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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 **TRIAL BRIEF**

1. INTRODUCTION

Appellant GlidePath Marianas Operations Inc. ("GlidePath" or "Appellant") has appealed the award of GPA-IFB-007-18 (the "IFB"), Renewable Energy Resources Phase III, by Guam Power Authority ("GPA") to interested party ENGIE SOLAR ("ENGIE"). GlidePath asserts that ENGIE's submission to GPA did not meet certain technical requirements of the IFB.[1] When GPA responded that, in its view, those certain technical specifications were not actually requirements under the IFB, GlidePath instituted a second protest seeking to have GPA allow GlidePath and others bidders to submit, as ENGIE did, bids untied to those particular technical specifications.[2]

[1] *See,* Attachment C to the Notice of Appeal filed on January 21, 2020.

[2] *See,* Attachment E to the Notice of Appeal filed on January 21, 2020.

GlidePath submits this Trial Brief in conformance with the Order of the Office of Public Accountability ("OPA") issued on May 26, 2020.[3] This Trial Brief will assist the OPA in addressing the following list of issues to be resolved in this consolidated Appeal[4]:

(1) What were the requirements established by the GPA invitation for bid GPA-IFB-007-18 with regard to the amount of photovoltaic solar ("PV") generation capacity physically installed as part of the project including, but not limited to, any relationship between this amount and the size of the energy storage system and/or the capacity of the project as interconnected to the GPA system?

(2) Did interested party ENGIE Solar submit a bid that was fully responsive to the requirements articulated for the IFB?

(3) Did GPA violate the underlying purposes of the Guam Procurement law by failing to establish clearly articulated and consistently applied technical requirements in this IFB, resulting in the submission of bids from offerors that could not be effectively compared to each other on the issue of price?

2. GPA AND RENEWABLE ENERGY UNDER THIS PROCUREMENT

GPA began Phase III of its Renewable Energy Resource[5] project by publishing a Multi-Step Invitation for Bid on November 16, 2017.[6] The IFB was published as GPA-IFB-007-18.

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[3] The hearing on the merits in this matter was originally set for March 25, 2020. The Trial Brief was originally due on March 20, 2020. The global spread of Covid-19 resulted in all dates in this matter being postponed in accordance with the direction of the Governor of Guam and the orders of the OPA. *See,* OPA Memorandum, March 16, 2020.

[4] The parties submitted their lists of issues to be resolved on March 13, 2020.

The first step of the IFB was an analysis of technical compliance in all material respects with the requirements of the IFB in conformance with 2 GAR §§3109 (r)(1)'s command "to evaluate and determine the acceptability of technical offers." The second step was to analyze price and make an award to the lowest priced offeror who had advanced beyond the first step technical analysis. The IFB is part of an ongoing effort to comply with Public Law 29-62, which requires GPA to meet renewable energy portfolio standard goals and add additional renewable energy capacity. Phase III also involves a land use partnership between GPA and the United States Navy, where two specific sites — one at Naval Base Guam and the other at South Finegayan — were leased to the Government of Guam with the intent that each would subsequently be subleased to the bidder(s) selected for award(s) under the terms of the IFB. All submissions in response to the IFB would use the same physical sites and offerors could choose to submit proposals for one or both of the sites. This use of Navy owned land and the supply of such land by GPA to the ultimate awardee(s) of the IFB was unique to this IFB. Prior Renewable Energy procurements by GPA required each bidder to identify the site for its proposed project.

2.1. Existing Solar Power Generation on Guam

The project contemplated by the IFB builds upon the basic concepts of solar generation already in place on Guam, such as the Dandan Solar Project located in Inarajan, Guam (the "Dandan Project") which GlidePath owns and operates. The Dandan Project was built in 2015 as a result of Phase I of GPA's Renewable Energy Resource procurement, has a capacity of 25.65

[5] "Renewable Energy Resource" is defined in IFB Volume III Draft Renewable Energy Purchase Agreement, Section 1.83 (IFB Page 86 of 501) to mean an energy source that is replaced by a natural, ongoing process and that is not nuclear or fossil fuel. GlidePath Evidence Binder Batestamp ("GEB") 1-000086.

[6] GEB 1-000001-1000501.

MW_{AC},[7] and sells Renewable Energy and Renewable Energy Credits to GPA pursuant to two (2) long-term Renewable Energy Purchase Agreements (each a "REPA"). The Dandan Project is a utility scale solar generation project that uses 121,792 polycrystalline silicon photovoltaic solar modules — commonly called solar panels — to generate up to 25.65 MW_{AC} of electricity and is interconnected to GPA's Dandan Substation. GPA purchases all electricity generated by the Dandan Project and resells it, along with energy generated by other sources, to its customers.

The Dandan Project is the only operating solar generation project on Guam, however, GPA has also executed two (2) REPAs for the supply of an additional 120 MW_{AC} of Renewable Energy (60 MW_{AC} per REPA) from solar projects awarded and currently under development by Korea Electric Power Corporation and Hanwha Energy Corporation; these projects are expected to begin commercial operation in 2022, and were awarded as a result of GPA-IFB-070-16, Renewable Energy Resource Phase II.

2.2. The basics of Solar Power Generation

GlidePath's protest is based upon its conclusion that ENGIE gained an unfair pricing advantage by submitting a non-compliant system built upon a greater quantity of solar panels than allowed by the IFB. Understanding this advantage requires a basic understanding of solar power generation.

Like all solar systems using PV modules including the project contemplated by the IFB at issue in this Appeal, the electricity generation at the Dandan Project starts by the absorption of photons, or particles of light energy, emitted by the Sun. Within each of the project's solar modules (a/k/a solar panels), electrons in crystalline silicon cells are excited by the photons and

[7] MW_{AC} means Megawatt Alternating Current and is equivalent to 1,000 kilowatts (kW) or 1,000,000 watts (W).

begin to move freely between layers of material that each carries a positive or negative charge. This movement of electrons creates an electric current and this current is collected and combined with the current from all of the module's cells as a single direct current electrical output from the module. Each model of solar PV module is rated for a maximum output at specific conditions ($1000W/m^2$ and 25°C) as measured in Wp[8] by the manufacturer based on IEC[9] Standard No. 61853-1; the higher the rating the more efficient the module is at producing electricity. For example, if one module is rated at 300 Wp and the other is rated 400 Wp, the module rated at 400 Wp would produce more electricity under identical conditions when compared to the 300 Wp module.[10] The actual amount of electricity produced by each module at any given moment is correlated to the sunlight received at the module, temperature, and other site conditions. As the sun moves across the sky or is obscured by clouds or haze, electrical output from the module changes generally, and produces the most electricity on clear days around noon. Similarly, the relationship between the number of modules installed at a project and the overall amount of electricity generated is proportional to the quantity of modules installed. Put simply, the more physical solar panels installed on site, the more energy the system can collect and convert to electricity. Like the economic scale advantages achieved when comparing taxis to city buses, or

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[8] Wp stands for watt peak and MWp stands for Megawatt peak (also known as MW_{DC} or stc) and is a measure used in the solar industry to describe what the peak maximum power generation capabilities of the system are. One megawatt equals 1,000 kilowatts. Wp and MWp represent measurements of Direct Current (DC).

[9] The International Electrotechnical Commission (IEC); in French is an international organization that publishes international standards for all electrical, electronic, and related technologies.

[10] The Dandan Project uses 20,712 CS6X-285P modules with a rating of 285 Wp each, 30,680 TSM-300PD14 modules with a rating of 300 Wp, and 70,400 TSM-305PD14 modules with a rating of 305 Wp for a total project generating capacity of 36,578,920 Wp.

the purchase of bulk food items in larger quantities, a solar power system with more solar panels can generate that power at a lower relative cost when compared to a smaller system operating with less panels.

Solar power generation facilities like Dandan gather the power from the sun through the panels, and then too many several spaces of those panels are electrically connected in series to form a string, and multiple strings are connected to an inverter which converts the direct current ("DC") electricity generated by the modules to alternating current ("AC") electricity— the type of electricity that is used by the consumer. The AC output from each of the inverters is combined, metered, and injected into the GPA electric grid at the point of interconnection.

The Dandan Project, like the project called for in the IFB, sells the electricity it generates to GPA pursuant to the terms of two REPAs. The electricity that is delivered to GPA is metered on a kilowatt-hour ("kWh") basis similar to the way individual GPA customers buy electricity from GPA. For each kWh delivered to GPA, the power provider is paid a fixed price as defined in the REPAs and is paid monthly by GPA based on the total number of kWhs delivered to GPA in that month — multiplied by the rate (enumerated in dollars per kWh or $/kWh) applicable for that month. This represents the sole source of revenue for the solar power provider. The Dandan Project and other similarly structured installations allow the solar power provider to sell a long-term and consistent supply of electricity to GPA, and recover both its capital investment and operating costs over the term of the REPA. Since solar projects like the one called for in the IFB have high upfront capital costs and low operating costs, the rate paid in the REPA can be defined upfront for the life of the REPA and is primarily a function of the capital cost spread over the total number of kWhs of electricity generated by the solar panels installed in the project. If two projects have identical costs but one is able to supply a higher quantity of electricity (kWhs),

then the project supplying more electricity would generally have a lower cost as measured in a $/kWh basis.

2.3. The Phase III IFB

In the IFB, solar generation (similar to what is installed at the Dandan Project) is paired with a battery component. In the Phase III projects, the electricity generated by the solar PV modules will, instead of being directly delivered to GPA as it is generated, be stored via a separate Energy Storage System ("ESS") in large batteries for later delivery to GPA's electric grid. This separate ESS component helps solve one of the fundamental problems with solar power: peak power demand does not occur when the sun shines brightest. On average, peak output from solar PV panels occurs at mid-day, which on Guam is before the typical day's peak demand. The ESS enables GPA to store Renewable Energy for use during the evening hours when electricity demand is the highest. The Phase III projects would be the first on Guam, and among some of the first in the world, to use an ESS to fully shift solar energy generated during the daytime to evening or nighttime hours.

2.4. The IFB requirements limiting the total size of the project's Solar Panels

The initial version of the IFB issued by GPA in November 2017 was 501 pages long. The IFB ultimately grew to nearly 900 pages with 24 amendments and over 18 months of time extensions. Unlike previous IFBs for Renewable Energy, GPA identified the two project sites that bidders could elect to build their projects on and did not allow the use of any other locations. The projects requested in the IFB consist of a solar generation system (sometimes referred to by GPA as the "PV charging system") and the battery ESS. The IFB required that the solar system and ESS be electrically connected together via DC and prohibited projects from directly providing energy produced by the solar generation system to GPA's grid. Instead, all energy

produced by the solar generation system was required to be stored in the ESS via the DC connection between the solar system and ESS, and only discharging the battery system to convert to AC energy at a later time after solar production had stopped for the day.[11]

In addition, the IFB also set specific limits on the size of the battery — the minimum ESS capacity of the system — and the generation capacity of the solar panels— maximum Wp— that could be installed on the project sites. GPA was very clear in the nature and production output of the solar systems it was seeking to procure. Offerors were provided with a specific formula within which to size and shape the solar systems that would be offered. These systems had to comply with specific requirements about the maximum megawatt peak of the system (MWp) as well as the minimum Energy Storage System capacity of the system. Numerous requests for information were sent by various offerors to GPA over the course of the procurement, and GPA, in response to those inquiries, issued numerous amendments to the procurement that helped confirm the outer formula contours to be applied to the systems that would be offered. All questions posed to GPA during the bidding process were responded to in writing via an amendment to the IFB. GPA issued twenty-four amendments (Amendment I through Amendment XXIV) to the IFB, which pushed the IFB schedule back over 18 months.

On January 25, 2019, GPA issued — as part of Amendment XIII, an attachment called the "Supplement and Update to Volume II Technical Qualification Requirements." The amendment required that the ESS should be equal to or greater than the 145% of the MW rating of the PV charging system. This 145% requirement was coupled to GPA's other requirement that the ESS be no larger than $30MW_{AC}$ at each project site. Therefore, the plain directives of the IFB

[11] GEB 2-000160 ; Amendment XIII to the IFB, Attachment B, Section 2.

dictated that GPA wanted an ESS system that was both **no larger than 30MW$_{AC}$** but was also **at least 145% greater than the megawatt rating of the solar PV system**. This meant that the solar PV system to be procured would be limited to a peak megawatt 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.

2.5. Submission of bids and Review by GPA.

GlidePath submitted a bid to install the Solar Generation and battery facilities at both the Naval Base Guam site and the South Finegayan site. GlidePath submitted its bids on June 3, 2019 — for technical review. Those bids adhered to the clear language of the IFB that limited the size of the solar system.[12] Notably, GlidePath specifically included the following statement in both of its technical proposals:

> GlidePath would be especially interested to increase the MW$_{DC}$ of the Project, as interconnection limitations and ratios of PV to battery systems in the IFB are the limiting factors driving the system design. GlidePath believes that, should GPA be able to reevaluate these requirements, increased project sizing would ultimately be beneficial to ratepayers to provide lower-cost energy than is currently possible with a project that fully complies with IFB requirements.[13]

This statement was specifically a result of GlidePath's concerns with the limitations posed by the 145% Requirement and 30 MW Cap.

On August 14, 2019, GlidePath was notified that, following GPA's technical review, both of its bids had been deemed as qualified to proceed to Step 2 of the Procurement, where offerors would submit their prices. This notice included a list of other offerors that had similarly been deemed to be technically compliant, and all but one bidder had been deemed qualified. Given the

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[12] *See, § 5, infra.*

[13] Procurement Record Binder 5, pg. 4168, 4554§ C3-c of GlidePath's Naval Base Guam and South Finegayan technical proposals.

complexity of the technical requirements and numerous amendments to the IFB being issued by GPA without the assistance or guidance of an experienced outside consultant, GlidePath sought to confirm that all other bids approved by GPA had indeed complied with the various requirements put forth by GPA in its IFB. GlidePath subsequently submitted requests under the Guam Sunshine Act on August 20, 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. Those details were not provided.

Prices were submitted to GPA pursuant to a price submission worksheet that included explaining the cost of power to GPA in the form of the cost of a megawatt of power for one hour (MWh). In its cover letter to each of its price submissions, GlidePath included a statement identifying the size of each project's solar system and ESS and specifically highlighting GlidePath's intentional compliance with the 145% Requirement and 30 MW Cap. Price submissions were opened at a public venue on September 10, 2019, and ENGIE had a year one bid a price of $110.90/MWh for the Navy Base Guam location and $108.90/MWh for the South Finegayan location.[14] Because ENGIE's proposed prices indicated that ENGIE's bid benefitted from an economy of scale made possible by including more solar panels on the project sites than the IFB called for, GlidePath submitted a further Sunshine Act request to GPA on September 12, 2020, seeking, *inter alia*, ENGIE's technical proposal so that GlidePath could analyze whether its suspicion that ENGIE did in fact exceed the cap on solar panel installation set by the IFB. GPA again refused to provide ENGIE's technical proposal citing limitations imposed by 2 GAR §3109(v)(2) and 2 GAR §3109(t)(3).

[14] All bidder's price proposals included upward escalation of the purchase price over the contract term and a reduction in annual solar production due to degradation each year.

GPA again refused to provide ENGIE's technical proposal citing limitations imposed by 2 GAR §3109(v)(2) and 2 GAR §3109(t)(3).

On September 30, 2019, GlidePath, for the third time, raised its concerns to GPA that certain IFB requirements, namely the 145% Requirement and 30 MW Cap, were not properly applied by other bidders and specifically raised this concern about the proposals submitted by ENGIE based on its analysis of the limited information made public during the priced bid opening. GPA provided no response.

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. 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 EPS, an apparently partial indirect affiliate to the bidder ENGIE Solar, moved ahead and publicly released information confirming that its bid was significantly different than bids that adhered to the solar panel cap required by the IFB. On October 7, 2019, ENGIE EPS 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...." which is significantly more solar panels than the 41.4MWp allowable across the two sites according to the IFB requirements. Based upon this admission, GlidePath initiated a Protest of the Award to ENGIE on October 9, 2019.

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3. PROTEST AND APPEAL

GlidePath's protest was built upon the fact that inclusion of more than 20.7 MWp 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. GPA's denial of GlidePath's first protest was built upon the position that the IFB did not contain the technical restrictions—the limit on installed solar generation capacity— that GlidePath and other offerors shaped their bids to conform to. GPA explained that 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. In its denial of GlidePath's protest GPA incorrectly states that "The 'MW rating of the PV charging system,' in 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 with the IFB requirements."[15] GPA says this, despite the fact that in ENGIE's technical proposal, the rating of the DC/DC converters is, in fact, 24 MW_{DC}.[16] This is over 15% more than stated by GPA in its Denial Letter and in violation of the requirement that GPA incorrectly asserts was met. The

[15] *See,* Procurement Record Binder 1, pg. 69; page 2 of GPA's October 28, 2019 Denial of Procurement Protest beginning at line 17

[16] *See,* GEB3-000064; page 2139 of the Procurement Record – ENGIE Technical Proposal for South Finegayan, Section A5 – Page 6. ENGIE states that their design will include 12 blocks each with 4 DC-DC converters for a total of 48 DC-DC converters with each converter rated at 500kW or 0.5 MW for a total of 24 MW (48 * 0.5 MW = 24 MW).

Agency's assertion that the IFB did not contain certain technical restrictions (while in the same document, citing offeror specifications purported to be "in full compliance with the IFB requirements" that it had just denied exist) spawned GlidePath's second agency level protest.

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 offerors were led astray into submitting bids that were limited by specifications that, despite GPA's guidance in the IFB process, did not actually exist.

4. GLIDEPATH'S THEORY OF THE CASE ON APPEAL

ENGIE has confirmed that its Phase III solution is built upon a system that integrates "more than 50 MWp of solar PV with approx. 300 MWh of battery energy storage..." The inclusion of more than 20.7 MWp of solar generation capacity at either of the project sites is explicitly and specifically prohibited in the IFB and rendered ENGIE's proposal unresponsive to the IFB. GPA's ultimate acceptance of ENGIE's inclusion of extra solar generation capacity as part of the project prejudiced GlidePath and other offerors and resulted in a procurement that effectively compared "apples to oranges" and denied the ratepayers of Guam the opportunity to obtain the best competitive price for the IFB. By allowing ENGIE to move forward with proposals that exceeded the amount of solar generation capacity allowed by the IFB — 20.7 MWp — GPA allowed ENGIE an unfair pricing advantage over bidders such as GlidePath that complied with the IFB requirements.

Specifically, since ENGIE was allowed to have more generation capacity installed (e.g. more than 20.7 MWp of solar modules), the ENGIE-proposed projects were capable of generating a greater volume of electricity to sell to GPA and, therefore, were able to offer a lower per unit cost to GPA for that electricity. A lower per unit cost is possible because ENGIE was able to distribute the projects' fixed costs over more units of electricity. Since bidders that complied with GPA's requirements, such as GlidePath, were limited by the IFB in how much solar generation capacity they could install at each project, they had fewer units of electricity to sell to GPA and, therefore, had to distribute the cost of their project over those fewer units. Thus, even if their overall project costs were less than ENGIE's, their per-unit cost could be higher. By allowing this to occur, GPA could not conduct a like-to-like or "apples to apples" comparison and has no way of knowing if the project ENGIE proposed is, in fact, the lowest cost since it, effectively, was the only proposal evaluated.

5. THE REQUIREMENTS OF THE IFB RELEVANT TO THIS APPEAL

As explained, GPA's January 25, 2019, Amendment XIII required that the ESS should be equal to or greater than the 145% of the MW rating of the PV charging system. This 145% requirement was coupled to GPA's other requirement that the ESS be no larger than 30MW at each project site. Therefore, the plain directives of the IFB dictated that GPA wanted an ESS system that was both no larger than $30MW_{AC}$ but was also at least 145% greater than the megawatt-peak (DC) rating of the solar PV system. This meant that the solar PV system to be procured would be limited to a peak megawatt 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.

The specific aspects of the IFB that demonstrate this cap on the size of the solar system are detailed more fully below:

A. The IFB included the following requirements:

   a. The maximum export capacity of each project shall not exceed 30 MWac[17] (the "30 MW Cap"), and

   b. The MW rating of the ESS shall be equal to or greater than the 145% of the MW rating of the PV charging system (the "145% Requirement"),[18]

B. GPA used precise language when describing the 145% Requirement including:

   a. The use of the word "shall" meaning that the requirement was mandatory,[19]

   b. Providing two examples that demonstrated the mathematical application of the requirement was that the capacity of the PV system would be multiplied by 145% to determine the minimum capacity of the ESS, and

   c. The use of the word "installation" further confirming that the intent of the requirement was to apply to the physical size of the PV system and not a software control or limit elsewhere in the project,[20]

C. Mathematically the relationship between the 30 MW Cap and the 145% Requirement can be expressed as (where x is the size of the solar PV system:

   $x \times 145\% \leq 30 \; then \; x \leq \frac{30}{1.45} \; therefore \; x \leq 20.7$

   This function can then be applied to the two examples provided in the IFB as follow:

   a. $27 \times 145\% = 39.15 \approx 40$

   b. $10 \times 145\% = 14.50$

D. The following apply to the 30 MW Cap:

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[17] GEB1-000009; IFB Volume I, Section 1, 5th bullet (IFB Page 9 of 501)

[18] GEB 2-000160; Amendment XIII, Attachment B, Supplement and Update to [IFB] Volume II – Technical Qualification Proposal Requirements, Section 2, 5th bullet.

[19] *Id.*

[20] *Id.*

a. The export capacity of a project is measured at the point-of-interconnection ("POI") which is the physical demarcation of where electricity transfers from the IPP to the AC GPA grid,[21] and

b. The maximum export capacity of a project can be calculated by summing the nameplate rating of the AC terminals of the inverters installed at the project and subtracting any losses incurred between each inverter and the POI.

E. The GPA requirement that "GPA may schedule energy at any time throughout the 24 hour day, if needed, and may be scheduled for delivery concurrent with the PV charging of the ESS" can only be achieved through a DC-coupled solar and storage configuration. Therefore, the usage of DC-coupled PV and storage was required by GPA as part of this procurement.[22]

F. Any amendment, modification or addendum issued by the Guam Power Authority, prior to the opening of the bids, for the purpose of changing the intent of the Technical Requirements, clarifying the meaning or changing any of the provisions of this IFB, shall be binding to the same extent as if written in the originally issued IFB documents[23].

G. No Amendment to the IFB, subsequent to Amendment XIII, included any language modifying the 145% Requirement.[24]

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[21] GEB 5-000002; Amendment XVII, Page 2, Answer 1.1(a)

[22] GEB 2-000160; Amendment XIII, Attachment B, Supplement and Update to the IFB Volume II – Technical Qualification Proposal Requirements, Section 2, 2nd bullet.

[23] GEB 1-000015; IFB Volume I, Section 2.3 (IFB Page 15 of 501)

[24] GEB 5-000001-5-0000017; Amendment XVII to the IFB issued by GPA on April 18, 2019 included responses to two clarification questions from bidders related to the 145% Requirement. Both responses were essentially the same and appeared to be intended to provide GPA's

6. ENGIE'S BID FAILS TO MEET TO THE REQUIREMENTS OF THE IFB

ENGIE's confession that it offered a systems to GPA — systems that GPA accepted— consisting of a "27.64 MWp PV Plant[25]" at Naval Base Guam and a "26.47 MWp PV Plant[26]" at South Finegayan (for a total of 54.11 MWp of capacity) means that it is impossible for ENGIE's proposal to be mathematically compliant with the IFB requirement of no more than 20.7 MWp at any site. ENGIE either ignored the 145% requirement or ignored the 30 MW maximum ESS size requirement. GPA's decision to consider ENGIE's proposal for price evaluation significantly prejudiced the other offerors, and consequently, GPA's ratepayers. 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 restrictions on the amount of electricity that could be produced that other bidders, including GlidePath, were subject to. Simply put, GPA's acceptance of ENGIE's decision to ignore the 145% and 30 MW requirements of the IFB gave ENGIE an unfair price advantage, since ENGIE was no longer bound by the 20.7MWp system maximum that the 145% / 30MW requirement commanded. The additional physical solar generation capacity that underpins ENGIE's price gave ENGIE a distinct price advantage because, unconstrained by the limitations of the IFB, it's

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reasoning for the 145% Requirement, for example the response on page 13 of the amendment says "This section of the amendment is to illustrate that the charging and discharging times of the ESS are different and design of the ESS should include consideration that the ESS would only have 4-6 hours to discharge at a maximum interconnection output of 30MW ac." Neither answer contained any language modifying the requirement in any way.

[25] GEB 4-000011; Procurement Record Binder 3, Tab 41, Section 1.1, Bullet 1 (Page 2323 of 12444 of Procurement Record).

[26] GEB 3-000011; Procurement Record Binder 3, Tab 40, Section 1.1, Bullet 1 (Page 2086 of 12444 of Procurement Record)

proposed systems are able to produce significantly more electricity than bidders who conformed with the IFB. This increased volume of electricity allowed it to distribute the project's costs over more units of electricity reducing the cost of each unit to GPA. ENGIE's non-compliant 50 MWp system, with nearly 20% greater Guaranteed Net Annual Generation ("GNAG") production quantities than the other offers, allowed it to submit pricing numbers to GPA that were significantly lower *per unit* than any other bidder, even if ENGIE did not necessarily have the project with the lowest *total* cost. This means that another bidder's project may cost the same or less to build and operate, but the fact that they complied with the IFB requirements by limiting generation capacity to, at most, 20.7 MWp per project (41.4 MWp total), meant their projects would have fewer units of electricity to sell to GPA and would need to charge GPA more for those units to recover the costs of their project. ENGIE's failure to comply with the IFB requirements gave it a unique and significant pricing advantage that allowed it to manipulate the IFB process by increasing its volume of electricity over the maximum volume that it knew its competitors who were complying with the IFB could submit.

ENGIE's October 7, 2019, press release touting "more than 50 MWp of solar PV with approx. 300 MWh of battery energy storage..." confirms that ENGIE does not dispute that its system is larger than a PV megawatt capacity of 20.7 MWp. ENGIE, like GPA, has responded to this appeal by embracing the notion that the IFB contained no cap on the system's PV megawatt capacity. This litigation-convenient position directly contradicts the aspects of the procurement record where ENGIE recognized the existence of a cap.

While ENGIE now advances before the OPA that there was no cap on solar installation, there is no doubt that ENGIE's submission to GPA recognized the cap as a mandatory

requirement as evidenced by its acknowledgement of such in its technical proposals.[27] Rather than meet the cap, ENGIE circumvented the IFB requirement of the cap by vaguely implying that it would, in some undescribed or disclosed way, use an unknown software solution to address the technical requirements of the IFB. ENGIE claims in its technical proposal that the project would be "limited to the DC-DC converter power (PV rated power) which is equal to 1/1.45 of the maximum AC export capacity in compliance with the GPA requirements."[28] However this is clearly not true since elsewhere in the technical proposal ENGIE acknowledges that it's DC-DC converters also exceed 20.7 MWp.[29]

ENGIE appears to potentially be relying on upon a software solution— a "solution" that is offered without any explanation beyond the assertion that it exists. This offer also fails to grasp the requirements set in the IFB. 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, ENGIE's offer and GPA's acceptance of a software setting adjustment ignores the plain terms of the IFB that required certain limits on the entire "PV installation." The IFB takes many 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

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[27] GEB 3-000087, 4-000086; Procurement Record Binder 3, Tab 40, Section B1-a, Bullet 13 (Page 2162 of 12444 of Procurement Record) and Procurement Record Binder 3, Tab 41, Section B1-a, Bullet 13 (Page 2398 of 12444 of Procurement Record)

[28] GEB 3-000086, 3-000150, 4-000085, 4-000135; Procurement Record Binder 3, Tab 40, Section B1-a, Bullet 4 (Page 2161 of 12444 of Procurement Record) and Section C2 (Page 2225 of 12444 of Procurement Record) and Procurement Record Binder 3, Tab 41, Section B1-a, Bullet 4 (Page 2397 of 12444 of Procurement Record) and Section C2 (Page 2447 of 12444 of Procurement Record).

[29] *See,* GEB 4-000013, 4-000064; ENGIE states that their design will include 12 blocks each with 4 DC-DC converters for a total of 48 DC-DC converters with each converter rated at 500kW or 0.5 MW for a total of 24 MW (48 * 0.5 MW = 24 MW).

shall be a minimum of 40 MW."[30] Finally, ENGIE's use of a software solution, and GPA's decision to accept such 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. For example, in its answer to Question #6.3 on Page 40 of Amendment XIII and in its answer to Question #3.1 on Page 5 of Amendment XVII, GPA rejected the use of a software only solution to meet its requirement that PV generation cannot be connected directly to the GPA system and confirmed that responsive bids must comply with the physical arrangement requirements of the project.[31] GPA was clear during the pre-bid submission phase that a software solution could not be used but has since changed course to embrace the software solution submitted by ENGIE.

7. ENGIE'S ASSERTION THAT GLIDEPATH "MISINTERPRETED" THE IFB

In an attempt to distract the OPA from its non-conformity with the IFB, ENGIE has, instead of providing technical facts supporting its conformance, accused GlidePath of "misinterpreting" the requirement and attempted to wave away the facts that its proposed projects did not meet the IFB requirements. ENGIE also ignores how deviation from those requirements allowed ENGIE to offer a lower price than bidders who dutifully followed the IFB requirements. To further its position that GlidePath has misinterpreted the requirements, ENGIE

[30] GEB 2-000160; Amendment XIII, Attachment B, Supplement and Update to the IFB Volume II – Technical Qualification Proposal Requirements, Section 2, 5th bullet

[31] GEB 2-000040, 5-000005; Question and Answer #6.3 on Page 40 of Amendment XIII and Question and Answer #3.1 on Page 5 of Amendment XVII

relies on an answer GPA provided in Amendment XVII to ENGIE's question number 32 in which GPA stated that the 145% Requirement was to "illustrate that the charging and discharging times of the ESS are different." ENGIE ignores the fact that nothing in Amendment XVII, or any other amendment to the IFB, alters the Technical Requirements Supplement of the IFB. Significantly, ENGIE also ignores the fact that GPA refused to provide ENGIE an answer that would have allowed it to exceed the system limits contained in the IFB. Specifically, GPA gave no answer to the portion of ENGIE's question that asked "Can we assume therefore the maximum PV charging system rating that can be installed is 27 MW?"[32] Rather than accept GPA's refusal to grant such permission, ENGIE moved ahead and submitted a bid that assumed its preferred specifications anyway. The result was ENGIE's submission of a "27.64 MWp PV Plant" and a "26.47 MWp PV Plant"— both PV sizes that exceeded the 145% requirement. ENGIE's question directly acknowledges that it understood there was a 145% Requirement, and knowingly violated it.

8. GPA'S FAILURE TO ADHERE TO THE REQUIREMENTS OF THE IFB

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. GPA is wrong. If indeed GPA was disavowing the existence of the technical requirements that formed the basis of GlidePath's first protest, then the amendments,

[32] GEB 5-000013; Question and Answer #32 on Page 13 of Amendment XVII

communications, and information provided to the bidders during the procurement process resulted in a flawed procurement where offerors did not submit competitive bids.

GPA's post protest claims that the IFB did not limit the capacity of the PV installation is wholly false. Again, GPA issued Amendment XIII on January 25, 2019. 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..." To be certain, GPA's use of the word "shall" in the requirements of the ESS system means that the limits contained in the amendment are mandatory. 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 now ignores 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.

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."[33] GPA uses similarly flexible language on how "GPA **may schedule** the energy delivery," and how "It is **anticipated** the ESS loads will be

[33] GEB 2-000160; 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.

changed every 15 minutes...."[34] 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." Both GlidePath and ENGIE 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, the implications such a requirement had on the totality of the project's specifications, and ultimately that it led to a higher price from bidders that complied with the requirement than from non-compliant ENGIE.

9. GPA HAS A DUTY TO PROCURE IN A FAIR AND UNAMBIGUOUS MANNER

Once the technical proposals were received, GPA should have immediately recognized the significant variation between the bids on, what ultimately, were the same projects. This lack of uniformity along with the numerous bids should have been a clear indicator that the IFB had failed to be competitive and GPA, as the only one with knowledge of such a problem, had a duty to correct the process; it did not. Finally, when the greatly varied priced proposals from sophisticated international energy companies were received by GPA, there was yet another clear indicator that the IFB had failed. Specifically, it appears now, given GPA's acceptance and defense of ENGIE's bid, that rather than engage in a meaningful technical review and detailed

[34] GEB 2-000160; 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.

review of price held up against those technical specifications, GPA has simply thrown up its hands and selected the lowest number on the page.

10. GPA'S LITIGATION CONVENIENT DEFENSE POSITION IS UNSUPPORTED BY THE RECORD.

GPA attempts to salvage this procurement 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." GPA, by offering this *post hoc* explanation of the 20.7 MWp rating, defies not only well accepted industry standards that define solar system capacity but also the actual technical facts included in ENGIE's bid.

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 to the definition it is now claiming, yet, in response to these questions, GPA held firm to the 145% requirement. GPA was specifically asked during the clarification period of this procurement of the mathematical implications of the 145% requirement. GPA chose not to tell bidders that asked at the time if, like the project ENGIE ultimately submitted and the position GPA has taken since defending its award to ENGIE, 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 (and should have) told offerors that the system could have been larger when directly asked but chose not to provide such clarity. The result: a non-competitive procurement.

GPA has explained, "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 ESS charge power not to exceed 20.7MW." 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" and is not simply an expression of desire for a "asymmetrical" discharge of power.

GPA's *post hac* justification for its acceptance of the ENGIE includes the assertion 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." 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 to the storage system be connected using DC connections, 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, the only physically possible way to measure the capacity of the PV charging system is in DC.[35]

11. COMPELLING REASONS JUSTIFY A REBID OF THE IFB

[35] 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.

At worst, GPA has intentionally chosen to accept a non-responsive bid that is based upon a pricing structure that every other bidder could not take advantage of. At best, GPA did not understand the import of its various technical specifications, and the award to ENGIE is the result of a non-competitive procurement where apples and oranges were compared to each other. In either scenario, the ratepayers of Guam have been prejudiced. That prejudice— pricing on $200,000,000 in power production — is not minimal. The law directs that any disadvantages to bidders such as ENGIE from being made to rebid in such a situation must yield to the interests of the ratepayers in having a competitive procurement. *See, e.g, E.H. Oftedal & Sons, Inc. v. State ex rel. Montana Transp. Comm'n*, 2002 MT 1, ¶ 17, 308 Mont. 50, 57, 40 P.3d 349, 353.("Competitive bidding statutes are primarily intended for the benefit of the public rather than for the benefit or enrichment of bidders, and consideration of advantages or disadvantages to bidders must be secondary to the general welfare of the public."); *Equitable Shipyards, Inc. v. State By & Through Dep't of Transp.*, 93 Wash. 2d 465, 473, 611 P.2d 396, 401 (1980) (internal citation omitted). ("The primary purpose of public bidding is to benefit the taxpayers by procuring the best work or material at the lowest price practicable. A secondary purpose of competitive bidding is to provide bidders with a fair forum for the award of public contracts.") If ENGIE's bid is deemed responsive to the IFB, a significant compelling interest exists to allow a rebid so that the people of Guam can be assured that their solar energy future was competitively procured.

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12. ANTICIPATED EVIDENTIARY ISSUES

It is anticipated that the following evidentiary issues may arise:

12.1. The propriety and quantity of testimony provided via telepresence and the opportunities to meaningfully cross-examine witnesses;

12.2. Issues related to the propriety and need for translated testimony; and

12.3. The ability of an "interested party" to advance positions in defense of a procurement that the procuring agency has neither articulated nor advanced on its own.

13. ABANDONED ISSUES

An earlier dispute raised by ENGIE about the need to protect Trade Secrets in this appeal, and limit the disclosure of its proposal, has been abandoned.

14. 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.

Respectfully submitted this 5 th day of June, 2020.

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