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KEPCO-LG CNS CONSORTIUM

**BEFORE THE PUBLIC AUDITOR
 PROCUREMENT APPEALS
 TERRITORY OF GUAM**

ARRIOLA, COWAN & ARRIOLA, HAGATNA, GUAM 96910

IN THE APPEAL OF)	Docket No. OPA PA-17-008
)	
SHANGHAI ELECTRIC POWER)	
JAPAN CO., LTD. AND TERRA)	INTERESTED PARTY CONSOR-
ENERGY, INC.,)	TIUM BETWEEN KEPCO AND
)	LG CNS CO. LTD'S HEARING
Appellant.)	BRIEF
)	
)	
)	

Interested Party, the consortium between Korea Electric Power Corporation and LG CNS Co., Ltd. (the "Consortium") selected as a successful bidder for the Multi-Step Invitation for Bid (the "IFB"), GPA-070-16, by and through its undersigned counsel, hereby submits its Hearing Brief in this matter in accordance with the Scheduling Order dated September 27, 2017. In its Comments to the Guam Power Authority ("GPA") Agency Report, filed on September 18, 2017, the Consortium showed that there is no merit to losing bidder Shanghai Electric Power Japan Co. Ltd. & Terra Energy, Inc.'s ("Appellant") contentions that GPA impermissibly doubled the size of the procurement or that the IFB was ambiguous about whether underground transmission lines for interconnection were required. The Consortium incorporates by reference herein its Comments.

In this Hearing Brief, the Consortium discusses additional issues which establish that this appeal should be denied.

ARGUMENT

I. THE CONSORTIUM AND THE PEOPLE OF GUAM WILL BE SEVERELY PREJUDICED IF THE IFB IS CANCELLED.

Unlike other procurements involving significantly lesser amounts of goods and services to be procured, this IFB required substantial amounts of time, resources, and expenses. The Consortium will present evidence that it hired some of the best consultants and experts in their fields to investigate, research, survey, develop and prepare the best bid submission they could offer. To date, the Consortium has already incurred over twenty million U.S. dollars (US\$20,000,000) of costs and expenses, equivalent to approximately twenty percent (20%) of the total estimated costs for the project, including expenses incurred to secure the project site, hire legal, tax and financial advisors, conduct the system impact study and to pay for multiple business trips and related overhead costs. The fact that the Consortium has already committed such large amounts of funds to the contemplated project not only demonstrates the extraordinary commitment of the Consortium to the IFB, but also is indicative of the magnitude of the prejudice that the Consortium would suffer if the IFB were to be cancelled.

The Consortium will also present evidence that the bid they submitted is extremely competitive yet commercially feasible and that execution of an award based on the bid will be beneficial for Guam and Guam consumers. The Consortium's bid represents a viable and sustainable project that meets the Government of Guam's renewable energy goals and diversification requirements.

The people of Guam will be severely prejudiced if the IFB is cancelled. Appellant's meritless and inconsistent arguments should not be allowed to derail the renewable energy projects

that are so badly needed in Guam. Furthermore, allowing such baseless claims to disrupt the IFB process may call into question the credibility of the GPA's procurement process and result in other credible developers being discouraged from participating in or making the necessary commitments to participate in future endeavors of GPA or other Guam agencies. For example, GPA is currently purchasing real property in order to construct a new power plant and the procurement process for that plant is expected to conclude by the end of 2018. See <http://www.guampdn.com/story/news/2017/10/13/commissioners-let-public-know-specific-plans-new-power-plant/760662001/>. Canceling the IFB here would send the wrong message to the international energy development market that the procurement process in Guam is easily disrupted and any financial commitment may be seriously compromised.

GPA's reservation of its right to increase or decrease the quantity of items for award and to make additional awards for the same type of items, *see* IFB at 196, is a standard and usual feature of Guam agencies' requests for proposals and invitations to bid. *E.g., In the Appeal of Town House Dept. Stores, Inc. dba Island Business Systems and Supplies*, Appeal No.: OPA-PA-11-02, Decision at 13-14 (provision in IFB allowing government to reserve right to increase or decrease quantity of items for award and make additional awards for the same type of items allows government to increase quantities). Further, there was no ambiguity about whether underground or overhead transmission lines for interconnection were required. Each bidder could evaluate whether to propose overhead or underground transmission lines or a combination thereof and to select the most appropriate interconnection method for its bid and GPA would consider such proposals on a case by case basis. *See In the Matter of Infratech International, LLC*, Appeal No.: OPA-PA-11-019, OPA-PA-11-020 OPA-PA-11-021, Decision at 14-15 (agency's specifications in IFB were not erroneous or confusing; they were sufficiently clear that bidders could make accurate estimates of quantities and scope of work necessary to complete projects). In fact,

through a system impact study (the "SIS"), GPA carefully assessed the technical feasibility of the Consortium's interconnection proposal and decided to award the Consortium only after it became satisfied with the feasibility of the Consortium's interconnection method.

This appeal should be denied.

II. APPELLANT'S CLAIMS ARE BARRED BY DOCTRINES OF WAIVER, ESTOPPEL AND LACHES.

The Consortium has established that Appellant's claims that the IFB is defective or unclear are meritless. Nonetheless, Appellant should be barred from asserting such claims by the doctrines of waiver, estoppel and laches.

Shanghai Electric Power Japan Co. Ltd. ("Shanghai") owns and operates solar power plants. <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapid=268384354>.

It operates as a subsidiary of Shanghai Electric Power Company Limited, one of Shanghai region's largest power producers, which does business in China as well as overseas.

<https://www.reuters.com/finance/stocks/company-profile/600021ta.SS>. Shanghai is a sophisticated power producer and has considerable experience in bidding for solar power projects.

Given Shanghai's background and experience, its failure to seek clarification about the IFB requirements it now claims are ambiguous, is indefensible.

Due to the subject matter of the IFB, it was not unusual that prospective bidders submitted numerous questions concerning the IFB. GPA extended the deadline for submission of bids four (4) times. It pushed back the deadline for the price proposal by almost four months to address questions raised by the prospective bidders and to allow them sufficient opportunity to submit their bids with a clear understanding of the requirements for their bids. Submission of bids by the Consortium, Hanwha and Appellant demonstrates that they all clearly understood the IFB's requirements. GPA made its award in strict accordance with the clear and unambiguous terms of

the IFB. If any of the IFB requirements were unclear, Appellant was free to seek clarification from GPA. It had numerous opportunities to do so. Because Appellant failed to do so, Appellant has waived or is estopped from protesting at this late date on alleged grounds that the IFB requirements were not clear.

Under waiver and estoppel principles, Appellant must have acted in a manner that demonstrated its intention for GPA to proceed with the bid process notwithstanding alleged problems or errors in the IFB. *See Guam Election Com'n v. Responsible Choices For All Adults*, 2007 Guam 20 ¶ 84. Waiver can be shown by the “affirmative acts of a party or by conduct that supports the conclusion that waiver was *intended*.” *Guam Hous. & Urban Renewal Auth. v. Dongbu Ins. Co.*, 2001 Guam 24 ¶ 18 (emphasis added). Each of the seven bidders, including Appellant, submitted bids for two project sites. Appellant therefore clearly understood the IFB requirements for project sites. Further, the General Terms and Conditions providing for GPA’s reservation of right to increase or decrease the quantity of the items for award and make additional awards for the same type items, *see* IFB at 196, were distributed to all bidders, including Appellant, who were therefore aware of the potential for an increase in the quantity of items awarded. By failing to complain prior to the award and by submitting its bid, Appellant “intend[ed] that [its] conduct will be acted upon,” *Mobil Oil Guam, Inc. v. Young Ha Lee*, 2004 Guam 9 ¶ 24, resulting in awards to bidders who met the lowest and best price requirement. Appellant’s actions support the conclusion that waiver was intended. *Guam Hous.*, 2001 Guam 24 ¶ 18.

Equitable estoppel has four elements: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct will be acted upon, or act in such a manner that the party asserting the estoppel could reasonably believe that he intended his conduct to be acted upon; (3) the party asserting the estoppel must be ignorant of the true state of the facts; and (4) he must rely upon the conduct to his injury. *Mobil Oil Guam, Inc. v. Young Ha Lee*, 2004 Guam 9 ¶ 24.

Appellant was fully apprised of the terms and conditions of the IFB and by failing to question the IFB requirements and submitting a bid, Appellant intended that its conduct would be acted upon. The Consortium reasonably believed that there were no defects, problems, or ambiguities in the IFB and was ignorant of any such defects, problems or ambiguities. The Consortium relied upon Appellant's conduct to its injury – had Appellant raised any questions or problems with the IFB prior to bid submission, the Consortium might have chosen not to submit a bid. Instead, the Consortium proceeded to incur substantial expense in order to submit its best possible bid.

Laches protects against “inexcusable delay which prejudices the [opposing party]'s ability to respond.” *May v. People*, 2005 Guam 17 ¶ 27. In order for the doctrine of laches to apply, there must be: “(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice against the party asserting the defense.” *Torres v. Super. Ct.*, CV90-00049, 1990 WL 320360, at *5 (D. Guam App. Div. Oct. 26, 1990) (citing *United States v. Weintraub*, 613 F.2d 612, 619 (6th Cir.1979)). Appellant's failure to seek clarification of the alleged ambiguities in the IFB is inexcusable. *See In the Appeal of K Cleaning Services*, Appeal No. OPA-PA 13-004 Decision at 4, 6 (finding that rejection of bidder's bid submissions was proper where agency's specific language of the IFB was clear and bidder did not seek clarification through opportunities provided to bidders by agency and did not exercise reasonable level of diligence in submitting its bid). The Consortium has suffered and will continue to suffer severe prejudice for so long as this appeal continues. Apart from the significant additional legal fees incurred to defend against Appellant's baseless claims, as a consequence of the protest by Appellant, achieving the originally contemplated terms and conditions for the critically important and time-sensitive financing for the project is jeopardized because GPA had to suspend all further actions regarding the award and the power purchase agreement. Such delay and suspension has caused a cascade of disruptions to not only the negotiations with the potential financiers but all other related project constituents that are

dependent on the project being formally awarded to the Consortium, as GPA announced it would do, and the power purchase agreement being finalized. These disruptions and delays are not merely theoretical inconveniences to the Consortium but rather have resulted in actual and severe prejudice being suffered by the Consortium. Just as one example, the Consortium had to pay a six figure delay penalty to one of the major project constituents because a closing, which was to occur around the time the award was to be granted to the consortium, could not be consummated due to the last minute protest lodged by Appellant.

III. THE AWARDS ARE SEVERABLE.

The Consortium does not address the arguments raised on pages 3-6 of the Notice of Appeal, which concern Hanwha's bid only. It is expected that Hanwha will address these arguments in its Hearing Brief and at the hearing. Although the Consortium sees no justifiable reason why Hanwha's award should not be upheld, in the event that the OPA finds the award to Hanwha to be unsustainable, the Consortium submits that the awards are severable and the Consortium's award should be upheld irrespective of the OPA's finding on Hanwha's award. GPA may make a written determination finding that such action is in GPA's best interest and Guam's best interest pursuant to 5 G.C.A. § 5225 and 2 GAR, Div. 4, Chap. 3, § 3115(d)(2)(A) (all bids may be rejected in whole or in part when the head of a purchasing agency determines that such action is in the best interests of the Government of Guam).

Dated this 16th of October, 2017.

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By: 
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