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Attorneys for Party in Interest ENGIE Solar

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

<p>In the Appeal of</p> <p>GlidePath Marianas Operations, Inc.</p> <p>Appellant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>DOCKET NOS. OPA-PA-19-010 OPA-PA-20-001</p> <p>ENGIE SOLAR'S RESPONSE TO GLIDEPATH MARIANAS OPERATIONS, INC. OBJECTION TO GUAM POWER AUTHORITY'S INCOMPLETE PROCUREMENT RECORD</p>
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COMES NOW ENGIE SOLAR (“ENGIE”) and files its response to Appellant GLIDEPATH MARIANAS OPERATIONS, INC.’s (“GlidePath”) Objection to Guam Power Authority’s (“GPA”) purportedly incomplete procurement record.

GlidePath claims that procurement record is incomplete¹ based upon the testimony on June [sic] 6, 2020 of Jennifer Sablan, GPA’s witness, who testified that she worked with Mr. David Burlingame on certain specifications for the IFB and its amendments at issue here. ENGIE will leave the response to that allegation that the record is somehow incomplete. However, the lack of a complete procurement record, even if GlidePath could prove that (which is not conceded), is not

¹ The procurement record in this case is quite large. GPA’s communication log alone consists of 77 pages of entries.

the only thing that GlidePath is required to show in order to obtain the relief it is requesting in its objection. GlidePath must also show that the supposedly missing information is “material” to its protest. *TeleGuam Holdings, LLC et. al. v. Territory of Guam, et al.*, 2018 Guam 5, ¶39.

In *TeleGuam*, the Supreme Court stated “... we do find that an appealing party must establish that items missing from the procurement record were material to the procurement.... Missing procurement records are material when as a result of their absence, judicial review is thwarted in determining whether the appealing party is entitled to the relief requested.” *Id.* (Citations omitted). Thus, while a complete procurement record is required, an RFP or IFB should not be rendered void unless “the items missing from the procurement record are material to the procurement.” *Id.* More importantly, it is the duty of the appealing party to provide evidence of missing items and establish that those items are material. *Id.*

GlidePath brought two protests to the notice of intent to award this project to ENGIE. The first was based primarily² on Glidepath’s allegation that GPA was ignoring the fact that ENGIE’s proposals did not comply with the IFB’s technical requirements. The technical requirements are set out in the IFB. This is the same IFB that all bidders were provided. All bidders submitted bids and technical proposals based on the same specifications. How those specifications were developed and by whom are immaterial and irrelevant to the protests and this appeal. All that is relevant is whether ENGIE’s bid and technical proposals met the requirements of the IFB.

The same is true with respect to GlidePath’s second protest. In that protest, GlidePath states: “[t]his protest is based upon the fact that the amendments, communications, and information

² GlidePath also asserted that the award to ENGIE would be effectively a sole source procurement because, it asserts, GPA either accepted a non-confirming bid from ENGIE or issued unclear system standards that led other bidders astray. Again, there is no need to go beyond the face and text of the IFB to make or reject those determinations. Anything else is immaterial.

provided to the bidders resulted in a flawed procurement where only one offeror ... submitted a bid that met the contours of the system held within GPA's mind's eye." Appellant, GlidePath Marianas Operations Inc. November 13, 2019 Protest 2 Letter (appended as Attachment E to the Notice of Appeal in Docket No. OPA-PA-20-001). (Emphasis added,). Thus, the second protest is based solely upon amendments, communications and information provided to the bidders. Information that was not provided to the bidders is neither material nor relevant.

The only part of GlidePath's objection that could be to any degree construed as an attempt to prove materiality lies in its conclusory allegations that it has been prejudiced by GPA's failure to identify Mr. Burlingame as the individual responsible for the specifications of the IFB, that without the information regarding the person, technical literature and manufacturer's brochures, GlidePath is prejudiced and put at a disadvantage because it cannot adjudicate the merits when the procurement record supplied to it is incomplete. GlidePath does not go on to explain how any of this is so, nor can it. Mere conclusory allegations of this type are insufficient evidence to satisfy the requirement of materiality.

GlidePath also claims that it is unable to adequately challenge the specifications in the IFB because it did not know that Mr. Burlingame is an essential member of the team drafting the specifications. GlidePath did not, however, protest the specifications. How the specifications were developed and by whom are entirely immaterial and irrelevant. In addition, it is far too late at this point in time for GlidePath to attempt to protest the specifications contained in the IFB.

In summary, Glidepath fails to address the materiality of any alleged missing information from the procurement record. GlidePath merely concludes without a factual basis that it is "unable to have a fair and complete review of the merits of its appeal". Appellant, Glidepath Marianas Operations Inc. Objection to Guam Power Authority's Incomplete Procurement Record, page 3

(filed 7 July 2020). Further, GlidePath fails to put forth a single argument demonstrating that the identity of the person drafting the specifications or any technical literature or brochures would have had a material outcome on the award of the bid. *Teleguam*, 2018 Guam ¶ 39 (holding that “[m]issing procurement records are material when, as a result of their absence, judicial review is thwarted in determining whether the appealing party is entitled to the relief requested.”) This appeal does not concern the nature or reasoning behind the specifications put forward by GPA but rather whether ENGIE complied with the specifications. GlidePath’s appeal is in no way disadvantaged by the lack of any information which led to the creation of the specifications.

For the foregoing reasons, GlidePath’s objections should be rejected.

DATED this 8th day of July, 2020.

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