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**IN 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

**OMNIBUS OPPOSITION TO ENGIE  
SOLAR'S MOTIONS *IN LIMINE* TO  
EXCLUDE REFERENCES TO  
VIOLATION OF AUTOMATIC STAY  
AND TO EXCLUDE GLIDEPATH'S  
ATTACKS ON GPA'S COMPETENCE  
TO MANAGE THE IFB**

**ARGUMENT IN OPPOSITION**

**I. INTRODUCTION.**

On February 20, 2020, interested party ENGIE SOLAR ("ENGIE") filed Motions *in Limine* seeking to (1) exclude references to the Guam Power Authority's ("GPA") violation of the automatic stay that occurred during GPA's review of GlidePath Marianas Operations Inc. ("GlidePath" or "Appellant") original procurement protest of GPA-IFB-007-18 (the "IFB") ("Motion 1"), and to (2) exclude GlidePath's attacks on GPA's competence to manage the IFB ("Motion 2"). This Opposition is filed in conformance with the Scheduling Order issued by the Office of Public Accountability ("OPA") on January 30, 2020, and addresses the merits of both of ENGIE's Motions *in Limine*.

ENGIE finds fault with GlidePath's comments on the Agency Report filed on February 10, 2020. Specifically, ENGIE takes issue with GlidePath noting in its comments— comments

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statutorily called for by Guam's procurement law—that GPA violated the automatic stay during this procurement. ENGIE's objection to GlidePath's commenting on this fact has led to its desire to exclude “any comment upon, reference to, evidence of, or testimony regarding the asserted violation of the automatic stay...” Motion 1, 3. ENGIE claims that such a reference would be “irrelevant and immaterial.” Motion 1, 3. ENGIE also finds fault with GlidePath advancing the argument that GPA failed to properly advance this procurement and committed errors that led to an award to ENGIE. Motion 2. GPA has neither filed its own motions on these issues, nor joined ENGIE's effort. ENGIE's Motions are flawed, and must be denied.

## **II. ENGIE MISAPPLIES THE STANDARDS GOVERNING MOTIONS *IN LIMINE*.**

ENGIE is correct in noting that the Public Auditor, sitting as the hearing officer in this matter, holds the power to rule on evidentiary issues. *See*, 2 GAR §12109(a),(e), and (f). While ENGIE is correct in noting the power of the Public Auditor, ENGIE has raised a motion that is infirm given the fact that this matter is not being tried before a jury that must be protected from “irrelevant and immaterial” evidence, but before a administrative hearing officer—the Public Auditor— sitting as the *de facto* judge in these proceedings. **National precedent shows that Motions *in Limine* raised in non-jury trial contexts should be rejected.** *See, e.g., Holmes v. Godinez*, No. 11 C 2961, 2016 WL 4091625, at \*1 (N.D. Ill. Aug. 2, 2016). (“In a bench trial, as here, the dangers of unfair prejudice, irrelevancy, and confusion are minimal, so motions *in limine* are less important than in a jury trial.”); *Cramer v. Sabine Transp. Co.*, 141 F. Supp. 2d 727, 733 (S.D. Tex. 2001). (“First, this is a bench trial, making any motion *in limine* asinine on its face. Motions *in limine* are intended to prevent allegedly prejudicial evidence from being so much as whispered before a jury prior to obtaining the Court's permission to broach the topic. In a bench trial, such procedures are unnecessary, as the Court can and does readily exclude from

its consideration inappropriate evidence of whatever ilk.”); *Morgan v. Mississippi*, No. CIV.A.2:07-CV-15-MTP, 2009 WL 3259233, at \*1 (S.D. Miss. Oct. 8, 2009). (“Without a jury, the motions *in limine* would serve no real purpose.”).

ENGIE’s Motions *in Limine* also assume that the public auditor may unknowingly base his ultimate decision in this matter upon improper evidence and submissions. A Motion *in limine* is unneeded in this matter, since “the law presumes that judges are not influenced by improper evidence brought before them.” *Ashford v. Gilmore*, 167 F.3d 1130, 1136 (7th Cir. 1999); *see also Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.*, 320 F.3d 1213, 1216 (11th Cir. 2003). (“This standard of deference is even greater when the objected-to evidentiary ruling is made during a bench trial because it is presumed that the district judge will rely only upon properly admitted and relevant evidence.”) *Singh v. Caribbean Airlines Ltd.*, No. 13-20639-CIV, 2014 WL 4101544, at \*1 (S.D. Fla. Jan. 28, 2014) (“In resolving evidentiary disputes before trial, motions *in limine* avoid the need to unring the bell once inadmissible evidence has been presented to the jury. The rationale underlying pre-trial motions *in limine* does not apply in a bench trial, where it is presumed the judge will disregard inadmissible evidence and rely only on competent evidence. In fact, courts are advised to deny motions *in limine* in non-jury cases.” (internal citations and quotations omitted)). Furthermore, a Motion *in limine* is especially unwarranted in this matter since the hearing officer is an experienced jurist with extensive service as both a trial judge and appellate justice.<sup>1</sup>

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<sup>1</sup> A judicial service biography of the public auditor can be found at [http://www.guamsupremecourt.com/Justices/Honorable\\_Benjamin\\_J\\_F\\_Cruz.html](http://www.guamsupremecourt.com/Justices/Honorable_Benjamin_J_F_Cruz.html)

**III. EVEN IF A MOTION *IN LIMINE* WAS PROPER IN A MATTER NOT TRIED BEFORE A JURY, THE FACT THAT GPA MAY HAVE COMMITTED OTHER ERRORS IN THE PROCUREMENT PROCESS IS RELEVANT AND MATERIAL.**

ENGIE urges the Public Auditor to exclude from the eventual merits hearing in this matter “comment upon, reference to, evidence of, or testimony regarding the asserted violation of the automatic stay...” Motion 1, 3. ENGIE also seeks to exclude from these proceedings “GlidePath’s attacks on GPA’s competence to manage the IFB.” Motion 2, 1. ENGIE accurately points out that “no protest was filed by GlidePath alleging that GPA is incompetent...” and that no protest was filed *vis a vis* GPA’s violation of the automatic stay. Motion 2, 2; Motion 1, 2.

To be clear, GlidePath has not suggested that GPA is “incompetent” as ENGIE asserts it has done. GlidePath recognizes the extraordinary work that the Agency undertakes to, quite literally, “keep the lights on” in the territory while dealing with the unique challenges of operating a utility in an insular community constantly threatened by natural and geopolitical forces. GlidePath also does not claim that it was materially prejudiced by GPA’s violation of the automatic stay. However, while GlidePath is not seeking to sustain its appeal on either of these failings, GPA’s other failures in this particular procurement process are certainly relevant and probative to answering the question of whether or not GPA made an award to ENGIE based upon articulated technical specifications that it now appears that GPA did not fully comprehend.

Such evidence should not be excluded from the hearing in this matter, as it is both relevant and probative to GlidePath’s contention raised in its Notice of Appeal that “GPA’s handling of this procurement was flawed by leading offerors like GlidePath to submit bids built upon technical requirements that GPA now claims did not need to be met.” Notice of Appeal (Protest 2), January 21, 2020, 7. In this consolidated procurement appeal, GlidePath asserts that ENGIE did not meet the technical requirements of the IFB. Notice of Appeal (Protest 1), November 13, 2019, 5. GPA has taken the position that ENGIE did meet those requirements, and

that GlidePath is mistaken on what the IFB's technical requirements were. *See*, Agency Report, January 31, 2020, 3. Because GlidePath and GPA disagree about what the IFB and associated amendments detailed about the technical requirements of the project, GlidePath has asserted "that GPA either (1) accepted a non-conforming proposal from ENGIE, or (2) **issued system standards that were sufficiently unclear so as to cause every other offeror—offerors that include some of the biggest and most experienced players in the world of solar power production—to be led astray.**" Notice of Appeal, (Protest 2), January 21, 2020, 10 (emphasis added). Evidence of GPA's failures throughout this procurement process is certainly relevant and probative of whether or not GPA committed the further error of issuing unclear and unintentionally misleading technical requirements and amendments.


#### IV. CONCLUSION.

ENGIE has filed Motions *in Limine* seeking to exclude evidence and testimony that is relevant and probative to the central issue of this appeal regarding GPA's error in finding ENGIE technically compliant. The Motions are especially unwarranted given the fact that this matter is not before a jury, and the eventual decision that is rendered by the OPA— a decision written by a former Chief Justice of the Supreme Court of Guam— will be presumed to be based upon a proper foundation. ENGIE's Motions *in Limine* should be denied.

*Respectfully submitted* on February 27, 2020.

**CIVILLE & TANG, PLLC**

By: \_\_\_\_\_

  
**JOSHUA D. WALSH**  
*Attorneys for Appellant*  
*GlidePath Marianas Operations Inc.*

**CERTIFICATE OF SERVICE**

I, JOSHUA D. WALSH, do hereby certify as follows:

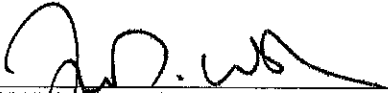
On February 27, 2020, via hand delivery, I caused to be served a true and correct copy of the **OMNIBUS OPPOSITION TO ENGIE SOLAR'S MOTIONS IN LIMINE TO EXCLUDE REFERENCES TO VIOLATION OF AUTOMATIC STAY AND TO EXCLUDE GLIDEPATH'S ATTACKS ON GPA'S COMPETENCE TO MANAGE THE IFB** upon the following:

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