

Suite 401 DNA Building
 238 Archbishop Flores St.
 Hagåtña, Guam 96910



FAX

To:	Mr. John M. Benavente, P.E. General Manager Guam Power Authority P.O. Box 2977 Hagåtña, Guam 96932 Fax: (671) 648-3165	From:	Benjamin J.F. Cruz Guam Public Auditor Office of Public Accountability	
	Mr. D. Graham Botha, Esq. General Counsel Guam Power Authority 688 Route 15, Suite 302 Mangilao, Guam, 96913 Phone: (671) 648-3203/3002 Fax: (671) 648-3290	Pages:	16 (including cover page)	
CC:	Mr. Joshua D. Walsh, Esq. Mr. Joseph C. Razzano, Esq. Civile & Tang PLLC Attorneys for Appellant GlidePath Marianas Operations Inc. 330 Hernan Cortez Avenue Ste. 200 Hagatna, Guam 96910 Phone: (671) 472-8868/9 Fax (671) 477-2511	Date:	January 22, 2020	
	Mr. Richard L. Johnson, Esq. Mr. R. Marsil Johnson, Esq. Blair Sterling Johnson & Martinez Attorneys for Interested Party ENGIE Solar 238 Archbishop Flores Steet Suite 1008 Hagatna, Guam Phone: (671) 477-7857 Email: r.marsjohnson@bsjmlaw.com	Phone:	(671) 475-0390 x. 208	
		Fax:	(671) 472-7951	

Re: OPA-PA-20-001 Notice of Receipt of Appeal

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Thank you,

Jerrick Hernandez, Auditor

jhernandez@guamopa.com

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OFFICE OF PUBLIC ACCOUNTABILITY

Suite 401 Pacific News Building, 238 Archbishop Flores St., Hagåtña, Guam 96910

Phone: (671) 475-0390 / FAX: (671) 472-7951

January 22, 2020

John M. Benavente, P.E.
General Manager
Guam Power Authority
P.O. Box 2977
Hagåtña, Guam 96932

VIA FACSIMILE: (671)648-3165

Re: Notice of Receipt of Appeal – OPA-PA-20-001

Dear Mr. Benavente,

Please be advised that GlidePath Marianas Operations Inc. (hereinafter referred to as “GlidePath”) filed an appeal with the Office of Public Accountability (OPA) on January 21, 2020, regarding the Guam Power Authority’s (GPA) denial of GlidePath’s protest related to the procurement for Phase III of its Renewable Energy Resource project (GPA-IFB-007-18). OPA has assigned this appeal case number OPA-PA-20-001.

Immediate action is required of GPA pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA’s office and on its website at www.opaguam.org. The first ten pages of the notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeal. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

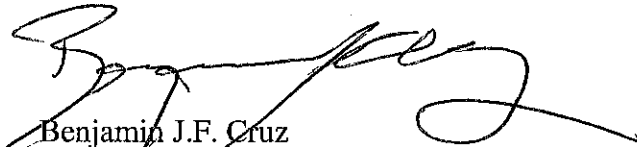
Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), the submission of one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated is required no later than **Wednesday, January 29, 2020**, five work days following this Notice of Receipt of Appeal. We also request one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Division 4, Chapter 12, §12105, by **Wednesday, February 5, 2020**, ten work days following receipt of this notice.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to GlidePath. Although the Guam Procurement Law and Regulations require only one copy of the procurement record, OPA respectfully asks that you

provide one original and two copies of the said record, which will be distributed as follows: Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 208 or jhernandez@guamopa.com should you have any questions regarding this notice.

Sincerely,



Benjamin J.F. Cruz
Public Auditor

Enclosure: First Thirteen Pages of the Notice of Appeal – OPA-PA-20-001

Cc: Joshua D. Walsh and Joseph C. Razzano, Civile & Tang, PLLC, Attorneys for Appellant
Glide Path

JOSHUA D. WALSH
JOSEPH C. RAZZANO
CIVILLE & TANG PLLC
330 HERNAN CORTEZ AVENUE STE. 200
HAGATNA, GUAM 96910
TEL: (671) 472-8868/9
FAX: (671) 477-2511

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

PART I.

In the Appeal of

GlidePath Marianas Operations Inc.,

Appellant.

DOCKET NO. OPA-PA- 20-001

NOTICE OF APPEAL

PART II: APPELLANT INFORMATION

Appellant's Name	GlidePath Marianas Operations Inc.
Appellant's Mailing Address	132 N. York St., Suite 3L Elmhurst, IL 60126
Appellant's Business Address	706 Dandan Road , Inarajan, Guam 96915
Appellant Representative's Direct Email Address	prood@glidepath.net

Appellant is represented by legal counsel in this appeal. For purposes of this appeal, please direct correspondence to GlidePath Marianas Operations Inc.'s counsels, Joshua D. Walsh and Joseph C. Razzano of Civile & Tang, PLLC.

Counsel's Mailing Address	330 Hernan Cortez Avenue Suite 200, Hagatna, Guam 96910
Counsel's Telephone	671-472-8868
Counsel's Facsimile	671/477-2511
Counsel's Direct Email Address	jdwalsh@civilletang.com

PART III: APPEAL INFORMATION

- A. Purchasing Agency: Guam Power Authority.
- B. Solicitation Number: GPA-IFB-007-18, Renewable Energy Resources Phase III.
- C. The Decision being appealed was provided to the Appellant on Friday, January 10, 2020. The Decision was made by the Head of the Purchasing Agency, Mr. John M. Benavente, P.E.
- D. This Appeal is made from a Decision on a Second Protest of an Award.
- E. The names of competing offerors known to Appellant are as follow:
 - 1. AES Distributed Energy, Inc. ("AES");
 - 2. Korea Electric Power Corporation and Hanwha Energy Corporation (consortium) ("Hanwha/KEPCO");
 - 3. X-Elio Energy North America Development Holdco, LLC ("X-Elio"); and

4. ENGIE Solar.

PART IV: STATEMENT OF GROUNDS FOR APPEAL

A. THE GROUNDS FOR APPEAL

1. Relevant Procedural and Factual History

The Guam Power Authority (“GPA”) has moved forward with Phase III of its Renewable Energy Resource project. The procurement for Phase III is being accomplished by GPA through a Multi-Step Bid. This project is part of an ongoing effort to comply with Public Law 29-62, which requires GPA to establish renewable energy portfolio standard goals and add additional renewable capacity. Phase III also involves a land use partnership between GPA and United States Navy, where Navy property is leased to the Government of Guam for use in the Phase III power operation. Phase III will be built on two different sites—Navy Base Guam and South Finegayan—and bidders were invited to respond to operate solar power production at either or both of the locations.

GlidePath Marianas Operations Inc. (“GlidePath” or “Appellant”), a Guam based company that qualifies for the local procurement preference proscribed in 5 GCA §5008, submitted a bid to provide solar production at both sites. GlidePath is well experienced on Guam, is buttressed by an extensive corporate support system that is well versed in solar production, is staffed by solar industry professionals who understand competitive procurement, and currently operates the Dandan solar project, which was awarded a contract under Phase I by GPA. GlidePath submitted its bid on June 3, 2019, and was informed on August 14, 2019, that it had passed

technical review and was eligible for consideration in Step 2 of the Procurement where the offerors would submit their prices.

Prices were submitted to GPA pursuant to a price submission worksheet that included explaining the cost of power to GPA's rate payers in the form of the cost of a megawatt of power per hour (MWh). Price submissions were opened at a public venue on September 10, 2019, and ENGIE Solar ("ENGIE") had bid a price of \$110.90/MWh for the Navy Base Guam location and \$108.90/MWh for the South Finegayan location. As allowed by the IFB, GlidePath submitted several pricing plans for GPA's consideration, and its bid price was \$149.60/MWh for both sites, as adjusted for the local procurement preference. Other offerors had submitted bids more expensive than the bid price offered by GlidePath. ENGIE had also offered a Guaranteed Net Annual Generation ("GNAG")—a number that reflects the amount of gross electricity generation a generator produces minus the electricity used to operate the power plant —that was significantly higher than any other offer, a feat that was technically impossible given the specific IFB requirements set down by GPA and its subsequent clarifications about the IFB.¹

Given the significant price and GNAG disparity between ENGIE and all other bidders, GlidePath submitted requests under the Guam Sunshine Act on August 22, 2019, and again on September 12, 2019, to GPA requesting, among other documents, copies of the technical proposals submitted by the other bidders so that GlidePath's engineers could review the technical details of their proposed projects.

¹ As designed by the IFB, the GNAG changes from year to year during the life of the contract.

GlidePath was concerned that, given the complexity of the technical requirements and numerous amendments to the IFB, that other bidders may not have complied with the various requirements put forth by GPA in its IFB. Specifically, GlidePath was concerned about the sizing of various project components, compliance with unique requirements in the Navy lease, and detailed electrical requirements and wanted to confirm that all bidders, especially ENGIE, had properly included these requirements. GPA never substantively responded to the information requests, and withheld ENGIE's technical proposal from disclosure.

On October 4, 2019, GlidePath was notified by GPA that it was not selected for award, and instead GPA's procurement team had recommended award for both of the projects included in the IFB to ENGIE.² ENGIE was selected for award because it presented GPA with a price that was at least 35% lower than the next offeror. While GPA continued at that time to withhold ENGIE's technical proposal from public scrutiny, ENGIE moved ahead and released information confirming that its bid was significantly different than the other bids submitted to GPA. On October 7, 2019, ENGIE issued a press release indicating that "[the] systems proposed by ENGIE integrate more than 50 MWp of solar PV with approx. 300 MWh of battery energy storage...."³

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² The Notice to GlidePath that it was not selected for Award is attached to this appeal as **Attachment A**.

³ The ENGIE press release is submitted as **Attachment B**.

GlidePath initiated a Protest of the Award to ENGIE on October 9, 2019.⁴ That protest was built upon the fact that inclusion of more than 20.7 MWp⁵ of solar generation capacity at either of the project sites is not allowed by the IFB. ENGIE's press release made it clear that ENGIE's proposed projects do not meet the technical requirements in the IFB. The ENGIE proposals should have been deemed non-compliant by GPA and should not have been awarded contracts as part of the IFB. On October 9, 2019, GlidePath submitted its Bid Protest to GPA. GPA denied the protest via correspondence received by GlidePath on October 30, 2019.⁶ An appeal to the OPA followed, as was given the designation OPA-PA-19-010.

GPA's denial of GlidePath's first protest was built upon the position that the IFB did not contain the technical restrictions that GlidePath and other offerors shaped their bids to conform to. Because the technical restrictions that GlidePath understood to be at work in the IFB were, in the view of GPA, not in fact restrictions, ENGIE's bid was, in the view of the agency, technically compliant. The Agency's determination that the IFB did not contain certain technical restrictions spawned GlidePath's second agency level protest.⁷

GlidePath's second protest was lodged with the agency on November 13, 2019. It was based upon the fact that, if indeed GPA was disavowing the existence of the technical requirements that formed the basis of GlidePath's first protest, then

⁴ This first protest filed with the agency is submitted as **Attachment C**.

⁵ MWp stands for Mega-Watt peak, a measure used in the solar industry to describe what the peak maximum power generation capabilities of the system are.

⁶ The Agency Denial of GlidePath's first Procurement Protest is submitted with this appeal as **Attachment D**.

⁷ The Second Protest filed by GlidePath with the agency is submitted as **Attachment E**.

the amendments, communications, and information provided to the bidders during the procurement process resulted in a flawed procurement where every offeror other than ENGIE was led astray into submitting bids that were limited by specifications that did not actually exist.

2. GPA's handling of this procurement was flawed by leading offerors like GlidePath to submit bids built upon technical requirements that GPA now claims did not need to be met. This prejudiced GPA's ratepayers.

GPA's January 10, 2020, denial of GlidePath's second protest did not substantively address the allegations that GPA's procurement process, specifications, clarifications, amendments, and communications led bidders like GlidePath astray. The aspects of the IFB that led to GlidePath's understanding of the 20.7MWp cap are contained in GlidePath's first protest, and are recounted here. On January 25, 2019, GPA issued Amendment XIII, an amendment called the "Supplement and Update to Volume II Technical Qualification Requirements."⁸ The amendment required that the **ESS shall be equal to or greater than the 145%** of the MW rating of the PV charging system.⁹ This 145% requirement was coupled to GPA's other requirement that the **ESS be no larger than 30MW** at each project site.¹⁰ Therefore, it was relatively simple to understand that **GPA wanted an ESS system that was both no larger than 30MW, but was also at least 145%**

⁸ 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 this appeal.

⁹ See, Technical Requirements Supplement, Section 2, bullet point 5, which is submitted as **Attachment G** to this appeal. (emphasis added).

¹⁰ See, IFB Volume I, Section 1, Bullet 6 (page 9 of 501); IFB Volume II, Section 1 Item 1; Section 2.2.5, Section 2.3.1, submitted as **Attachments H and I** to this appeal. (emphasis added).

greater than the mega-watt rating of the PV charging 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.

ENGIE's system offering 50 MWp means ENGIE proposed a system to GPA that either did not hold to a 145% requirement, or did not hold to a 30 MW maximum ESS size. This means that ENGIE did not have to limit its bid to the technology that supports a 20.7 MWp system, and as such, was not faced with the same price restrictions that other bidders, including GlidePath, were left to confront. GPA claimed in its Agency decision provided in response to GlidePath's first protest that this was fine.¹¹ GPA's decision to not adhere to a 145%/30 MW standard gave ENGIE an unfair price advantage, since ENGIE was no longer bound by the 20.7MWp system maximum that the other offerors believed the IFB commanded. ENGIE's completely different 50MWP system allowed it to submit pricing numbers to GPA—numbers based upon the Guaranteed Net Annual Generation ("GNAG") production quantities nearly 20% higher than the other offers—that were significantly lower than any other bidder.

GPA's Denial of GlidePath's second protest, like its first protest decision, avers that GPA's bid did not limit the capacity of the solar project installation to a 20.7 MWp system based upon a total 30MW size limitation. GPA is incorrect. GPA's instructions explain that "The MW rating of the ESS shall be equal to or greater

¹¹ See, **Attachment D**, pg. 2.

than the 145% of the MW rating of the PV charging system, up to a maximum capacity of 40 MW.”¹² Given that the PV array— the part of the project consisting of the actual solar panels— is the generator in the system, these commands also serve as the rating of the charging system. This was reinforced by GPA’s example offered to explain the requirement further: “For instance, for a PV installation of 27 MW, the ESS shall be rated at a minimum of 40 MW. For a PV capacity of 10 MW, the ESS rating shall be a minimum of 14.5 MW.”¹³

GPA attempts to salvage its lack of clarity in the IFB by arguing that GlidePath and the other similarly situated offerors simply got it wrong, because, 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.”¹⁴ GPA, by offering this *post hoc* explanation of the 20.7 MWp rating, defies well accepted industry standards that define solar system capacity.¹⁵

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¹² See, Attachment B to Amendment No.: XIII, §2, submitted as **Attachment F** to this appeal.

¹³ See, Attachment B to Amendment XIII, §2, submitted as **Attachment F** to this appeal.

¹⁴ Denial of Procurement Protest, January 7, 2020, p.2, submitted as **Attachment J** to this appeal. A Soar system generates power as a Direct Current (“DC”). The power in the system is converted from one voltage level of DC power to another voltage level of DC power through a DC/DC converter as it moves through the system at the solar plant. DC power is eventually converted again into Alternating Current (“AC”) power before joining the island power supply.

¹⁵ The International Electrotechnical Commission (“IEC”) issues various industry publications to help create uniform standards to avoid just the type of confusion that GPA has thrust into this procurement. Manufacturers rate their Photovoltaic (“PV”) modules at standard test conditions, and these tests provide what is understood in the industry to constitute the PV capacity of a system. IEC provision 61853 details what constitutes a PV system’s capacity.

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3. **GPA's acceptance of an ENGIE bid based upon technical specifications that other offerors could not access, by allowing what is effectively a sole source procurement for projects worth nearly \$200,000,000.¹⁶**

GPA, by allowing ENGIE to submit a project for consideration that did not hold to the system parameters GPA led the other offerors to, did not compare equivalent projects and, therefore, their selection of ENGIE as the lowest bidder was in error because their proposal was materially different than the other bidders. This failure lays squarely at the feet of GPA, since the acceptance of ENGIE's project means that GPA either (1) accepted a non-conforming proposal from ENGIE, or (2) issued system standards that were sufficiently unclear so as to cause every other offeror—offerors that include some of the biggest and most experienced players in the world of solar power production—to be led astray. This has resulted in a competitive bid process that wasn't competitive at all, *i.e.*, the ENGIE projects have substantially more capacity than the 20.7 MW per project that limited other offerors' proposals. To be clear, the limitations of the other proposals provided to GPA were the result of GPA action in setting up and explaining the parameters of the IFB. This meant that ENGIE's proposal, as accepted by GPA, increased the projects' solar power production and allowed for the fixed project costs—the costs the form the basis of an offeror's price submission to GPA—to be distributed across more MWhs resulting in a lower net cost per month. GlidePath and other offerors did not submit technical proposals that took advantage of this, which means that

¹⁶ The IFB commits GPA and its rate payers to purchasing nearly \$200,000,000 worth of power from the awardee of this IFB over the 20-year lifetime of the contract.

GPA could not meaningfully evaluate the prices that were being proposed by the various offerors.

Most frustrating about GPA's failures in this procurement is the fact that GlidePath noted in its Technical Proposal and elsewhere in its interactions with GPA that a lower cost to the people of Guam may be possible if the limits on solar capacity were eased. Rather than violate the technical requirements of the IFB, GlidePath, like the other offerors, designed its project in compliance with the terms of the IFB as those terms were explained by GPA. ENGIE, on the other hand, was an outlier and submitted a non-compliant project that included more than 20.7 MWp of solar charging capacity, and GPA is rewarding that entity with a contract Award despite the fact that GPA has, simply put, based its price analysis on a comparison between apples and oranges.

B. RULING REQUESTED

GlidePath respectfully requests that the Office of Public Accountability Order the following:

- (1) That GPA disqualify ENGIE from eligibility for Award under this IFB, as ENGIE's proposal did not materially comply with the technical requirements of the IFB established by GPA; and
- (2) That GPA award both project sites detailed in GPA-IFB-007-18, relative to Renewable Energy Resources Phase III, to GlidePath as the next lowest price responsive bidder to the IFB

In the alternative, the Office of Public Accountability should order GPA to:

- (1) Allow for a period of clarifications and discussion between GPA and Offerors so as to eliminate all questions about the technical nature of the system required by GPA for the Renewable Energy Resources Phase III ; and

- (2) Receive and review new technical and price proposals from all existing offerors in GPA-IFB-007-18 that desire to move forward with competition for award, and then award the Phase III project to the lowest responsive bidder from amongst those offerors.

Furthermore, the Office of Public Accountability should order GPA to retain a qualified Independent Engineer to assist the agency in all aspects and phases of future procurements regarding renewable energy or battery storage.

C. SUPPORTING EXHIBITS, EVIDENCE OR DOCUMENTS

Submitted with this appeal are the following supporting exhibits, evidence, and documents:

- (1) The Notice to GlidePath that it was not selected for Award is attached to this appeal as **Attachment A**.
- (2) The ENGIE press release is submitted as **Attachment B**.
- (3) The first protest filed with the agency is submitted as **Attachment C**.
- (4) The Agency Denial of GlidePath's first Procurement Protest is submitted with this appeal as **Attachment D**.
- (5) The Second Protest filed by GlidePath with the agency is submitted as **Attachment E**.
- (6) 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, is submitted as **Attachment F** to this appeal.
- (7) Technical Requirements Supplement, Section 2, Bullet 5 is submitted as **Attachment G** to this appeal.
- (8) IFB Volume I, Section 1, Bullet 6 (page 9 of 501) is submitted as **Attachment H** to this appeal.
- (9) IFB Volume II, Section 1 Item 1; Section 2.2.5, Section 2.3.1 is submitted as **Attachment I** to this appeal.
- (10) Denial of Procurement Protest, January 7, 2020, p. 2 is submitted as **Attachment J** to this appeal.

GlidePath anticipates providing further documentation, including independent expert engineering reports, to substantiate its claims as GPA submits

the full contracting procurement record to the OPA, and allows GlidePath and its experts to review the procurement record in full.

Also, submitted with this appeal pursuant to 2 GAR §12104 (5), is a copy of the prior decision by GPA denying Appellant's Second protest and compelling this appeal. That is attached as **Attachment J** to this appeal.

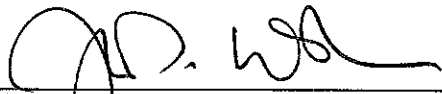
PART V: DECLARATION RE COURT ACTION

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his knowledge, no case or action concerning the subject of this Appeal has been commenced in court. An active appeal before the OPA related to this project has been commenced, and is styled OPA-PA-010. The undersigned party agrees to notify the Office of Public Accountability within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Respectfully submitted this 21st day of January, 2020.

CIVILLE & TANG, PLLC

By: 

JOSHUA D. WALSH
JOSEPH C. RAZZANO
Attorneys for Appellant
GlidePath Marianas Operations Inc.

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Suite 401 DNA Building
238 Archbishop Flores St.
Hagåtña, Guam 96910



FAX

To:	Mr. John M. Benavente, P.E. General Manager Guam Power Authority P.O. Box 2977 Hagåtña, Guam 96932 Fax: (671) 648-3165	From:	Benjamin J.F. Cruz Guam Public Auditor Office of Public Accountability
	Mr. D. Graham Botha, Esq. General Counsel Guam Power Authority 688 Route 15, Suite 302 Mangilao, Guam, 96913 Phone: (671) 648-3203/3002 Fax: (671) 648-3290	Pages:	16 (including cover page)
CC:	Mr. Joshua D. Walsh, Esq. Mr. Joseph C. Razzano, Esq. Civille & Tang PLLC Attorneys for Appellant GlidePath Marianas Operations Inc. 330 Hernan Cortez Avenue Ste. 200 Hagatna, Guam 96910 Phone: (671) 472-8868/9 Fax (671) 477-2511	Date:	January 22, 2020
	Mr. Richard L. Johnson, Esq. Mr. R. Marsil Johnson, Esq. Blair Sterling Johnson & Martinez Attorneys for Interested Party ENGIE Solar 238 Archbishop Flores Steet Suite 1008 Hagatna, Guam Phone: (671) 477-7857 Email: r.marsjohnson@bsjmlaw.com	Phone: Fax:	(671) 475-0390 x. 208 (671) 472-7951

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Jerrick Hernandez, Auditor

jhernandez@guampoa.com

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