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*Attorneys for Interested Party*  
**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	)	<b>INTERESTED PARTY CONSOR-</b>
ENERGY, INC.,	)	<b>TIUM BETWEEN KEPCO AND</b>
	)	<b>LG CNS CO. LTD'S COMMENTS</b>
Appellant.	)	<b>ON GUAM POWER</b>
<b>AUTHORITY'S</b>	)	<b>AGENCY REPORT</b>
	)	
	)	

Interested Party, the consortium between Korea Electric Power Corporation and LG CNS Co., Ltd. ("Consortium") selected as a successful bidder for the Multi-Step Invitation for Bid ("IFB"), GPA-070-16, by and through its undersigned counsel, hereby submits its comments on the Agency Report filed by Guam Power Authority ("GPA") in accordance with 2 G.A.R. § 12105.

**INTRODUCTION**

Public Law 29-62 mandates that GPA establish renewable energy portfolio standard goals, setting a 25% renewable energy goal by 2035. In December 2008 the Public Utilities Commission approved GPA's Integrated Resource Plan to provide for fuel diversification,

including Renewable Energy Resources (“RER”). This matter involves the second of two phases<sup>1</sup> for GPA to solicit proposals for RER, in which GPA intended to acquire 60 MW but in its discretion authorized under the IFB, increased the amount to be supplied to 120 MW of renewable capacity. The Consortium was selected to operate a 60 MW solar plant, and Hanwha Energy Corporation & Pacific Petroleum Trading Corp. (“Hanwha”), was selected to operate another 60 MW solar plant for a total of 120 MW of renewable power. These projects are essential to Guam’s power needs, as they come at a critical time when the island’s main power grid was damaged by an explosion and fire at the Cabras power plant in 2015.

Shanghai Electric Power Japan Co. Ltd & Terra Energy, Inc. (“Appellant”), a losing bidder, challenges the award to the Consortium and Hanwha on the grounds that GPA impermissibly doubled the size of the procurement from 60 MW to 120 MW and that the IFB was ambiguous about whether underground or above-ground transmission lines for interconnection were required. As discussed more fully below, GPA complied with Guam procurement law and the IFB’s requirements, which were unambiguous. Appellant’s claims are without merit and should be dismissed to prevent any further delay to projects critically essential to the people of Guam.<sup>2</sup>

## I. SUMMARY OF FACTS RELEVANT TO THIS APPEAL

The IFB requires that a “Bidder’s renewable resource project must [be] within a minimum nameplate capacity of 5 MW and a maximum nameplate capacity 30 MW; *this may be the combination of several generation units at one site.*” IFB, Vol. I at 1 (emphasis added); IFB, Vol. II at 6, § 2.3.1 (same). Bidders could submit proposals for any renewable energy source, “including biomass, hydro, geothermal, solar, wind, ocean thermal, wave action and tidal

<sup>1</sup> In Phase I, Quantum Guam Power and Pacific Green Resources were awarded contracts for renewable energy totaling 35 MW in capacity.

<sup>2</sup> The Consortium does not address the argument raised on pages 3-6 of the Notice of Appeal, which concerns Hanwha’s bids only.

action.” *Id.*, Vol. II at 4, § 2.2.1. The IFB provides that “GPA may elect to award one, more, or none” among the bidders’ proposals. IFB, Vol. I at 2. In addition, “GPA reserves the right to select a short list that could include a diversity of resource characteristics, project sizes and other options to provide a well-rounded portfolio of renewable resources.” IFB, Vol. II at 14, § 3.3.1. GPA further reserves “the right to diversify renewable technology selections to provide a well-rounded portfolio of renewable resources, even if the \$ per MWh cost may be greater. This is consistent with GPA’s goal for generation diversification and Integrated Resource Plan.” IFB, Vol. IV at 6, § 3.1. The General Terms and Conditions of GPA’s Seal Bid Solicitation and Award state that “[t]he government reserves the right to *increase or decrease the quantity of the items for award and make additional awards for the same type items.*” IFB at 196 (emphasis added).

Bidders must deliver renewable energy to a GPA-determined interconnection point on GPA’s transmission system. *Id.*, Vol. II at 6-7, § 2.4.1. GPA recommended an underground transmission line, *id.*, but included cost estimates of “overhead” and “underground” transmissions, *id.* (“Transmission Cost Per Mile” Table), allowing bidders to choose the type of interconnection best suited for their project. Bidders must also include the cost for interconnection in their price proposal and the methodology of how to measure the power and energy output at the point of interconnection. *Id.*, Vol. II at 6-7, § 2.4.1. In response to a bidder’s question about interconnection requirements, GPA stated:

*Can interconnection lines go overhead, or do they have to be underground?*

**Response:** GPA strongly recommends underground lines for interconnection between the renewable generation and GPA power system for their substantially greater reliability, especially during destructive storms and typhoons Guam often experiences relative to overhead lines. Also, our existing power poles do not have the capacity to accommodate additional 34.5kV level transmission lines. The contractors who choose to build overhead lines to the interconnection points will have to put up new poles even if there are existing GPA power poles along the route or upgrade the existing lines. But

GPA has to consider that the cost of constructing underground lines is, in most cases, higher than cost of building overhead lines. The location of the new on site substation, the distance to the interconnection point, the system reliability and the cost comparison between constructing underground and overhead lines will all have to be taken into account before making a decision. GPA will approach it *in a case to case basis*.

Q&A Set 2, July 15, 2016, Question 13.<sup>3</sup>

The IFB specifies that each bidder would be evaluated based on their guaranteed minimum energy production and a price per kilowatt hour (kWh). IFB, Vol. IV at 5 § 2.2 and at 6 § 3 and *see* the Qualitative Evaluation Scoresheet at 219 of 222 and the Price Offer Worksheet at p. 220 of 222. The IFB evaluation committee recommended that seven of twelve bidders be deemed qualified under the technical evaluation phase. *See* GPA Agency Report at 2. The seven bidders with fourteen project sites were qualified. *Id.* Each of the seven bidders, including Appellant, submitted bids for two project sites. The Consortium submitted a Site A and Site B price of \$0.0855/kWh and was ranked #3 and #4 based on price. Appellant's two proposals were ranked at #5 and #7 based on price. As noted by GPA, even the least expensive bid submitted by Appellant exceeded GPA's avoided cost and the LEAC rate of \$ .105/kWh at the time of the price proposal evaluation. GPA Agency Report at 4.

**II. THE IFB AUTHORIZED GPA TO ACQUIRE 60 MW PER AWARD AND TO INCREASE THE QUANTITY OF ITEMS OR ADD AWARDS FOR THE SAME TYPE OF ITEMS.**

2 GAR § 3109(n)(1) requires that a contract is to be awarded “to the lowest responsible and responsive bidder” who meets the bid requirements and criteria set forth in the Invitation for Bids. *See* 5 GCA §5211(g). The IFB requirements and criteria are not ambiguous. 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.” IFB,

<sup>3</sup> Appellant quoted only an excerpt of GPA's response in its Notice of Appeal at 9, the full question and answer is provided here.

Vol. II, Overview at 3; IFB, Vol. II at 6, § 2.3.1. The IFB places no restriction on the number of projects that each bidder may submit. The only restriction is that each project may not exceed 30 MW per location.<sup>4</sup> Each of the seven Phase II qualified bidders, including Appellant, clearly understood the requirements, as each bidder, including Appellant, submitted proposals for two project locations consisting of 30 MW each. Notice of Appeal at 3. Moreover, GPA may elect to award one, more, or none among the bidders' proposals, *see* IFB, Vol. I at 2, and it reserves the right to diversify its selections to provide a “well-rounded portfolio of renewable resources.” IFB, Vol. II at 14, § 3.3.1; IFB, Vol. IV at 6, § 3.1. Based upon these provisions, and GPA's clear reservation of rights to increase the quantity of items or add awards for the same type of items, *see* IFB at 196, Appellant's contention that GPA doubled the size of procurement from 60 MW to 120 MW impermissibly, *see* Notice of Appeal at 6, is meritless.

The federal cases and authorities from other jurisdictions cited by Appellant are inapposite. Guam law and regulations apply to this procurement matter. Even if Appellant's authorities applied, there is no basis to disturb the awards.

In the federal procurement context, courts have found that awarding agencies may not make changes to a contract that are so pronounced as to be material or “cardinal.” In determining whether a contract has been materially changed, courts consider factors such as the extent of any changes in the type of work, performance period, and costs between the contract as awarded and modified. *E.g., CCL, Inc. v. United States*, 39 Fed. Cl. 780, 791 (1997). These considerations are irrelevant here because GPA did not, as Appellant argues, change the “size” of the procurement. Rather, it simply made more than one award, as it explicitly advised it might do. Even if one mistakenly concluded that GPA adjusted the procurement value, the courts have

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<sup>4</sup> In response to a bidder's question, GPA responded: “GPA restricts the capacity of the bid from 5 to 30 MW. If bidder wants to provide a bid greater than 30 MW he/she must provide to [sic] two bids.” Amendment No.: III to IFB, Question 47 at 5.

opined that even a change resulting in a significant increase in price and value of the contract is not a determining factor in finding a “cardinal change” so long as the nature and purpose of the contract has not significantly changed. *See Am. Apparel, Inc. v. United States*, 108 Fed. Cl. 11, 38 (2012) (citing *S. J. Groves & Sons Co. v. United States*, 661 F.2d 170, 173 (Cl. Ct. 1981); *Def. Sys. Grp.*, B240295, 1990 WL 293536 (Comp. Gen. Nov. 6, 1990)).

Here, unlike the cases referenced by Appellant, the awards did not change the type of work to be performed, the performance period, the costs to be incurred, or any other terms of the submitted bids because each successful bidder was awarded two projects as contemplated in their original bids. GPA Agency Report at 7. The fact that GPA awarded four projects for a total of 120 MW (as opposed to the originally intended 60 MW) makes no difference to the nature of work to be performed by the successful bidders or the purpose of the contracts. The successful bidders would not be required to conduct any more or different work than that for which GPA solicited bids, and their pricing would remain unchanged. Each of the awarded bidders would perform its work in exactly the same way as would have been the case had GPA awarded only two projects.

Appellant contends that a larger project totaling 120 MW would have resulted in “efficiencies of scale” resulting in lower bids. Notice of Appeal at 6. But GPA awarded only 60 MW contracts per awardee, and, as a result, there would have been no additional efficiencies of scale for Appellant. In fact, the only impact on Appellant of the decision to issue two awards was favorable. Appellant was twice as likely to receive an award than if GPA had made only one award. Had Appellant secured an award, it, like the two winning bidders, would have received a maximum of two 30 MW projects for a total of 60 MW of power production, since one of the evaluation criteria states: “Bid size (GPA may prefer contracts in an output range sufficient to allow GPA to contract with more than one project entity to diversify project risk).”

IFB, Part 1 – Qual. Support References at 4, Section C, C3-c.<sup>5</sup> It would have been contrary to this criterion and contrary to the public interest for GPA to award a total 120 MW to one single entity and risk a failure of that entity or its project. Issuing the awards to two bidders, such as the Consortium and Hanwha, minimizes such risk.

Finally, contrary to Appellant’s misleading claim that there is “no hint” in the IFB that GPA may award 120 MW, 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. GPA fully complied with the IFB conditions in selecting two bidders who submitted proposals for a total of 60 MW each and who met the lowest and best price requirement. GPA’s award to the Consortium fulfills the purpose of the procurement law that the agency “maximize to the fullest extent practicable the purchasing value of public funds of the Territory”), *see* 5 G.C.A. § 5001(5), and should be upheld.

### **III. THE INTERCONNECTION REQUIREMENTS WERE NOT UNFAIR OR AMBIGUOUS.**

In the IFB, GPA provided a cost estimate for interconnection for evaluation purposes which included costs for both overhead and underground transmission lines. IFB at 54. GPA stated unequivocally that it would consider overhead or underground transmission lines on a “case by case basis.” Q&A Set 2, July 15, 2016, Question 13. Appellant concedes that “GPA did not rule out the possibility of overhead transmission lines,” and the Consortium’s award “may not be rejected solely because [it] utilizes above ground transmission lines.” Notice of

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<sup>5</sup> GPA repeated this same bid evaluation criteria about bid size in response to a bidder’s question. Amendment No.: III, Question 46 at 5.

Appeal at 9. This admission alone defeats Appellant’s argument that the IFB was “misleading.” *Id.* at 11-12.

There is nothing unfair or ambiguous about GPA recommending underground lines for interconnection between the GPA electric system and the projects. Although GPA recommended underground lines for their reliability, it nonetheless unequivocally acknowledged that overhead lines would also be considered due to the higher cost of constructing underground lines. 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.

Appellant’s assertion that the bids (and specifically, the interconnection requirement) “must be apple-to-apple”, *see* Notice of Appeal at 11, is flatly contradicted by the IFB requirements. The IFB specifically encourages varying types of renewable energy projects and it would not be feasible or practical to require that only underground or overhead transmission lines be installed, since that would depend upon the type of project proposed. Bidders were allowed to make their own decisions about transmission lines and other project factors such as site selection, equipment and configuration in producing a proposal that would be most attractive to GPA. 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).

#### IV. CONCLUSION

Paradoxically, Appellant requests a ruling from the Public Auditor that the IFB was so ambiguous and the size of the procurement was so impermissibly changed that the entire IFB must be re-bid, while at the same time arguing that if Hanwha’s bids are disqualified Appellant



should be awarded the bid. These contradictory requests cannot be reconciled and establish that Appellant's claims are groundless.

GPA, in accordance with the terms of the IFB, selected two bidders who submitted proposals for a total of 60 MW each and who met the lowest and best price requirements. In addition, the IFB unambiguously allowed the bidders to consider both underground and overhead transmission lines to submit proposals that would be the most attractive to GPA. Therefore, GPA complied fully with Guam procurement law and the IFB's requirements. The Consortium respectfully requests that the Office of Public Accountability dismiss this appeal as being without merit. A dismissal is requested as soon as possible to avoid further delay in this critical procurement and to uphold GPA's award to the Consortium as being in the best interests of the territory of Guam. *See In the Appeal of IP&E Holdings, LLC*, OPA-PA-16-013, Decision of Nov. 23, 2016 (it is in the best interest of the territory that governmental agency purchase products and services at the lowest prices offered).

**RESPECTFULLY SUBMITTED** this 18<sup>th</sup> day of September, 2017.

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