

economical use of public funds. If the government of Guam were unwilling to respect the confidential nature of trade secrets and proprietary data, then no businesses who develop new and competitive technology would be willing to contract with the government of Guam. For procurement to work properly, the government of Guam must strike a balance between these competing interests. It is for this reason that ENGIE asks the OPA to stay GPA's production of the full agency report and to preserve the confidentiality of ENGIE's trade secrets and proprietary information.

A. MOTION FOR STAY IN GPA'S PRODUCTION OF THE PROCUREMENT RECORD

ENGIE's unpriced technical proposal contains sensitive information on system design, proprietary technology, confidential vendor information, details on third-party advisors and specifics of past projects. Taken together, they represent ENGIE's competitive advantage and intellectual property that if disclosed to direct competitors, would severely jeopardize ENGIE's future commercial efforts in the solar and battery storage projects.

Guam's procurement law provides a process by which portions of unpriced technical offers may be disclosed during a pre-award procurement protest if it is important for information contained in those offers be released to ensure confidence in the integrity of the procurement process. That process is set forth in 2 G.A.R. § 3109(v)(2)(d)¹.

In short, that process requires bidders to mark pages in their unpriced technical offer as confidential because they contain trade secrets or proprietary data. If a request is made to release that information prior to award of the contract, then the Procurement Officer must first

¹ The full text of 2 G.A.R. § 3109(v)(2)(d) provides that:

(d) unpriced technical offers of bidders who are not awarded the contract shall not be opened to public inspection unless the Procurement Officer determines in writing that public inspection of such offers is essential to assure confidence in the integrity of the procurement process; provided, however, that the provisions of Subsection 3109(v)(2)(c) of this Section shall apply with respect to the possible disclosure of trade secrets and proprietary data.

determine in writing that the release of such information “is essential to assure confidence in the integrity of the procurement process”. 2 G.A.R. § 3109(v)(2)(d). This determination is subject to the process set forth in 2 G.A.R. § 3109(v)(2)(c)², which requires the Procuring Officer to “inform the bidder in writing what portions of the unpriced technical offer will be disclosed and that unless the bidder protests under Chapter 9 (Legal and Contractual Remedies) of the Guam Procurement Regulations, the offer will be so disclosed.”

In this procurement appeal, no party has yet been awarded the contract. A notice of intent to award the contract has been made, but a protest was filed by GlidePath prior to an award to ENGIE. Since no award has been made, 2 G.A.R. § 3109(v)(2)(d) prohibits the opening of Engie’s technical offer unless the Procurement Officer determines in writing that public inspection of the offer is essential to assure confidence in the integrity of the procurement process. Further, even if Engie had been awarded the contract, the procedure set forth in 2 G.A.R. § 3109(v)(2)(c) would still apply and the Procurement Officer would need to provide written determination of the validity of any requests for confidentiality of trade secrets and proprietary data.

ENGIE respectfully requests that the procedures set forth in 2 G.A.R. § 3109(v)(2)(c) and (d) be followed prior to the release of any pages in ENGIE’s unpriced technical offer marked as “Confidential and Proprietary to the OPA, to GlidePath, and to the general public.

² The full text of 2 G.A.R. § 3109(v)(2)(c) provides that:

(c) after award the unpriced technical offer of the successful bidder shall be disclosed as follows. The Procurement Officer shall examine written requests of confidentiality for trade secrets and proprietary data in the technical offer of such bidder to determine the validity of any such requests. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidder in writing what portions of the unpriced technical offer will be disclosed and that unless the bidder protests under Chapter 9 (Legal and Contractual Remedies) of the Guam Procurement Regulations, the offer will be so disclosed. Such technical offer shall be opened to public inspection subject to any continuing prohibition on the disclosure of confidential data; and

B. ALTERNATIVELY, ENGIE REQUESTS THAT ITS UNPRICED TECHNICAL OFFER BE KEPT CONFIDENTIAL BECAUSE THE INFORMATION CONTAINED IN IT IS UNNECESSARY TO THE DETERMINATION OF THIS PROCUREMENT APPEAL

The procurement appeal specifically addresses (1) whether the IFB prohibits the inclusion of more than 20.7 MWp of solar generation capacity in a bid and (2) if, by exceeding the alleged 20.7 MWp solar generation capacity restriction, ENGIE's proposal should be considered technically unresponsive to the IFB. This is a question of interpreting the language of the IFB. This is not a technical question that requires an analysis of Engie's unpriced technical offer.

In determining whether a 20.7 MWp solar generation capacity restriction exists, all the OPA need review is the IFB, including the initial invitation for bids and all subsequent amendments. The OPA need not review the unpriced technical bid of ENGIE or any other bidder in interpreting the language of the IFB.

If the OPA feels it is necessary to review the ENGIE unpriced technical offer then ENGIE requests that the OPA limit the release of ENGIE's confidential and proprietary data to the pages contained in ENGIE's unpriced technical offer which specifically address the alleged 20.7 MWp solar generation capacity restriction. If the OPA feels this is necessary, ENGIE is willing to share pages in the unpriced technical proposal that directly deal with the alleged 20.7 MWp solar generation capacity restriction, and requests that the remainder—not material to the protest in any way—is kept confidential.

The pages of the ENGIE unpriced technical proposal which contain information relevant to the alleged 20.7 MWp solar generation capacity restriction are the following:

- I.B1 | Page 1
- I.B1 | Page 2
- I.B1 | Page 3
- II.C2 | Page 1
- II.C2 | Page 2

CONCLUSION

Engie understands the need to ensure an open and public government procurement process, but asks that this process not be thrust open at the expense of releasing confidential and proprietary data developed by bidders for the purpose of improving their ability to compete in their respective fields.

Requiring parties to reveal all confidential and proprietary data is against the procurement process which allows bidders to maintain the confidentiality of trade secrets and proprietary data through the procedures set forth in 2 G.A.R. § 3109(v)(2)(c) and (d). Further, it is harmful to the procurement process because businesses with new, innovative, and competitive approaches who would be forced to lay their trade secrets bare in order to bid on government of Guam projects would simply not bid at all.

ENGIE respectfully requests that the OPA to stay GPA's production of the full agency report in in order to permit the process set forth in 2 G.A.R. § 3109(v)(2)(c) and (d) to work so that ENGIE may be afforded an ability to protect its confidential and proprietary data. Alternatively, ENGIE requests that the OPA order that GPA not release the ENGIE unpriced technical offer with the full procurement record and agency report because it is not necessary for the OPA to issue a decision with respect to this procurement appeal. As a compromise, ENGIE is willing to submit to the release of the pages noted above that specifically address the alleged 20.7 MWp solar generation capacity restriction.

DATED this 15th day of November, 2019.

BLAIR STERLING JOHNSON & MARTINEZ
A PROFESSIONAL CORPORATION

BY: 

R. MARSIL JOHNSON

Attorneys for Party in Interest ENGIE Solar

CERTIFICATE OF SERVICE

I, **R. MARSIL JOHNSON**, do hereby certify that on the 15th day of November 2019, I caused a copy of the **INTERESTED PARTY ENGIE'S MOTION FOR STAY IN GPA'S PRODUCTION OF THE FULL AGENCY REPORT AND TO PRESERVE CONFIDENTIALITY** to be served upon the following, via hand delivery:

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DATED this 15th day of November, 2019.

BLAIR STERLING JOHNSON & MARTINEZ
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