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DATE: 10.16.17
TIME: 3:45 AM PM BY: JM
FILE NO OPA-PA: 17.008

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9 SHANGHAI ELECTRIC POWER JAPAN CO., LTD. and
10 TERRA ENERGY, INC.

11 BEFORE THE PUBLIC AUDITOR
12 PROCUREMENT APPEALS
13 TERRITORY OF GUAM

14 IN THE APPEAL OF

Appeal No. OPA-PA-17-008

15 SHANGHAI ELECTRIC POWER
16 JAPAN CO., LTD. and TERRA
17 ENERGY, INC.,

HEARING BRIEF OF SHANGHAI
ELECTRIC POWER JAPAN CO., LTD.
and TERRA ENERGY, INC.

18 Appellants.

19 The Appellants Shanghai Electric Power Japan Co., Ltd. and Terra Energy, Inc.
20 ("SEPJ") submit the following as their Hearing Brief.

21 I. INTRODUCTION

22 It is the position of SEPJ that GPA's award of a microgrid to Hanwha violated the
23 IFB, that the Hanwha bids should be rejected, and that SEPJ as first and second runner-
24 up should be granted awards for its Site 1 and Site 2.

25 Alternatively, it is the position of SEPJ that this procurement must be rebid due
26 to GPA's (1) doubling of the scope of the procurement after bid opening from 60 MW to
27 120 MW, (2) the failure of GPA to unambiguously state whether it required overhead or
28 underground transmission lines in the IFB, and (3) in the event the Public Auditor finds
that the term "actual current avoided cost" is the same as GPA's LEAC rate, then the
failure of GPA to disclose the requirement in the IFB that bids must be at or lower than
its current LEAC rate.

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2 **II. GPA's ACCEPTANCE OF THE HANWHA BIDS VIOLATED**
3 **THE IFB**

4 As discussed in the SEPJ Opening Brief and Comments to the GPA Agency
5 Report, GPA did no more than request the bidders to provide informational pricing for
6 a microgrid in the event GPA wished to procure a microgrid in the future. See Exhibit
7 "1".¹ The actual procurement of a microgrid was never part of the IFB. Nevertheless,
8 GPA and Hanwha improperly negotiated and agreed to the inclusion of a microgrid as
9 part of the award to Hanwha. See Exhibit "2", which is an email dated May 31, 2017,
10 from John L. Cruz, Jr., GPA's Assistant General Manager, to various GPA employees
11 and consultants. This email summarizes discussions between GPA and KEPCO and
12 Hanwha. Of great interest, GPA had agreed to "Award microgrid option Fixed Annual
13 Payment Contract option" to Hanwha.

14 This award of the microgrid is confirmed by the most recent draft of the Hanwha
15 PPA that SEPJ was able to locate in the procurement record, which is dated June 19,
16 2017. An excerpt from that draft shows that Hanwha's proposal for a microgrid was
17 included. See Exhibit "3". There is a microgrid operation price stated for each of the 25
18 years of the procurement, totaling \$54,447,002.00 for the two microgrids awarded to
19 Hanwha.

20 Further confirmation of the microgrid award to Hanwha is found in Exhibit "B"
21 to CCU Resolution No. 2017-25 dated June 6, 2017. See Exhibit "4". That exhibit
22 calculates the Hanwha base price together with the microgrid annual fee to determine
23 an adjusted rate. There would be no reason to make such a calculation unless GPA
24 intended to award the microgrids to Hanwha. The PPA was an item for approval at the
25 CCU meeting on July 25, 2017, which did not happen because of the SEPJ protest. See
26 Exhibit "5".

27 ¹ The Exhibit numbers refer to SEPJ's Exhibit List which is filed contemporaneously herewith.

1 It was highly improper for Hanwha and GPA to convert mere informational
2 pricing information for a microgrid to an award which increases the amount Hanwha
3 will receive over 25 years by a staggering \$54,447,002.00. This appears to be some sort
4 of a special deal between GPA and Hanwha. For example, both SEPJ and KEPCO
5 submitted informational pricing for a microgrid, but Hanwha's figures are over twice as
6 high as those submitted by SEPJ and KEPCO. This is demonstrated by a comparison of
7 the Exhibits "6" and "7" (Hanwha) with Exhibits "8" and "9" (SEPJ totaling
8 \$23,131,180.00), and Exhibits "10" and "11" (KEPCO totaling \$25,180,934.00). The
9 agreement between Hanwha and GPA to include a \$54,447,002.00 microgrid award to
10 Hanwha invalidates the award, and disqualifies the Hanwha bids as no longer
11 compliant with the IFB. The two awards to Hanwha should be rejected, and the two
12 runner-up bids of SEPJ should be awarded in their place.

13
14 **III. ALTERNATIVELY, GPA'S ACTION IN DOUBLING THE SIZE
OF THE PROCUREMENT TO 120 MW WAS IMPROPER**

15 This procurement was for 60 MW of renewable capacity. See Exhibit "12". GPA
16 improperly doubled the size of the procurement to 120 MW. This issue was addressed
17 in SEPJ's Opening Brief and Comments on GPA's Agency Report. SEPJ stands on those
18 arguments, and now responds to the arguments on this issue made by KEPCO in its
19 Comments to GPA Agency Report.

20 KEPCO cites *American Apparel, Inc. v. United States*, 108 Fed. Cl. 11 (Ct. Claims
21 2012). That case involved the military procurement for all weather coats. The original
22 procurement was for five different types of coats, which types were awarded
23 separately. Two of the bidders received awards under the procurement. Two years
24 later, the government issued a request for two additional types of coats to the two
25 winning bidders pursuant to an Add/Delete Clause in the original procurement
26 contract. Following competition based on price, one of the two bidders was awarded
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1 the procurement for the two additional types of coats. The other bidder protested and
2 argued that the procurement of the two additional types of coats was a new
3 procurement, and that factors other than price should have been considered in the
4 award as they would have been in a new procurement. The court held that the two
5 additional types of coats were similar to the coats previously procured. Importantly,
6 the Add/Delete Clause in the original procurement had specifically advised the bidders
7 that additional types of coats may be procured by the government under the
8 procurement contract. *Id.* at 37.

9 The court stated the general rule that modification after award is permissible
10 only if within the scope of the original procurement. A contract cannot be modified to
11 the extent that the modified contract is materially different from the original
12 procurement. *Id.* at pp. 28-30. Since the additional two types of coats were generally
13 similar to the coats procured under the original procurement, and the addition of new
14 types of costs was anticipated in the Add/Delete Clause of the contract, the court held
15 that a new procurement was not required. The court specifically held that the bidders
16 would reasonably have anticipated the addition of the two new coats to the contract by
17 virtue of the Add/Delete Clause. *Id.* at p. 37.

18 By way of comparison with the Add/Delete Clause in the *American Apparel* case,
19 the “change clause” in this procurement is found in paragraph 23 of the Government of
20 Guam General Terms and Conditions. That paragraph provides:

21 **23. AWARD, CANCELLATION & REJECTION:** Awards
22 shall be made to the lowest responsible and responsive
23 bidder, whose bid is determined to be the most
24 advantageous to the Government, taking into consideration
25 the evaluation factors set forth in this solicitation. No other
26 factors or criteria shall be used in the evaluation. The right is
27 reserved as the interest of the Government may require to
28 waive any minor irregularity in bid received. The Chief
Procurement Officer shall have the authority to award,
cancel, or reject bids, in whole or in part for any one or more
items if he determines it is in the public interest. Award
issued to the lowest responsible bidder within the specified

1 time for acceptance as indicated in the solicitation, results in
2 a bidding contract without further action by either party. In
3 case of an error in the extension of prices, unit price will
4 govern. It is the policy of the Government to award
5 contracts to qualified local bidders. The government
6 reserves the right to increase or decrease the quantity of the
7 items for award and make additional awards for the same
8 type items and the vendor agrees to such modifications and
9 additional awards based on the bids prices for a period of
10 thirty (30) days after original award. No award shall be
11 made under this solicitation which shall require advance
12 payment or irrevocable letter of credit from the government
13 (GPR Section 3-202.14.1).

14 See Exhibit "13" (IFB pp. 145-146 out of 15026; IFB at pp. 196-197 out of 222).

15 This standard paragraph only alerts bidders that the Government may decrease
16 or increase the quantity of the procured items for a period of thirty (30) days after the
17 original award. That is not what happened here, and this change clause is not
18 applicable.

19 Also unlike the Add/Delete Clause in the *American Apparel* case, the change
20 clause here in no way put the bidders on notice that GPA could double the scope of the
21 procurement from 60 MW to 120 MW. KEPCO, in fact, so admitted. In response to
22 SEPJ's protest to GPA, KEPCO wrote a letter dated July 29, 2017 to John Benavente of
23 GPA. In the first paragraph on p. 2, the KEPCO representative stated that "Prior to
24 submitting our binding bid, the Consortium had no knowledge of GPA's willingness to
25 increase in the total procurement amount by awarding contracts to multiple bidders ..."

26 See Exhibit "14". SEPJ agrees that the dramatic expansion of the procurement could not
27 have been anticipated by the bidders.

28 A more relevant case is *Krygoski Construction Co., Inc. v. United States*, 94 F.3d
1537 (Fed. Cir. 1996), which SEPJ discussed in its Opening Brief. The expansion in the
scope of the work in that case related to only one service, namely asbestos removal, but
since the amount of the asbestos removal was greatly understated in the original
procurement, the government correctly terminated the contract and rebid. To accept

1 GPA's and KEPCO's argument on this important issue would set a precedent granting
2 the government unfettered discretion to greatly increase the scope of a procurement
3 after bid opening.

4 SEPJ maintains its position and will present evidence at the hearing that if the
5 bidders had been informed that this procurement was for 120 MW, economies of scale
6 would have resulted in a substantially lower cost per unit of power than a 60 MW
7 procurement. The only way to determine how much lower will be a rebid of this
8 procurement for 120 MW.

9 IV. ALTERNATIVELY, THE SPECIFICATIONS REGARDING
10 OVERHEAD VERSUS UNDERGROUND TRANSMISSION
11 LINES ARE AMBIGUOUS AND UNFAIR TO SEPJ

12 This issue was also addressed in SEPJ's Opening Brief and Comments on the
13 GPA Agency Report. SEPJ stands on those arguments, and now responds to the
14 arguments on this issue made by KEPCO in its Comments to the GPA Agency Report.

15 KEPCO argues that SEPJ's position that the bids must be "apple-to-apple" is
16 contradicted by the IFB. KEPCO argues that the IFB encourages varying types of
17 renewable energy projects, and that it would not be feasible or practical to require that
18 only underground or overhead transmission lines be installed since that would depend
19 upon the type of project proposed. KEPCO here is trying to change the subject and
20 misses the point. The issue is whether the transmission lines from whatever type of
21 renewable energy project is proposed should be overhead or underground.

22 The difference in cost is dramatic. According to GPA's estimate the cost of
23 underground transmission lines is \$2,220,000 per mile versus \$1,240,000 per mile for
24 overhead lines. See Exhibit "15". The problem is that GPA on the one hand strongly
25 recommended the use of expensive underground transmission lines, see Exhibits "16"
26 and "17", but on the other hand did not provide any credit for bidders who heeded
27 GPA's strong recommendation by providing underground transmission lines. This
28

1 violates 5 GCA § 5211(e), which mandates that the evaluation for award shall be based
2 on objectively measurable costs. GPA was aware that despite its strong
3 recommendation, KEPCO intended to provide overhead lines. See Exhibit “18”. In
4 order to obtain comparable bids, GPA had to clearly require either overhead or
5 underground lines, or alternatively grant a credit to bidders who proposed more
6 expensive underground lines. It did neither, which was highly prejudicial to SEPJ
7 which did provide for expensive underground lines as strongly recommended by GPA.
8 The only fair result is a rebid.

9 V. **THE SOLARCITY BID RANKED NUMBER 6 WAS NOT**
10 **ACCEPTED BY GPA, AND THE SEPJ BIDS WERE THE**
11 **RUNNER-UP BIDS**

12 In the GPA Price Proposal Evaluation, Exhibit “19”, SEPJ’s bid for its Site 2 was
13 ranked number 5 after the two Hanwha and two KEPCO bids, and its Site 1 bid was
14 ranked number 7. The SolarCity (also referred to as PSS) bid was ranked number 6.
15 However, that bid could not be accepted since GPA refused to grant an exemption to
16 SolarCity, which exemption was necessary for that SolarCity bid to comply with the
17 IFB.

18 Exhibit “20” is a list of bidder questions to which GPA responded on December
19 9, 2016. In its question on page 2, SolarCity explained that in its bid submission, it
20 understood that it could use the existing GPA transmission line from the Dandan
21 transfer station to the Talofofu substation to interconnect with the GPA grid. It
22 acknowledged that possibility was eliminated by Item 1 of Amendment VIII to the IFB,
23 which precluded the use of that line. SolarCity stated that had it known that the use of
24 that GPA transmission line was not available, it likely would have pursued other
25 options and proposed a different technical solution. It stated that altering its approach
26 at this point would effectively require it to start over.
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1 For that reason, SolarCity requested an exemption to Item #1 of Amendment
2 VIII. However, GPA's response was that it was unable to grant the requested
3 exemption. As a result, SolarCity's bid ranked number 6 is contrary to Item #1 of
4 Amendment VIII, which precludes the use of the existing Dandan to Talofofa
5 transmission line. SolarCity's bid ranked number 6 thus has no interconnection to the
6 GPA grid, and as a result cannot be considered. This is confirmed by the abstract of the
7 SolarCity bid prepared by GP. See Exhibit "21". The less expensive SolarCity bid was
8 noted to be "w/out transmission". The Price Proposal Evaluation should be
9 understood as a ranking based on price, and not as a statement of qualification. As a
10 result, the SEPJ Site 1, which is ranked at number 7 on the Price Proposal Evaluation,
11 should in fact rank as number 6. That means that the SEPJ Sites 2 and 1 are the first and
12 second runners-up after the Hanwha and KEPCO sites.

13 **VI. GPA's LEAC RATE IS NOT APPLICABLE**

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

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

21 **QUESTION:**

22 29. **Volume IV, Bid Scoring Mechanism, Page 5 (Page**
23 **136 of 222).** Section 3: does the starting price have to
be BELOW the then current LEAC rate?

24 **RESPONSE:**

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

26 See Exhibit "22".
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1 The Legislature could not have had LEAC in mind on December 11, 1984, when
2 it enacted 12 GCA § 8306(3). That is because GPA did not adopt LEAC until 1999. *See*
3 Exhibit “23”. Because GPA did not require in the IFB that bids must be at or below its
4 current LEAC rate, it clearly did not interpret the term “avoided cost” as equal to LEAC
5 when it prepared the IFB. GPA was correct in not equating the two terms in the IFB.

6 As stated in the Energy Dictionary, there is both short-run avoided cost and
7 long-run avoided cost. *See* Exhibit “24”. The LEAC rate would at most be short-run
8 avoided cost. Since this procurement runs for 25 years, the long-run avoided cost
9 would appear to be the only relevant standard, which would include capital
10 expenditures necessary for the facilities and infrastructure upgrades. This is confirmed
11 by the Independent Energy Producers Association, where it is explained that Long-Run
12 Avoided Costs reflect the costs of a resource the utility would construct if the QF
13 (Qualifying Facility) did not exist. Contracts based on Long-Run Avoided Cost have
14 longer terms, typically between 15 and 30 years, which is applicable to the 25 year
15 procurement here. *See* Exhibit “25”. The FERC and CFR definitions of avoided cost are
16 Exhibits “26” and “27”.

17 GPA may already have calculated the estimated cost of the facilities and
18 infrastructure upgrades involved in this procurement, and its return on investment in
19 the form of energy production, *i.e.*, its long-run avoided cost. SEPJ believes the
20 calculation of long-run avoided cost would be substantially more than the current
21 LEAC rate, given the enormous cost of the facilities required by the procurement. If
22 GPA has made a long-run avoided cost calculation, it should disclose it. If not, GPA
23 should not be allowed to reject a bid on the ground that it is not lower than an unstated
24 figure.

25 In fact, GPA has agreed to rates for alternative energy that are far higher than
26 those in SEPJ’s bid. Exhibit “28” is an Order of the Guam Public Utilities Commission
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1 (“PUC”) dated June 11, 2012, where the PUC approved the PPA between GPA and
2 Quantum Guam Power LLC. As the PUC noted in paragraph 13, the contract price
3 ranged from \$196.50 mWh in the first year to \$220.90 mWh in year 25. SEPJ’s bid was
4 \$.128 kWh (\$128.00 mWh) for its Site 2, and \$.1613 kWh (\$161.30 mWh) for its Site 1.
5 The rates GPA agreed to in its PPA with Quantum Guam Power are clearly the more
6 relevant guide to “avoided cost” for alternative energy than its LEAC rate.

7 Likewise, Exhibit “30” is a PUC Order dated February 26, 2013, where the PUC
8 approved the PPA between GPA and Pacific Green Resources LLC. As the PUC noted
9 in paragraph 15, the contract price ranged from \$216.50 mWh in the first year to \$220.90
10 mWh in year 25. Again, these rates for renewable energy are substantially higher than
11 SEPJ’s bids. Exhibit “29” is GPA’s summary of renewable energy rates, all of which are
12 higher than SEPJ’s bids.

13 If, however, the Public Auditor believes that GPA can equate the term “avoided
14 cost” to its current LEAC rate, then all that can be said is that this crucial information
15 was never disclosed to the bidders, who to the contrary were advised by GPA that bids
16 did not have to be lower than LEAC. All bidders are entitled to an opportunity to
17 determine whether they can propose projects that will comply with this previously
18 unknown condition. That can only be accomplished through a rebid where the
19 requirement is clearly stated.

20 **VII. RULING REQUESTED**

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

25 Alternatively, SEPJ requests that the Public Auditor order a rebid of this
26 procurement due to (1) the expansion of the scope of the procurement after bid opening
27

1 resulting from GPA's doubling its size from 60 MW to 120 MW, (2) the failure of GPA to
2 unambiguously state whether it required above ground or underground transmission
3 lines in the IFB, and (3) the failure of GPA to disclose the requirement that bids must be
4 at or lower than its current LEAC rate.

5 DATED this 16th day of October, 2017.

6 Respectfully submitted,

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9 SHANGHAI ELECTRIC POWER JAPAN CO.,
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10 By: 
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