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

In the Appeal of

GlidePath Marianas Operations Inc.,

Appellant.

DOCKET NOS. OPA-PA-19-010
OPA-PA-20-001

MOTION FOR DISCOVERY

I. MOTION

GlidePath Marianas Operations Inc. (“GlidePath” or “Appellant”), by and through its undersigned counsel, requests pursuant to 5 GCA § 9218, 2 G.A.R. §§ 12109(c) and 12105(g), that the Public Auditor issue an Order requiring the Guam Power Authority (“GPA”) to produce for a deposition a competent representative that can offer testimony regarding the Technical Qualification Proposal Requirements contained in Invitation of Bid GPA-IFB-007-18, Renewable Energy Resources Phase III (the “IFB”), and Amendment XII to the IFB issued on January 25, 2019. This Motion is supported by the appended Memorandum in Support, all matters of record, and such further evidence as may be presented at a hearing on the matter.

II. MEMORANDUM IN SUPPORT

A. PROCEDURAL AND FACTUAL BACKGROUND

On November 13, 2019, GlidePath filed a Notice of Appeal with the Office of Public Accountability (“OPA”) following the denial of its agency level protest by procuring agency Guam Power Authority (“GPA”). That case is styled, *In the Appeal of GlidePath Marianas*

ORIGINAL

Operations Inc., OPA-PA-19-010, and is premised on the understanding that interested party ENGIE was not technically responsive to the IFB. On January 21, 2020, GlidePath filed a Notice of Appeal with the OPA following GPA's denial of its second agency level protest. That case was designated OPA-PA-20-001, and was brought because GPA, in response to the first protest, disavowed the existence of the technical requirements that GlidePath articulated ENGIE did not comply with. Both appeals were consolidated by the OPA on January 30, 2020.

On January 15, 2020, as part an effort to develop a joint schedule for this matter that was acceptable to all parties, GlidePath sought GPA's cooperation in agreeing to a date for a deposition. *See*, Email Correspondence, January 15, 2020, attached as **Exhibit A** to the Declaration of Joshua D. Walsh submitted in support of this motion ("Walsh Declaration"). That email was not responded to. GlidePath again contacted GPA regarding an agreement regarding a deposition on January 17, 2020. That correspondence was similarly not responded to. *See*, Email Correspondence, January 17, 2020, attached as **Exhibit B** to the Walsh Declaration.

GPA did not respond to the GlidePath's effort to obtain a single deposition of an Agency representative until the Status Conference held in this matter on January 29, 2020. At that hearing GPA declined to agree to a deposition, and this Motion is submitted in an effort to obtain an Order from the OPA compelling such limited discovery.

B. THE SINGLE DEPOSITION THAT GLIDEPATH SEEKS IS NECESSARY GIVEN THE UNIQUE NATURE OF THIS APPEAL, AND THE VOLUMINOUS NATURE OF THE PROCUREMENT RECORD.

The ambiguity created by GPA with regard to the technical requirements of the IFB warrant allowing the minimal discovery GlidePath seeks. GlidePath's first protest and appeal was premised on the grounds that winning offeror ENGIE did not submit a technically responsive bid by. GPA responded to that protest by attempting to explain that ENGIE's bid was responsive, since the technical requirements that GlidePath pointed toward were not, in the view

of the agency, technical requirements. To make this claim, GPA points toward Amendment XIII to the IFB it issued on January 25, 2019. That amendment is called the “Supplement and Update to Volume II Technical Qualification Requirements.” *See*, Attachment B to Amendment No.: XIII to Invitation for Multi-Step Bid No.: GPA-007-18 for Renewable Energy Resource Phase III issued on January 25, 2019, submitted as **Attachment F** to GlidePath’s Notice of Appeal filed on November 13, 2019. That amendment required that the energy storage of the system shall be equal to or greater than the 145% of the megawatt rating of the solar charging system. This 145% requirement was still coupled to GPA’s other requirement that the energy storage be no larger than 30 megawatts at each project site. *See*, Technical Requirements Supplement, Section 2, bullet point 5, submitted as **Attachment G** to GlidePath’s Notice of Appeal filed on November 13, 2019. This case is unique since not only are an offeror’s technical submission under review for whether or not technical requirements were met, but exactly what the technical requirements of IFB are have been called into doubt by the Agency’s response.

The Deposition is needed because the procurement record—a record spanning thousands of pages over 12 volumes—contains no information on how the technical requirements in the supplement of Amendment XIII came to be, thus leaving an information vacuum on an essential part of this appeal, *i.e.*, the Agency’s technical reasoning behind creating Amendment XIII and how that Amendment impacted the other technical requirements of the project. GPA also now claims, again without citation to the Procurement Record, that the technical restrictions on the project that GlidePath believes existed were mistaken, since, in the view of GPA, the 20.7 MWp limit was not a limit on the system itself, but actually a cap of the “DC/DC converters.” Denial of Procurement Protest, January 7, 2020, p.2, submitted as **Attachment J** to GlidePath’s Notice of Appeal filed on November 13, 2019. GPA should be compelled to nominate a competent

representative to provide deposition testimony on how this “DC/DC” acceptance came to be, and to explain the technical underpinnings of Amendment XIII since the procurement record is silent on that matter.

C. THE PUBLIC AUDITOR CAN ORDER THE DISCOVERY THAT GLIDEPATH SEEKS

GlidePath is seeking limited discovery in order to assist it in streamlining the eventual administrative hearing that will be held in this matter. The Hearing Officer in a procurement appeal has broad authority to order discovery and require that witnesses and documents be produced in procurement appeals. 2 G.A.R. § 12109(a) allows the Hearing Officer “to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion.” The regulations also provide that the Hearing Officer has the authority to “Rule on motions, and other procedural items on matters pending before such officer.” 2 G.A.R. § 12109(d). Those same regulations also contemplate compelling testimony in the manner that GlidePath now seeks. 2 G.A.R. § 12109(c) authorizes the Hearing Officer to “require parties to produce for examination those relevant witnesses and documents under their control.”

While both GPA and interested party ENGIE can correctly assert that the procurement rules of procedure themselves do not explicitly provide for the discovery that GlidePath seeks, those rules rely upon the Administrative Adjudication Act which does allow for the deposition that the Appellant wants to conduct. **The Procurement regulations direct that “Where not otherwise provided for by these rules and regulations or statute, and where not inconsistent herewith, hearings shall be conducted in accordance with the Administrative Adjudication Law in Chapter 9 of Title 5, Guam Code Annotated, including those provisions on subpoenas and contempt.”** 2 GAR § 12108(d) (emphasis added). The Administrative Adjudication Law

explicitly allows for “Depositions” and explains that “an agency may order that the testimony of any material witness residing within or without the territory of Guam be taken by deposition in the manner prescribed by law for depositions in civil actions.” 5 GCA § 9218.¹

The Guam Supreme Court has made it clear that the Administrative Adjudication Act—the Act that provides for the Deposition that GlidePath seeks—applies to administrative proceedings where hearings are required. *See, Guam Fed. of Teachers ex rel. Rector v. Perez*, 2005 Guam 25, ¶ 36 citing Article 2, Title 5 GCA § 9200 (2005) (“The procedure of any agency shall be conducted pursuant to the provisions of this Chapter in any proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after an agency hearing.”) The Supreme Court of Guam has also classified the OPA's authority to resolve procurement protests as “administrative adjudication.” *See, Teleguam Holdings, LLC v. Territory of Guam*, 2015 Guam 13 ¶ 29. GlidePath is seeking a Deposition that is allowed implicitly by Guam’s Procurement Regulations, and explicitly by the Administrative Adjudication law.

D. CONCLUSION

GPA’s answer in its agency report to the Notice of Appeal filed by GlidePath spans six pages, of which, just two pages deal with the merits of GlidePath’s claims. 2 G.A.R. § 12105(g) requires that the agency report be “fully response to the allegations of the Appeal.” Guam’s Administrative Adjudication Law allows that “an agency may order that the testimony of any material witness residing within or without the territory of Guam be taken by deposition in the

¹ Black’s Law Dictionary makes it plain that a deposition is an event that occurs outside of the eventual hearing that will occur in this matter. It defines a “deposition” as “1. A witness’s out-of-court testimony that is reduced to writing (usu. by a court reporter) for later use in court or for discovery purposes. *See* Fed. R. Civ. P. 30; Fed. R. Crim. P. 15. — Also termed examination before trial. 2. The session at which such testimony is recorded.” DEPOSITION, Black’s Law Dictionary (11th ed. 2019)

manner prescribed by law for depositions in civil actions.” 5 GCA § 9218. Guam’s Procurement Regulations allow for the Hearing Officer to “require parties to produce for examination those relevant witnesses and documents under their control.” 2 G.A.R. § 12109(c). GlidePath asks that the OPA act in accordance with the law, and allow it to take the single deposition it seeks of a deponent qualified to respond to questions about Technical Qualification Proposal Requirements contained in Invitation of Bid GPA-IFB-007-18, and Amendment XII to the IFB issued on January 25, 2019.

Respectfully submitted on February 5, 2020.

CIVILLE & TANG, PLLC

By: _____


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

CERTIFICATE OF SERVICE

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

On February 5, 2020, via hand delivery, I caused to be served a true and correct copy of the **MOTION FOR DISCOVERY** upon the following:

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Executed February 5, 2020, at Hagåtña, Guam.

CIVILLE & TANG, PLLC

By: _____


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