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OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

IN THE APPEAL OF) DOCKET NO. OPA-PA-19-010,
) OPA-PA-20-001, OPA-PA-20-007
GlidePath Marianas Operations, Inc.,)
)
Appellant.) **APPELLEE’S [PROPOSED] FINDINGS**
) **OF FACTS AND CONCLUSIONS**
) **OF LAW**
_____)

COMES NOW, the GUAM POWER AUTHORITY, by and through its counsel of record, D. GRAHAM BOTHA, ESQ., and submits its Proposed Findings of Facts and Conclusions of Law, as follows.

[PROPOSED] FINDINGS OF FACTS

The Public Auditor makes the following finds of fact:

1. On November 28, 2017, Guam Power Authority (“GPA”) issued Multi-Step Invitation for Bid, GPA-IFB-007-018, RENEWABLE ENERGY RESOURCES PHASE III, [Procurement Record (“PR”), Tab 71].
2. Multiple bidders expressed interest in the IFB from November 28, 2017 to June 3, 2019. Six companies submitted bids in response to the Multi-Step IFB; ENGIE, AES, KEPCO/Hanwha, GlidePath, X-Elio, and Global Sources. [PR, Tab 37-47].
3. All bidders, except for Global Sources, submitted bids for both sites, Naval Base Guam and South Finegayan. Phase I Bid Abstract, June 3, 2019. [PR, Tab 48].

- 1 4. Prior to submission of the technical proposals, the bidders had an opportunity to submit
2 questions regarding the IFB. GPA issued amendments II to XIX in response to these
3 questions, and other amendments to clarify the IFB. [PR, Tab 50-68].
- 4 5. On June 3, 2019, the sealed technical proposals of the six bidders were opened in the
5 presence of company representatives. Each of the six bidders submitted technical proposals
6 for either one site or two sites. The representatives were provided a copy of the Abstract of
7 Bids which lists the technical proposals for the six bidders. [PR, Tab 48].
- 8 6. On August 12, 2019, the evaluation committee met and recommended that five of the six
9 bidders be deemed qualified under the Phase I technical evaluation, and one of the six
10 bidders be deemed not qualified under the Phase I technical evaluation to proceed to Phase II
11 -- price proposals. Five bidders with twelve project sites were qualified, ENGIE, AES,
12 KEPCO/Hanwha, GlidePath, and X-Elio. [PR, Tab 22].
- 13 7. One bidder was not qualified in the Phase I technical proposal, Global Sourcing USA, Inc.
14 [PR, Tab 21].
- 15 8. Amendment No. XXIII and letters were sent to the qualified bidders on August 14, 2018.
16 [PR, Tab 22].
- 17 9. Phase I letters were sent to the non-qualified bidders on August 14, 2018. [PR, Tab 21].
- 18 10. Amendment XX to XXIII and clarifications were sent to Phase II bidders. [PR, Tabs 20-35].
- 19 11. On September 10, 2019, the sealed price proposals for the five bidders and ten project sites
20 were opened in the presence of company representatives. [PR, Tab 38].
- 21 12. The price proposal evaluation was completed and determined that the lowest responsive
22 bidder for Naval Base Guam and South Finegayan was ENGIE. [PR, Tab 12].
- 23 13. The evaluation committee recommended award of Naval Base Guam (NBG) and South
24 Finegayan (SF) sites based on the technical price proposals submitted. [PR, Tab 12].

- 1 14. The Phase II – Bid Abstract and evaluation committee memo reflect the NGB site price of
2 **\$110.90/MWh** and the SF site price of **\$108.90/MWh**; AES prices for NGB of
3 **\$169.00/MWh** and SF of **\$158.90/MWh**; GlidePath prices for NGB of **\$196.00/MWh** and
4 SF of **\$191.50/MWh** and GlidePath (Alternate) prices for NGB of **\$176.00/MWh** and SF of
5 **\$176.00/MWh**. [PR, Tab 12].
- 6 15. GlidePath filed a protest with GPA which resulted in a Stay of Procurement, and a Lift of
7 Stay when the protest was denied by GPA. [PR, Tab 5].
- 8 16. GlidePath filed an appeal to the OPA on November 13, 2019, and GPA filed a Stay of
9 Procurement on November 15, 2019. [PR, Tab 2 & 4].
- 10 17. GlidePath filed a second appeal to the OPA on January 21, 2020, docketed as OPA-PA-20-
11 001, appealing GPA's decision dated January 10, 2020, denying GlidePath's second protest
12 related to the IFB.
- 13 18. The Public Auditor issued an Order consolidating the two appeals on January 30, 2020.
- 14 19. The formal hearing for OPA-PA-19-010 and 20-001 started on July 6, 2020 and continued
15 July 7, 8, 9 and 14, 2020.
- 16 20. GlidePath filed a third appeal to GPA on July 9, 2020, and filed a motion for order staying
17 proceedings pending completion of procurement record, and on the same day, GPA filed a
18 supplemental procurement record.
- 19 21. GPA issued a decision denying GlidePath's third protest related to the IFB, and filed a
20 motion to consolidate the third agency appeal on July 14, 2020.
- 21 22. GPA filed another supplemental procurement record with additional attachments that were
22 inadvertently not included in the July 9, 2020 supplemental procurement record.

1 23. GlidePath filed a third appeal to the OPA on July 20, 2020, docketed as OPA-PA-20-007,
2 appealing GPA's decision dated July 14, 2020, denying GlidePath's third protest related to
3 the IFB.

4 24. The Public Auditor issued an order consolidating the three appeals on July 22, 2020.

5 25. The IFB provided that "the Bidder's renewable resource project shall have a maximum
6 export capacity 30MW (AC) at the interconnection point; this may be the combination of
7 several generation units at one site." [GPA Trial Exhibit A, PR p.11964].

8 26. Section 2.3.1, Minimum and Maximum Project Capacity, states that "There is no minimum
9 nameplate project capacity that a Bidder may offer, however the maximum export capacity
10 shall be 30MW." [GPA Trial Exhibit A, PR p.11968].

11 27. During the hearing, witness Jennifer Sablan explained that Amendment 8, Supplement and
12 Update to Volume II – Technical Requirements, was provided to bidders in December 2018,
13 which included additional GPA requirements regarding the Energy Storage System (ESS).
14 [Hearing, July 7, 2020, GPA Trial Exhibit B, PR pgs. 10999 et seq.].

15 28. Amendment 8 provided that "the bidder should target to maximize the amount of energy that
16 can be delivered to the GPA system given the locations where PV can be developed ... The
17 MW output of PV used to charge the ESS should be maximized to the amount of capacity
18 available on each site and any energy restrictions of the ESS." [GPA Trial Exhibit B, PR p.
19 11000].

20 29. In Amendment 8, GlidePath asked question 2.13 "please confirm the nameplate capacities
21 referred to in the IFB are measured in megawatt (MW) AC and not DC. For example, a solar
22 plant with a nameplate capacity of 30MW as measured on the AC side of the inverters would
23 be an eligible project even if it had more than 30MW of generation capacity on the DC side

1 of the inverters. Answer: Yes, capacities are in megawatts AC.” [GPA Trial Exhibit B, PR
2 pg. 10876].

3 30. David Burlingame, GPA consultant, thoroughly discussed the basis for the restrictions on the
4 capacity/discharge rate (MW) output and other design of the ESS. Specific discussions
5 focused on the Amendment 8 language which provided that “the MW rating of the ESS shall
6 be equal to or greater than the 145% of the MW rating of the PV charging system, up to a
7 maximum capacity of 40MW. For instance, for a PV installation of 27 MW, the ESS shall
8 be rated at a minimum of 40MW. For a PV capacity of 10MW, the ESS rating shall be a
9 minimum of 14.5MW. The storage rating of the ESS shall be 105% of the “expected” ...
10 daily energy production of the PV charging capability.” [Hearing, July 7, 2020, GPA Trial
11 Exhibit B, PR p. 11000].

12 31. Peter Rood, GlidePath witness, testified that GlidePath submitted a project with 20.7MW
13 based derived because the MW rating must be at least 145% of the solar PV. So if the
14 project size is 30MW, then in order to have exactly 30MW, you need to have 20.7MW based
15 on GPA requirements. [Hearing, July 6, 2020, GlidePath Exhibit 2-000160 and 5-00013].

16 32. Upon cross examination, Peter Rood was unable to specify in the IFB where the limitation of
17 20.7MW on the size of the solar PV was contained and referenced 2-000160 and 5-00013.
18 [Hearing, July 6, 2020, GlidePath Exhibit 2-000160 and 5-00013].

19 33. David Burlingame, GPA consultant, testified that his company had performed numerous
20 system stability studies for GPA, prior to the Phase III renewable energy bid. Based on those
21 studies, he drafted the original technical specifications incorporating batteries for load
22 shifting and assisted with the updates to Volume II of the technical proposal in December
23 2018 as Amendment 8 of the IFB. He testified that there was no restriction on the amount,
24 quantity or size of PV panels. The bidders could choose the PV size based on risk within the

1 parameters of the ESS. The purpose of the 145% requirement was to ensure you can get the
2 stored energy out of the system in the time allocated from 6-10pm, which was later changed
3 to 5pm to 12. [Hearing, July 7, 2020].

4 34. Upon cross by GlidePath, David Burlingame clarified his testimony that the only limitation
5 was that the ESS had to store 105% of the PV energy. The limitation on the PV system does
6 not impose a direct limitation on the PV, just the amount of energy. Not the capacity but the
7 energy. He stated that the 30MW_{AC} output requirement doesn't have anything to do with the
8 145% requirement. The 145% requirement is our estimate of what it would take on a sunny
9 day using the Phase I data, how much time it would take to deplete the battery. [Hearing,
10 July 7, 2020].

11 35. Jennifer Sablan testified that the delays in the Phase III IFB were due to lease issues with the
12 Navy that needed to be finalized. There was a waiver of lease fees based on an in-kind
13 consideration, that allowed Navy to have a microgrid. We needed Navy to define that.
14 Black start capable inverter was the in-kind requirement. The main reason for the 30MW
15 restriction is that any loss of generation will have an impact on the grid, and to minimize
16 impact we put those requirements in place. The only limit on the size of the PV array was
17 what they could build on the leased Navy property. The purpose for the 145% MW rating
18 examples was to ensure batteries were sized properly because the discharge rate needed to be
19 greater than the charge rate. [Hearing, July 7, 2020, GPA Trial Exhibit B, PR p. 11000].

20 36. Amendment 17, responding to a GlidePath clarification dated 2/11/19, provided that "(b)
21 what is the maximum procurement under this bid, could GPA select two 30MW_{ac} projects at
22 each site for a total procurement of 60MW_{ac}? GPA Answer 1.1(a) "30MAW_{ac} is the
23 maximum interconnection capacity for each site. We expect the bids to be equal to or less
24 than this amount. GPA will evaluate the total energy and cost impact for selection of bids.

1 Acceptable capability is between 20MWac to 30MWac.” [GPA Trial Exhibit D, PR p.
2 10822].

3 37. In response to a question in Amendment 17, “the MW rating of the ESS shall be equal to or
4 greater than the 145% of the MW rating of the PV charging system, up to a maximum
5 capacity of 40MW. For a PV capacity of 10MW, the ESS rating shall be a minimum of
6 14.5MW. Can we therefore assume the maximum PV charging system rating that can be
7 installed is 27MW?” GPA Answer “this section of the amendment is to illustrate that the
8 charging and discharging times of the ESS are different and design of the ESS should include
9 consideration that the ESS would only have 4-6 hours to discharge at a maximum output of
10 30MWac.” [GPA Trial Exhibit D, PR p. 10833].

11 38. Another question from bidders in Amendment 17 asked “shall the BESS be required to be
12 capable to supply at 40MW power level any time between 6pm-10pm and even possibly
13 continuously over the 4 hours if required? In other words, does it mean the BESS shall have
14 at least 160MWh ready every day at the beginning of the 6pm-10pm utilization period. Or is
15 this requirement only on the maximum power output (40MWac) and not capacity (limited to
16 what is available)?” GPA Answer “ ... Bidders shall provide delivery of power at the
17 maximum allowed discharge of the proposed ESS over the period of time starting from 5pm
18 to midnight to accommodate the discharge of a 30MWac project. Note that GPA has
19 restricted interconnection capacity to 30MWac. ESS discharge to the grid shall be limited to
20 30MWac maximum output.” [GPA Trial Exhibit D, PR p. 10834].

21 39. Every bidder, except for GlidePath, proposed systems above the 20.7MWp cap alleged by
22 GlidePath. There were five bidders who submitted price proposal to GPA, AES,
23 KEPCO/Hanwha, X-Elio, Engie, and GlidePath. AES (SF site) proposed 23.58MWp [PR
24 Binder 2, p. 1574]; KEPCO/Hanwha (SF/NBG sites) proposed 21MWp [PR, Binder 4,

1 p.3300]; X-Elio (NBG site) proposed 24.98MWp [PR Binder 6, p. 5144]; and Engie
 2 (SF/NBG sites) proposed 26.47MWp/27.6MWp [PR, Binder 3, pgs. 2086/2323]. GlidePath
 3 (SF/NBG sites) proposed 20.6MWp/20.6MWp.

4 The committee evaluation memo and the Bid Abstract – Phase II price clearly sets forth the
 5 prices of the top three bidders, including ENGIE, AES, and GlidePath (alternate bid). The
 6 evaluation committee recommended award to ENGIE of the NBG and SF site base on the
 7 ENGIE price proposal of NGB site at **\$110.90/MWh** and the SF site at **\$108.90/MWh**.

<u>Bidder</u>	<u>NBG price</u>	<u>SF price</u>	<u>% Increase</u>
9 ENGIE	\$110.95/MWH	\$108.90/MWH	
10 AES	\$169.00/MWH	\$158.90/MWH	52.3%/45.9%
11 GlidePath(alt)	\$176.00/MWH	\$176.00/MWH	58.6%/61.6%
12 GlidePath	\$196.00/MWH	\$196.00/MWH	76.6%/79.9%

13 40. The proposal submitted by ENGIE for the Naval Base Guam and South Finegayan sites is
 14 compliant with the specifications in the IFB and amendments. The IFB states that the intent
 15 of the 145% requirement is to ensure that the ESS charge and discharge rates are
 16 asymmetrical, with the ESS discharge power required to be no greater than 30MWac at the
 17 point of interconnection, and the ESS charge power not to exceed 20.7MW.

18 41. The MW rating of the PV charging system in Engie’s proposal is equal to the power rating of
 19 the DC/DC converters, and is capped at 20.7MW (i.e. 1/1.45 of 30MWac) which is
 20 compliant with the IFB. The MW rating of the ESS maximum does not exceed 40MW, and
 21 complies with the requirement that the MW rating of the ESS shall be equal to or greater than
 22 145% of the MW rating of the PV charging systems.

23 42. The GlidePath proposal summary submitted has a “solar PV capacity of 20.6MWp and
 24 30MW/120MWh battery energy storage system. The project will be capable to store all solar

1 energy produced during daylight hours and dispatch this renewable electricity to GPA’s grid
2 during evening peak hours.” [GPA Trial Exhibit J, PR p. 4117].

3 43. The ENGIE (SF site) proposal submitted has a “PV and BESS comprised of 26.47MWp PV
4 peak power, 30MWac export, 146MWh BESS installed capacity designed to time shift 100%
5 of daily PV production for use during the evening hours (5PM to midnight).” [GPA Trial
6 Exhibit K, PR p. 2086].

7 44. The table demonstrates that all bidders, except for GlidePath, have at least one site that
8 exceeds the alleged GlidePath cap of 20.7MW PV. It is clear only GlidePath misinterpreted
9 the specifications set forth in the specifications and amendments.

<u>Bidder</u>	<u>ESS MW/PV MW (SF)</u>	<u>ESS MW/PV MW (NBG)</u>
11 ENGIE	30MW/26.47MW	30MW/27.64MW
12 KEPCO	30MW/21.06MW	30MW/21MW
13 AES	25MW/23.58MW	20MW/19.65MW
14 X-ELIO	14MW/24.97MW	12MW/20.5MW
15 GlidePath	30MW/20.6MW	30MW/20.6MW

16 45. It would be manifestly unfair to allow for a rebid, as requested by GlidePath, as
17 cancelling the proposed award is unfair to the bidding process, specifically where the
18 winning bidder, ENGIE, has complied with all the specifications contained in the IFB
19 and amendments.

20 **[PROPOSED] CONCLUSIONS OF LAW**

21 46. Pursuant to 5 GCA §5703, the Public Auditor reviews GPA’s denial of GlidePath’s
22 three Protests *de novo*, and concludes that GPA’s decision to award the Naval Base
23 Guam and South Finegayan site to ENGIE was proper.

1 47. Procurement law requires that GPA make an award to the lowest responsible and
2 **responsive** bidder. A responsive bidder is a person who has submitted a bid which
3 confirms in all material respects to the Invitation for Bid. 5 GCA §5201 (g) and 2
4 GAR, Div. 4, Chap. 3, §3109(n)(2). Further, any bidder's offering which does not
5 meet the acceptability requirement shall be rejected as non-responsive. 2 GAR, Div.
6 4, Chap. 3, §3109(n)(3)(c).

7 48. The ENGIE bid was clearly the lowest responsible and responsive bid submitted, at
8 the Naval Base Guam site price of **\$110.90/MWh** and the South Finegayan site price
9 of **\$108.90/MWh**, compared to the GlidePath Naval Base Guam site price of
10 **\$176.00/MWh** and the South Finegayan site price of **\$176.00/MWh**.

11 49. The Public Auditor has reviewed the procurement recorded submitted by GPA, as
12 well as the supplemental procurement records, and the GlidePath arguments
13 regarding the prejudice it suffered by not being provided a complete procurement
14 record prior to the beginning of the procurement proceedings. The supplemental
15 procurement record filings provided a complete procurement record prior to the
16 closing of the procurement proceedings.

17 50. After careful evaluation and consideration, the Public Auditor determines that the
18 procurement record is not materially incomplete.

19 51.5 GCA §5211(g) provides that "the contract shall be awarded with reasonable
20 promptness by written notice to the lowest responsible bidder whose bid meets the
21 requirements and criteria set forth in the Invitation for Bids ...". *Pacific Data*
22 *Systems, Inc. vs. General Services Agency*, OPA-PA 15-012.

23 52.5 GCA §5211(e) and 2 GAR, Div. 4, Chap. 3, §3109(n)(1) provides that "the
24 invitation for bids shall set forth the evaluation criteria to be used and no criteria may

1 be used in bid evaluation that are not set forth in the Invitation for Bids." *In the*
2 *Appeal of 1-A Guam WEBZ, OPA-PA 16-002.*

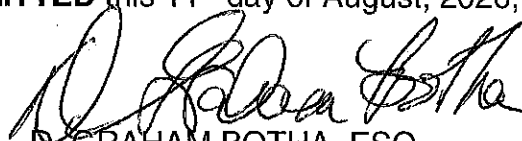
3 53. GPA properly awarded the Naval Base Guam and South Finegayan site to ENGIE
4 as the lowest responsible and responsive bidder, as the price proposal evaluation
5 and bid abstract clearly demonstrate that the ENGIE bid for the two sites was the
6 lowest bidder for renewable energy, and the bid was evaluated and awarded based
7 on the Multi-Step bid specifications and evaluation criteria.

8 54. GCA § 5001. Purposes, Rules of Construction. (a) Interpretation, provides that the
9 underlying purposes and policies of this Chapter are: ... (3) to provide for increased
10 public confidence in the procedures followed in public procurement; (4) to ensure the
11 fair and equitable treatment of all persons who deal with the procurement system of
12 this Territory; (6) to foster effective broad-based competition within the free
13 enterprise system; (7) to provide safeguards for the maintenance of a procurement
14 system of quality and integrity; and (8) to require public access to all aspects of
15 procurement consistent with the sealed bid procedure and the integrity of the
16 procurement process.

17 CONCLUSION

18 GPA requests that the appeal of GlidePath be dismissed, and that the Public
19 Auditor award all legal and equitable remedies that GPA may be entitled to as a result.

20 **RESPECTFULLY SUBMITTED** this 11th day of August, 2020, by:

21 
22 D. GRAHAM BOTHA, ESQ.
23 GPA General Counsel
24