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KEPCO-LG CNS CONSORTIUM

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

IN THE APPEAL OF)	Appeal No. OPA PA-17-008
)	
SHANGHAI ELECTRIC POWER,)	
JAPAN CO., LTD. AND TERRA)	[PROPOSED] FINDINGS OF FACT
ENERGY, INC.,)	AND CONCLUSIONS OF LAW BY
)	INTERESTED PARTY KEPCO-LG
Appellant.)	CNS CONSORTIUM
_____)	

ARRIOLA, COWAN & ARRIOLA, HAGATNA, GUAM 96910

INTRODUCTION

On August 21, 2017, Appellant Shanghai Electric Power Japan (“SEPJ”) appealed the Guam Power Authority’s (“GPA”) August 3, 2017 Decision denying SEPJ’s July 24, 2017 protest of GPA’s intent to award renewable energy resources projects to Interested Parties Hanwha (“Hanwha”) and KEPCO-LG CNS Consortium (“Consortium”) (collectively “Interested Parties”). This appeal and the projects concern Multi-Step Invitation for Bid, GPA-070-16, Renewable Energy Resource Phase II (“the IFB”). The Public Auditor Doris Flores Brooks holds that: (1) the IFB was not vague, ambiguous or defective; (2) GPA complied with Guam procurement law and the IFB in awarding the projects to Interested Parties; (3) Interested Parties were the most responsible and lowest responsive bidders for the IFB. Accordingly, SEPJ’s appeal is DENIED in its entirety.

FINDINGS OF FACT

The Public Auditor in reaching this decision has considered and incorporates herein the procurement record and all documents submitted by the parties, and all testimony and arguments made during the hearings which were held on October 24, 25 and 26, 2017. Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

1. On May 13, 2016, GPA issued the IFB for a Renewable Energy Resources project (“the Project”). (GPA Exh. Tab A)
2. The IFB stated that GPA was soliciting for renewable energy projects and, among other things, that:
 - a. GPA “intends to acquire a total of 60 MW (Megawatt) of renewable capacity”. (GPA Exh. Tab A, Vol. I, Introduction, at 9) A bidder’s project must be “within a minimum nameplate capacity of 5 MW and a maximum nameplate capacity 30 MW” and “this may be the combination of several generation units at one site.” (*Id.*, Vol. II, Overview at 3, and Vol. II at 6, § 2.3.1.) The only restriction is that each project may not exceed 30 MW per location. (GPA Exh. Tab B, Question 47 at 5)
 - b. Bidders were allowed to choose their own point of interconnection. Although GPA “strongly” recommended underground transmission lines, GPA stated that it would consider overhead or underground transmission lines on a “case by case basis.” (SEPJ Exh. 16) GPA provided a cost estimate for interconnection for evaluation purposes which included costs for both overhead and underground transmission lines. (GPA Exh. Tab A at 54) Additionally, GPA stated that it would “entertain a 34.5 kV overhead interconnection from Dandan Substation to the Umatac Substation.” (Cons. Exh. 13)
 - c. GPA stated that it “would like to see bids close to or lower than the current LEAC.” (SEPJ Exh. 21) LEAC refers to Levelized Energy Adjustment Clause to enable fuel costs to be set on a bi-annual basis. (J. Sablan)
 - d. The General Terms and Conditions provided 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. (GPA Exh. Tab A at 196)

3. Eighty-four bidders expressed interest in the IFB from May 20, 2016 to October 19, 2016. (J. Sablan) Twelve (12) companies submitted bids in response to the IFB. (J. Sablan)

4. Prior to submission of the technical proposals, the twelve bidders had an opportunity to submit questions regarding the IFB. SEPJ, Hanwha, and the Consortium all submitted questions. (E. Woo, D. Jeon, C. Choi) GPA issued Amendments II to VII in response to these questions, and other amendments to clarify the IFB. (GPA Exh. Tab B)

5. Amendment IV was issued on August 10, 2016, which contained information concerning a micro-grid option for bidder's projects. (GPA Exh. Tab B, p. 5) GPA stated that its requirements for a micro-grid were "informational" and that it "will eventually develop plans for and execute projects to establish microgrid supporting major loads." (*Id.*)

6. On November 8, 2016, the evaluation committee met and recommended that seven of the 12 bidders be deemed qualified under the Phase 1 technical evaluation, and five of the 12 bidders be deemed not qualified. (GPA Exh. Tab D) Seven bidders with a total of fourteen project sites (i.e., two project sites for each bidder) were qualified, including SEPJ, Hanwha, the Consortium, Guam Clean Energy LLC, LSIS Co., Ltd, PACIFIC Solar Storage 1 (Guam) LLC, Sean ENC & NexGeo Consortium. (*Id.*)

7. Amendment VIII and letters were sent to the qualified bidders on November 10, 2016. (GPA Exh. Tab E) Phase 1 letters were sent to nonqualified bidders on November 10, 2016. (GPA Exh. Tab F) Amendments IX - XIII were sent to Phase 2 bidders. (GPA Exh. Tab H)

8. Amendment VIII requested pricing of a micro-grid as an option that GPA may consider outside the main proposal. (Cons. Exh. 13) GPA stated that it would consider the optional pricing provided as "the initial starting point for negotiating these ancillary services with

a Proponent/Bidder receiving an award under the non-optional bid scope . . . Any acceptance for ancillary services is at GPA's option." (*Id.*) Amendment VIII also stated that the System Impact Study ("SIS") is the "final determining authority for how proposed systems will interconnect to GPA's grid." (*Id.*)

9. The evaluation committee recommended award of Hanwha Sites 1 and 2 and Consortium Sites A and B based on the technical price proposals submitted. The Phase 2 bid abstract and evaluation committee reflect that the Hanwha had a Site 2 price of \$.06245/kWh and a Site 1 price of \$.06599/kWh, and the Consortium had prices for Sites A and Site B of \$.0855/kWh. (GPA Agency Report, Exh. 1) The SEPJ prices were \$.128/kWh for their Site 2 and \$.1613/kWh for their Site 1. (*Id.*) Both Hanwha's and the Consortium's price bids were less than the LEAC rate and less than GPA's avoided costs. (J. Sablan)

10. GPA decided to increase the total MW of the Project from 60 MW to 120 MW after receiving the price bids from Hanwha and the Consortium. (J. Sablan) In comparison with the \$.1960 price tag for the Phase I NRG project, Hanwha's and the Consortium's prices of \$.0642 (based on the average prices for Hanwha's Site A and Site B) and \$.085 respectively, were in total well below the NRG cost and were very competitive. (*Id.*) Pursuant to Amendment VIII, SEPJ, Hanwha, and the Consortium all submitted pricing for a micro-grid for each of their project sites. (J. Sablan; C. Choi; D. Jeon; SEPJ Exhs. 6-11) It is undisputed by the parties that the amounts priced for the micro-grid would be added to the bidders' base bid. (D. Gaulther; C. Choi; J. Sablan) However, the amounts priced for the micro-grid were not considered in bidders' base bid proposals. (J. Sablan). Bidders were not penalized or given extra points in submitting micro-grid pricing. (*Id.*) The purpose of the micro-grid is to give additional security to the GPA power grid; it assists in voltage regulation and control. (D. Gaulthier; J. Sablan)

11. The SIS was only required for bidders with winning price proposals and would be conducted at the cost of such winning bidders. (J. Sablan) The SIS is the final determining authority for system integration; it looks at the impact of and injecting megawatts from a bidder's project sites into the GPA grid. (D. Gauthier) Among other things, the SIS could require a bidder to change the location where their projects interconnect with the GPA grid, it could change a bidder's chosen substation to an alternative substation, or it could require upgraded costs in the project's interconnection system. (J. Sablan) If, based on findings of the SIS, the costs for interconnection turn out to be too high thereby rendering continued feasibility of a bidder's project doubtful, the bidder has the opportunity to withdraw its bid. (*Id.*)

12. GPA hired an independent consultant, EPS, to provide an SIS for each of Hanwha's and the Consortium's projects, but both studies are not final due to the stay of the procurement after SEPJ filed its protest and appeal. (J. Sablan, C. Choi) The SIS for the Hanwha project showed that there were issues relating to the stability and reliability of power on one or both of Hanwha's sites, and recommended a micro-grid for the Hanwha project. (*Id.*) Even with the addition of a micro-grid for the Hanwha project, SEPJ's bid for its Site 2 remains twice as high, and its bid for Site 1 remains almost thrice as high, as Hanwha's Site 2 and Site 1 bids, respectively. (Hanwha's Closing Argument Slide #3)

13. 12 G.C.A. §§ 8306(2) and (3) provide that GPA cannot sign an alternative energy contract unless its Board of Directors certifies that "the price paid for electricity pursuant to the agreement does not exceed actual current avoided cost." The term "avoided cost" is not defined, but by comparing the NRG Phase I project, which was approved by the Guam Public Utilities Commission with a cost of \$.1960/kWh, (SEPJ Exhs. 28, 29 and 30), it can be inferred that GPA's avoided cost for the IFB is not greater than \$.1960/kWh. (C. Choi)

14. The LEAC rate is not equal to avoided costs. (J. Sablan) The LEAC rate in effect for the Project is approximately \$.115/kWh. (*Id.*)

CONCLUSIONS OF LAW

Based on the foregoing, the Public Auditor hereby determines the following:

1. The IFB and Amendments I – XIII were not vague, ambiguous, or defective. They clearly set out the requirements for the Project. Appellant contends that the micro-grid was never a part of the IFB and that it should have been bid out separately. The record demonstrates otherwise. GPA indicated that its request for a micro-grid was initially “informational” but that it “will eventually develop plans for and execute projects to establish micro-grid supporting major loads.” (SEPJ Exh. 1) In the early stages of the bid process, GPA had not yet determined whether a micro-grid would be necessary because it had not seen the bid proposals, and particularly the site locations, from the bidders. (J. Sablan) Once seven bidders were deemed qualified and GPA was able to review their bids, GPA issued Amendment VIII to confirm that the micro-grid was at GPA’s option, the bidders could submit pricing on the micro-grid, and a micro-grid option may be considered only as to a winning bidder. (Cons. Exh. 13; J. Sablan) Amendment VIII establishes unquestionably that GPA’s option for the micro-grid was a part of the IFB. SEPJ’s submission of its price proposal on the micro-grid belies its claim that the micro-grid was not a part of the IFB.

2. SEPJ’s next claim is that there were insufficient details and specifications for the design of a micro-grid. However, the evidence establishes that SEPJ had sufficient information concerning the micro-grid option as demonstrated in its submission of a price offering for the micro-grid (SEPJ Exhs. 8 and 9), as did Hanwha and the Consortium. (SEPJ Exhs. 6-7, 10-11)

SEPJ did not submit any questions seeking to clarify the micro-grid option nor did it file a protest concerning the option when Amendment VIII was issued. (J. Sablan)

3. SEPJ's contention that GPA impermissibly doubled the size of the Project is not sustainable. GPA originally intended to acquire 60 MW but the IFB provided for GPA's reservation of right to increase the amount to be supplied, thereby authorizing the increase of supply amount to 120 MW. (GPA Exh. Tab A at 196) The General Terms and Conditions of the IFB were available to all bidders and put them on notice that GPA *could* increase the quantity of the MW or make additional awards for the same 60 MW project as stated in the IFB. In this regard, every bidder was on the same footing with respect to the eventual increase of the total capacity of the projects to be acquired by GPA and no one was at a disadvantage due to such increase. 5 G.C.A. § 5001(5) provides that the purpose and policy of the Guam procurement law is "to provide increased economy in territorial activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Territory." Given the competitive prices offered by Hanwha and the Consortium, particularly in comparison to NRG's Phase I price, GPA's decision to select two bidders who submitted proposals for a total of 60 MW each and who met the lowest and best price requirement, furthers that purpose and benefits the people of Guam.

4. Although GPA recommended underground lines for their reliability, it acknowledged that overhead lines would also be considered due to the higher cost of constructing underground lines. (GPA Exh. Tab A at 54) Each bidder could evaluate whether to propose above-ground or below-ground 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. (J. Sablan) It is up to each bidder to propose a transmission line design which is

technically reliable yet economically competitive in order to attain such goal. (*Id.*) The Consortium submitted a bid with both underground and overhead transmission lines. (C. Choi) SEPJ admitted it had the option to submit a bid with overhead or underground transmission lines or a combination of both, but it chose to submit one with underground transmission lines only. (D. Gauthier) There was nothing unfair or ambiguous in the IFB about the interconnection method for any bidder's project. SEPJ argues that GPA should have given credit or special consideration for bidders who submitted bids with underground transmission lines because they are more costly, (E. Woo), but this would have resulted in unfair and unequal treatment of bidders and a skewed evaluation process. *See* 5 G.C.A. § 5001(4) (one of the policies of the procurement law is "to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory"). This would be particularly so where, as in the present case, there are significant price offering differences between the Interested Parties and SEPJ. The IFB's interconnection requirements achieve an essential policy of the Guam Procurement Law "to foster effective broad-based competition within the free enterprise system." 5 G.C.A. § 5001(6).

5. SEPJ asserts that if GPA equates the term "actual current avoided cost" with GPA's LEAC rate and considers the bid price being below the LEAC rate to be a bid price condition, then GPA failed to disclose this in the IFB or to the bidders, and the IFB should be re-bid with this requirement being clearly stated. But it was indisputably established through the testimony of GPA's project engineer that GPA does not equate the "actual current avoided cost" to be the same as the LEAC rate and that the two terms are separate concepts. (J. Sablan) SEPJ presented no evidence to the contrary. While SEPJ presented different definitions of the term "avoided cost" (SEPJ Exhs. 24-27), Guam law, and not these definitions, applies here. The applicable Guam law requirement is 12 G.C.A. §§ 8306(2) and (3), which provides that an

alternative energy contract must provide that “the price paid for electricity pursuant to the agreement does not exceed actual current avoided cost.” Separate from this Guam law, GPA in responding to a clarification request from a bidder, expressed its expectations regarding the pricing when it stated that it “would like to see bids close to or lower than the current LEAC.” (SEPJ Exh. 21) The applicable LEAC rate of approximately \$.115/kWh is readily available at the Public Utilities Commission (SEPJ Exh. 23) and GPA’s avoided cost is not greater than \$.1960/kWh. (C. Choi; SEPJ Exhs. 28, 29, 30) As the “avoided costs” and the LEAC rate are two different concepts, both reasonably ascertainable by each bidder, there was no ambiguity in the IFB about the requirements for the bid price. SEPJ’s contention that GPA’s “avoided cost” and the LEAC rate were the same and was an unknown condition of the IFB that should have been disclosed to the bidders, is based on an incorrect understanding of these terms and ultimately is without any merit.

6. The voluminous procurement record here establishes that during the course of this bidding which lasted over eight (8) months, bidders were afforded ample opportunities to ask, and actually asked, many questions about the IFB and the Project. During this extensive period of time, SEPJ had every opportunity to ask questions or seek clarifications about the issues it now raises in this appeal: whether GPA could increase the amount of awards to bidders; whether GPA was requiring underground transmission lines; whether GPA’s “avoided costs” were equal to the LEAC rate; and whether the micro-grid was part of the IFB. SEPJ failed to request clarifications on any of these issues during the bidding process. By submitting a bid for the IFB without making any meaningful efforts to clarify these points, SEPJ demonstrated that it understood the bid requirements. *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).

7. This matter involves a large, multi-million dollar Project that is critical to the power needs of Guam. Hanwha and the Consortium have expended considerable resources, time and effort for the bid and the Project. (C. Choi; S. Ryu; D. Jeon) Based on these expenditures to date, it is foreseeable that any further delay may result in a prohibitive increase in the cost of the Project, which would hurt the people of Guam. It is in the best interest of Guam to uphold GPA's intent to award the Project to Hanwha and the Consortium. *See* 5 G.C.A. § 5225.

8. SEPJ's appeal is denied in its entirety.

9. **[In the alternative, although it is the Consortium's position that SEPJ's appeal should be denied in its entirety, in the event the Public Auditor finds the award to Hanwha to be unsustainable, the awards are severable and the Consortium's award should be upheld irrespective of the Public Auditor's finding on Hanwha's award.]**

10. This is a Final Administrative Decision. The Parties are hereby informed of their right to appeal from a Decisions by the Public Auditor to the Superior Court of Guam, in accordance with Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receive of a Final Administrative Decision. 5 G.C.A. § 5481(a).

Dated this 7th day of November, 2017.

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