CIVILLE & TANG, PLLC
SUITE 200, 330 HERNAN CORTEZ AVENUE
HAGÅTÑA, GUAM 96910
TELEPHONE: (671)472-8868
FACSIMILE: (671) 477-2511

Attorneys for Appellant
GlidePath Marianas Operations Inc

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 02/10/2020
TIME: 4:30 ☑AM ☐PM BY: AR
FILE NO OPA-PA: 19-010/20-001

BEFORE 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 **COMMENTS ON AGENCY REPORT**

I. INTRODUCTION

Pursuant to 2 GAR §§ 12104(c)(4) and 12108(a), Appellant GlidePath Marianas Operations Inc. ("GlidePath" or "Appellant") submits its Comments on the Agency Reports submitted by the Guam Power Authority ("GPA") to the Office of Public Accountability ("OPA") on January 31, 2020, and November 29, 2019. These comments are submitted to address the inadequacies and unavailing nature of the Statements Answering Allegations of Appeal contained in the Agency Reports regarding the consolidated procurement appeal of GPA IFB 007-018 (the "IFB").

II. COMMENTS TO AGENCY STATEMENT

A. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND.

The Guam Power Authority ("GPA") is pressing forward with Phase III of its Renewable Energy Resource project. The procurement for Phase III involves GPA's implementation of a Multi-Step Bid in an ongoing effort to comply with Public Law 29-62, which requires GPA to

ORIGINAL

establish renewable energy portfolio standard goals and add additional renewable capacity. Appellant GlidePath was not selected for award.

On October 7, 2019, winning offeror 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...."[1] GlidePath initiated a Protest of the Award to ENGIE on October 9, 2019.[2] That protest was built upon the fact that inclusion of more than 20.7 MWp[3] of solar generation capacity at either of the project sites is not allowed by the IFB. ENGIE's press release boasting of "50 MWp of solar PV" made it clear that ENGIE's proposed projects do not hold to a 20.7 MWp threshold, and as such, do not meet the technical requirements in the IFB. GPA denied the protest via correspondence received by GlidePath on October 30, 2019.[4] 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.[5]

---

[1] The ENGIE press release was submitted as **Attachment B** to GlidePath's Notice of Appeal filed on January 21, 2020.

[2] This first protest filed with the agency was submitted as **Attachment C** to GlidePath's Notice of Appeal filed on January 21, 2020.

[3] 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.

[4] The Agency Denial of GlidePath's first Procurement Protest was submitted as **Attachment D** to GlidePath's Notice of Appeal filed on January 21, 2020.

[5] The Second Protest filed by GlidePath with the agency was submitted as **Attachment E** to GlidePath's Notice of Appeal filed on January 21, 2020.

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 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.

GPA issued its Agency Report on GlidePath's first protest on November 29, 2019, and its Agency Report on GlidePath's second protest on January 31, 2020.[6]

B. GPA'S AGENCY REPORT REVEALS A HAPHAZARD PROCUREMENT PROCESS WHERE A CLEAR VIOLATION OF PROCUREMENT LAW OCCURRED IN THE ISSUANCE OF A "LIFT OF STAY OF PROCUREMENT."

At the heart of this procurement dispute is the question of whether or not GPA understood the technical requirements of the IFB it put out. GPA's violation of the law of procurement is indicative of GPA's flawed procurement for Phase III of the Guam's solar portfolio development. The Statement contained in the Agency Report acknowledges a clear violation of law and failure in its procurement process by the issuance of "Lift of Stay" when GPA denied GlidePath's first protest.[7] The Supreme Court of Guam has since 2015 made it clear that Agencies should not do what GPA has admitted doing here: lifting a procurement stay before final resolution of a bid protest.[8] Guam law is clear: "under applicable statutes and

[6] Both Reports are identical, with the exception of a single paragraph deleted from the Agency Statement provided on January 31, 2020. While these comments are responsive to both reports, since both reports are nearly identical, all references to the "Agency Report" will be to the January 31, 2020 report, unless otherwise noted.

[7] Agency Statement, 2 *citing* Tab 5 of the procurement record.

[8] *See, Teleguam Holdings, LLC v. Territory of Guam*, 2015 Guam 13, ¶31("Under the foregoing interpretation, we hold that in a procurement controversy under 5 GCA § 5425, the automatic stay set forth in section 5425(g) remains in effect during the fourteen-day period following OPA's decision and commencement of a civil suit within the Superior Court and continues until final resolution of the action by the Superior Court.")

regulations, the [procuring agency] was required to refrain from further action on the bids at issue until 'final resolution' of [the procuring agency's] protest unless it chose to invoke a necessity exception."[9] Not only did GPA ignore the law by lifting the procurement stay, the agency also took explicit further action to assist ENGIE in moving forward with the Award before final resolution of the protest.[10] Simply put, GPA's decision to issue a "Lift of Stay" in violation of the direction provided in *Teleguam Holdings* reveals that GPA either intentionally chose to violate the law *vis a vis* the automatic stay, or is ignorant of basic procurement law. More, the violation of law adds credence to the fact that GPA's procurement processes are not up to the standards required of an agency seeking to procure $200,000,000.00 of energy for island ratepayers.[11]

C. GPA MISCHARACTERIZES GLIDEPATH'S BID.

GPA recounts for the OPA the various unadjusted prices offered by ENGIE and GlidePath. GPA includes the characterization that the GlidePath bid contained a "demand that it be awarded both sites."[12] This is false. GlidePath offered pricing for each of the two locations making up Phase III of GPA's solar power initiative. As was allowed by the IFB, GlidePath also submitted alternate pricing that reflected the cost savings to Guam's ratepayers that could be realized if GlidePath were awarded both locations of the project.

//

//

---

[9] *Teleguam Holdings, LLC v. Territory of Guam*, 2015 Guam 13, ¶25.
[10] GPA not only lifted the stay, but then proceeded to advance the procurement forward by dealing directly with ENGIE on award and contract performance issues such as coordinating the PVC and CCU approval process, as well as coordinating with the Navy. *See,* Procurement Record, Tab 4, pg. 132-133.
[11] GPA has previously used professional guidance in assisting the agency in preparing for complex procurement. No such professional guidance was retained by the agency for this procurement.
[12] Agency Statement, 2.

D. GPA'S CLAIM THAT THE IFB "DID NOT LIMIT THE CAPACITY OF THE PV INSTALLATION" IS WHOLLY FALSE.

GPA issued Amendment XIII on January 25, 2019. That Amendment set out mathematical parameters that mandated the installed capacity of the PV charging system while also setting parameters of the project's Energy Storage System.[13] The Amendment declared, without equivocation, that "The MW rating of the ESS **shall be equal to or greater** than the 145% of the MW rating of the PV charging system, up to a maximum capacity of 40 MW."[14] To be certain, GPA's use of the word "shall" in the requirements of the ESS system means that the limits contained in amendment XIII are mandatory.[15] Therefore, the 145% requirement is a mandatory limit on the PV system, and GPA provided more clarity to show how the 145% requirement would impact the other system particulars. GPA not only informed offerors of the 145% requirement, but offered arithmetic examples to explain the impact to the PV installation size caused but the 145% requirement. The Agency explained: "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."[16] Now, however, GPA has now chosen to ignore that requirement in order to excuse its award to ENGIE of a system that is built on more solar generation capacity than the plain terms of the IFB allowed.

---

[13] GPA makes no effort to explain the technical aspects of this project, including the nature of an "ESS," in its Agency Report. The ESS operates like a battery that allows for solar power to be collected at peak solar energy production times, stored, then returned to the power system for use at times when the power is needed at night or when the day is darker.

[14] Amendment XIII. §2, submitted as **Attachment D** to GlidePath's Notice of Appeal filed on November 13, 2019 (emphasis added).

[15] *See, e.g.,* 1 G.C.A. § 715 ("Shall is mandatory"); 22 G.C.A. § 12104 ("The word shall is mandatory").

[16] Amendment XIII. §2, submitted as **Attachment D** to GlidePath's Notice of Appeal filed on November 13, 2019. Even GPA's math examples, while containing correct arithmetic, reveals GPA's internal confusion about their own project. GPA's IFB sets that the maximum ESS size for each site is 30MW. It is unclear why GPA would have used math examples based upon 27 MW and 10 MW hypothetical PV charging systems given that, by GPA's own math, the 27 MW system would require a 40 MW ESS— 10 MW more than allowed by the IFB.

The mandatory nature of the 145% requirement that GPA now seeks to excuse stands in contrast to the permissive language of the technical specifications contained in the other provisions governing the ESS system. While the 145% requirement is coupled with the word "shall," the other provisions of the amendment do not contain the same declaration of firm restrictions. For instance, GPA explains that "the PV **may be scheduled** to the maximum discharge rate allowed by the GPA system load."[17] GPA uses similarly flexible language on how "GPA **may schedule** the energy delivery," and how "It is **anticipated** the ESS loads will be changed every 15 minutes...."[18] GPA's technical team made a decision to use mandatory language in Amendment XIII that "the ESS **shall be equal to or greater** than the 145% of the MW rating of the PV charging system." GlidePath and other responsible bidders noted the contrast between the compulsory, prescriptive nature of GPA's terminology regarding the 145% requirement, and other technical aspects that were clearly open to interpretation (based on terms such as "may be"), and structured their bids accordingly. GPA cannot be allowed to run away from this clear requirement, and the implications such a requirement had on the totality of the project's specifications.

E. GPA'S AGENCY REPORT SIMPLY MAKES UP LANGUAGE AND REASONING RELATED TO THE 145% REQUIREMENT, AND IGNORES THAT FACT THAT THE 145% REQUIREMENT ALSO SERVED AS A LIMIT ON THE PV SOLAR GENERATION CAPACITY.

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

[17] 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 D** to the Notice of Appeal filed on November 13, 2019 (emphasis added).

[18] 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 D** to the Notice of Appeal filed on November 13, 2019 (emphasis added).

limit was not a limit on the system itself, but actually a cap of the "DC/DC converters."[19] GPA, by offering this *post hoc* explanation of the 20.7 MWp rating, defies well accepted industry standards that define solar system capacity.[20]

Worse, GPA's decision in this procurement appeal to simply ignore a technical requirement it added by Amendment is especially frustrating given the fact that GPA was asked questions by bidders after issuing the supplemental technical requirements that provided GPA with the opportunity to alter the 145% requirement, yet, in response to these questions, GPA held firm to the 145% requirement.[21] GPA was specifically asked during the clarification period of this procurement of the mathematical implications of the 145% requirement, **and chose not to tell bidders** that asked at the time if, like the project ENGIE ultimately submitted and the position GPA has taken in its Agency Report now, the PV charging system capacity could exceed the limits bidders understood to be in place given the formulas provided to the bidders. Simply put, GPA could have told offerors that the system could have been larger when directly asked, but chose not to provide such clarity.[22]

GPA explains in its Agency Report, without a single citation to the voluminous record, "that the intent of the 145% requirement is to require the ESS charge and discharge be asymmetrical with ESS discharge power required to be 30MWac at the point of connection and

---

[19] Denial of Procurement Protest, January 7, 2020, p.2. A Soar system generates power as a Direct Current ("DC"). The power in the system in 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.

[20] 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.

[21] *See, e.g.,* Amendment XVII, pgs 13; 16.

[22] *See,* Amendment XVII, p. 13; 16; Binder 6, Tab 52.

ESS charge power not to exceed 20.7MW."[23] Nothing in the IFB or amendments makes this narrow link, or provides this justification for the technical requirement. To the contrary, the plain language requirement in Amendment XIII commands that "the ESS shall be equal to or greater than the 145% of the MW rating of the PV charging system." It is clear that the 145% requirement sets a size for the ESS that is explicitly tied to the size of the "PV charging system"— a system that GPA explains is 30MW— and is not simply an expression of desire for a "asymmetrical" discharge of power.

F. GPA'S AGENCY REPORT SIMPLY MAKES UP LANGUAGE ABOUT AN ALTERNATING CURRENT REQUIREMENT, AND THE AGENCY'S RELIANCE UPON A DC CONVERTER TO JUSTIFY ACCEPTING ENGIE'S BID VIOLATED THE PLAIN TERMS OF THE IFB.

GPA explains in a single paragraph of its Agency Report that a key system requirement "limits the maximum AC PV charging power on each site to *1/1.45* of the maximum AC export capacity."[24] This supposed requirement is offered to the OPA without a citation to the record. No citation is offered, or can be offered, since the use of "AC" as the applicable unit is simply wrong. GPA required that the solar system be connected using DC connections, [25] which means that it is impossible for the system to have an AC rating. More, since ENGIE's proposed system to GPA uses a DC/DC converter,[26] the only physically possible way to measure the capacity of the PV charging system is in DC.[27]

GPA's agency report also claims that "ENGIE's proposal, is equal to the power rating of the DC/DC converters, and is capped at 20.7MW (i.e. 1/1.45 of 30MW AC), in full compliance

---

[23] Agency Statement, 4-5.
[24] Agency Report, 5
[25] The Agency's requirement of DC connection can be seen in the IFB, pg. 228.
[26] *See,* ENGIE Proposal, Binder 3, Tab 41.
[27] Measurements in MWp would be equivalent as well. MWp stands for Mega-Watt peak, a measure used in the solar industry to describe, like the DC value, what the peak maximum power generation capabilities of the system are.

with the IFB requirements."[28] Like most other parts of GPA's vapid Agency Report, this assertion is made without citation to the record. GPA clearly fails to grasp the requirements the Agency itself set in the IFB, since GPA is accepting ENGIE's proposal to use **software controls** to achieve the limits required of these DC converters. GPA, in accepting such software controls working with a "DC/DC converter" at this stage of the procurement has changed its position after GlidePath's protest was lodged.

First, the use of DC/DC converters or system adjustments based on software application is neither contemplated nor required by GPA in the IFB. **Second,** a DC/DC converter does just that, and has nothing to do with the overall "capacity" of a charging system as defined in the IFB. Simply put, folding 100 sheets of paper in half does not actually change the amount of a paper in a pile, even though a person may be able to now articulate there are 200 sheets. **Third,** GPA's acceptance of a software setting adjustment ignores the plain terms of the IFB that required certain limits on the entire "PV **installation**." GPA takes numerous opportunities to explain a physical limit of the project. GPA's example on system size provided in amendment XIII points out that "for instance, for a PV **installation** of 27 MW, the ESS rating shall be a minimum of 40 MW."[29] **Finally**, GPA's decision to accept a software controls runs counter to the clarification it provided other bidders during the IFB process in specifically refusing to accept proposed software controls offered by other offerors. [30]

//

//

---

[28] Agency Report, 5.
[29] Amendment XIII. §2, submitted as **Attachment D** to GlidePath's Notice of Appeal filed on November 13, 2019.
[30] *See,* Amendment XIII, Answers to Questions, pg. 40; Procurement Record Binder 7, Tab 56. (Refusing to accept a "protection/control" system that operates though a software application that would prevent unintended transfer of energy directly from the PV system to GPA's system.)

III. CONCLUSION

GPA issued an IFB for a complex procurement of renewable energy that contained several technical specifications that were tied to each other. GPA issued amendments creating a mandatory 145% link to the total PV system size. This meant that the project included an installed solar capacity threshold, but GPA is now ignoring that standard. The effect of GPA's technical amendments, and the refusal by GPA to now accept those amendments for the system requirements that they were, is that the ratepayers of Guam will be purchasing solar energy from a sole source provider whose offered price could not intelligently be compared to any other offeror. Based on the foregoing, GlidePath respectfully requests that its protest appeal be sustained.

Submitted this 10th day of February, 2020.

CIVILLE & TANG, PLLC

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