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PROCUREMENT APPEALS
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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of

GlidePath Marianas Operations Inc.,

Appellant.

Docket No. OPA-PA-19-010

**MOTION FOR SCHEDULING
CONFERENCE;**

**MOTION TO VACATE EXISTING
DATE TO FILE COMMENTS ON
AGENCY REPORT**

MOTION

GlidePath Marianas Operations, Inc. (“GlidePath” or “Appellant”) respectfully moves the Office of Public Accountability for an Order setting a Scheduling Conference in this procurement appeal, and setting a future date at that Scheduling Conference for the Appellant and any interested party to proceed with filing comments to the Guam Power Authority Agency Report filed on November 29, 2019. This Motion is supported by the following Memorandum In Support of Motion and the record already before the Office of Public Accountability.

MEMORANDUM IN SUPPORT OF MOTION

I. RELEVANT PROCEDURAL HISTORY.

GlidePath filed its Notice of Appeal on November 13, 2019. On November 14, 2019, the Office of Public Accountability (“OPA”) directed the General manager of the Guam Power Authority (“GPA”) to provide copies of the procurement record kept in accordance with 5 GCA §5249 to the Appellant and the OPA by Thursday, November 21, 2019. The Public Auditor also

ORIGINAL

ordered that the Agency Report outlined in 2 GAR, Division 4, §12105 should be filed by November 29, 2019.

Pursuant to a November 21, 2019, joint stipulation, the OPA issued an email order extending the procurement record filing deadline to November 29, 2019, and setting the due date for GPA's Agency Report to Friday, December 6, 2019. On November 29, 2019, the parties submitted a further joint stipulation allowing GPA until December 12, 2019, to submit the procurement record as the parties continued their efforts to resolve the ENGIE's claimed need for confidentiality protection. On the same day that stipulation was filed, GPA went ahead and filed its agency report, but did not begin to produce the procurement record to the Appellant until Thursday December 12, 2019. The full record, including the parts of the record most directly related to this appeal, did not get produced until Friday, December 13, 2019.

II. A REGULATORY DEADLINE HAS BEEN TRIGGERED AND GOOD CAUSE EXISTS TO MODIFY THAT DEADLINE.

Guam law sets certain dates for the occurrence of the parties' filings during the course of a procurement appeal. The Agency's procurement record is to be provided within five working days of the receipt of the Notice of Appeal. 2 GAR Div 4 §12104(c)(3). This means that the record should have been made available to the Appellant on November 21, 2019. An Agency Report would be provided after the procurement record. *See*, 2 GAR Div 4 §12104(c)(3). In this case, the opposite has occurred. Because of an earlier claim of confidentiality by interested party ENGIE and the voluminous nature of the procurement record— a record for a hyper-technical procurement worth \$200,000,000 over its lifetime—the Agency Report came before the submission of the procurement record. The end result is that the Appellant did not receive the Procurement Record on November 21, 2019, as originally ordered, but instead on December 13, 2019. The OPA has set December 19, 2019, as the due date for comments on the Agency Report.

This means that Appellant Glide path would have been provided just six calendar days to provide its comments on an Agency report based upon a 12,000 page procurement record, as opposed to the 10 days contemplated by law. 2 GAR §§ 12104(c)(4), and 12108(a). More, the record was provided only in a paper format and that has resulted in difficulty for the Appellant's team—a team consisting of individuals working from Inarajan to Chicago—to share the record, analyze it, and prepare substantive comments.

Finally, GPA has not yet issued an Agency level decision on the second protest of this procurement filed by GlidePath with GPA on November 13, 2019.¹ Because that protest covers the same procurement, and GPA has made no indication that it is contemplating ruling in favor of GlidePath, principles of judicial economy favor consolidating that protest with the instant protest appeal once GPA issues its decision. The consolidated action would be further benefitted by adoption of the same procurement record, and streamlining briefing on the Agency Report, Comments on that Report, and any eventual rebuttal GPA issues as well as an eventual hearing on the merits of the appeals. To that end, GlidePath requests that a joint scheduling conference be held in the immediate future where the parties and the OPA can discuss formulating a joint schedule moving forward that not only accounts for the voluminous record in this case, but also the second protest that GPA has not yet decided.

The OPA has adopted a good cause standard when deciding to extend the time for appellants to file comments on an agency report, and has provided such extensions freely. *See, e.g., In the Appeal of Eons Enterprises, Corp.* OPA—PA—10—003, Order Re Appellant's Motion to Extend Time to File Comments on Agency Report (June 18, 2010). Good cause exists here to extend the deadline as the Appellant seeks.

¹ A copy of that protest is attached to this Motion as Attachment A.

III. RELIEF REQUESTED.

Accordingly, GlidePath respectfully requests that the OPA issue an order that:

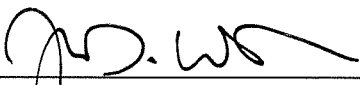
(1) Vacates December 19, 2019, as the date for the parties to file Comments on the Agency Report; and

(2) Sets a Scheduling Conference in this case to determine dates for the consolidation of Protest 2 into this appeal, the new date for Comments on the Agency Report to be filed, and any other scheduling matters that the parties and the OPA feel necessary to establish.

Given the compressed regulatory timelines that have been triggered by the submission of an Agency Report with only a short period review of the Procurement Record, an expedited decision on this Motion is requested. Both counsel for GPA and interested party ENGIE have been informed, via email, of this Motion being filed.

Respectfully submitted on December 17, 2019.

CIVILLE & TANG, PLLC

By: 

JOSHUA D. WALSH
Attorneys for Appellant
GlidePath Marianas Operations, Inc.

ATTACHMENT A

CIVILLE & TANG, PLLC

www.civilletang.com

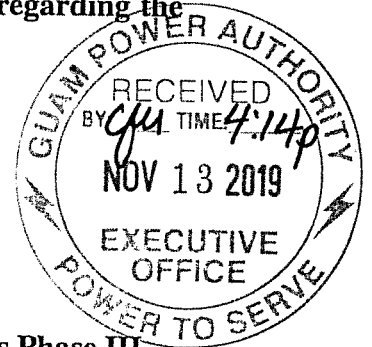
Sender's Direct E-Mail:
jdwalsh@civilletang.com

November 13, 2019

This is a pre-award procurement protest of Guam Power Authority Solicitation Number GPA-IFB-007-18, and as such this correspondence serves as a continued statutory trigger for an Automatic Stay regarding the continued procurement of GPA-IFB-007-18.

VIA HAND DELIVERY

John M. Benavente, P.E.
General Manager
GUAM POWER AUTHORITY
688 Route 15, Suite 100
Mangilao, Guam 96913-6203



Re: Protest 2, GPA-IFB-007-18, Renewable Energy Resources Phase III

Dear General Manager Benavente:

Our office represents GlidePath Marianas Operations Inc. ("GlidePath"). As you know, GlidePath was an offeror who submitted a bid pursuant to GPA-IFB-007-18 ("IFB") issued by the Guam Power Authority ("GPA"). The IFB sought proposals to provide GPA with the renewable energy contemplated by Phase III of its Renewable Energy Resource project. GPA ultimately selected ENGIE Solar ("ENGIE") for award, and after learning that ENGIE submitted a proposal to GPA that did not materially comply with the technical requirements of the IFB, GlidePath submitted a protest on October 9, 2019 ("Protest 1"). GPA denied the protest via correspondence received by GlidePath on October 31, 2019, and GlidePath is appealing that decision to the Office of Public Accountability.¹

GPA's denial of GlidePath's Protest 1 was built upon GPA's assertion that the IFB did not limit capacity to no more than 20.7MWp, despite IFB amendments setting requirements that ESS systems should be equal to or greater than 145% of the MW rating of the PV charging system and that the ESS be no larger than 30MW for each project site. To the extent that GPA has waived the 20.7 MWp cap that GlidePath and other offerors found in the IFB, GlidePath respectfully submits this second protest regarding the IFB. This protest is based upon the fact that the amendments, communications, and information provided to the bidders resulted in a flawed procurement where only one offeror—an offeror that ignored the plain language of the various pronouncements by GPA in the procurement record²—submitted a bid that met the

¹ This second protest is submitted to GPA out of an abundance of caution to assure administrative review of the key issues and flaws affecting this procurement.

² The aspects of the IFB that led to GlidePath's understanding of the 20.7MWp cap are contained in GlidePath's first protest. The essential facts are that on January 25, 2019, GPA issued Amendment XIII that required that the ESS should be equal to or greater than the 145% of the MW rating of the PV charging system. This 145% requirement was coupled to GPA's other requirement that the ESS be no larger than 30MW at each project site. Coupled together, these requirements meant that GPA wanted an ESS system that was both no larger than 30MW, but was also at least 145% greater than the mega-watt rating of the system. This meant that the system to be procured would be limited to a peak mega-watt capacity of 20.7 MWp, since 145% of a 20.7 MWp system would be no larger than the 30MW ESS maximum demanded by GPA in its IFB.

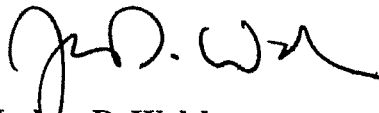
John M. Benavente, P.E.
General Manager
Guam Power Authority
November 13, 2019
Page 2

contours of the system held within GPA's mind's eye.

GPA, by allowing ENGIE to submit a project for consideration that did not hold to the 20.7 MWp PV charging system parameters set by the IFB that all other offerors held to, means that GPA did not compare equivalent projects and, therefore, selection of ENGIE as the lowest bidder was in error because their proposal was materially different than the other bidders. This has resulted in a competitive bid process that was not competitive at all, *i.e.*, the ENGIE projects have substantially more solar generation capacity than 20.7 MWp per project. This meant that ENGIE's proposal, as accepted by GPA, increased the projects' power production and allowed for the fixed project costs—the costs that form the basis of an offeror's price submission to GPA—to be distributed across more MWhs resulting in more gross revenue to ENGIE, and an ultimate lower cost per MWh to GPA. By moving forward with an award to ENGIE without first allowing the other offerors to competitively bid on providing a system that is not capped at 20.7 MW per project, GPA prejudices the people of Guam by ignoring what could be competing bids that offer GPA and its ratepayers substantial savings over ENGIE's price.

GPA should clarify its stance on the 20.7 MWp cap for all bidders, and allow all bidders to submit bids for consideration in conformance with that clarification. Providing such clarification will correct the error that has occurred here. We look forward to your prompt and expeditious resolution of this matter.

Sincerely,



Joshua D. Walsh

CERTIFICATE OF SERVICE

I, JOSHUA D. WALSH, do hereby certify as follows:

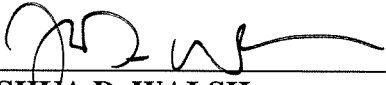
On December 17, 2019, via hand delivery, I caused to be served a true and correct copy of the **MOTION FOR SCHEDULING CONFERENCE; MOTION TO VACATE EXISTING DATE TO FILE COMMENTS ON AGENCY REPORT** upon the following:

D. Graham Botha
GPA General Counsel
Guam Power Authority
688 Route 15, Suite 302
Mangilao, GU 96913
Attorneys for Appellant Guam Power Authority

R. Marsil Johnson
Blair Sterling Johnson & Martinez, P.C.
238 Archbishop Flores St., Suite 1008
Hagatna, GU 96910
Attorneys for Appellant ENGIE Solar

Executed December 17, 2019, at Hagåtña, Guam.

CIVILLE & TANG, PLLC

By: 

JOSHUA D. WALSH
Attorneys for Appellant
GlidePath Marianas Operations Inc.