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FILE No. OPA-PA - 09-008

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7 *Attorneys for Intervenor Taiwan Electrical and Mechanical Engineering Services, Inc.*

8 BEFORE THE OFFICE OF THE PUBLIC AUDITOR

9 In the Appeal of
10 O&M ENERGY, S.A.,

11 Appellant.

Docket No. OPA-PA-09-008

12 MOTION TO DISMISS
13 and
14 MEMORANDUM OF POINTS AND
15 AUTHORITIES IN SUPPORT OF MOTION

16 **MOTION TO DISMISS**

17 Comes now, Intervenor Taiwan Electrical and Mechanical Engineering Services, Inc.
18 (hereinafter "TEMES"), by and through its counsel of record, The Law Offices of John S.
19 Unpingco & Associates, LLC, and submits this Motion to Dismiss pursuant to 2 GAR §
20 12104(b)(8) and GRCP 12(b)(6).

21 * * *

22 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

23 2 GAR § 12104(b) and Appendix A, Part IV gives instruction on what needs to be filed
24 on appeals. These are, *inter alia*,:

- 25 1. A concise, logically arranged, and direct statement of the grounds for appeal;
2. A statement specifying the ruling requested;
3. Supporting exhibits, evidence, or documents to substantiate any claims and the grounds for appeal unless not available within the filing time in which case the expected availability date shall be indicated.

1 O&M Energy has not followed any of these instructions. Instead, we are left with
2 ferreting out what their grounds for appeal is and having to guess what the supporting evidence is
3 for their ground of appeal.

4 In O&M Energy's Protest Letter filed with the OPA on October 23, 2009, it states:

5 In summary during the performance of TEMES as PMC contractor during the last
6 8 years, the O&M expenditures reflected in the Annual Budgets have averaged 3
7 million USD, and has obtained plant sub-par performances of 84-86%
8 availability. In the new proposal TEMES commits to achieve 90% availability
9 with a diminished Annual Budget of only 1 million USD.

10 If this is the only ground for appeal then O&M Energy has not proven but merely
11 asserted it as a ground. It has not developed the argument nor has it offered evidence to show
12 why it is not in the realm of probability. If their argument is that the historical data does not
13 support the availability, then they must say so. But even the historical data leaves them at the
14 year 2008 and certain improvements may be brought on-line during 2009. The historical data is
15 also faulty because it is static. The historical data does not take into account that there are
16 improvements to the plant that are on-going and whose impact on the O&M budget is either just
17 now being realized or whose impact is to be realized in the future.

18 O&M Energy goes on, in the same letter, to state:

19 We assert the plausible claim that TEMES is not the lowest possible and
20 responsive bidder and did not submit a bid which conforms in all material aspects
21 to this Multi-Step Bid as defined by the General Terms and Conditions found
22 under Section #17 pertaining to Sections (D) and (G) as well as other material
23 deviations which we will further reserve the right to present forthwith after we are
24 afforded a fair opportunity to review the complete Procurement Files of TEMES
25 as well as the GPA Bid review committee findings and analysis.

...
We therefore respectfully request your Good Office to hear our claims and permit
us to the opportunity to present our substantive issues of Laws and Facts as we
will prepare a full and comprehensive protest after receipt of pertinent
procurement records from GPA.

1 Here, O&M Energy, is using the "Standards for Determination of Lowest Bidder" and
2 trying to turn it into the grounds of this protest. Section D states that it is the "quality of
3 performance of the bidder with regards to awards previously made to him" and Section G states
4 that the "ability of the bidder to provide future maintenance services for the subject of the
5 award." Again, ferreting out what the grounds of appeal for O&M Energy, if Sections D and G
6 are to be taken as grounds for appeal, they are only assertions that TEMES will not be able to
7 meet them and nothing more. This is not a concise, logically arranged and direct statement of
8 the grounds for appeal. One is still left wondering what are the actual grounds for appeal.

9 In the second paragraph, quoted above, from their Protest Letter what O&M Energy
10 seems to be saying is that they can flesh out the grounds of their appeal after they have been
11 given a fair opportunity to review the complete Procurement Files as well as GPA Bid Review
12 Committee findings and analysis. But, GPA did submit the Procurement Record to the OPA on
13 November 5, 2009. It further submitted its agency report on November 13, 2009 the majority of
14 which is the same as the Procurement Record. Thus, O&M Energy has had a fair opportunity to
15 review the Procurement Record. Yet, it submitted its comments on November 27, 2009 and it
16 was late. It was four (4) days late and its comments were still incomplete. Its attachments were
17 not included and incomplete, *see e.g.* attachments 1, 2 and 3. It is the responsibility of the
18 proponent of the pleading to ensure its completeness.

19 The penalty of a tardily filed pleading is stated in 2 GAR § 12104(c)(5) which states:

20 The failure of Appellant or Any Interested Party to comply with the time limits
21 stated in this Section may result in resolution of the appeal without consideration
22 of the Comments untimely filed.

23 We ask that there be no consideration of the Comments of Appellant to the Agency Report. The
24 Agency Report which was filed on November 13, 2009, and, in this case, which is much like the
25 Procurement Record filed on November 5, 2009 was there for O&M to review. O&M energy

1 has had reasonable time to review them. But, the Comments are still incomplete. Worse, the
2 Comments are widening the grounds for appeal. They, in effect, are a moving target. A protest
3 is not meant to be a moving target, but a concise, logically arranged, and direct statement of the
4 grounds for appeal. Appendix A, Part IV; 2 GAR § 12104(b)(8).

5 We were under the same time limits. 2 GAR § 12104(c)(4) states that "comments on the
6 agency report by an Appellant or an *Interested Party*...shall be filed within ten (10) days after the
7 Public Auditor's receipt of the report, *with a copy to the agency office that furnished the report.*"
8 Emphasis added. It would be manifestly unjust to favor the Appellant by allowing it an
9 additional four (4) days in which to file its report than TEMES had.

10 In addition, Appellant did not serve the agency office with a copy of its Comments. This
11 is clearly required by the regulations. *See* 2 GAR §12104(c)(4). In the interests of fair play we
12 ask that the Appellant's Comments not be considered.

13 We submit that O&M Energy's intent and strategem all along is to use the protest
14 mechanism to discover more information about the TEMES in the hopes that if there is to be a
15 rebid, it can tailor its bid to be more competitive. This is so easy to do and costs so little. Such
16 abuse of the procurement process must be stopped.

17 For all of the foregoing reasons, we ask that O&M Energy's protest be dismissed for
18 failing to state the grounds for it.

19 Respectfully submitted this 9th day of December, 2009.

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21
22 **The Law Offices of John S. Unpingco
& Associates, LLC**

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24 By: 

25 _____
John S. Unpingco, Esq.
Attorneys for TEMES