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**RECEIVED**  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

DATE: 7/20/2020  
TIME: 4:55 CIAM CPM BY: JU  
FILE NO OPA-PA: 19-010 + 20-001

**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 NOS. OPA-PA-19-010  
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 Razzano Walsh & Torres, P.C.

Counsel's Mailing Address	139 Murray Blvd. Ste. 100 Hagatna, Guam 96910
Counsel's Telephone	671-989-3009
Counsel's Direct Email Address	jdwalsh@rwtguam.com jrazzano@rwtguam.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 Tuesday, July 14, 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 Third Protest of an Award.
- E. The names of competing offerors known to Appellant are as follow:
  - 1. AES Distributed Energy, Inc.;
  - 2. Korea Electric Power Corporation and Hanwha Energy Corporation (consortium);
  - 3. X-Elio Energy North America Development Holdco, LLC; and

4. ENGIE Solar.

**PART IV: STATEMENT OF GROUNDS FOR APPEAL;**

**RULING REQUESTED; EXHIBITS**

**A. RELEVANT PROCEDURAL AND FACTUAL HISTORY**

**1. History of the IFB issuance**

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 G.C.A. § 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. 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.

## 2. Price Submission and Protest 1

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 revealed a wide divergence in pricing despite the fact that many of the variables usually associated of PV plant offers — the land for the project, project size, duration of production — were controlled here by the agency.

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 Solar ("ENGIE").<sup>1</sup> 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 EPS<sup>2</sup> issued a press release indicating that "[the]

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<sup>1</sup> The Notice to GlidePath that it was not selected for Award is attached to this appeal as Attachment A.

<sup>2</sup> ENGIE EPS is a company owned partially by ENGIE.

systems proposed by ENGIE integrate more than 50 MWp of solar PV with approx. 300 MWh of battery energy storage....”<sup>3</sup>

GlidePath initiated a Protest of the Award to ENGIE on October 9, 2019.<sup>4</sup> That 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, as the IFB set a 145% ratio limit between the battery component size of the project and the installed solar generation capacity. GPA denied the protest via correspondence received by GlidePath on October 30, 2019.<sup>5</sup> An appeal to the OPA followed, as was given the designation OPA-PA-19-010.

**3. GPA’s position that there was no IFB limit on the installed capacity of the solar panels necessitated GlidePath Protest 2.**

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

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<sup>3</sup> The ENGIE press release was submitted as **Attachment A** to GlidePath’s first Notice of Appeal filed with the OPA on November 13, 2019.

<sup>4</sup> This first protest filed with the agency was submitted as **Attachment C** to GlidePath’s first Notice of Appeal filed with the OPA on January 21, 2020.

<sup>5</sup> The Agency Denial of GlidePath’s first Procurement Protest was submitted as **Attachment C** to GlidePath’s first Notice of Appeal filed with the OPA on November 12, 2019.

spawned GlidePath's second agency level protest.<sup>6</sup> 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 into submitting bids that were limited by specifications that did not actually exist in GPA's mind's eye. GPA denied that second protest on January 10, 2020. An Appeal to the OPA followed, and the matters were consolidated on January 30, 2020.<sup>7</sup>

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. GlidePath has contended that GPA is incorrect, as GPA's instructions explain 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."<sup>8</sup> 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 examples offered to explain the requirement further that apply the 145% ratio limit: "For instance, for a PV installation of 27

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<sup>6</sup> The Second Protest filed by GlidePath with the agency was submitted as **Attachment E** to GlidePath's Second Notice of Appeal filed with the OPA on January 21, 2020.

<sup>7</sup> Order Consolidating Appeals/Scheduling Order, January 30, 2020.

<sup>8</sup> Amendment XIII, § 2, if the IFB was submitted as **Attachment D** to GlidePath's first Notice of Appeal filed with the OPA on November 13, 2019.

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.”<sup>9</sup> GPA attempted to salvage its lack of clarity in the IFB by arguing that GlidePath 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 on the “DC/DC converters.”<sup>10</sup> This explanation appears nowhere in the IFB documents, and because of that *post hoc* explanation of the 20.7 MWp rating, Glidepath filed a Motion on February 20, 2020, seeking to have GPA supplement the record since the record — and the explanation of a cap on the DC/DC converters provided by the Agency— seemed to be built upon some undisclosed part of the procurement record.<sup>11</sup> During the hearing on GlidePath’s Motion for Order Compelling Agency to Supplement Record, GPA counsel informed the OPA and the parties that “there is nothing else” to produce for the procurement record and that the record was complete.<sup>12</sup>

**4. GPA’s testimony of July 6, 2020, contradicted its earlier assertion that the record is complete and necessitated a third protest.**

On July 6, 2020, GPA Engineer Jennifer Sablan, P.E, testified before the OPA that she worked with Mr. David Burlingame — a witness that GPA had

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<sup>9</sup> Amendment XIII. § 2.

<sup>10</sup> Denial of Procurement Protest, January 7, 2020, p.2, submitted as Attachment C to GlidePath’s first Notice of Appeal filed with the OPA on November 13, 2019.

<sup>11</sup> In that Motion, GlidePath requested GPA provide “(1) a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement generally, and specifically the creation of Amendment XIII; and (2) any and all documents, communications and records explaining the Agency’s technical reasoning behind creating Amendment XIII.” Motion to Order Agency Supplement the Record, pg. 4.

<sup>12</sup> March 3, 2020 Motion Hearing recording available at <http://www.opaguam.org/procurement-appeals/search-procurement-appeals#9688>.

originally informed counsel for GlidePath was testifying as an expert in the case — on the development and specifications for the IFB and its more than 20 amendments. Ms. Sablan also testified that she communicated with Mr. Burlingame via email and telephone. Ms. Sablan further testified that there are emails in her possession with Mr. Burlingame about the IFB and the underlying technical specifications and rationales of the Phase III project— emails that appear nowhere in the procurement record and that GPA counsel had previously confirmed to the OPA did not exist.<sup>13</sup> On July 7, 2020, Mr. Burlingame confirmed Ms. Sablan’s testimony under oath. GlidePath sought to obtain the missing documents from GPA, but as the scheduled time for closing arguments approached and discussions on rebuttal witnesses needed to be announced, and the missing documents were not provided, GlidePath filed a protest on the record deficiency in order to preserve its rights on the issue before needing to close its trial presentation.<sup>14</sup> A procurement record supplement containing previously undisclosed items was provided on July 9, 2020—minutes before the cross-examination of Dario Gigliotti of ENGIE EPS.<sup>15</sup>

Despite providing documents and communications admittedly not previously included in the procurement record, and despite the continued lack of a communications log that would have illuminated the contacts between GPA and Mr. Burlingame, GPA denied GlidePath’s third protest. This denial comes even as

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<sup>13</sup> *Id.*

<sup>14</sup> GlidePath’s Third protest is attached as **Attachment B** to this Notice of Appeal.

<sup>15</sup> The disclosure that was provided failed to include other documents themselves referenced in that disclosure. GlidePath is currently working with GPA to obtain those still missing documents from the procurement record.



GPA's procurement record continues to need to be supplemented, and continues to be supplemented without meaningful certification that the record was indeed complete and maintained. GPA's denial is based upon timeliness, and explains that "Any protest regarding the completeness of the procurement record, particularly regarding Dave Burlingame and EPS, should have been filed within 14 days, or by December 26, 2019."<sup>16</sup> Even before providing GlidePath with a copy of the protest denial, and before GlidePath had an opportunity to review the denial and determine if an appeal to the OPA was appropriate, GPA moved forward and sought to consolidate the yet to be filed appeal with the existing consolidated appeal.<sup>17</sup>

**B. GPA'S USE OF TIMELINESS TO DENY GLIDEPATH'S PROTEST IS WHOLLY WITHOUT MERIT.**

GPA claims that GlidePath's protest regarding the incomplete record is untimely, since the basis of that protest—the lack of inclusion of documents related to Mr. David Burlingame's role in the IFB process—should have been addressed before December 26, 2019. This is so, we are told, since Mr. Burlingame's name appears "in the procurement record at pages 10051, 10069, and 10073."<sup>18</sup> GPA's timeliness contentions are without merit.

First, Mr. Burlingame does not appear three times. His name is repeated twice in a procurement record of more than 12,000 pages themselves containing tens of dozens of names. His name appears in a forwarded email chain where Jennifer Sablan states simply that she is working along with "any further ESS or

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<sup>16</sup> GPA's Denial of GlidePath's third protest is attached here as **Attachment C**.

<sup>17</sup> *See*, Motion to Consolidate Third Agency Appeal filed on July 14, 2020.

<sup>18</sup> GPA Protest Denial, p. 2.

interconnection requirements as recently discussed with Dave Burlingame and EPS team.”

**Second**, the single reference to Burlingame in the voluminous record provides no indication in this email that there are other items missing from the procurement record that an offeror should know exists. This single record could have been referring to a single phone conversation where only a couple of minor changes were recommended. It was not known until GPA eventually supplemented the deficient record following Ms. Sablan’s testimony that Burlingame was involved in the substantial written correspondence that actually took place.

**Third**, the single reference to Burlingame does not reflect the magnitude of comments and involvement from EPS throughout this procurement, as discovered in the testimony provided by Ms. Sablan and in the supplemental procurement record submission that followed that testimony.

**Finally**, GPA’s timeliness argument strains credulity since GPA itself affirmed on the record before the OPA— falsely— that the record was indeed complete, and that there were absolutely no other communications to provide, and furthermore, no log of communications to rely upon. This assertion was exposed as false when Jennifer Sablan testified on July 6, 2020. GlidePath’s protest on the record deficiency came within 14 days of that testimony, and is therefore timely.

**C. THE PROCUREMENT RECORD IS IN DISARRAY, WAS NOT MAINTAINED IN ACCORDANCE WITH LAW.**

Guam law is clear that, in order to protect the integrity of the bidding process, a procurement record must be kept and maintained. 5 G.C.A. § 5252 (a).

That record must include the papers, papers including “drafts... and other papers or materials used in the development of specifications.” 5 G.C.A. § 5249 (d). The record must also be certified, in writing, as having been properly maintained and complete. 5 G.C.A. § 5249. The record of this procurement is in disarray. The record has had to be supplemented multiple times, including *after* Engineer Jennifer Sablan testified that communications regarding the bid specifications that gave rise to GlidePath’s original protest were not included in the record that was maintained.<sup>19</sup> The record also continues to lack a certification that conforms to the requirements of 5 G.C.A. § 5249, and continues to lack the vital log of communications required by 5 G.C.A. § 5249(b) that would provide insight into how the IFB specifications were developed.<sup>20</sup> Because of these failings, an award cannot be made under this IFB, and the law requires the procurement be cancelled. *See, In the Appeal of Latte Treatment Center, Inc.*, OPA-PA-08-008, Decision (Office of the Public Auditor, February 26, 2009).

**D. RULING REQUESTED**

GlidePath respectfully requests that the Office of Public Accountability, in addition to the relief previously requested, determine that the Record of Procurement Action attachments for the IFB was not maintained in accordance

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<sup>19</sup> GPA supplemented the record that was supposed to be properly maintained on January 17, 2020, on July 8, 2020 and again on July 15, 2020. The supplements of July 8, 2020 and July 15, 2020 came after GPA counsel affirmatively informed the OPA, in response to GlidePath’s original effort to have the record supplemented, that there were no further materials to provide.

<sup>20</sup> It is likely that no certification exists, since it was impossible for GPA to certify under oath that the record was complete when GPA then needed to supplement the record multiple times.

with Guam law, and that pursuant to 5 G.C.A. § 5250, no procurement award can be made and the IFB must be cancelled and reissued.

**E. SUPPORTING EXHIBITS, EVIDENCE OR DOCUMENTS**

Submitted with this appeal are the following supporting attached 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. GlidePath's Third protest is attached as **Attachment B** to this Notice of Appeal.
3. GPA's Denial of GlidePath's third protest is attached here as **Attachment C**.
4. The cover pages from GPA's record supplementations made *after* the Notice of Award to ENGIE, and after the initial procurement protest in this case, are attached as **Attachment D**.

Submitted with this appeal pursuant to 2 G.A.R. § 12104 (b) (5), is a copy of the prior decision by GPA denying Appellant's third protest and compelling this appeal. That is attached as **Attachment C** to this appeal.

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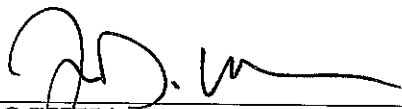
**PART V: DECLARATION RE COURT ACTION**

Pursuant to 5 G.C.A. 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. There are two active consolidated appeals before the OPA related to this project, and are designated OPA-PA-19-010 and OPA-PA-20-001. 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 15 day of July, 2020.

**RAZZANO WALSH & TORRES, P.C.**

By:   
\_\_\_\_\_  
**JOSHUA D. WALSH**  
**JOSEPH C. RAZZANO**  
*Attorneys for Appellant*  
*GlidePath Marianas Operations Inc.*

**VERIFICATION**

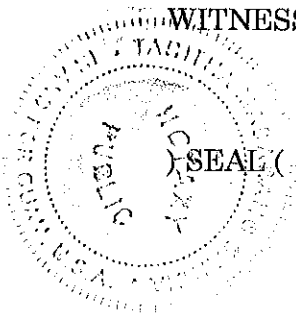
I, Peter Rood, am a duly authorized representative of Appellant GlidePath Marianas Operations Inc., and I am authorized to make this verification. I have read the foregoing Notice of Appeal, and, based on information and belief and to the best of my knowledge, the facts stated therein are true and correct. I declare under penalty of perjury under the laws of Guam that the foregoing is true and correct. This verification was executed on the 15<sup>th</sup> day of July, 2020.

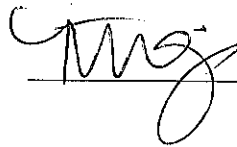
By:   
\_\_\_\_\_  
**PETER ROOD**  
*Appellant GlidePath Marianas  
Operations Inc.*

GUAM, U.S.A.,        )  
                                  (ss.:  
City of Hagåtña.    )

On this 15<sup>th</sup> day of July, 2020, before me, a notary public in and for Guam, personally appeared Peter Rood, known to me to be the person whose name is subscribed to the foregoing **NOTICE OF APPEAL**, and he acknowledged to me that he executed the same.

WITNESS my hand and official seal.



  
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**TABITHA MADARANG GARCIA**  
**NOTARY PUBLIC**  
In and for Guam, U.S.A.  
My Commission Expires: **JAN. 08, 2024**  
140 As Conejo Pl, Barrigada, GU 96913

# **ATTACHMENT A**



# GUAM POWER AUTHORITY

ATURIDÁT ILEKTRESEDÁT GUAHAN  
P.O. BOX 2977 • HAGÁTÑA, GUAM U.S.A. 96932-2977

October 4, 2019

GlidePath Power Solutions LLC  
On behalf of GlidePath Marianas Operations Inc.  
709 Dandan Road  
Inarajan, Guam 96915 USA  
Tel: (651) 494-4939  
Email: [prood@glidepath.net](mailto:prood@glidepath.net)

Dear Mr. Rood:

**MULTI-STEP BID INVITATION:** GPA-007-18      **OPENED:** September 10, 2019

**DESCRIPTION:** Renewable Energy Resource Phase III

The following is the result of the above-mentioned bid. Refer to items checked below.

- Cancelled (in its entirety), or partially canceled due to:**
  - ( ) Insufficient funds;
  - ( ) Change of specifications;
  - ( ) Best interest of the Government
  
- Not awarded due to:**
  - ( ) Late submission of bid;
  - ( ) No bid security or insufficient bid security amount submitted: as required by Section 11 of the General Terms and Conditions;
  - ( ) Not meeting the delivery requirements as stated in the IFB;
  - ( ) Non-conformance with the specifications;
  - ( ) Inability to provide future maintenance and services to the equipment;
  - (X) High price; Naval Base Guam Site (Basic and Alternate offers) and South Finegayan Site (Basic and Alternate offers).
  - ( ) Others:

Bid is recommended for award to Engie Solar for Naval Base Guam and South Finegayan Sites.

The Guam Power Authority greatly appreciates your interest and participation in our bid.

  
JOHN M. BENAVENTE, P.E.  
General Manager



# **ATTACHMENT B**

# RAZZANO WALSH & TORRES, P.C.

www.rwtguam.com

Sender's Direct E-Mail:  
jdwalth@rwtguam.com

July 9, 2020

This is a pre-award procurement protest of Guam Power Authority IFB No. 007-18 ("IFB"), and as such this correspondence serves as a statutory trigger for an Automatic Stay regarding the continued procurement of the IFB. Pursuant to 5 GCA § 5425(g), the Territory shall not proceed further with the solicitation or with the award of the contract prior to final resolution of this protest.

## VIA HAND DELIVERY

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



**RE: Bid Protest of Invitation for Multi-Step Bid No.:  
GPA-007-18 Renewable Energy Resources Phase III; Sunshine  
Act Request.**

Dear Mr. Benavente:

### PROCUREMENT PROTEST

Our office represents GlidePath Marianas Operations Inc. ("GlidePath") who was an offeror on GPA-IFB-007-18 (the "IFB"). As you know, the matter is currently before the Office of Public Accountability ("OPA") on a consolidated procurement protest appeal advanced by GlidePath.

On July 6, 2020, Guam Power Authority ("GPA") Engineer Jennifer Sablan, P.E., testified before the OPA that she worked with Mr. David Burlingame on the specifications for the IFB and its more than 20 amendments. Ms. Sablan also testified that she communicated with Mr. Burlingame via email and telephone. Ms. Sablan also testified that there are emails in her possession with Mr. Burlingame about the IFB and the underlying technical specifications and rationales of the Phase III project. On July 7, 2020, Mr. Burlingame confirmed Ms. Sablan's testimony under oath. Unfortunately, none of these items appear in the procurement record for the IFB.

A complete procurement record requires all drafts, signed by the draftsman and other papers or materials used in the development of specifications. See, 5 G.C.A. § 5249(d) and 2 G.A.R. § 3129(4)). Moreover, the specifications contained in

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(T): 671-989-3009 (F): 671-989-8750

any invitation for bids or requests for proposals shall identify the person responsible for drafting the specifications and any person, technical literature or manufacturer's brochures relied upon by the responsible person in drafting the specifications. 5 G.C.A. § 5267 and 2 G.A.R. § 4108. Nowhere in the procurement record does GPA identify David Burlingame and his role in the drafting of the specifications of the IFB. The procurement record also does not contain the technical literature or the reports and documents provided by Mr. Burlingame or GPA in drafting the specifications of the IFB.

The first time that David Burlingame was identified as having some role in the IFB was in GPA submitted its Witness List to the OPA in the current appeal on March 13, 2020. The full extent of his role, and his communications with GPA, were obscured until Ms. Sablan provided her testimony. The recent disclosure confirming that the procurement record is incomplete is especially troubling given the fact that on February 20, 2020, GlidePath filed in its protest appeal a Motion for Order Compelling Agency to Supplement Record. In that Motion, GlidePath requested GPA provide "(1) a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement generally, and specifically the creation of Amendment XIII; and (2) any and all documents, communications and records explaining the Agency's technical reasoning behind creating Amendment XIII." Motion to Order Agency Supplement the Record, pg. 4. During the hearing on GlidePath's Motion for Order Compelling Agency to Supplement Record, GPA counsel informed the OPA and the parties that "there is nothing else" to produce for the procurement record and that the record was complete. March 3, 2020 Motion Hearing.

This haphazard post award decision "certification" violates Guam's procurement law, and it is now clear that the post hoc certification was in error. Without the information regarding the persons, communications, reports, technical literature, and brochures that gave birth to the IFB and its various requirements, GlidePath has been prejudiced not just in its procurement appeal, but was also prejudiced in forming its technical proposal since none of this information that the IFB and Amendments were built upon was previously provided to bidders.

#### RELIEF REQUESTED

GlidePath requests that GPA render a decision that:

- (1) Determines that the procurement record was incomplete and could not have been certified as being complete;
- (2) Determines that the Agency's failure to identify the person responsible for drafting the specifications and any person, technical literature or

manufacturer's brochures relied upon by the responsible person in drafting the specifications of the IFB and Amendments resulted in a fundamentally flawed procurement; and

(3) Determines that the only fair remedy is to allow GlidePath to resubmit to GPA its technical proposal and price submission following a period allowing for questions to the agency seeking clarifications about the previously undisclosed documents.

Finally, this is a pre-award procurement protest of Multi-Step Bid No.: GPA-007-18 Renewable Energy Resources Phase III, and as such this correspondence serves as a continuation of the statutory trigger already in place for an Automatic Stay regarding the continued procurement of IFB GWA IFB-2019-17. Pursuant to 5 GCA § 5425(g), the Territory shall not proceed further with the solicitation or with the award of the contract prior to final resolution of this protest.

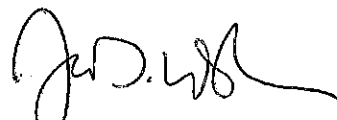
We look forward to your prompt and expeditious resolution of this protest.

**SUNSHINE ACT REQUEST**

In addition to the instant protest, GlidePath also requests, pursuant to the Guam Sunshine Act, PL 25-06 and 5 G.C.A. § 10101, *et seq.* the following documents:

- All documents, records, drafts, reports and other material produced by Mr. David Burlingame and his firm relied upon in producing the technical requirements of Phase III;
- A copy of all communications between GPA and Mr. David Burlingame and his firm regarding, about, or otherwise related to the IFB;
- A Copy of all communications between Ms. Jennifer Sablan, P.E. and Mr. David Burlingame regarding, about, or otherwise related to the IFB;
- The log of communications kept by GPA relative to the IFB; and
- The certification of the procurement record issued in this IFB.

Sincerely,



**Joshua D. Walsh**

# **ATTACHMENT C**



# GUAM POWER AUTHORITY

ATURIDÁT ILEKTRESEDÁT GUAHAN  
P.O.BOX 2977 • AGANA, GUAM U.S.A. 96932-2977

Tel: (671) 648-3225; Fax: 648-3290

## ***DENIAL OF PROCUREMENT PROTEST***

July 14, 2020

VIA E-mail: [jdwalsh@rwtguam.com](mailto:jdwalsh@rwtguam.com)

VIA E-mail: [prood@glidepath.net](mailto:prood@glidepath.net)

Mr. Joshua D. Walsh  
Razzano Walsh & Torres, P.C.  
139 Murray Blvd, Suite 100  
Hagatna, Guam 96910

RE: Guam Power Authority's Response to GlidePath Marianas Operations, Inc.'s Protest dated July 9, 2020, for GPA-IFB-007-18, Renewable Energy Resources Phase III

Dear Mr. Walsh:

I have reviewed your protest letter dated July 9, 2020, protesting the Guam Power Authority's (GPA) proposed award to ENGIE Solar ("ENGIE"), and the procurement record for the IFB. Your Protest is hereby denied for the following reasons:

1. You correctly indicated that this matter is currently before the OPA on a consolidated procurement protest appeal in OPA-PA-19-010 and OPA-PA-20-001. Your protest letter failed to indicate that you had filed a motion before the OPA regarding your allegation that the procurement record was incomplete. This motion was substantially the same as this third protest letter filed with GPA on the same day. A copy of the motion filed with the OPA on July 9, 2020 is attached hereto as Exhibit "A". The testimony provided by Mr. Burlingame at the OPA hearing on July 7, 2020, was that there were no technical literature or brochures he relied upon in assisting with the drafting of the technical specifications for the GPA Phase III Solar bid.

You claim that “the first-time David Burlingame was identified as having some role in the IFB was when GPA submitted its Witness List to the OIPA in the current appeal on March 13, 2020.” That claim is factually inaccurate as the procurement record referencing Dave Burlingame are contained in an e-mail included in the procurement record at pages 10051, 10069, and 10073. The procurement record pages are attached hereto as Exhibit “B”. The procurement record containing these pages was filed with the OPA on December 12, 2020. Additionally, on July 9, 2020, a Supplemental Procurement Record consisting of additional e-mails and draft specifications was filed with the OPA, a copy of the top page showing receipt by your firm is attached hereto as Exhibit “C”.

Each bidder in this procurement was provided identical documents consisting of the Invitation for Bid, and the numerous amendments to the IFB. All bidders, including GlidePath, had numerous opportunities to request clarification from GPA regarding the technical specifications. The two previous protests submitted by GlidePath do not contain any protests regarding the technical specifications contained in the GPA Phase III solar bid. The person assisting GPA in the creation or revision of the technical specifications is not material or relevant to the issues raised by GlidePath in its two appeals before the OPA.

The e-mails regarding David Burlingame in the procurement record states that “[w] are working on the following for the 1<sup>st</sup> amendment .... 3. Any further ESS or interconnection requirements as recently discussed with Dave Burlingame and the EPS team.” GlidePath was on notice with the filed procurement record that Dave Burlingame and EPS played a role in the “ESS or interconnection requirements” since December 12, 2019. Any protest regarding the completeness of the procurement record, particularly regarding Dave Burlingame and EPS, should have been filed within 14 days, or by December 26, 2019. For procurement protests, any actual or prospective bidder, offeror or contractor who may be aggrieved in connection with source selection, solicitation, or award of a contract may protest to the .... head of a purchasing

agency. 5 GCA §5425(a). The protest shall be submitted in writing within fourteen days after such aggrieved person knows or should know of the facts giving rise thereto and protests filed after the fourteen-day period shall not be considered. *Id.*, 2 GAR, Div. 4, §9101(c)(1). Your third protest is therefore untimely and is denied.

Therefore, your protest is denied on these grounds. GPA reviewed the bid packages and provided a notice of intent to award to the lowest responsible and **responsive** bidder. A responsive bidder is a person who has submitted a bid which conforms in all material respects to the Invitation for Bids. 5 GCA §5201(g) and 2 GAR, Div. 4, Chap. 3, §3109(n)(2).

2. GPA has determined that ENGIE should be awarded the bid for Renewable Energy Resources Phase III, as they were deemed to be the lowest, responsive and responsible bidder. Therefore, GPA hereby finds that there is no merit to the GlidePath Marianas Operations, Inc.'s claim that they have been prejudiced in their two appeals currently before the OPA. Additionally, GPA hereby finds there is no merit to the GlidePath claim that there was a fundamentally flawed procurement.

GlidePath Marianas Operations, Inc. is hereby ON NOTICE that this is the Guam Power Authority's final decision concerning GlidePath Marianas Operations, Inc.'s July 9, 2020, third protest for the above described IFB, filed while the previous two protests were before the OPA. You are hereby advised that GlidePath Marianas Operations, Inc. has the right to seek judicial review.

Sincerely,

  
JOHN M. BENAVENTE, P.E.  
General Manager



Rec'd 7/9/20 @ 3:11pm  
@ OPA

**RAZZANO WALSH & TORRES, P.C.**  
SUITE 100, 139 MURRAY BLVD  
HAGÁTÑA, GUAM 96910  
TELEPHONE: (671)969-3009

*Attorneys for Appellant*  
*GlidePath Marianas Operations Inc*

RECEIVED  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

DATE: 7/10/20  
TIME: 3:12 PM CLAIMED BY: Vince D  
FILE NO OPA-PA: 19-0010

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

In the Appeal of  
  
GlidePath Marianas Operations Inc.,  
  
Appellant.

DOCKET NOS. OPA-PA-19-010  
OPA-PA-20-001

**MOTION FOR ORDER STAYING  
PROCEEDINGS PENDING  
COMPLETION OF THE  
PROCUREMENT RECORD**

Appellant GlidePath Marianas Operations, Inc., moves the Office of Public Accountability ("OPA") for an order staying proceedings in connection with matters in this action<sup>1</sup>, pending the production by the procuring Agency, the Guam Power Authority ("GPA"), of the complete Procurement Record of Guam Power Authority Invitation for Bid GPA-007-18 Renewable Energy Resources Phase III (the "IFB").

On July 6, 2020, Guam Power Authority ("GPA") Engineer Jennifer Sablan, P.E, testified before the OPA that she worked with Mr. David Burlingame on the specifications for the IFB and its more than 20 amendments. Ms. Sablan also testified that she communicated with Mr. Burlingame via email and telephone. Ms. Sablan also testified that there are emails in her possession with Mr. Burlingame

<sup>1</sup> This Motion is not brought to seek a delay of the proceedings *vis vis* Interested Party ENGIE's ability to continue with its case-in chief.

Ex A

about the IFB and the underlying technical specifications and rationales of the Phase III project. On July 7, 2020, Mr. Burlingame confirmed Ms. Sablan's testimony under oath. Unfortunately, none of these items appear in the procurement record for the IFB that has been produced in the appeal.

A complete procurement record requires all drafts, signed by the draftsman and other papers or materials used in the development of specifications. See, 5 G.C.A. § 5249(d) and 2 G.A.R. § 3129(4)). Moreover, the specifications contained in any invitation for bids or requests for proposals shall identify the person responsible for drafting the specifications and any person, technical literature or manufacturer's brochures relied upon by the responsible person in drafting the specifications. 5 G.C.A. § 5267 and 2 G.A.R. § 4108. Nowhere in the procurement record does GPA identify David Burlingame and his role in the drafting of the specifications of the IFB. The procurement record also does not contain the technical literature or the reports and documents provided by Mr. Burlingame or GPA in drafting the specifications of the IFB.

On July 8, 2020, GPA counsel informed counsel for GlidePath that GPA would be searching Ms. Sablan's email and when finished would supplement the admittedly incomplete procurement record. Without prejudice to its position that the procurement is fundamentally flawed because of the errors in the procurement record<sup>2</sup>, Glidepath desires to see the previously undisclosed portions of the procurement record before determining if rebuttal testimony is required, and before

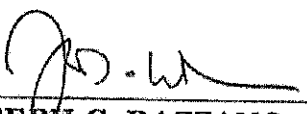
---

<sup>2</sup> In order to preserve its rights on this issue, GlidePath filed a procurement protest with the Agency regarding the incomplete procurement record on July 9, 2020.

closing the hearing in this case and submitting this matter for the Public Auditor's decision.

Submitted this 9<sup>th</sup> day of July, 2020.

**RAZZANO WALSH & TORRES, P.C.**

By:   
**JOSEPH C. RAZZANO**  
**JOSHUA D. WALSH**  
*Attorneys for Appellant*  
*GlidePath Marianas Operations, inc.*

**Dawn KP Fejeran**

**From:** Jennifer G Sablan  
**Sent:** Wednesday, November 29, 2017 3:51 PM  
**To:** Dawn KP Fejeran; Lance M.C. Lujan  
**Subject:** FW: Proposed January Site Visit Dates > RE: Phase III announced today

Dawn, Lance,

Just got off the phone with Matt from Navy. Dates are good and we will have vendors submit applications to Navy directly. GPA will request for vendors to advise GPA that applications have been submitted in order to cross check with Navy and ensure processing before site visit.

Also, will go over the vendor questions and give you an amendment tomorrow. I just need to finish the bond report for finance today.

Thanks,  
jenn

-----Original Message-----

**From:** Jennifer G Sablan  
**Sent:** Wednesday, November 29, 2017 11:27 AM  
**To:** Matthew.Harbeson@fe.navy.mil  
**Cc:** kirstin.punu@navy.mil; thomas.bawden@navy.mil; Lance M.C. Lujan <lmclujan@gpagwa.com>; John J Cruz, Jr. <jcruz@gpagwa.com>; david.stiner@navy.mil; Victoria.Zialcita@fe.navy.mil; Dawn KP Fejeran <dfejeran1@gpagwa.com>  
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Matt,

Referring to my voice mail yesterday, this is the proposed schedule for the applications and the site visits:

Deadline for Applications - 12/20/2017  
GPA Pre Bid & Site Visits -1/23/2017 (S. Fin) , 1/24/2017 (NBG)

Please let me know if this schedule works with you. Also the base application does require sensitive information (passport numbers, social security no., etc.) . We would like Navy to reconsider that the applications be sent directly to Navy with indication on it for the Phase III site visit so it may be sorted at the VCC. GPA can ask vendors to register to GPA so that we can verify if Navy has received all interested participants.

Thank you,  
jenn

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**Sent:** Wednesday, November 22, 2017 10:00 AM  
**To:** 'Matthew.Harbeson@fe.navy.mil' <Matthew.Harbeson@fe.navy.mil>; david.stiner@navy.mil; Victoria.Zialcita@fe.navy.mil

Cc: kirstin.punu@navy.mil; thomas.bawden@navy.mil; Lance M.C. Lujan <lmclujan@gpagwa.com>; John J Cruz, Jr. <jcruz@gpagwa.com>  
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If we can issue the amendment by Tuesday or Wednesday we can still set deadline around mid-December and schedule around 3rd or 4th week of January to allow application processing. GPA will limit to 2 participants per company to manage the count. This may be however more than 40 persons (only 3-4 being GPA), but we would know well in advance.

Regards,  
Jenn

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From: Matthew.Harbeson@fe.navy.mil [mailto:Matthew.Harbeson@fe.navy.mil]  
Sent: Tuesday, November 21, 2017 5:03 PM  
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If GPA expects or restricts to 40 people or less then:

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- For base access please provide a compiled list of visitor names, company, and citizenship with completed base access forms by COB Dec. 7th.
- For any non-U.S. citizen/foreign nationals, they will be responsible for doing in-person biometrics at the NBG Visitor Control Center before the site visit.

Let me know if you have any questions.

Thanks.

v/r,

Matt

-----  
Matthew Harbeson  
PW Facilities and Energy Program Coordinator NAVFAC Marianas PW8  
COMM: 671-349-5404  
DSN: 315-349-5404  
Matthew.harbeson@fe.navy.mil

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From: Jennifer G Sablan [mailto:jsablan@gpagwa.com]  
Sent: Thursday, November 16, 2017 3:04 PM  
To: Stiner, David D CIV NAVFAC PACI, PW  
Cc: Punu, Kirstin M CIV NAVFAC PAC, AM; Harbeson, Matthew J CIV USN NAVFAC MARIANAS; Bawden, Thomas M CIV NAVFAC Pacific, PW (thomas.bawden@navy.mil); Lance M.C. Lujan  
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regards,

Jenn

Jennifer G. Sablan

Manager, SPORD

GUAM POWER AUTHORITY

Page 10052 of 12444

P.O. Box 2977

Hagåtña, Guam 96932-2977

Phone: (671) 648-3103

Email: [jsablan@gpagwa.com](mailto:jsablan@gpagwa.com) <<mailto:jsablan@gpagwa.com>>

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v/r,

Matt

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Matthew Harbeson.  
PW Facilities and Energy Program Coordinator NAVFAC Marianas PW8  
COMM: 671-349-5404  
DSN: 315-349-5404  
Matthew.harbeson@fe.navy.mil

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Sent: Thursday, November 16, 2017 3:04 PM  
To: Stiner, David D CIV NAVFAC PACI, PW  
Cc: Punu, Kirstin M CIV NAVFAC PAC, AM; Harbeson, Matthew J CIV USN NAVFAC MARIANAS; Bawden, Thomas M CIV NAVFAC Pacific, PW (thomas.bawden@navy.mil); Lance M.C. Lujan  
Subject: [Non-DoD Source] Phase III announced today

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Jennifer G. Sablan

Manager, SPORD

GUAM POWER AUTHORITY

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Hagatna, Guam 96932-2977

Phone: (671) 648-3103

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**Dawn KP Fejeran**

**From:** Dawn KP Fejeran  
**Sent:** Wednesday, November 29, 2017 10:48 AM  
**To:** Jennifer G Sablan  
**Cc:** Lance M.C. Lujan; Stephanie M. Tajeron; Jamie C. Pangelinan  
**Subject:** RE: Phase III announced today

<b>Tracking:</b>	<b>Recipient</b>	<b>Delivery</b>
	Jennifer G Sablan	Delivered: 11/29/2017 10:48 AM
	Lance M.C. Lujan	Delivered: 11/29/2017 10:48 AM
	Stephanie M. Tajeron	Delivered: 11/29/2017 10:48 AM
	Jamie C. Pangelinan	Delivered: 11/29/2017 10:48 AM

Hi Jenn,

I verified the proposed dates below in reference your request, both Option 1 and 2 are both clear on the calendar. Kindly advise the actual dates with the updated Bid Milestone and any additional changes as discussed as soon as possible.

Awaiting your advisement ☺

Thank you,

Dawn

---

**From:** Jennifer G Sablan  
**Sent:** Wednesday, November 22, 2017 1:30 PM  
**To:** Dawn KP Fejeran  
**Cc:** Lance M.C. Lujan; Stephanie M. Tajeron; Jamie C. Pangelinan  
**Subject:** RE: Phase III announced today

Dawn,

As discussed earlier, I have informed Navy that the December site visit and application deadline schedules are too tight so I'm going to go with their recommendation (email from Matt H below) to move to January. Matt from Navy won't be available until next Monday, so I will confirm then. In the meantime can you look at the following dates and times for proposed prebid and site visits

Option 1.

1/16/18	9AM - 11AM	Prebid
	1PM - 3PM	S. Fin Site Visit (Meet at S. Fin site on Rt. 3, Dededo)
1/17/18	9AM - 12PM	Naval Base Guam Site Visit (Meet at Navy Visitor Control Center, Agat)

Option 2.

1/23/18	9AM - 11AM	Prebid
	1PM - 3PM	S. Fin Site Visit (Meet at S. Fin site on Rt. 3, Dededo)

1/24/18

9AM - 12PM

Naval Base Guam Site Visit (Meet at Navy Visitor Control Center, Agat)

Page 10071 of 12444

Thank you,  
jenn

-----Original Message-----

From: Jennifer G Sablan  
Sent: Tuesday, November 21, 2017 5:41 PM  
To: Dawn KP Fejeran <[dfejeran1@gpagwa.com](mailto:dfejeran1@gpagwa.com)>  
Cc: Lance M.C. Lujan <[lmclujan@gpagwa.com](mailto:lmclujan@gpagwa.com)>; Stephanie M. Tajjeron <[smtajjeron@gpagwa.com](mailto:smtajjeron@gpagwa.com)>; Jamle C. Pangélinan <[jpangelinan@gpagwa.com](mailto:jpangelinan@gpagwa.com)>  
Subject: FW: Phase III announced today  
Importance: High

Dawn,

We are trying to coordinate the site visit with Navy for the Naval Base Site. Due to base pass access processing and the timing for the site visit, they are asking to limit the number of visitors for this first Naval Base Guam (Agat) site visit to 40 (including any GPA personnel that may need base pass access - yourself or other Procurement personnel required at the site visit.)

Please advise if we can have the following scheduled:

12/19 9AM-11AM PRE-BID CONFERENCE (@ GPA Procurement Office)  
12/19 1PM-3PM South Finegayan Site Visit, Rt 3 Dededo (Meet at the site)  
12/20 9AM - 12PM Naval Base Guam Site Visit, Agat (Meet at the Navy VCC - GPA to provide bus transportation into Base)

As noted below, bidders accessing the NGB sites will be required to submit their applications to GPA (per Navy) by December 6. GPA would need to send applications to Navy as a single submittal. Navy will process up to 40 applications. Lance is working on obtaining the bus

GPA may limit NGB site access to 1-2 persons per company, however GPA can schedule another visit on January 9th.

I'm working on the amendment to include other updates to the bid documents.

Thanks,  
jenn

-----Original Message-----

From: Matthew.Harbeson@fe.navy.mil [mailto:[Matthew.Harbeson@fe.navy.mil](mailto:Matthew.Harbeson@fe.navy.mil)]  
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# **ATTACHMENT D**

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*Attorney for the Guam Power Authority*

OFFICE OF THE PUBLIC AUDITOR  
PROCUREMENT APPEALS

IN THE APPEAL OF	)	DOCKET NO. OPA-PA-19-010
GlidePath Marianas Operations, Inc.,	)	
Appellant.	)	<b>SUPPLEMENTAL PROCUREMENT RECORD</b>
_____	)	

COMES NOW, D. GRAHAM BOTHA, ESQ., and hereby submits the  
Supplemental Procurement Record in this matter on behalf of appellee, GUAM POWER  
AUTHORITY (GPA).

**RESPECTFULLY SUBMITTED** this 16<sup>th</sup> day of January, 2020.

  
D. GRAHAM BOTHA, ESQ.  
GPA General Counsel

Civil Service Commission, RLLC

**RECEIVED**

DATE: 1/17/20  
TIME: 3:41 PM  
BY: K.B.



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OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS  
DATE: July 9, 2020  
TIME: 2:38 ~~AM~~ PM BY: Chris  
FILE NO OPA-PA: 19-010120-001

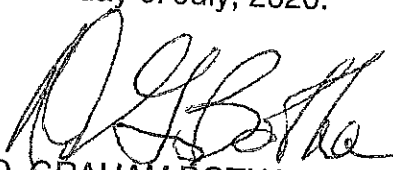
*Attorney for the Guam Power Authority*

OFFICE OF THE PUBLIC AUDITOR  
PROCUREMENT APPEALS

IN THE APPEAL OF	)	DOCKET NO. OPA-PA-19-010
	)	OPA-PA-20-001
GlidePath Marianas Operations, Inc.,	)	
	)	<b>SUPPLEMENTAL PROCUREMENT</b>
Appellant.	)	<b>RECORD</b>
_____	)	

COMES NOW, D. GRAHAM BOTHA, ESQ., and hereby submits the Supplemental Procurement Record in this matter on behalf of appellee, GUAM POWER AUTHORITY (GPA). This supplement consists of e-mails between Jennifer Sablan, GPA SPORD Manager, and Mr. David Burlingame, GPA consultant, regarding GPA Phase III Solar. It specifically excludes all e-mail correspondence between Ms. Sablan and Mr. Burlingame related to other GPA studies, including Reliability Standards for GPA grid, Renewable Integration Study, Military Buildup, Phase II System Impact Studies, and Long Range Integration Study, which Mr. Burlingame testified about on July 7, 2020.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of July, 2020.

  
D. GRAHAM BOTHA, ESQ.  
GPA General Counsel

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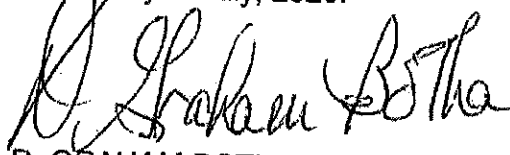
*Attorney for the Guam Power Authority*

**OFFICE OF THE PUBLIC AUDITOR  
PROCUREMENT APPEALS**

IN THE APPEAL OF	)	DOCKET NO. OPA-PA-19-010
GlidePath Marianas Operations, Inc.,	)	OPA-PA-20-001
Appellant.	)	<b>SUPPLEMENTAL PROCUREMENT RECORD</b>
_____	)	

**COMES NOW**, D. GRAHAM BOTHA, ESQ., and hereby submits the Supplemental Procurement Record in this matter on behalf of appellee, GUAM POWER AUTHORITY (GPA). This supplement consists of additional e-mails between John Cruz, Jennifer Sablan, and Mr. David Burlingame, GPA consultant, regarding GPA Phase III Solar, and additional attachments inadvertently not included in the supplemental procurement record filing on July 9, 2020. It specifically excludes all e-mail correspondence between Ms. Sablan and Mr. Burlingame related to other GPA studies, including Reliability Standards for GPA grid, Renewable Integration Study, Military Buildup, Phase II System Impact Studies, and Long Range Integration Study, which Mr. Burlingame testified about on July 7, 2020.

**RESPECTFULLY SUBMITTED** this 15<sup>th</sup> day of July, 2020.

  
D. GRAHAM BOTHA, ESQ.  
GPA General Counsel