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PROCUREMENT APPEALS
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10 **OFFICE OF THE PUBLIC AUDITOR**
11 **PROCUREMENT APPEALS**

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14 IN THE APPEAL OF) DOCKET NO. OPA-PA-19-010
15) OPA-PA-20-001
16 GlidePath Marianas Operations, Inc.,)
17) **APPELLEE'S HEARING BRIEF**
18 Appellant.)
19)
20 _____)

21
22 **COMES NOW**, the GUAM POWER AUTHORITY, by and through its counsel of
23
24 record, D. GRAHAM BOTHA, ESQ., and submits its Hearing Brief, as follows.

25 **BACKGROUND**

26 On November 28, 2017, Guam Power Authority (“GPA”) issued Multi-Step Invitation for
27 Bid, GPA-IFB-007-018, Renewable Energy Resources Phase III. Multiple bidders expressed
28 interest in the IFB from November 28, 2017 to June 3, 2019. During the 18-month period prior to
29 submission of the technical proposals, all bidders had an opportunity to submit questions regarding
30 the IFB. GPA issued amendments II to XIX in response to these questions, and other amendments
31 to clarify the IFB.

32 On June 3, 2019, the sealed technical proposals of the six bidders were opened in the
33 presence of company representatives. On August 12, 2019, the evaluation committee met and
34 recommended that five of the six bidders be deemed qualified under the Phase I technical

1 evaluation. Five bidders with twelve project sites were qualified, ENGIE, AES, KEPCO/Hanwha,
2 GlidePath, and X-Elio.

3 On September 10, 2019, the sealed price proposals for the five bidders and ten project sites
4 were opened in the presence of company representatives. The price proposal evaluation was
5 completed and determined that the lowest responsive bidder for Naval Base Guam and South
6 Finegayan was ENGIE. The evaluation committee recommended award of Naval Base Guam
7 (NGB) and South Finegayan (SF) sites based on the technical price proposals submitted. The
8 Phase II -- Bid Abstract and evaluation committee memo reflect the ENGIE prices for NGB site of
9 **\$110.90/MWh** and the SF site price of **\$108.90/MWh**; AES prices for NGB of **\$169.00/MWh**
10 and SF of **\$158.90/MWh**; GlidePath prices for NGB of **\$196.00/MWh** and SF of **\$191.50/MWh**
11 and GlidePath (Alternate) prices for NGB of **\$176.00/MWh** and SF of **\$176.00/MWh**.

12 GlidePath filed a protest with GPA which resulted in a Stay of Procurement, and a Lift of
13 Stay when the protest was denied by GPA. GlidePath filed an appeal to the OPA on November 13,
14 2019, and GPA filed a Stay of Procurement on November 15, 2019. GlidePath filed a second
15 appeal to the OPA on January 21, 2020.

16 ARGUMENT

17 Guam Power Authority (GPA) submits that it's decision to award the Naval Base Guam
18 and South Finegayan site to ENGIE in Multi-Step Invitation for Bid, GPA-007-018, Renewable
19 Energy Phase III was made to the lowest responsible and responsive bidder. Guam Procurement
20 law requires that GPA award to the lowest responsible and **responsive** bidders. A responsive
21 bidder is a person who has submitted a bid which conforms in all material respects to the Invitation
22 for Bid. 5 GCA §5201(g) and 2 GAR, Div. 4, Chap. 3, §3109(n)(2). Further, any bidder's
23 offering which does not meet the acceptability requirements shall be rejected as non-responsive. 2
24 GAR, Div. 4, Chap. 3, §3109(n)(3)(c). A review of the bid abstract is clear that the ENGIE bids

1 for the NBG and SF sites were substantially less than the bid and alternate bid for two sites
2 submitted by GlidePath.

3 The committee evaluation memo and the Bid Abstract -- Phase II clearly sets forth the
4 prices of the top three bidders, including ENGIE, AES, and GlidePath (alternate bid). The
5 evaluation committee recommended award to ENGIE of the NBG and SF site based on the ENGIE
6 price proposal of NBG site at **\$110.90/MWH** and the SF site at **\$108.90/MWH**.

7	<u>Bidder</u>	<u>NBG price</u>	<u>SF price</u>	<u>% Increase</u>
8	ENGIE	\$110.95/MWH	\$108.90/MWH	
9	AES	\$169.00/MWH	\$158.90/MWH	52.3%/45.9%
10	GlidePath(alt)	\$176.00/MWH	\$176.00/MWH	58.6%/61.6%
11	GlidePath	\$196.00/MWH	\$191.50/MWH	76.6%/75.8%

12 The GlidePath alternate bid required GPA to select both sites in the GlidePath proposal.

13 The main grounds for the GlidePath protest appear to be GlidePath's allegations that
14 ENGIE did not meet the specifications forth in the IFB, specifically GlidePath's claim that one of
15 the technical requirements of the IFB is that the IFB caps solar generation capacity at both sites at
16 20.7MWp. GPA's bid did not limit the capacity of the PV installation, but does restrict the
17 delivery of energy at the interconnection point which is 30MW_{ac}. Volume II- Technical
18 Qualification Proposal Requirement, Section 1 Overview (pg 52 of 501) states: "1. The bidder's
19 renewable resource project shall have a **maximum export capacity of 30MW_{ac}**; this may be a
20 combination of several generation units at one site." Section 2.3.1. Minimum and Maximum
21 Project Capacity (pg 56 of 501) states "there is no minimum nameplate project capacity that a
22 Bidder may offer, **however the maximum export capacity shall be 30MW.**"

23 GlidePath itself sought clarification on this issue on February 11, 2019, which was
24 addressed in Amendment XVII (pg. 2 of 17) in which GlidePath asks "what is the maximum

1 procurement under this bid, could GPA select two 30MW_{ac} projects at each site for a total
2 procurement of 60MW_{ac}? The GPA response was “Yes.”

3 GlidePath states that the GPA limit on the ESS size to 30MW at each project site together
4 with the 145% requirement effectively caps the size of the PV system to 20.7MW_{ac}. The IFB
5 states that the intent of the 145% requirement is to require the ESS charge and discharge be
6 asymmetrical, with ESS discharge power required to be 30MW_{ac} at the point of connection and
7 ESS charge power not to exceed 20.7MW. This requirement limits the maximum AC PV charging
8 power on each site to 1/1.45 of the maximum AC export capacity. The “MW rating of the PV
9 charging system” in ENGIE’s proposal, is equal to the power rating of the DC/DC converters, and
10 is capped at 20.7MW (i.e. 1/1.45 of 30MW AC), in full compliance with the IFB requirements.
11 Clarifications were provided in Amendment XVII for both GlidePath and ENGIE regarding the
12 increased delivery period.

13 The ENGIE proposal does not exceed the 30MW discharge power maximum at the point of
14 connect. The MW rating of the ESS may not exceed 40MW, and the MW rating of the ESS shall
15 be equal to or greater than the 145% of the MW rating of the PV charging system. The ENGIE
16 bids complies with all the restrictions set out in the IFB.

17 GlidePath also complains that GPA’s technical specifications somehow misled GlidePath
18 and that there was a “flawed procurement where every offeror other than ENGIE was led astray
19 into submitting bids that were limited by specifications that did not actually exist.” Despite the
20 sophisticated background of GlidePath and its advisors, GlidePath claims not to understand the
21 technical specifications set forth in the IFB. All parties, including GlidePath, had many
22 opportunities to seek clarification at all steps in the bidding process, to ensure that they understood
23 the technical specifications, and any restrictions contained within those specifications. It is clear
24 that through the question and amendment process, that GlidePath and other bidders submitted and

1 received answers to the questions submitted to GPA. Despite GlidePath’s contention that all other
 2 bidders were confused about the restrictions on PV plant size, the bid submissions show that no
 3 other bidders, other than GlidePath, limited PV capacity to less than 20.7MW for each site.

4	<u>Bidder</u>	<u>SF site</u>	<u>NBG site</u>
5		ESS MW/PV MW	ESS MW/PV MW
6	GlidePath	30MW/20.6MW	30MW/20.6MW
7	KEPCO/Hanwha	30MW/21.06MW	30MW/21MW
8	AES	25MW/23.58MW	20MW/19.65MW
9	X-Elio	14MW/24.97MW	12MW/20.5MW
10	ENGIE	30MW/26.47MW	30MW/27.64MW

11 The GlidePath interpretation of the technical specifications is that the GPA limit on the ESS size to
 12 30MW at each project site together with the 145% requirement effectively caps the size of the PV
 13 system to 20.7MW_{AC}. Unfortunately for GlidePath’s argument, as shown in the table above, four
 14 of the five bidders, did not reach the same conclusion or have the same misunderstanding. The
 15 five bidders were all sophisticated solar bidders, having operated and developed other solar
 16 projects. It appears that the only one who didn’t understand the technical specifications, despite
 17 having more than 18 months during the procurement period to ask questions was GlidePath.
 18 GlidePath complains that the specifications are ambiguous and unfair and that the procurement
 19 must be rebid. In both appeals it requests the OPA to disqualify ENGIE and award to GlidePath,
 20 or in the alternative to have GPA receive new technical and price proposals.

21 5 GCA §5211(g) provides that “Award. The contract shall be awarded with reasonable
 22 promptness by written notice to the lowest responsible bidder whose bid meets the requirements
 23 and criteria set forth in the Invitation for Bids ...” as cited in *Pacific Data Systems, Inc. vs.*
 24 *General Services Agency*, OPA-PA 15-012. *In the Appeal of 1-A Guam WEBZ*, OPA-PA 16-002

1 also addresses the issue of bid evaluation and stated that “the invitation for bids shall set forth the
2 evaluation criteria to be used and no criteria may be used in bid evaluation that are not set forth in
3 the Invitation for bids.” 5 GCA §5211(e) and 2 GAR, Div 4, Chap 3, §3109(n)(1).

4 Procurement law requires that GPA award to the lowest responsible and **responsive**
5 bidders. A responsive bidder is a person who has submitted a bid which conforms in all material
6 respects to the Invitation for Bid. 5 GCA §5201(g) and 2 GAR, Div. 4, Chap. 3, §3109(n)(2).

7 GPA properly awarded the Naval Base Guam and South Finegayan sites to ENGIE as the lowest
8 responsible and responsive bidder. The price proposal evaluation and bid abstract clearly
9 demonstrate that the ENGIE bid was the lowest bidder for the renewable energy and battery
10 storage bid. The bids were evaluated and awarded based on the Multi-Step bid specifications and
11 evaluation criteria set forth in the bid documents.

12 The only party in this case that appears to be confused about the technical specifications is
13 GlidePath, despite having ample opportunities to seek clarification from GPA during the bidding
14 process. No matter how many times GlidePath attempts to restate its issues for appeal, the only
15 issue before the Public Auditor is whether the ENGIE bid, as submitted, met the technical
16 specifications of the Phase III solar IFB in Multi-step bid, GPA-IFB-007-018. Since the ENGIE
17 bid complies with the GPA technical specifications, then the GlidePath appeals should be denied.
18 The procurement process was not rushed or expedited, as the IFB was issued on November 16,
19 2017, and a notice of intent to award to ENGIE was issued on October 4, 2019, almost two years
20 later.

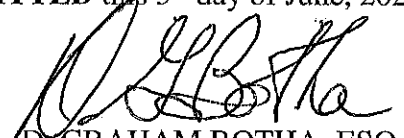
21 It would be manifestly unfair to allow for a rebid in this matter, as cancelling the proposed
22 award is unfair to the bidding process, and specifically to the successful bidder. GlidePath is now
23 aware of the ENGIE pricing and strategy, and a rebid would allow GlidePath another chance to
24 revise its proposal and pricing, which is contrary to the procurement policy of treating all bidders

1 fairly. 5 GCA §5001(b)(4). 5 GCA § 5001. Purposes, Rules of Construction. (a) Interpretation,
2 provides that the underlying purposes and policies of this Chapter are: ... (3) to provide for
3 increased public confidence in the procedures followed in public procurement; (4) to ensure the
4 fair and equitable treatment of all persons who deal with the procurement system of this Territory;
5 (6) to foster effective broad-based competition within the free enterprise system; (7) to provide
6 safeguards for the maintenance of a procurement system of quality and integrity; and (8) to require
7 public access to all aspects of procurement consistent with the sealed bid procedure and the
8 integrity of the procurement process.

9 CONCLUSION

10 GPA requests that the appeals of GlidePath be dismissed, and that the Public Auditor award
11 all legal and equitable remedies that GPA may be entitled to as a result.

12 **RESPECTFULLY SUBMITTED** this 5th day of June, 2020, by:

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14 D. GRAHAM BOTHA, ESQ.
15 GPA General Counsel
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