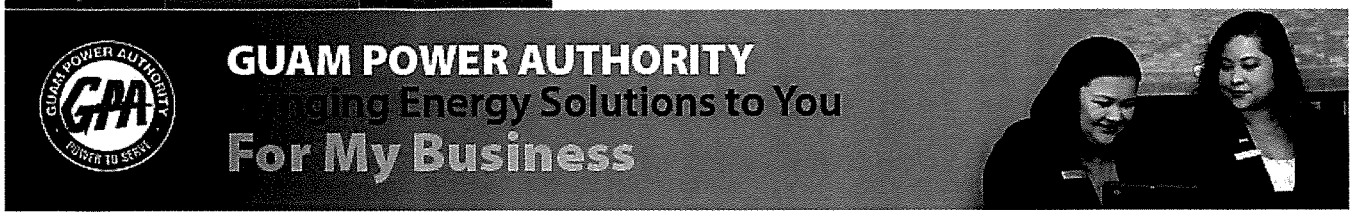
Category C4 will be deleted from the scorebook.

QUESTION:

31. **Volume IV, Bid Scoring Mechanism, Page 5 (Page 136 of 222).** Section 3: what discount rate is GPA using to determine net present value?

RESPONSE:

The discount rate that GPA will use is subject to the economic conditions at the time of evaluation. However, GPA believes that it will use a discount rate between 5% and 6.5% in evaluating bids. Please note that GPA also will consider excessive back-loading of prices as being non-responsive. GPA wants to avoid gaming of the price proposals using the effect of discounted cash flow analysis weighting less the effects of Price in the out years of the contract.



MANAGE MY ACCOUNT | RATES & TARIFFS

The Guam Public Utilities Commission (GPUC) sets Guam Power Authority's electric power rates or tariffs. GPA must petition the GPUC in order to change its rates.

Two components comprise GPA electric power rates: a fixed base rate and variable fuel rate components. Part of GPA's budget is made up of items such as debt service, maintenance, labor, insurance and other costs that are reasonably predictable and estimable. This predictable portion of GPA's budget is funded by fixed base rates. Another part of GPA's budget is expended on fuel costs which are highly susceptible to wide market fluctuations. This difficult-to-predict portion of GPA's budget is funded by a variable fuel rate.

Prior to 1999, GPA reset its fuel rate on a monthly basis to reflect current market conditions. In 1999, GPA adopted a Levelized Energy Adjustment Clause (LEAC) to enable fuel costs to be set on a bi-annual basis. The LEAC allows sharp market price fluctuations to be spread over a six month period. It also provides increased consistency to customer bills.

Every six months a schedule of fuel costs is provided to the Public Utilities Commission to enable the LEAC rate to be reset. Any under recovery or over recovery is trued up during the review process. In the event that GPA's fuel forecasts indicate an under recovery exceeding $2 million, it is allowed to petition for an adjustment before the expiration of the LEAC period.

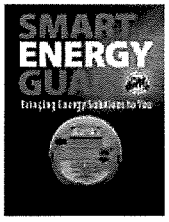


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EXHIBIT
2

Show

Energy Dictionary

avoided cost, short run avoided cost, long run avoided cost

Avoided cost is the marginal cost for the same amount of energy acquired through another means such as construction of a new production facility or purchase from an alternate supplier. For example, a megawatt-hour's avoided cost is the relative amount it would cost a customer to acquire this energy through the development of a new generating facility or acquisition of a new supplier.

Short run avoided cost refers to avoided cost calculated based on energy acquisition costs plus ongoing expenses. Long run avoided cost factors in necessary long-term costs including capital expenditures for facilities and infrastructure upgrades.

Avoided cost is typically used to calculate a fair price for energy produced by cogenerators and other energy producers that meet the specifications of the Public Utility Regulatory Policies Act of 1978. The use of avoided cost rates for cogenerated energy is intended to prevent waste and improve both efficiency and cleanliness by insuring that fair market prices paid for energy generated from renewable resources, small producers and others.

See also:

decremental cost, cogenerator, qualifying facility, Public Utility Regulatory Policies Act of 1978 (PURPA), **renewable resources**

EXHIBIT 3

INDEPENDENT ENERGY PRODUCERS ASSOCIATION

Avoided Cost

What is meant by the term "avoided cost"?

"Avoided Cost" is essentially the marginal cost for a public utility to produce one more unit of power. Because QFs reduce the utility's need to produce this additional power themselves, the price utilities pay for QF power has been set to the avoided, or marginal, cost. In California, the utilities' avoided costs are determined by the California Public Utilities Commission (CPUC) in public hearings. These prices are designed to simulate a "market price" for energy, and have helped make utilities more efficient in their operations.

What is the energy component of avoided costs?

A utility will commit the required amount of its power plant system to meet the daily expected peak electric load plus a "reserve margin" to maintain service in the event of a power plant failure. If a QF delivers energy into the utility system, the utility will reduce the amount of energy generated at their most expensive operating plant (which are often older, dirtier facilities). The energy-related costs of that "avoided" plant, which are typically the cost of fuel and a portion of operation and maintenance cost, comprise the energy component of avoided cost paid to QFs.

What is the capacity component of avoided costs?

QFs are also paid a capacity price that reflects the independent producer's contribution to enhancement of the utility's system reliability. As demand grows in a utility's service area the "reserve margin" begins to decease. After a certain level of demand growth, the utility may need to increase its system capacity by building a new generation resource. Generally, utility additions are large plants with capacity in excess of what is necessary today. QFs are able to defer the construction of these plants and add the need capacity in smaller increments the "lumps" of capacity that would be build with the large utility plants. In California, the cost of a gas turbine peaking plant is used as a "proxy" for capacity value. QFs receive money in proportion to the capacity they add to the system, according the needs of the utility system. The capacity price is subject to adjustment depending on the utility system need for increased reliability both in the short run and long run.

Are avoided cost figures the same in the short run and long run?

No. California's ratemaking proceedings, and the prices paid to QFs, make an important distinction between short-run avoided costs and long-run costs. QFs in California typically enter pre-approved contracts (called Standard Offer Contracts) with utility companies. These contracts reflect the differences between short- and long-run costs. Often certain QF resources are particularly well suited for a particular contract because of the utility costs they displace.

Short Run Avoided Cost is calculated to reflect the costs that would be displaced when a QFs makes a short term commitment to deliver energy. These costs are based upon the utility's marginal operating and shortage costs (i.e. the utility's instant costs to provide the power, or the "spot market" price). These cost are naturally variable with seasonal demand, the fuel in use, and the utilities operating resources.

Long-Run Avoided Costs are designed to reflect the type and costs of a resource that the utility would construct if the QF resources did not exist. Contracts based upon Long-Run Avoided Cost has longer terms, typically in excess to 15 years and up to 30 years. In California, Long-Run Avoided Costs are based upon the identified Deferrable Resource (IDR) which the utility declares to be a cost effective resource addition. The value of that resource (capital related costs) and added to the value of the plants capacity (the "shortage cost") to determine the price to be paid to a QF.

Return

EXHIBIT 4