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FILE NO OPA-PA: 15-006

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

9
10 **In the Matter of**)

Docket OPA PA-15-006

11 **IP&E HOLDINGS, LLC.,**)

12 **Appellant,**)

13 **And**)

**COMMENTS
OF INTERESTED PARTY**

14 **GUAM POWER AUTHORITY,**)

15 **Purchasing Agency.**)

16
17 On May 14, 2015, **MOBIL OIL GUAM INC.** ("Mobil") received **GUAM**
18 **POWER AUTHORITY'S** ("GPA") Agency Report in the present procurement
19 appeal filed by **IP&E HOLDINGS, LLC** ("IP&E"). This appeal concerns
20 the invitation for multi-step bid on GPA-005-15, a contract to
21 provide diesel fuel and automotive gasoline for the GPA
22 transportation fleet. Mobil hereby submits the following
23 comments.
24

25 **A. GPA CORRECTLY STATES THAT THE INSURANCE POLICY WAS NOT PART OF
THE REQUIRED DOCUMENTS AT THE TIME OF THE IFB SUBMISSION**

26 As noted by GPA, "the actual items required at the time of
27 the IFB submission are indicated in the Special Reminders to
28

1 Prospective Bidders and include the bid guarantee, statement of
2 qualification, and various affidavits regarding shareholders,
3 non-collusion, no gratuities, ethical standards, wage
4 determination, and sex offenders." See Agency Report. The
5 parties were not required to submit insurance policies and, in
6 fact, could not have submitted valid policies without GPA first
7 awarding the contract to the successful bidder.
8

9 In its Notice of Procurement Appeal, IP&E seeks to confuse
10 what was actually required under the bid solicitation with what
11 is required of the successful bidder under the terms of the
12 contract. In doing so, IP&E characterizes the insurance policy
13 provision as "Section G of the IFB GPA-005-15" in order to make
14 it seem as though it is a part of the "Invitation for Bids to
15 Supply Fleet Fuels (Diesel Fuel, Oil No. 2 and Automotive
16 Gasoline, Regular Unleaded) to the Guam Power Authority". See
17 IP&E's Notice of Procurement Appeal. The copy of Paragraph G
18 submitted by IP&E in Exhibit A of its Notice of Procurement
19 Appeal is even presented without the rest of the page and the
20 IFB page number, which further confuses where in the bid packet
21 it appeared. In reality, Paragraph G is part of Section 3.13 of
22 the Fuel Oil Supply Contract.
23

24 Pursuant to the terms of the Fuel Oil Supply Contract, "the
25 contractor shall not commence work under this contract until he
26 has obtained all insurance required under this section and such
27

1 insurance has been approved by GPA, nor shall the Contractor
2 allow any Subcontractor to commence work on this subcontractor
3 until all similar insurance required of the Subcontractor has
4 been so obtained." Furthermore, the first page of the contract
5 defines the term "Contractor" to mean the party with whom GPA
6 executes the contract, on the date of the award, whomever that
7 party shall be. ("This CONTRACT, shall be executed on the date
8 of the award, by and between Guam Power Authority, a public
9 corporation, hereinafter referred to as 'Authority' or 'GPA',
10 and _____ herein referred to as 'Contractor' or
11 'Supplier'.") See Exhibit 1 (Page 857 of the Procurement
12 Record). The contract does not define "Contractor" to mean any
13 or all of the prospective bidders, but the one bidder with whom
14 GPA executes the contract on the date of the award. As a result,
15 none of the prospective bidders could be obligated under the
16 terms of the contract until the contract was awarded and executed
17 as none them could meet the requirements of the definition until
18 that date. Those terms, which none of the prospective bidders
19 could be obligated under until the award and execution, include
20 Paragraph G of Section 3.13 of the Fuel Oil Supply Contract.
21
22

23 **B. IT WAS IMPOSSIBLE FOR THE BIDDERS TO SUBMIT THE SUPPOSEDLY**
24 **REQUIRED INSURANCE POLICIES WITH THEIR BIDS, BECAUSE NONE OF**
25 **THEM WOULD HAVE HAD AN INSURABLE INTEREST IN CONNECTION WITH**
26 **THE CONTRACT AT THE TIME OF BID SUBMITTAL**

27 None of the bidders could have complied with the
28 requirements of Paragraph G before the award and execution of

1 the contract, because none of them had an insurable interest in
2 connection with the contract. Only the party awarded the
3 contract could have such an interest, following the contract's
4 execution.

5 Under Guam law, a party must have an insurable interest in
6 order to enter into a valid insurance contract. "Every interest
7 in property, or any relation thereto, or any liability in respect
8 thereto, of such a nature that a contemplated peril might
9 directly damnify the insured, is an insurable interest." 22
10 G.C.A. § 18204(a). Furthermore, "[a] mere contingent or
11 expectant interest in anything, not founded upon an actual right
12 to or in the thing, nor upon any valid contract for it, is not
13 insurable." *Id.* An insurable interest also cannot be a mere
14 contingent or expectant interest to qualify. *Id.* To be an
15 insurable interest, "[a]n interest in property insured must
16 exist when the insurance takes effect and when the loss occurs
17 but need not exist in the meantime." 22 G.C.A. § 18207. Even
18 if an entity were to obtain an insurance policy without having
19 an insurable interest, the contract would be void. 22 G.C.A. §
20 18204(c) ("If the insured has no insurable interest, the contract
21 is void.").
22
23

24 Following Guam law, none of the parties bidding on GPA-005-
25 15 could have an insurable interest in connection with the
26 contract until the contract was awarded and executed. Pursuant
27
28

1 to the clear language of 18 G.C.A. § 18204(a), a contingent or
2 expectant interest, not founded upon a valid contract is not
3 insurable. Prior to the execution of the contract, the bidders
4 have at most a contingent or expectant interest in the contract,
5 which is not insurable under the clear language of 22 G.C.A.
6 § 18204(c). Without such an insurable interest, any supposed
7 insurance policy submitted by any bidder would be void under 22
8 G.C.A. § 18204(c), including the policy IP&E claims to have
9 submitted.
10

11 **C. IP&E'S LACK OF AN INSURABLE INTEREST IS CLEAR ON THE FACE OF THE**
12 **POLICY IT SUBMITTED, A POLICY THAT FAILS TO MEET THE**
13 **REQUIREMENTS OF PARAGRAPH G**

14 Assuming, for the sake of argument, that the reading IP&E
15 proposes GPA should have applied to the bid is correct, IP&E's
16 insurance certificate does not comply with Paragraph G. Under
17 the proposed contract, the parties are not required to provide
18 GPA with a copy of just any insurance certificate. Instead, the
19 insurance certificate must meet the requirements set forth in
20 Paragraph G.

21 One of those requirements is that "[t]he Certificates of
22 Insurance shall clearly show this Contract number." See Exhibit
23 2 (Page 872 of the Procurement Record). The insurance policy
24 submitted by IP&E does not. See Exhibit 3 ("Endorsement No. GL-
25 1"). The contract number is GPA-005-15. Endorsement No. GL-1
26 of the IP&E policy does show contract numbers for other contracts
27 between GPA and IP&E. Specifically, the endorsement states that
28

1 "[i]t is hereby agreed and understood that this policy applies
2 the 'bodily injury' and 'property damage' for which the insured
3 is liable under law and is obligated to pay damages by reasons
4 of the assumption of liability in the following schedules [sic]
5 contracts:". The schedule of contracts includes GPA 010-10,
6 GPA-049-09, and GPA-050-09, three other contracts IP&E actually
7 had with GPA at the time the parties submitted their bids.
8 However, GPA-005-15 is clearly not included in the schedule of
9 contracts. Thus, the insurance policy submitted by IP&E has
10 absolutely no bearing on the contract up for bid and does not
11 even purport to cover any potentially insurable interest in
12 connection with the contract. As described above, it was
13 impossible for IP&E to have submitted a valid insurance policy
14 with its bid, because it did not have an insurable interest.
15 That is why the insurance policy that IP&E submitted with its
16 bid, which had nothing to do with the contract, could not
17 possibly comply with the Requirements of Paragraph G.

18
19
20 **D. CONCLUSION**

21 The award made by GPA was made properly as it was made to
22 the lowest responsible and responsive bidder, which was Mobil.
23 The insurance policy that IP&E claims was required at the time
24 of the IFB submission was actually required of the winning bidder
25 once the contract was awarded and executed. Given Guam's
26 insurance law, none of the bidders could have submitted a valid
27

1 insurance policy that met the specifications set forth in
2 Paragraph G and the policy submitted by IP&E failed to do so.
3 For these reasons, as explained above, Mobil respectfully
4 requests that the Public Auditor deny IP&E's appeal.

5 **DATED** this 26th day of May, 2015.

6 **BLAIR STERLING JOHNSON & MARTINEZ**
7 A PROFESSIONAL CORPORATION

8
9 BY: 
10 **R. MARSIL JOHNSON**
Attorneys for Party in Interest Mobil Oil Guam Inc.

11 **ATTACHMENTS:**
12 EXHIBITS 1, 2, & 3

13 U56\50556-285
14 G:\MOGI\PLD\850-MOGI'S COMMENTS OF INTERESTED PARTY
RE IP&E HOLDINGS AND GPA OPA PA-15-006.DOCX

CERTIFICATE OF SERVICE

1
2 I, **R. MARSIL JOHNSON**, do hereby certify that on the 26th day
3 of May, 2015, I caused to be served a copy of **COMMENTS OF INTERESTED**
4 **PARTY** to be served upon the following, via hand delivery:

5 **Purchasing Agency:** Joaquin C. Flores
6 General Manager
7 Guam Power Authority
8 1911 Rte 16
9 Harmon, Guam

10 **Appellant:** Steven Carrara
11 IP&E Holdings, LLC
12 646 Chalan San Antonio
13 Tamuning, Guam 96913-3644

14 **DATED** this 26th day of May, 2015.

15 **BLAIR STERLING JOHNSON & MARTINEZ**
16 A PROFESSIONAL CORPORATION

17 BY: 

18 **R. MARSIL JOHNSON**

19 *Attorneys for Party in Interest Mobil Oil Guam Inc.*

20 U56\50556-285
21 G:\MOGI\PLD\850-MOGI'S COMMENTS OF INTERESTED PARTY RE
22 IP&E HOLDINGS AND GPA OPA PA-15-006.DOCX
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PREAMBLE

This **CONTRACT**, shall be executed on the date of the award, by and between Guam Power Authority, a public corporation, hereinafter referred to as "Authority" or "GPA", and _____ hereafter referred to as "Contractor" or "Supplier".

WITNESSETH:

RECITALS

WHEREAS, the Authority has issued an Invitation for Bid, for a THREE (3) year Fleet Fuel Supply Contract, Invitation For Bid, **IFB GPA-005-15**, for the supply of the **AUTHORITY's** Diesel Fuel Oil No. 2 and Automotive Gasoline, Regular Unleaded, for the Authority's Transportation Fleet; and

WHEREAS, the Authority will award the Contract to the lowest responsible bidder whose bid conforms to the material aspects of the Invitation; and

WHEREAS, if Contractor specified herein has been awarded the **CONTRACT**, Authority and Contractor have agreed upon the terms and conditions of the Contract;

NOW, THEREFORE, for and in consideration of the mutual covenants contained herein, the parties hereto do hereby agree as follows:

with minimum limits of \$5,000,000 that provides coverage for third party bodily injury, third party property damage, and clean-up cost whether ordered by a government entity or not ordered by a government entity. Grant waiver of subrogation in favor of GPA. GPA is to be an additional insured.

F. EXCESS LIABILITY

Excess Liability with limits of \$5,000,000. GPA shall be an additional insured. Contractor shall grant Waiver of Subrogation in favor of GPA.

G. CERTIFICATE OF INSURANCE:

The Contractor shall furnish GPA with two (2) copies of a Certificate of Insurance evidencing policies required in Paragraphs B, C, D, E, and F above. Such certificates shall specifically indicate that the Commercial General Liability Insurance includes all extensions of coverage required in Paragraph C., Subparagraph 2. above. Such certificate shall specifically state that the insurance company or companies issuing such insurance policies shall give GPA at least thirty (30) days written notice in the event of cancellation of or material change in any of the policies. If coverage on said certificate(s) is shown to expire prior to completion of all terms of this Contract, the Contractor shall furnish a Certificates of Insurance evidencing renewal of such coverage to GPA. The Certificates of Insurance shall clearly show this Contract number.

The Contractor shall provide a copy of their Insurance Policy to GPA as part of the bid requirements. All updates or revisions after contract commencement shall also be forwarded to GPA.

H. SUBCONTRACTOR'S INSURANCE:

The Contractor shall require each of his Subcontractors to take out and maintain during the life of his Subcontract, the same insurance coverage required of the Contractor under Paragraphs B, C, D, E, and F above, including the extensions of coverage required under Paragraph C., Subparagraph 2, above. Each Subcontractor shall furnish to the Contractor two (2) copies of a Certificate of Insurance and such certificate shall contain the same information required in Paragraph C. above. The Contractor shall furnish one (1) copy of the certificate to GPA.

Endorsement No. GL-1

Named Insured: **IP & E Holdings LLC; IP & E Palau and Mariana Acquisition Corp.**
 Address: **643 Chalan San Antonio, Suite 100, Tamuning, GU, 96913**

CONTRACTUAL LIABILITY

This clause modifies the provisions of Exclusion 7:

It is hereby agreed and understood that this policy applies the "bodily injury" and "property damage" for which the Insured is liable under law and is obligated to pay damages by reasons of the assumption of liability in the following schedules contracts:

Schedule of Insured Contracts:

- (1) Asset Purchase Agreement – Guam
- (2) Asset Purchase Agreement – Palau
- (3) Stock Purchase Agreement – Saipan
- (4) Assignment & Assumption of Contracts, Guam
- (5) Assignment & Assumption of Lease and Terminal Facility Leases, Guam
- (6) Aviation Technical Services Agreement
- (7) Master Bill of Sale and Assignment Lease Agreement, Guam
- (8) Guam License Agreement
- (9) Agreement for Sale & Distribution of Lubricants
- (10) Marine Lubricants Purchase, Sale & Services Agreement
- (11) Guam – Saipan Supply Agreement
- (12) License Agreement, Saipan
- (13) Assignment & Assumption of Contracts, Palau
- (14) Assignment & Assumption of Bases, Palau
- (15) Bill of Sale, Palau
- (16) Amendment License Agreement, Palau
- (17) Supply Agreement, Palau
- (18) Throughput, Operating and Pipeline Use Agreement for LPG
- (19) Throughput, Operating and Pipeline Use Agreement for Wet Stock
- (20) Agreement for the Supply of Aviation Fuel, IP & E and Continental
- (21) Fleet Fuel Supply for Regular Unleaded Gasoline and Diesel Fuel Oil (GPA 010-10)
- (22) Diesel Engine Cylinder Lubrication Oil Supply (Cylinder Oil 019-09)
- (23) Diesel Fuel Supply (GPA-049-09)
- (24) Diesel Fuel Supply (GPA-050-09)
- (25) Petredec/SPPC LPG Contract
- (26) Agreement for Provision of Fixed Facilities and into Plane Services at Guam Airport
- (27) Agreement for the Supply of Aviation Fuel with Philippine Airlines, Inc.
- (28) Aviation Fuel Supply Agreement with Japan Airlines Company, Ltd.
- (29) Aviation Turbine Fuel Contract with Continental Airlines, Inc.
- (30) Lease Agreements – (CNMI), Puerto Rico Inc., Joaquin LG Sablan, Greg & Evelyn Calvo, D & W Saipan Inc., Jose Demapan, Lorenzo LG Cabrera, Juan T. Lizama, Commonwealth Ports Authority
- (31) Lease Agreement – (GUAM) Antonio M Palomo, et. al., Jones & Guerrero Inc., Manuel & Maria Paulino, Henry & Carolyn Simpson, Calvo Enterprises, RCS Enterprises, Vicente P. Camacho, Camacho Family Reality Trust, Micronesia Seven Inc., Alfredo & Carmen Sablan, Laurent F. Duenas.
- (32) Supply & Terminalling Agreement with SPPC
- (33) SPPC LPG Supply and Terminalling Agreement
- (34) Facility User Agreement F1 Dock with Guam Power Authority
- (35) Facility User Agreement F1 Dock with TRISTAR
- (36) Contract of Affreightment Asahi Tanker (S) Pte. Ltd.

EXHIBIT 3

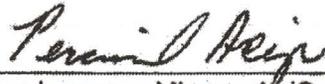
- (37) Security Services Agreement (Mengkar Security Co.)
- (38) Tanker Receiving Agreement (Mar-C)
- (39) Shell Fleet Card Contracts
- (40) Commercial Supply Agreements for Fuel/Lubricants
- (41) Auto Lease Agreement (Atkins Kroll, Inc.)
- (42) Shell Terminal Cleanup, Landscaping (N.K. Landscaping)
- (43) Lease Agreements – Palau
 - Fritz Business Lease
 - KSPLA (Koror State Public Lands Authority)
 - MCC Terminal (Malakal Commercial Corporation)
- (44) PPUC Supply Agreement
- (45) Fuel Supply Contract with Itochu Petroleum Co. (Singapore) Pte. Ltd.
- (46) NEX Fuel Supply Contract
- (47) Aviation Fuel Supply Contract with UPS
- (48) Aviation Fuel Supply Contract with EVA Air
- (49) SK Energy (Pending Contract Copy)
- (50) Lubes Warehouse Rental Agreement (Santos Properties)
- (51) Aviation Fuel Supply Contract with United Airlines
- (52) Aviation Fuel Supply Contract with FedEx

Such assumption of liability shall be subject to the coverage, terms and conditions of the Combined General and Products Liability Policy No. GL-PL-GUM-2014-1055.

Nothing herein contained shall be held to vary, alter, waive or change any of the terms, limits or conditions of the policy, except as herein above set forth.

This endorsement is effective as of 09/30/14 and forms part of Policy No. GL-PL-GUM-2014-1055 of the Century Insurance Co. (Guam) Ltd.

Date issued: December 23, 2014.

By: 
 Aon Insurance Micronesia (Guam), Inc.
 General Agent