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PROCUREMENT APPEALS

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**OFFICE OF THE PUBLIC AUDITOR  
PROCUREMENT APPEALS**

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14 IN THE APPEAL OF ) DOCKET NO. OPA-PA-17-008  
15 )  
16 Shanghai Electric Power Japan Co., Ltd.)  
17 and Terra Energy, Inc., ) **APPELLEE'S HEARING BRIEF**  
18 Appellant. )  
19 \_\_\_\_\_ )  
20 )

21  
22 **COMES NOW**, the GUAM POWER AUTHORITY, by and through its counsel of  
23  
24 record, D. GRAHAM BOTHA, ESQ., and submits its Hearing Brief for the October 24, 2017,  
25 hearing as follows.

**ARGUMENT**

26  
27 Guam Power Authority (GPA) submits that it's decision to award the two 30MW sites to  
28 Hanwha and KEPCO in Multi-Step Invitation for Bid, GPA-070-16, Renewable Energy Phase II  
29 was made to the two lowest responsible and responsive bidders. Guam Procurement law requires  
30 that GPA award to the lowest responsible and **responsive** bidders. A responsive bidder is a person  
31 who has submitted a bid which conforms in all material respects to the Invitation for Bid. 5 GCA  
32 §5201(g) and 2 GAR, Div. 4, Chap. 3, §3109(n)(2). Further, any bidder's offering which does not  
33 meet the acceptability requirements shall be rejected as non-responsive. 2 GAR, Div. 4, Chap. 3,  
34 §3109(n)(3)(c). A review of the bid abstract is clear that the Hanwha and KEPCO bids for both  
35 sites were substantially less than the two sites submitted by Shanghai Electric.

1           The committee evaluation memo and the Bid Abstract – Phase II clearly sets forth the  
2 prices of the bidders, including Shanghai, Hanwha and KEPCO. Seven bidders submitted  
3 technical price proposals for fourteen sites which were opened by GPA on January 13, 2017. The  
4 evaluation committee recommended award of the four lowest site proposals each consisting of a  
5 30MW solar project. Based on the bid abstract, the two proposals submitted by Shanghai Power,  
6 SEPJ Site 1 and SEPJ Site 2, based on price are the #5 and #7 bidder at a first-year price of  
7 \$.128/kWh for SEPJ Site 2 and \$.1613/kWh for SEPJ Site 1. This compares with the Hanwha  
8 Site 2 price of \$.06245/kWh and the Hanwha Site 1 price of \$.06599/kWh, and the KEPCO Site A  
9 and Site B price of \$.0855/kWh. In addition, even the least expensive bid submitted by Shanghai  
10 Power, the SEPJ Site 2 first year price of \$.128/kWh exceeds GPA’s avoided cost and the LEAC  
11 rate of \$.105/kWh at the time of the price proposal evaluation.

12           Shanghai states that its bids for 30MW solar projects should be ranked #5 and #6 based on  
13 the disqualification of one of the Solar City bids which was #6 on the bid abstract. Shanghai  
14 acknowledges that it would not otherwise be awarded the bid, and therefore it contends that GPA’s  
15 acceptance of the Hanwha bid and the proposed award of a microgrid option to Hanwha should  
16 result in the disqualification of the Hanwha bid. The bid specifications require that each bidder be  
17 evaluated based on the bidder’s guaranteed minimum energy production and a price per kilo watt  
18 hour (kWh). GPA evaluated the technical price proposals for the fourteen sites based on the  
19 Strategist program for based fuel cost, high fuel cost, and the price proposals for years 1-25 and  
20 the proposed PV capacity of each proposal. GPA requested that bidders submit a fixed price  
21 proposal for a micro-grid as an option, which would not be considered in evaluating the price  
22 proposals of each bidder. The bidders, including Shanghai, Hanwha, and KEPCO, submitted a  
23 fixed price proposal for a micro-grid to GPA.

1 Shanghai claims that a proposed award of Hanwha to include a micro-grid demonstrates  
2 GPA's preferential treatment to Hanwha, but then correctly notes that the CCU has not approved  
3 the proposed PPA with Hanwha. Even if the Hanwha micro-grid were approved and the cost of  
4 the Hanwha micro-grid at \$1,287,082 per year is added to each of Hanwha's 30MW proposals,  
5 that the total Hanwha price per kWh will still be less than the KEPCO price of \$.0855/kWh and  
6 substantially less the Shanghai Site 2 first year price of \$.128/kWh and almost half the price of the  
7 Shanghai Site 1 first year price of \$.1613/kWh.

8 Hanwha's micro-grid price for each 30MW site is \$1,287,082 per year, and Hanwha has  
9 guaranteed a minimum energy guarantee (MWH) of 72,005,000 MWH per year. If the Hanwha  
10 micro-grid option were added to the bid price, the additional price, even assuming no additional  
11 energy guarantee, would be an additional \$.01787/kWh which would represent a Hanwha site 1  
12 price of \$.06245/kWh + \$.01787/kWh (micro-grid) for a total Hanwha site 1 price of  
13 \$.08032/kWh. The Hanwha site 2 price would be \$.06599/kWh + \$.01787/kWh (micro-grid) for a  
14 total Hanwha site 2 price of \$.08386. Even the Hanwha site 2 price with a micro-grid option would  
15 represent approximately 2/3 of the Shanghai Site 2 price of \$.128/kWh and approximately 50% of  
16 the Shanghai Site 1 price of \$.1613/kWh.

17 Shanghai claims that doubling the size of the procurement to 120MW was improper and  
18 that the procurement must be rebid. GPA's bid places no restrictions on the number of projects that  
19 each bidder may submit. The only restriction is that each project may not exceed 30MW per  
20 project. Each of the seven Phase II qualified bidders submitted 2 project sites consisting of 30MW  
21 each. Shanghai now contends that had it known that GPA intended to award 120MW total, it  
22 would have bid four 30MW projects, and due to efficiencies of scale, would have "bid a lower  
23 price per unit of renewable energy."

1            Yet the claimed “efficiencies of scale” for the 60MW bid submitted by Shanghai were  
2 clearly not present in its current bid, as it submitted prices of \$.128/kWh and \$.1613/kWh, the  
3 second price almost 30% higher than its first price. Given that its 2 sites are adjacent to each other,  
4 presumably with similar or identical land costs, these prices submitted by Shanghai don’t  
5 demonstrate any efficiencies of scale. There would be no efficiencies of scale regarding the land  
6 size needed for each project, as additional solar PV panels would require additional land in  
7 proportion to the additional PV panels added for each 30MW project.

8            The AECOM Vice President, Dale Gauthier, speculates in his declaration that SEPJ could  
9 have negotiated more favorable pricing from material and service providers, including AECOM,  
10 Black Construction, EMCE and GHD. It appears that Mr. Gauthier is not familiar with the  
11 additional transmission line upgrades which would be incurred by projects exceeding 30MW. One  
12 30MW project may be able to be carried on a 34.5kV transmission line, but if the project size is  
13 increased, it may require installation of a 115kV transmission line, which is substantially more  
14 expensive per mile than the installation of an additional 34.5kV transmission line.

15            GPA did not award 120MW to a single bidder, as Shanghai is speculating is could have  
16 been awarded, but instead awarded two 30MW projects to two separate bidders, Hanwha and  
17 KEPCO, who each had proposals which were significantly lower than Shanghai. No bidder,  
18 including Shanghai, Hanwha, or KEPCO was aware that GPA would propose to award four  
19 30MW projects instead of just two 30MW projects, and therefore no bidder was disadvantaged by  
20 the additional proposed award of an additional two 30MW projects.

21            The expansion of the proposed award from two 30MW projects to four 30MW projects,  
22 and from one to two bidders is distinguishable from the cases cited by Shanghai’s counsel. In the  
23 *Cardinal Maintenance Service, Inc. vs. U.S.* case cited by counsel, the court found that the changes  
24 were considerable, and the amount of additional work would nearly double the price of the

1 contract. That is clearly distinguishable in this case, as there is no change in work required nor is  
2 there a change in the contract price. There is simply an increase in the number of 30MW projects  
3 awarded and the awarded bidders increased from one bidder to two bidders. Had Shanghai  
4 submitted a competitive bid which was lower than the #3 and #4 bidder KEPCO, then Shanghai  
5 would have been awarded two 30MW projects.

6 Shanghai complains that the specifications are ambiguous and unfair and that the  
7 procurement must be rebid. It states that it didn't understand whether it could submit overhead of  
8 underground transmission lines. While it states that "SEPJ did not rule out the possibility of  
9 overhead transmission lines" it is somehow confused because GPA responded in the answers to  
10 bidders that GPA "strongly recommends underground lines for interconnection between the  
11 renewable generation and GPA power system ..." Nowhere in the bid specifications does GPA  
12 require underground transmission lines only for any bidder. Shanghai speculates that other bidders  
13 were equally confused by the specification and therefore submitted a higher price than Shanghai.  
14 Shanghai acknowledges that in the IFB that "GPA identified transmission costs per mile of  
15 \$1.24M for overhead lines, and \$2.20M per mile for underground."

16 As an effort to justify its substantially higher bid than both Hanwha and KEPCO, Shanghai  
17 claims that it took the "strong recommendation" for underground lines, and therefore its costs are  
18 higher. While Shanghai correctly cites 5 GCA §5211(e) that "bids shall be evaluated based on  
19 requirements set forth in the invitation for bids ... The Invitation for Bids shall set forth the  
20 evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the  
21 Invitation for Bids," the use of underground or overhead transmission lines was not an evaluation  
22 criteria used by GPA in the bid specifications. Shanghai could not have relied on this as a bid  
23 evaluation criteria, which Shanghai's counsel appears to acknowledge as he states "bidders whose

1 bid used expensive underground lines did not get any extra points for this, and would inevitably  
2 lose.”

3 5 GCA §5211(g) provides that “Award. The contract shall be awarded with reasonable  
4 promptness by written notice to the lowest responsible bidder whose bid meets the requirements  
5 and criteria set forth in the Invitation for Bids ...” as cited in *Pacific Data Systems, Inc. vs.*  
6 *General Services Agency*, OPA-PA 15-012. *In the Appeal of 1-A Guam WEBZ*, OPA-PA 16-002  
7 also addresses the issue of bid evaluation and stated that “the invitation for bids shall set forth the  
8 evaluation criteria to be used and no criteria may be used in bid evaluation that are not set forth in  
9 the Invitation for bids.” 5 GCA §5211(e) and 2 GAR, Div 4, Chap 3, §3109(n)(1).

10 Shanghai also states that its bids are actually #5 and #6 due to the disqualification of the  
11 actual #6 bidder, Solar City, on the price proposal evaluation, and “that means that the SEPJ sites 2  
12 and 1 are the first and second runners-up.” Given that Shanghai acknowledges that at best it’s bid  
13 is #5 and #6, it appears to also acknowledge that GPA can award four 30MW sites as well. If GPA  
14 only awarded two 30MW sites, then Shanghai would not be the “first and second runners-up”, but  
15 would be the third and fourth runners-up if only two projects were awarded as Shanghai previously  
16 suggested would be appropriate.

17 Shanghai in its “Ruling Requested” requests that the Hanwha bids be disqualified and  
18 rejected, and SEPJ sites 2 and 1 be awarded, even though neither of the SEPJ bids meets the  
19 contracting restrictions found in 12 GCA, Chapter 8, Article 3, §8306(2) and (3). 12 GCA  
20 §8306(3) states that “no contract may be signed by the government of Guam or the Guam Power  
21 Authority to develop or purchase power from alternate energy sources (including power generated  
22 from windmills, solar ponds and Ocean Thermal Energy conversion), if such contract will result in  
23 increased expenses and costs for the Guam Power Authority. No such alternate energy contract  
24 may be signed until the board of directors of the Guam Power Authority has so certified that the

1 agreement is consistent with all bond covenants and that the **price paid** for electricity pursuant to  
2 the agreement **does not exceed actual current avoided cost.**”

3 The GPA actual current avoided costs are equivalent to the LEAC rate which at the time of  
4 the evaluation was \$.105/kWh. The Hanwha and KEPCO bid prices are clearly below the LEAC  
5 rate, and even the lowest Shanghai Site 2 price of \$.128/kWh clearly exceeds GPA’s current  
6 avoided costs. While the LEAC rate did increase on August 1, 2017, to \$.1177/kWh, which is after  
7 the bid evaluation period, the lowest Shanghai price exceeds the higher LEAC rate.

8 Procurement law requires that GPA award to the lowest responsible and **responsive**  
9 bidders. A responsive bidder is a person who has submitted a bid which conforms in all material  
10 respects to the Invitation for Bid. 5 GCA §5201(g) and 2 GAR, Div. 4, Chap. 3, §3109(n)(2).  
11 GPA properly awarded two 30MW projects to Hanwha and KEPCO as the lowest responsible and  
12 responsive bidders. The price proposal evaluation and bid abstract clearly demonstrate that the  
13 Hanwha and KEPCO bids were the two lowest bidders for renewable energy. The bids were  
14 evaluated and awarded based on the Multi-Step bid specifications and evaluation criteria set forth  
15 in the bid documents.

16 5 GCA § 5001. Purposes, Rules of Construction. (a) Interpretation, provides that the  
17 underlying purposes and policies of this Chapter are: ... (3) to provide for increased public  
18 confidence in the procedures followed in public procurement; (4) to ensure the fair and equitable  
19 treatment of all persons who deal with the procurement system of this Territory; (6) to foster  
20 effective broad-based competition within the free enterprise system; (7) to provide safeguards for  
21 the maintenance of a procurement system of quality and integrity; and (8) to require public access  
22 to all aspects of procurement consistent with the sealed bid procedure and the integrity of the  
23 procurement process.

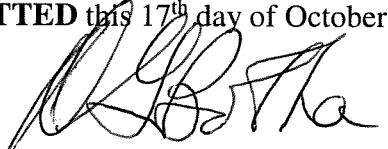
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CONCLUSION

GPA requests that the appeal of Shanghai Electric be dismissed, and that the Public Auditor award all legal and equitable remedies that GPA may be entitled to as a result.

**RESPECTFULLY SUBMITTED** this 17<sup>th</sup> day of October, 2017, by:



D. GRAHAM BOTHA, ESQ.  
GPA General Counsel