

O&M ENERGY  
PARQUE EMPRESARIAL LA FINCA  
P.O. DEL CLUB DEPORTIVO, 1 EDIFICIO 5  
28723 POZUELO DE ALARCÓN (MADRID)  
ESPAÑA  
TEL: (34) 91 219 39 00  
FAX: (34) 91 219 39 01

March 7, 2008

VIA HAND DELIVERY

Doris Flores Brooks  
Public Auditor  
Office of the Public Auditor  
238 Archbishop Flores Street  
Suite 401, Pacific News Building  
Hagatna, Guam 96910

RE: PROCUREMENT APPEAL ON MULTI-STEP BID #GPA-013-07 IFB FOR PERFORMANCE  
MANAGEMENT CONTRACT (PMC) CABRAS 1 & 2 STEAM POWER PLANT

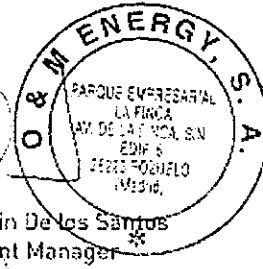
Dear Ms. Brooks,

We are submitting herein, in triplicate, a Procurement Appeal on behalf of O&M Energy, S.A., a wholly owned subsidiary of Union Fenosa, regarding the above Guam Power Authority IFB #GPA-013-07 for the Performance Management Contract.

Should you require more information, please do not hesitate to contact me via email: [juancr@unionfenosa.es](mailto:juancr@unionfenosa.es) ; Tel# +34 912 103 900. Moreover, our local representative in Guam is Mr. Danny Leon Guerrero, email: [danny.guerrero@yahoo.com](mailto:danny.guerrero@yahoo.com) ; Tel# +671 482 3825 or +671 477 9111.

Thank you.

Respectfully yours,



Juan Rodríguez Martín De los Santos  
Business Development Manager

**RECEIVED**  
OFFICE OF THE PUBLIC AUDITOR  
PROCUREMENT APPEALS

MAR 07 2008

TIME: 11:52 AM  
BY: J. Comacho  
FILE No. OPA-PA-08-004





OFFICE OF THE PUBLIC AUDITOR

RECEIVED  
OFFICE OF THE PUBLIC AUDITOR  
PROCUREMENT

MAR 07 2008

PROCUREMENT APPEAL

TIME: 11:52 AM  
BY: J. Canabatao  
FILE No. OPA-PA-08-004

PART I- To be completed by OPA

In the Appeal of )  
)  
O&M Energy, S.A. )  
(Name of Company), APPELLANT )  
)  
\_\_\_\_\_ )

NOTICE OF APPEAL

Docket No. OPA-PA-08-004

PART II- Appellant Information

Name: Juan Rodriguez Martin de los Santos, Business Manager  
Mailing Address: Parque Empresarial "La Finca", Paseo del Club Deportivo, 1  
28223 Pozuelo de Alarcon, Madrid Spain  
Business Address: Same as above  
Daytime Contact No: (34) 91 210 39 00

I. PART III- Appeal Information

- A) Purchasing Agency: Guam Power Authority
- B) Identification/Number of Procurement, Solicitation, or Contract: GPA-013-07
- C) Decision being appealed was made on Feb. 21, 2008 (date) by:  
 Chief Procurement Officer  Director of Public Works  Head of Purchasing Agency

Note: You must serve the Agency checked here with a copy of this Appeal within 24 hours of filing.

- D) Appeal is made from:  
(Please select one and attach a copy of the Decision to this form)  
 Decision on Protest of Method, Solicitation or Award  
 Decision on Debarment or Suspension  
 Decision on Contract or Breach of Contract Controversy  
(Excluding claims of money owed to or by the government)  
 Determination on Award not Stayed Pending Protest or Appeal  
(Agency decision that award pending protest or appeal was necessary to protect the substantial interests of the government of Guam)

E) Names of Competing Bidders, Offerors, or Contractors known to Appellant:

Taiwan Electrical and Mechanical Engineering Services Inc.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**PART IV- Form and Filing**

In addition to this form, the Rules of Procedure for Procurement Appeals require the submission together with this form of additional information, including BUT NOT LIMITED TO:

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. See STATEMENT OF GROUNDS FOR APPEAL, which is attached hereto and incorporated herein by reference.

*Note: Please refer to 2 GAR § 12104 for the full text of filing requirements.*

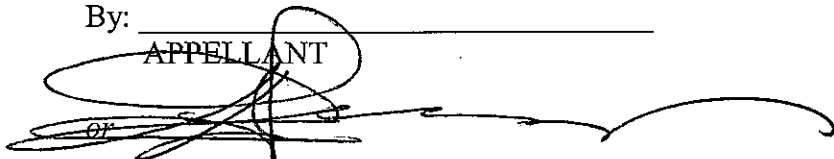
**II. PART V- Declaration Re Court Action**

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of the Public Auditor 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 or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this 7 day of March 2008.

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



By: DANNY LEON GUERRERO  
Appellant's Duly Authorized Representative

(Address) Suite #225 & 235  
(Phone No.) International Trade Center  
Tamuning, Guam 96913  
(671) 482-3825  
(671) 477-9111



OFFICE OF THE PUBLIC AUDITOR

**RECEIVED**  
OFFICE OF THE PUBLIC AUDITOR  
PROCUREMENT APPEALS

**PROCUREMENT APPEAL**

MAR 07 2008

TIME: 11:52 AM  
BY: T. Comata  
FILE No. OPA-PA -08-004

In the Appeal of )  
)  
)  
)  
**O&M Energy, S.A.** )  
(Name of Company), APPELLANT )  
)  
\_\_\_\_\_ )

**HEARING  
REQUEST/WAIVER**

Docket No. OPA-PA -08-004

Please select one:


Pursuant to 2 GAR § 12108(a), the undersigned party does hereby request a hearing on the appeal stated above.

Pursuant to 2 GAR § 12108(a), the undersigned party does hereby waive his/her right to a hearing and is submitting the appeal stated above on record without a hearing.

Submitted this 7 day of March 2008.

By: (Please select one)

- APPELLANT
- Chief Procurement Officer
- Director of Public Works
- Head of Purchasing Agency

  
\_\_\_\_\_  
Signature

DANNY LEON GUERRERO  
Print Name

## O&amp;M ENERGY


PARQUE EMPRESARIAL LA FINCA  
P.º DEL CLUB DEPORTIVO, 1-EDIFICIO 5  
28223 POZUELO DE ALARCÓN (MADRID)  
ESPAÑA  
TEL. (34) 91 210 39 00  
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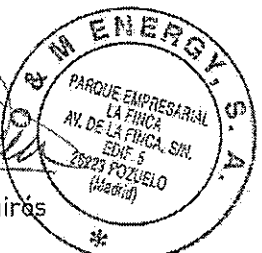
Dear Sirs,

I, Mr. Luis Zarauza Quirós, of legal age, Spanish nationality and bearer of valid Identity Card number 10 847 151-Y,

hereby communicate that exercising my competences as General Manager of the company Operación y Mantenimiento Energy, S.A. (O&M ENERGY), grant Mr. Daniel (Danny) Leon Guerrero of legal age, with driving license number 586- 05 - 7920 power enough to represent our company and perform all necessary actions in the name and on behalf of O&M ENERGY before The Office of the Public Auditor of Guam USA (OPA), and Guam Power Authority (GPA), related to the presentation of a formal protest to the resolution of GPA regarding the Multi-Step Bid GPA-013-07 for the Performance Management Contract (PMC) for Cabras 1&2 power plants, being the rights and obligations arisen from the documents subscribed by means of the present document, if it were the case, fully binding and enforceable for O&M ENERGY.

Yours faithfully,


  
By: Mr. Luis Zarauza Quirós  
General Manager  
OPERACION Y MANTENIMIENTO ENERGY, S.A.



PROCUREMENT APPEAL  
O & M Energy

I, DANNY LEON GUERRERO, the authorized representative of O & M Energy, hereby certify and verify, under penalty of perjury of the laws of Guam, that the facts set forth in the attached statements, evidence, and documents are true and correct.

EXECUTED this 7<sup>th</sup> day of March, 2008.



DANNY LEON GUERRERO

PROCUREMENT APPEAL  
O&M Energy

STATEMENT OF GROUNDS FOR APPEAL

1. Introduction

Appellant herein, O&M Energy, S.A. (hereinafter "O&M") is a wholly owned subsidiary of the Spanish energy group Union Fenosa. Union Fenosa has over 100 years of experience in power plant operation and maintenance. It has a presence in more than 26 countries. It owns and operates over 12,000 MW in plants of a varied range of technologies. O&M is the company within the Union Fenosa Group in charge of accumulating the Group experience in management, operation and maintenance of power and industrial plants and providing these services both internally and to external customers.

On August 7, 2007, the Guam Power Authority (hereinafter "GPA") issued Multi-Step Bid GPA-013-07, the Performance Management Contract (PMC) for the Cabras 1 & 2 Steam Power Plant. There were two phases of the "multi-Step" bid process:

(1) submission of technical bid; and (2) submission of price proposal. In Phase 1, O&M submitted its 973 page Technical bid. On December 27, 2007 GPA informed O&M that its bid had been reviewed and was deemed qualified to participate in Phase 2 of the Multi-Step process. See Exhibit "1" attached hereto, Letter from Joaquin C. Flores to O&M dated December 27, 2007. Taiwan Electrical and Mechanical Engineering Services Inc. ( hereinafter "Temes") was also determined to be a qualified bidder.

On December 31, 2007, GPA conducted the bid opening of the price proposals for Phase 2 of the bid process. A true and correct copy of the ABSTRACT OF BIDS is attached hereto as Exhibit "2". Temes submitted a price bid of \$26,899,305.98. O&M submitted its price bid of

\$20,841,155.78. O&M's price bid was \$6,058,150.20( six million fifty eight thousand one hundred fifty dollars and twenty cents less than that submitted by Temes). The price bid proposal calculation sheets of O&M Energy and Temes are attached hereto respectively as Exhibits "3" and "4".

On January 18, 2008, GPA sent O&M a letter rejecting O &M's price proposal as "non-responsive" based upon so called "exceptions" in its proposal. See Bid Status Letter dated January 18, 2008, attached hereto as Exhibit "5". These same "exceptions" had been included in O&M's technical proposal, which had previously been submitted to GPA. GPA disqualified O&M's price bid based upon "exceptions" or assumptions in the technical proposal which GPA had not objected to. GPA approved O&M's technical bid as qualified, even though it essentially included the same exceptions and assumptions as in the price proposal. In addition, none of the bid documents indicated that the bid would be rejected based upon the exceptions cited by GPA. The bid documents do not justify a rejection of the bid proposal. O&M immediately responded to GPA, indicating that the so-called exceptions were only "assumptions" and were, at the very least, negotiable.

On January 27, 2008, O&M filed with GPA its Bid Protest and Request for Reconsideration and to Review/Copy Procurement files. A true and correct copy thereof is attached hereto as Exhibit "6". On February 21, 2008 GPA denied O&M's protest. The Denial of Procurement Protest is attached hereto as Exhibit "7".

This Appeal is timely filed in accordance with Chapter 12, Division 4, Title 2 of the Administrative Rules and Regulations governing Procurement Appeals to the Public Auditor. O&M Energy seeks administrative review and relief concerning the issues set forth herein pursuant to 5 GCA Chapter 5, Article 12, Public Law 28-68, 5 GCA §5425(c) and (e), and



§5701, as well as other provisions cited. O&M submits that GPA has failed to follow the proper procedures for Phase 2 of a multi-step bid pursuant to 2 GAR §3109 and its own General Terms and Conditions.

2. Summary of Argument

The jurisdiction of the Public Auditor is utilized “to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5.” 2 GAR §12103. Procurement law promotes the policy of providing for increased economy in procurement activities and “to maximize to the fullest extent practicable the purchasing value of public funds...” 5 GCA §5001(5); 2 GAR §1102(4). **O&M’s proposal will save GPA over \$6 million dollars.** GPA should not reject a bid so clearly superior from a cost savings view as “non-responsive” unless bid document criteria unequivocally mandate rejection, and the bidder has been notified that its bid will be rejected unless express criteria are complied with.

GPA disqualified O&M’s priced bid proposal upon grounds and criteria that were not included in the IFB documents. There are no provisions in those documents which require the contractor to perform “unscheduled maintenance.” Any evaluation factors in a bid must be clearly stated in the IFB. The factors criteria relied upon by GPA for rejection of O&M’s price proposal were not specifically set forth in the bid documents or the terms and conditions. O&M was never notified that the grounds relied upon by GPA would be used as a basis for disqualification.

Also, the technical bid proposal submitted by O&M to GPA included similar “exceptions” and “assumptions” that were subsequently included in O&M’s price proposal. GPA accepted O&M’s technical proposal as qualified, along with those exceptions and assumptions. It was improper for GPA to disqualify O&M’s price proposal based upon the

similar exceptions or assumptions that had been contained in O&M's technical proposal, which GPA had determined to be qualified.

Regardless of any of the "assumptions" set forth in O&M's bid proposal, O&M, by virtue of its price proposal, is obligated to comply with and perform all of the services and requirements set forth in GPA's bid. O&M's bid is a firm, fixed price bid guaranteed by both bid and performance bonds. In Phase 1, O&M's technical bid was already determined by GPA to be qualified. In Phase 2 of the multi-step bid process, GPA should not have considered any factors other than price. Each acceptable bidder submits a price bid. 2 GAR §3109(v)(2). "Priced bids will be considered only in the second phase and only from bidders whose unpriced technical offers are found acceptable in the first phase..."General Terms and Conditions, 13(b)(2).

O&M contends that GPA was obligated under its own bid documents to select its bid as the lowest price proposal. 2.13 of the Commercial Terms and Conditions, Vol. 1, states: "**The contract will be awarded to the Bidder evaluated as being qualified and with the best-priced proposal.**" O&M requests a determination by the Public Auditor that (1) O&M's fixed price proposal was firm and binding; and (2) that GPA was bound and obligated to accept such proposal under 2.13. By law, GPA may only apply objectively measurable criteria, which are set forth in the invitation for bids, in determining the lowest bidder. 2 GAR §3109(n)(4).

During Phase 2 of the process, GPA is not permitted to consider any factor other than price. There should be no consideration of "assumptions, "exceptions", or "clarifications". Only "priced proposals" are properly considered by GPA. O&M did submit a timely and fully priced proposal.

GPA's denial of O&M's Bid Protest repeatedly claims that certain "exceptions" in O&M's price proposal would "materially" affect the O&M fixed price proposal, by somehow increasing the amount of its bid. As a starting point, O&M denies that its fixed price bid will or could increase. Its price cannot and will not change or increase, because it is a fixed price under a fixed price bid proposal. O&M is obligated to perform any PMC contract in strict accordance with the dollar amounts of its price proposal. However, addressing its claim, GPA has failed to prove that any of the so-called assumptions would in fact have a "material" effect in increasing the priced bid.

GPA has not made any effort to quantify any amount of increased cost which it believes would be attributable to such assumptions. GPA never quantified any "material" effect on price, nor asked O&M to clarify or quantify the value of the assumptions before communicating a decision to consider its proposal as non-compliant. Since GPA failed to quantify such assumptions, it has not demonstrated that there would be any price increase, or "material" impact, upon O&M's price proposal.

O&M submits that the "assumptions" referred to by GPA do not have any "material" impact upon O&M's price proposal. At most the "assumptions" involve issues of "minor informalities" that do not materially or substantially affect prices. Since only "pricing" is involved in Phase 2, GPA is required to quantify the materiality of any assumptions which it alleges impact upon prices. It must prove that the increased costs allegedly imposed by the "assumptions" made by O&M exceed the over \$6 Million difference between the contract proposals of O&M and Temes. Thus, even if the "assumptions" did increase O&M's price, any such increase would be far less than the cost difference between the two proposals. O&M's price would still qualify it as the lowest responsible bidder.

Finally, GPA should and could have cleared up any issue concerning the “materiality” of any “assumptions” in the price proposal by writing O&M and discussing or clarifying these assumptions further. That is precisely what GPA did when issues arose concerning O&M’s technical proposal in Phase 1. The IFB and the tender documents expressly provide that GPA and O&M may clarify any issues concerning the price proposal before they enter into a final and binding contract. 4.2 of the Commercial Terms and Conditions, Vol. 1. O&M was the lowest responsible and responsive bidder and is entitled to an award of the PMC contract.

3. Grounds of Appeal

- A. GPA was obligated under its own bid documents to select O&M’s bid as the lowest price proposal. O&M submitted a valid, binding and responsive “priced bid.”

GPA was required to select O&M’s price proposal because O&M had been evaluated as “qualified” in Phase 1 and its proposal was the “best-priced proposal.” 2.13 of the Commercial Terms and Conditions, Vol. 1. O&M’s price proposal indicated that it would perform the requirements of the PMC bid for the price of \$20,841,155.78. 2.11.1 of the Commercial Terms and Conditions indicates that GPA will open price offers using a MS Excel Workbook Price Proposal Evaluation...and that “GPA will select a vendor based on a comprehensive evaluation of the price offer and performance guarantees as specified in Volume IV.” In particular, 2.11.3 specifies “Evaluation Criteria and Comparison of Price Offers” :

GPA will evaluate and compare the Priced Offers for Bidder’s Technical Proposals that were determined during Step One to be responsive to the tender document requirements. GPA’s evaluation of price offers shall compare Fixed Management Fees, O&M Spending Budget and performance guarantees. The Scoring Mechanism is further explained in Volume IV. (emphasis added).

GPA failed to compare the price offers of O&M and Temes. Under the Proposed Scoring Mechanism, PAR 3. at Step 2, Price Proposal, GPA is required to award the PMC contract to the bidder, in this case O&M, whose proposal has the best net present value:

**“GPA will award the PMC Contract to the BIDDER whose proposal yields the highest positive Net Present Value.”**

O&M’s price proposal satisfied all the required elements requested by GPA. It included a fixed price indicating net present value (NPV), and specifically addressed the following items:

- A). NPV of Bidder’s Proposal: \$20,841,155.78
- B). Fixed Management Fees: \$8,764,231.24
- C). O&M Spending Budget Difference: \$14,695,885.92
- D). Unit Availability Savings: \$2,617,525.09
- E). Anticipated Fuel Savings/Cost: \$1,436.28
  - (1) Unit #1: \$57.45
  - (2) Unit #2: \$1,378.83

Since O&M’s price proposal had the highest net present value, GPA was required to select its proposal.

O&M Energy complied with GPA’s bid bond requirement securing the issuance of Citibank’s “Irrevocable Standby Letter of Credit, issued in favor of GPA. The bid bond protects against the failure or refusal of O&M, as the low bidder, to supply the necessary performance and to proceed with performance under the contract. 2 GAR §5103. A true and correct copy of said Irrevocable Standby Letter of Credit is attached hereto as Exhibit “8”. O&M Satisfied all Bid bond requirements under the GPA bid.

O&M’s price bid includes a pre-qualified financial ability to procure a 100% performance bond as required under the GPA bid. In addition, O&M’s obligation to provide a performance bond

indemnifies GPA from any loss resulting from the failure of O&M to perform its PMC Contract in accordance with the bid. 2 GAR §5104(b). The bid bond and the performance bond financially bind O&M to its price bid of \$20,841,155.78. If O&M does not perform all obligations under the contract, GPA is protected under the performance bond.

O&M submitted a fully priced bid comporting to the bid requirements of Phase 2. Only priced bids are considered in the second phase, and only from bidders whose unpriced technical offers are found acceptable in the first phase. O&M submitted the fully priced proposal comporting to these requirements and submitted such price proposal in a timely manner for consideration by GPA under Phase 2 of the multi-step bid. A true and correct copy of the O&M Energy Price Proposal, with assumptions, is attached hereto as Exhibit "9". The price bid submission by O&M, coupled with submission of *bonafide* bid bond and obligation to supply a performance bond, obligated and bound O&M to perform all duties and obligations required under the bid within the express confines of its priced bid proposal.

B. GPA improperly rejected O&M's price bid as "non-responsive."

GPA, in its rejection of O&M's bid, and the Denial of Procurement Protest (Exhibits "5" and "7" respectively) referred to certain "assumptions" in O&M's price proposal as non-responsive:

- (1) The assumption that the budget was "subject to escalation";
- (2) The assumption that there would be a cap on unscheduled maintenance of \$200,000.00USD per year;
- (3) The assumption that there would be a \$50,000.00 limit on yearly performance testing;
- (4) That the cost of management staff vehicles and utilities would be excluded from the proposal.

Contrary to GPA's assertion, O&M's proposal expressly indicated that

budget is a firm price.” As to any “escalation” clause, the Public Auditor will note that there is a line on the bid price proposal (See Exhibit “9”) for an “O&M Spending Budget Escalation Rate.” There is no escalation clause or rate indicated in O&M’s Bid Proposal.

<sup>1</sup> The fact that no escalation clause was included in the price proposal is emphasized and referenced in O&M’s bid proposal that any escalation had “to be agreed between both Parties.” O&M did not unilaterally impose any escalation clause and recognized that any such clause would have to be negotiated by the parties. Regardless of any reference to an escalation clause as an “assumption”, O&M’s bid price proposal did not contain an escalation clause.

As to any “assumption” about unscheduled maintenance, there is no requirement in the bid documents or terms and conditions that the contractor provide “unscheduled” maintenance. This is not included in the IFB within the scope of work. Nothing in the contract documents obligates the contractor to perform all unscheduled maintenance at its expense. In fact, there is even a suggestion in 4.17 of the Commercial Terms and Conditions that milestones for monies due to the contractor from GPA will include “reimbursement payments for Operations and Maintenance related expenditures as agreed to and scheduled between GPA and the Contractor.” For maintenance that is not scheduled and required as unforeseen events, GPA and the contractor will have to schedule and agree to the performance of such maintenance.

Nevertheless, O&M’s price proposal provided more than the IFB required by including a provision of USD 200,000 for unscheduled maintenance, which is typically

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<sup>1</sup> GPA rejected O&M’s bid due to the alleged presence of an escalation clause. However, as is evident from the bid proposal of Temes (Exhibit “9”) in violation of the bid documents, Temes priced bid expressly included escalation rates for both the fixed management fee and the O&M Spending Budget Escalation Rate. Under Temes proposal, the fixed management fee escalates at the rate of 1.7% per annum and the O&M Spending Budget escalates at the rate of 3.0% per annum, Temes’ inclusion of an escalation rate renders its bid non-responsive.

acceptable for a plant such as Cabras 1 and 2 according to industry standards and O&M wide experience. There is no standard practice under which the Contractor is charged for all risks related to unscheduled maintenance without a limitation, especially when there are factors potentially developed prior to the assumption of responsibilities of the Contractor that may affect the expenditure in unscheduled maintenance and from which Contractor should be not held liable. Reference to these factors and practice are stated in the Technical Proposal of O&M. Such proposal was accepted by GPA with no comment thereon or objection thereto.

As to “Performance Testing”, the agreement between PMC and GPA concerning scope of testing and the selection of a third party to perform the services will not occur until the beginning of the contract year. 9.1.6 provides as follows:

The PMC will procure performance testing services for each unit at the beginning of this first contract year and within 30 days of the contract year anniversary date to establish performance baselines. The PMC and GPA will agree on the testing scope and on the selection of the third-party firm to perform the services prior to contracting these services. (emphasis added).

These matters concerning performance testing are clearly subject to further procurement of a third party firm and an agreement between GPA and the PMC as to the scope of testing. Again, O&M decided to provide a standard typical budget for this concept and according to O&M experience, the cost for the concept should not exceed this amount. Any impact of the assumption would have affected conditions related to the limitations of responsibility in the contract, which were not completely clear, and were not in effect price changes.



Another reason for rejection offered by GPA was that “the cost of management staff vehicles and utilities are excluded from the proposal...” 11.1 of the Vol. II, Technical and Functional Requirements, provides the possibility that office space may be available on-site, which is common and standard practice in this kind of project including the utilization of utilities, and that was the assumption under the O&M bid which was made clear. Other than the four stated items contained in the Bid Status rejection to O&M (Exhibit “5”), no other reasons were given by GPA for rejection. Any other grounds or reasons stated in GPA’s Denial of Procurement Protest are not relevant.

Regardless of any “issue” concerning these assumptions, the IFB bid documents do not indicate that the failure of O&M to address the four matters which are the subject of the “assumptions” would be grounds for rejection of its bid or the basis for a finding of “non-responsiveness.” In accordance with Par. 23 of the General Terms and Conditions, award is to be made “taking into consideration the evaluation factors set forth in this solicitation. No other factors or criteria shall be used in the evaluation.”

The bid documents did not specifically notify O&M that inclusion of assumptions concerning these matters would be grounds for a finding of “non-responsiveness” and a rejection of its bid. For example, 2.10.1.4 of the Commercial Terms and Conditions, Vol. I, states that GPA shall automatically disqualify any proposal submitted without certain supplementary information, including various items such as bidder’s Articles or Incorporation, Affidavit of Disclosure of Major Shareholders, Audited Financial Information, Certificate of Good Standing, Non-Collusion Affidavit, Bid Bond and Business License, etc. Bidders such as O&M are put on notice that if their proposals do not include those items, their bids will be rejected.

There is nothing in the bid documents which indicates that a price proposal will be rejected if it raises the “assumptions” referred to by GPA. In the “Special Reminder to Prospective Bidders”, bidders are notified that failure to submit a bid guarantee, statement of qualifications, business license, etc., will result in disqualification: “Failure to comply with the above requirements will mean a disqualification and rejection of the bid.” Before a bid is determined to be non-responsive based upon an evaluation criteria or factor, the government should notify the bidder that failure to comply with such requirement will be a basis for disqualification and rejection of the bid.

In the appeal of Dick Pacific Construction Ltd. before the Office of the Public Auditor, Appeal No. OPA-PA-07-007, the contractor was properly disqualified where the “Special Reminder” had specifically notified the contractor that it was required to submit a valid copy of its contractors license, including a C41 Classification. The reminder made it clear that the failure to comply with that requirement would be a basis of disqualification and rejection of the bid.

In the present case, there was no indication from GPA that the placement of any of the “assumptions” by O&M would result in disqualification and rejection of its bid or constitute a failure to conform in material respects to the Invitation for Bid. In determining whether a bid is responsive to a solicitation for bids, and whether a deviation from contract specifications may be disregarded as insubstantial, the contracting entity must provide the bidder with notice and allow it to submit materials concerning the issue of responsiveness. Ghilotti Construction Company v. City of Richmond, 53 Cal. Rptr. 2d 389, 393 (Cal. App. 1996).

O&M's technical proposal had already been found to be acceptable in Phase 1; the only issue which should have been addressed in Phase 2 was whether O&M or Temes provided the best (lowest) price offer.

- C. GPA improperly disqualified O&M's price proposal based upon "exceptions" and "assumptions" which GPA had already determined to be "qualified" in O&M's technical proposal.

As a part of its technical proposal, O&M submitted a Section referred to as "A7, Amendments to the PMC." Portions of A.7 are attached hereto as Exhibit "10". Section A.7 was submitted to GPA in response to its request to bidders that they propose modifications "which could help streamline this offer and help both companies improve costs and value." O&M's submission contained written modifications to numerous sections of the Commercial Terms and Conditions that constituted a part of the bid documents.

O&M's submittal, A.7, included the same "exceptions" and "assumptions" that GPA subsequently used to disqualify O&M's price bid. The modification in A.7 to 4.16 indicated that the contract price would be "subject to escalation." In 4.17, O&M stated "Contractor agrees to assume cost of inspections up to 50,000US dollars per year. Over said amount, any inspection to be carried out by Contractor as ordered by GPA shall be paid by GPA." This is the same "exception" on performance testing that GPA referred to as a ground for disqualification of O&M's price bid.

As to unscheduled maintenance, there are many modifications by O&M in the technical proposal which indicate that GPA would be responsible to pay for such unforeseen events. What "unscheduled maintenance" would be required is an unknown to the parties at the commencement of the contract. Such unanticipated changes "which

may have economic consequences” had to “be agreed by the Parties.” 4.15. In addition, where GPA commissioned the contractor to perform “additional services) (which would include unscheduled maintenance) then “the Contractor is entitled to have the Contract adjusted, to include the reasonable value of the increase in costs as a result of that event...”. 4.24

On November 30, 2007, the General Manager of GPA wrote O&M and requested “clarification to O&M’s technical proposal in regards to Section A.7.” A true and correct copy of the letter of Joaquin C. Flores is attached hereto as Exhibit “11”. The letter stated that the Evaluation Committee “would like to know whether these recommendations constitute an integral part of your bid, and whether your price proposal is contingent upon GPA agreeing to these modifications.” On the same day, O&M confirmed that “our price proposal is conditioned to the modifications to PMC’s Commercial Terms and Conditions that we have included in our Technical Proposal and therefore they constitute an integral part of our bid.” A copy of the email response from O&M dated November 30, 2007, is attached hereto as Exhibit “12”.

On December 27, 2007, GPA informed O&M that its technical bid had been reviewed and that O&M was qualified to participate in Phase 2 of the Multi-Step process. GPA raised no objections to the assumptions or exceptions in O&M’s technical proposal, thereby agreeing that O&M could submit a price proposal based upon the technical proposal, including its assumptions and exceptions. However, when O&M submitted its price proposal in Phase 2, GPA determined that its price proposal was “non-responsive” based upon the same exceptions and assumptions which had been included in the qualified technical proposal.

It was improper for GPA to disqualify O&M based upon “exceptions” or assumptions which had been included in its technical proposal. Since GPA has already determined that O&M’s technical proposal in Phase I was “qualified”, it could not properly disqualify O&M based upon the exceptions and assumptions which were previously in the qualified technical proposal. GPA could only consider “price” in Phase 2 of the bid process and could not lawfully determine that exceptions and assumptions which were included in the approved technical proposal were “non-responsive” in the price proposal.

- D. It was proper for O&M to raise issues in its price proposal that could be clarified by GPA during the contract negotiations between the parties. GPA had full authority to discuss and clarify any issues raised by the “assumptions” prior to the execution of a PMC contract.

GPA’s Denial of Procurement Protest indicates that it sent a letter to O&M, dated December 11, 2007, which advised O&M that “GPA cannot accept any exceptions to the approved bid documents as amended.” A true and correct copy of said letter from Joaquin C. Flores, dated December 11, 2007, is attached hereto as Exhibit “13”. If GPA is claiming that it could not clarify the price assumptions with O&M prior to execution of a written, final, PMC contract with O&M, GPA’s position is contrary to many of the express provisions of the IFB documents. Such clarification by GPA could have resulted in a net savings, in the best interest of over 45,000 rate payers, in the amount of **more than Six Million dollars**.

Furthermore, the issues raised were not in any manner intended to increase the bid price. GPA has a duty in the negotiation, performance and administration of territorial contracts to act in good faith. 5 GCA §5003.

O&M responded to GPA's letter in its letter dated December 14, 2007 a copy of which is attached hereto as Exhibit "14". There, O&M pointed out that GPA's position is not consistent with many of the provisions in the IFB documents. Those documents indicate that the proposals of Bidders may contain certain modifications to the IFB documents, as well as amendments that GPA may introduce thereafter, until a final contract agreement is reached. O&M requests that the Public Auditor review those provisions set forth in its December 14, 2007 letter. 2.13 of the Commercial Terms and Conditions, Awarded Contract, provides that a representative of the successful bidder must come to Guam "for the purposes of executing a contract with such alterations or additions thereto it may be required to adopt such contract to the circumstances of the proposal." These alterations or additions would affect mainly contract clauses and definitions that were not clear, such as limitations of liabilities and definitions of responsibilities, and not necessarily the bid price.

4.2 of the Commercial Terms and Conditions, Vol. 1, provides the possibility that GPA can request written clarifications to the proposal, and that the parties will "resolve and document any differences between the contractor's proposal and the tender documents" prior to entering into a formal agreement. In other words, there is a precise process whereby GPA and the selected Contractor can discuss and clarify any issues that have arisen, and resolve those issues prior to entering into a formal agreement. This provision mentions that there will be "resolved tender documents" that will govern in the case of a conflict with "the adjusted proposal." The provision refers to a "final negotiated proposal," which indicates that there could be changes to the original proposal of O&M, and the ability to resolve any issue by "written clarifications to the proposal."

GPA's position, that there cannot be any discussion of the "assumptions", or even resolution or clarification of "differences" between the contractor's proposal and the tender documents, is contrary to 4.2 of the Commercial Terms and Conditions and is simply erroneous and wrong based upon the IFB documents. O&M gave a fixed price proposal; GPA's claim that "there could be no negotiation regarding fixed management fees after the sealed price proposal is open" is irrelevant. O&M was not attempting to negotiate its fixed management fees. It was attempting to clarify issues that were not entirely clear in the bid documents. O&M did offer a firm fixed price for its management fees and it intended to be, and is bound, by such firm price offer.

To the extent that GPA felt that there were any issues as to whether this management fee was in fact "fixed", it could have engaged in a discussion and clarification process with O&M. Based upon its fixed price bid, and the existence of a bid bond and performance bond, O&M would be contractually bound to perform its PMC obligations for the fixed price indicated in its price proposal.

- E. GPA failed to allege or demonstrate that any of these "assumptions" of O&M were "material", or would in fact have affected or increased O&M's price proposal.

There is an over \$6 Million price difference between the proposals of O&M and Temes. GPA claims that the "assumptions" of O&M "would materially affect the O&M fixed price proposal." Throughout its Denial of Procurement Protest GPA repeatedly alleges that the "assumptions" would materially deviate from the fixed price proposal requested by GPA. However, GPA never addressed any issue of "materiality." To allege that price differences were "material", GPA would be required, at a bare minimum, to price those alleged assumptions. In other words, in order to argue that an "assumption" is

“material”, GPA would be required to price such assumption and prove that it”  
materially” affects the price.

Given that Temes’ proposal is more expensive by **over \$6 Million**, GPA would be required to prove that the alleged “assumptions” cost in excess of \$6 Million. Otherwise, O&M would still be the lowest bidder. O&M submits that a review of the items referred to by GPA indicate that they are not “material”, that they do not have any impact, let alone a significant impact upon the price offered by O&M, and do not, in any event, render O&M’s proposal more expensive than that of Temes.

There is no escalation clause for the fixed management fee in O&M’s price proposal. O&M recognized there would be no such clause unless agreed to by the parties. As to performance testing, in any event the agreed scope thereof must be agreed to by O&M and GPA. GPA made no effort to determine the “materiality” of any limit on unscheduled maintenance costs, performance testing, or the cost of management staff vehicles and utilities. These items are all subject to clarification and do not effect O&M’s price proposal. Even if they did, such items clearly would not exceed \$6 Million.

F. If GPA believed that the cost “assumptions” of O&M were “material,” it could and should have clarified such issues through a written request for clarification.

4.2 of the Commercial Terms and Conditions specifically authorizes GPA to seek “written clarifications to the proposal.” O&M’s position is that, regardless of such assumptions, it is contractually bound by the prices set forth in its bid price proposal. However, if GPA had a genuine doubt about the effect of these “assumptions” upon the bid price, it should have sought to clarify those assumptions with O&M. Such requirement of clarification is consistent with the policy of the procurement law to



maximize, to the fullest extent practicable, the purchasing value of public funds. The purpose of the public bid process is to secure the best price for the government. The failure of GPA to clarify “assumptions” is not consistent with the policies set forth in 5 GCA §5001(b)(5).

Not only do the contract provisions such as 4.2 of the Commercial Terms confirm the ability of GPA to clarify assumptions or resolve differences between a proposal and a tender document, it is GPA’s ordinary practice to clarify any such differences with the contractor. A similar situation arose in Phase 1 of this bid when GPA requested clarification on O&M Energy’s technical proposal in regard to section A.7 thereof. See Exhibits “10”, “11”, and “12” respectively. As previously explained, O&M had returned to GPA a copy of GPA’s Commercial Terms and Conditions, with various O&M exceptions to, and revisions of, the language contained therein.

Rather than simply rejecting O&M’s technical bid, GPA wrote O&M to clarify its revisions to the Commercial Terms and Conditions, and requested to be informed “whether these recommendations constituted an integral part of the bid and whether O&M’s price proposal was contingent upon GPA agreeing to these modifications.” O&M responded that its price proposal was conditioned upon such modifications. GPA did not object to any of the modifications or exceptions and, on December 27, 2007, determined that O&M’s technical bid was qualified and responsive.

GPA’s position that there can never be any discussion of price after a price bid proposal is submitted is also contrary to 4.14.1 of the Commercial Terms and Conditions, Vol. 1, “Price Adjustment Methods”. That provision states in pertinent part: “Any adjustment in contract price within the parameters of this contract shall be made in one or more of the following ways: (a)

By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable; ....(d) In such other manner as the parties may mutually agree...”

GPA’s refusal to attempt any clarification of O&M’s “assumptions” is not a mere matter of form over substance. The price differential between O&M’s qualified price offer (\$20,841,155.78) and Temes’ price offer (\$26,899,305.98) was **\$6,058,150.20**. Thus, at stake was a potential savings of \$6,058,150.20 to the 45,000 GPA ratepayers of Guam. The primary purpose of statutes dealing with bidding on public works is to protect the public against the wasting of money. Bader v. Sharp, 110 A.2d 300 (Del. 1954).

Under Phase 1, O&M has been deemed to be qualified by GPA’s bid review Committee. GPA’s refusal to clarify any price “assumptions”, and to proceed to award Temes the contract at a price exceeding that of O&M by over \$6 million, is not consistent with the procurement regulations and policies cited above. O&M’s priced offer submitted can be secured and contracted in the fixed amount as submitted, without any additional price modifications intended, with a secure bid bond and performance bond. The Public Auditor should not condone a procedure whereby an agency such as GPA does not take every step lawfully within its power to secure potentially huge and substantial savings through the award of a bid to the lowest bidder. By merely seeking clarification, GPA could have achieved substantial savings in the amount of **\$6, 058,150.20** for the benefit of the ratepayers of Guam, without violating any procurement regulations. GPA’s failure to exercise its proper procurement option to clarify any “assumptions” by O&M, if allowed to stand, would cost ratepayers millions of dollars in valuable funds.

Since the O&M price proposal was fixed, the “assumptions” had no legal effect thereon. However, *arguendo*, assuming that the assumptions did have an impact, GPA was required to quantify and price such “assumptions” according to industry standards. Otherwise, there is no validity to GPA’s argument that these price “assumptions” were “material.” Materiality can only be demonstrated if GPA proves that these assumptions in any manner altered or affected the O&M fixed price proposal. O&M’s price “assumptions” would have to be worth more than \$6 million to make its price bid more expensive of that of Temes, GPA did not engage in the required determination.

G. The “assumptions” of O&M were “Minor Informalities” which had, if at all, a negligible effect on price.

O&M had consistently submitted that it provided a fixed price proposal to GPA. Its price was not subject to alteration. It agreed to perform its duties and obligations under the PMC in accordance with such fixed price. “Assumptions” do not affect the fixed price. There is no escalation clause in its fixed price proposal. O&M is bound to its fixed price proposal. As O&M stated in its bid protest dated January 27, 2008, at all times it has fully intended to comply with the original firm pricing of \$20,841,155.78 as submitted, without any intention of increasing its original bid price, in spite of any “assumptions” mentioned in its proposal. “Assumptions” were pointed out to clarify ambiguous issues and were in manner intended to in any manner increase the bid price submitted by O&M.

Even assuming, *arguendo*, that the “assumptions” were somehow inconsistent with the bid documents, 2 GAR 3109(m)(4)(B) provides that “Minor Informalities” can be waived or corrected by GPA without prejudice to other bidders where the effect on price or other matters is negligible. The procurement officer can waive such informalities or allow the bidder to correct them depending on which is in the best interest of the territory. A variance from specifications

is not material where it does not give a bidder a substantial advantage or benefit not enjoyed by other bidders. Duffy v. Village of Princenton, 60 N.W. 2d 27, 29 (Supreme Court of Minnesota 1953).

Here, a \$6 million difference in the priced bids rendered it a best interest of the territory to determine whether any of the assumptions would affect price. GPA could have clarified any issue concerning these “assumptions” by merely pursuing the written clarification procedure provided in 4.2 of the Commercial Terms and Conditions. Industry standards would demonstrate that, for the matters involving the assumptions, any costs resulting therefrom would be “minor” when compared to the huge price differences and savings which would result from acceptance of the O&M price proposal. O&M has indicated that it is prepared to perform the contract in accordance with the price proposal that it submitted.

H. O&M is the lowest responsible and responsive bidder; Temes’ offer was non-responsive and non-conforming.

O&M submits that it is the lowest responsible and responsive bidder whose bid was most advantageous to the government, taking in to consideration the evaluation factors set forth in the solicitation. O&M is entitled to a bid award based upon the valid and binding price proposal which it submitted. See Par. 23 of the General Terms and Conditions, “AWARD, CANCELLATIONS & REJECTIONS.” O&M was a responsive bidder who submitted a bid which conformed in all material respects to the Invitation for bids. 5GCA §5201(g); 2 GAR §3109(n)(2). O&M is prepared to perform the contract with GPA at the price submitted. O&M should be awarded the contract as the lowest bidder without any material deviations from its fixed price proposal, consistent with the net present value amount of \$20,841,155.78. Temes is not the lowest responsible bidder with its price proposal of \$26,899,305.98.

Originally there was some inconsistency in the contract documents as to whether an escalation factor was allowed with regard to the contract price submitted by bidders. Some provisions of the bid documents allowed for an escalation factor. See Appendix F, Performance Guarantees, Section 1 (Performance Compensation Specifications), 1.1 (Overview), 1.2 (Fixed Compensation), 1.2.1 (Base Annual Management Fee), and 2.2.2 (Annual Escalation Rate). The last mentioned section provided that “a non-negative annual escalation rate shall be specified for the five year contract period.”

Due to this inconsistency, O&M submitted a question to GPA suggesting that it could propose an escalation clause to be discussed with the Guam Power Authority. GPA’s response, Amendment V, dated November 1, 2007, was that an escalation could not be included and management fees were fixed for the first five years. A portion of Amendment V, point 4.16, is attached hereto as Exhibit “15”.

One of the grounds upon which GPA rejected O&M’s bid was that the budget was “subject to the negotiation of an escalation clause.” As previously indicated, there was no escalation clause cited in O&M’s priced bid, and any escalation was made clearly “subject to negotiation.” However, in direct violation of the prohibition on an escalation clause in Amendment V, Temes’ bid proposal specifically included escalation factors for both its Fixed Management Fees and its O&M Spending Budget. A review of its price bid indicates that for each of the five years of the contract, Temes included a 1.7 % escalation rate based on its bid proposal for its Fixed Management Fees. In addition, with regard to O&M Spending Budget, Temes’ priced bid contained a 3.0 % O&M Spending Budget Escalation Rate for each of the five years of the contract.

Temes' inclusion of both escalation rates for the Fixed Management Fees and the O&M Spending Budget were in direct violation of Amendment V. These were material deviations from the instruction of Amendment V, which render Temes a non-responsive bidder. Temes' bid should have been disqualified.

In addition, Appendix F, PERFORMANCE GUARANTEES, establishes a certain "Performance Measure-Equivalent Availability" for Cabras Plants 1 & 2 in section 2.2.1. A true and correct copy thereof is attached hereto as Exhibit "16". A review of Temes Unit Availability guarantees (See Exhibit "4") indicate that the guarantees proposed by Temes for Unit 1 in Contract Year 1 and 4 are lower than the Minimum Performance Guarantees required. In addition, Availability Guarantees proposed by Temes for Unit 2 is lower than the Minimum Performance Guarantees in Contract Years 1, 2, 3 and 5. For this additional reason, Temes was a non-responsive bidder and should have been disqualified. Its failure to meet the unit availability performance guarantees will also render its price submittal even more expensive than indicated. O&M submitted Equivalent Availability guarantees that were fully compliant with bid requirements.

- I. O&M reserves the right to amend its Appeal when GPA complies with the Sunshine Act Request to provide it with a complete copy of Temes' bid proposal and all documents regarding the bid.

O&M has requested that GPA provide it with all bid documents and relevant materials under 2 GAR DIV. 4 §§12105 and 12106, including any and all inter-agency bid review committee findings, reports or recommendations to award Temes the PMC contract, GPA engineering bid evaluations, ratings of Temes, scoring sheets and bid tabulations of GPA's procurement division and engineering division, all bid review committee members findings and all comments and correspondence between the General Manager's office and any other person or

entity regarding this bid. The documents have been requested under the Freedom of Information Act but have not yet been received by O&M. O&M reserves the right to amend or modify its appeal claims when the documentation requested from GPA is received by it.

4. Appellant's statement specifying the ruling requested:

Appellant O&M Energy hereby requests that the Public Auditor award it the following relief:

- A. to reverse THE DENIAL OF PROCUREMENT PROTEST by GPA;
- B. for a determination by OPA that there was a bona fide, binding, and legitimate price bid proposal by O&M;
- C. for a determination that O&M was and is the lowest responsible bidder, and that GPA was obligated to award O&M the bid award;
- D. that IFB GPA-013-07 be awarded to O&M;
- E. that Temes bid should be disqualified as non-responsive;
- F. in the alternative, for an order that GPA be required to quantify any "assumptions" in O&M's bid which it believes are "material";
- G. that, pursuant to 5 GCA §5425(h), O&M be awarded its reasonable costs incurred in connection with the solicitation and protest, including bid preparation costs
- H. for any and all other relief which may be just or proper, or to which Appellant may be reasonably entitled.



# GUAM POWER AUTHORITY

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

December 27, 2007

Clarice Delphine and/or Juan Rodriquez  
O&M Energy, S.A.  
Parque Empresarial "La Finca"  
Paseo del Club Dejpotive, 1  
28223 Pozuelo de Alarcon  
Madrid, Spain

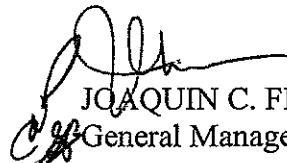
RE: Phase 2 of Multi-Step Bid No.: GPA-013-07 for PMC for Cabras 1 & 2

Dear Ms. Delphine and/or Mr. Rodriquez:

As a result of Multi-Step Invitation for Bid No.: GPA-013-07, your bid for the above subject, has been reviewed and deemed qualified to participate in Phase 2 of the multi-step process. Phase 2 is the opening of the qualified bidder's price proposal. The opening shall take place in the Engineering Conference Room at 9:00 A.M. on Monday, December 31, 2007. Your company is invited to attend this opening, as it is open to the public.

If you have any questions or concerns, please contact Ms. Jamie L.C. Pangelinan, Supply Management Administrator, at Tel: 648-3054/5 or by Fax: 648-3165.

Sincerely,

  
JOAQUIN C. FLORES, P.E.  
General Manager

**EXHIBIT**

**" 1 "**





VENDOR NAME:

O&M ENERGY

Fill in highlighted fields below only then click on the "Solve for HR Curve Coefficients" button located on the 158 cell to initiate Macro.

Proposed Cost Component	Contract Year				
	1	2	3	4	5
Fixed Management Fees (\$000)	\$ 2,080,596,95	\$ 2,080,596,95	\$ 2,080,596,95	\$ 2,080,596,95	\$ 2,080,596,95
Proposed O&M Spending Budget (\$000)	\$ 3,488,750,42	\$ 3,488,750,42	\$ 3,488,750,42	\$ 3,488,750,42	\$ 3,488,750,42
<b>Unit #1 Proposed Guarantees</b>					
Relative Heat Rate Guarantee (%)	100,8%	100,8%	99,7%	99,1%	99,1%
Heat Rate (HHV) (MBTU/MWh)					
at 100% Maximum Continuous Rating (MCR)	10,206	10,206	10,104	10,043	10,036
at 75% Maximum Continuous Rating (MCR)	10,243	10,243	10,141	10,079	10,072
at 50% Maximum Continuous Rating (MCR)	11,270	11,270	11,157	11,089	11,082
Baseline Heat Input Curve (MBTU/h)					
at 100% Maximum Continuous Rating (MCR)	673,621	673,621	666,885	662,843	662,372
at 75% Maximum Continuous Rating (MCR)	507,047	507,047	501,976	498,934	498,579
at 50% Maximum Continuous Rating (MCR)	371,902	371,902	368,183	365,951	365,691
Heat Input Curve Regression Coefficients					
A	0,0577	0,0577	0,0571	0,0568	0,0568
B	3,4287	3,4287	3,3944	3,3738	3,3714
C	195,8972	195,8972	193,9382	192,7629	192,6257
Unit Availability (percent)	90,0%	88,0%	92,0%	93,0%	93,0%

Proposed Cost Component	Unit #2 Proposed Guarantees				
	99,4%	99,4%	99,1%	98,9%	98,6%
Relative Heat Rate Guarantee (%)	99,4%	99,4%	99,1%	98,9%	98,6%
Heat Rate (HHV) (MBTU/MWh)					
at 100% Maximum Continuous Rating (MCR)	10,310	10,310	10,284	10,258	10,232
at 75% Maximum Continuous Rating (MCR)	10,347	10,347	10,321	10,295	10,269
at 50% Maximum Continuous Rating (MCR)	11,384	11,384	11,356	11,327	11,298
Baseline Heat Input Curve (MBTU/h)					
at 100% Maximum Continuous Rating (MCR)	680,460	680,460	678,750	677,041	675,331
at 75% Maximum Continuous Rating (MCR)	512,195	512,195	510,908	509,621	508,334
at 50% Maximum Continuous Rating (MCR)	375,677	375,677	374,733	373,789	372,845
Heat Input Curve Regression Coefficients					
A	0,0583	0,0583	0,0582	0,0580	0,0579
B	3,4635	3,4635	3,4548	3,4461	3,4374
C	197,8860	197,8860	197,3888	196,8916	196,3944
Unit Availability (percent)	86,0%	91,0%	92,0%	93,0%	93,0%
Fixed Management Fees Escalation Rate (%)					

Relative Heat Rate Guarantee (%)	100.8%	100.8%	99.7%	99.1%	99.1%
<b>Heat Rate (HHV) (MBTU/MWh)</b>					
at 100% Maximum Continuous Rating (MCR)	10,206	10,206	10,104	10,043	10,036
at 75% Maximum Continuous Rating (MCR)	10,243	10,243	10,141	10,079	10,072
at 50% Maximum Continuous Rating (MCR)	11,270	11,270	11,157	11,089	11,082
<b>Baseline Heat Input Curve (MBTU/h)</b>					
at 100% Maximum Continuous Rating (MCR)	673,621	673,621	666,885	662,843	662,372
at 75% Maximum Continuous Rating (MCR)	507,047	507,047	501,976	498,934	498,579
at 50% Maximum Continuous Rating (MCR)	371,902	371,902	368,183	365,951	365,691
<b>Heat Input Curve Regression Coefficients</b>					
A	0.0577	0.0577	0.0571	0.0568	0.0568
B	3,4287	3,4287	3,3944	3,3738	3,3714
C	195,8972	195,8972	193,9382	192,7629	192,6257
<b>Unit Availability (percent)</b>	90.0%	88.0%	92.0%	93.0%	93.0%

		Unit #2 Proposed Guarantees				
Relative Heat Rate Guarantee (%)		99.4%	99.4%	99.1%	98.9%	98.6%
<b>Heat Rate (HHV) (MBTU/MWh)</b>						
at 100% Maximum Continuous Rating (MCR)	10,310	10,310	10,284	10,258	10,232	
at 75% Maximum Continuous Rating (MCR)	10,347	10,347	10,321	10,295	10,269	
at 50% Maximum Continuous Rating (MCR)	11,384	11,384	11,356	11,327	11,298	
<b>Baseline Heat Input Curve (MBTU/h)</b>						
at 100% Maximum Continuous Rating (MCR)	680,460	680,460	678,750	677,041	675,331	
at 75% Maximum Continuous Rating (MCR)	512,195	512,195	510,908	509,621	508,334	
at 50% Maximum Continuous Rating (MCR)	375,677	375,677	374,733	373,789	372,845	
<b>Heat Input Curve Regression Coefficients</b>						
A	0.0583	0.0583	0.0582	0.0580	0.0579	
B	3,4635	3,4635	3,4548	3,4461	3,4374	
C	197,8860	197,8860	197,3888	196,8916	196,3944	
<b>Unit Availability (percent)</b>	86.0%	91.0%	92.0%	93.0%	93.0%	
<b>Fixed Management Fees Escalation Rate (%)</b>						
<b>O&amp;M Spending Budget Escalation Rate (%)</b>						
<b>Availability Savings / Costs (see 'Availability Calculations' worksheet)</b>	\$ (11,032.35)	\$ (332,961.21)	\$ (843,767.13)	\$ (1,040,918.48)	\$ (1,040,918.48)	

**NPV OF BIDDER'S PROPOSAL** (\$20,841,155.78)

Fixed Management Fees (\$0000)	(\$8,764,231.24)
O&M Spending Budget Difference (\$000)	(\$14,695,885.92)
Unit Availability Savings (+) / Costs (-) (\$000)	\$2,617,525.09
Anticipated Fuel Savings/ Costs (\$000)	\$1,436,28
Unit #1	\$57,45
Unit #2	\$1,378,83

VENDOR NAME:

(Taiwan Electrical and Mechanical Engineering Services, Inc.)

Fill in highlighted fields below only then click on the "Save for HR Curve Coefficients" button located on the IS&E call to Inflate Macro.

Proposed Cost Component	Contract Year				
	1	2	3	4	5
Fixed Management Fees (\$)	\$ 1,520,000.00	\$ 1,545,840.00	\$ 1,572,119.28	\$ 1,598,845.31	\$ 1,626,025.68
Proposed O&M Spending Budget (\$)	\$ 2,130,000.00	\$ 2,193,900.00	\$ 2,259,717.00	\$ 2,327,508.51	\$ 2,397,333.77
Unit #1 Proposed Guarantees					
Relative Heat Rate Guarantee (%)	108.4%	108.4%	108.4%	108.4%	108.4%
Heat Rate (HHV) (MBTU/WH) at 100% Maximum Continuous Rating (MCR) at 75% Maximum Continuous Rating (MCR) at 50% Maximum Continuous Rating (MCR)	11,439	11,439	11,439	11,439	11,439
	11,209	11,209	11,209	11,209	11,209
	11,619	11,619	11,619	11,619	11,619
Baseline Heat Input Curve (MBTU/h) at 100% Maximum Continuous Rating (MCR) at 75% Maximum Continuous Rating (MCR) at 50% Maximum Continuous Rating (MCR)	754,960	754,960	754,960	754,960	754,960
	554,864	554,864	554,864	554,864	554,864
	383,412	383,412	383,412	383,412	383,412
Heat Input Curve Regression Coefficients	A	0.0526	0.0526	0.0526	0.0526
	B	6.0511	6.0511	6.0511	6.0511
	C	126,4396	126,4396	126,4396	126,4396
Unit Availability (percent)	87.0%	88.0%	87.0%	84.0%	90.0%

Relative Heat Rate Guarantee (%)	Unit #2 Proposed Guarantees				
	108.4%	108.4%	108.4%	108.4%	108.4%
Heat Rate (HHV) (MBTU/WH) at 100% Maximum Continuous Rating (MCR) at 75% Maximum Continuous Rating (MCR) at 50% Maximum Continuous Rating (MCR)	11,162	11,162	11,162	11,162	11,162
	11,385	11,385	11,385	11,385	11,385
	12,083	12,083	12,083	12,083	12,083
Baseline Heat Input Curve (MBTU/h) at 100% Maximum Continuous Rating (MCR) at 75% Maximum Continuous Rating (MCR) at 50% Maximum Continuous Rating (MCR)	736,692	736,692	736,692	736,692	736,692
	563,578	563,578	563,578	563,578	563,578
	398,755	398,755	398,755	398,755	398,755
Heat Input Curve Regression Coefficients	A	0.0152	0.0152	0.0152	0.0152
	B	8.7332	8.7332	8.7332	8.7332
	C	93,9794	93,9794	93,9794	93,9794
Unit Availability (percent)	83.0%	84.0%	87.0%	90.0%	84.0%
Fixed Management Fees Escalation Rate (%)	1.7%	1.7%	1.7%	1.7%	1.7%
O&M Spending Budget Escalation Rate (%)	3.0%	3.0%	3.0%	3.0%	3.0%

Availability Savings / Costs (see 'Availability

Baseline Heat Input Curve (MMBTU/h)									
at 100% Maximum Continuous Rating (MCR)	754,960	754,960	754,960	754,960	754,960	754,960	754,960	754,960	754,960
at 75% Maximum Continuous Rating (MCR)	554,864	554,864	554,864	554,864	554,864	554,864	554,864	554,864	554,864
at 50% Maximum Continuous Rating (MCR)	383,412	383,412	383,412	383,412	383,412	383,412	383,412	383,412	383,412
Heat Input Curve Regression Coefficients									
A	0.0526	0.0526	0.0526	0.0526	0.0526	0.0526	0.0526	0.0526	0.0526
B	6.0511	6.0511	6.0511	6.0511	6.0511	6.0511	6.0511	6.0511	6.0511
C	126.4396	126.4396	126.4396	126.4396	126.4396	126.4396	126.4396	126.4396	126.4396
Unit Availability (percent)	87.0%	88.0%	87.0%	87.0%	87.0%	84.0%	84.0%	84.0%	90.0%

		Unit #2 Proposed Guarantees							
Relative Heat Rate Guarantee (%)		108.4%	108.4%	108.4%	108.4%	108.4%	108.4%	108.4%	108.4%
Heat Rate (MMBtu/MWh)									
at 100% Maximum Continuous Rating (MCR)		11.162	11.162	11.162	11.162	11.162	11.162	11.162	11.162
at 75% Maximum Continuous Rating (MCR)		11.385	11.385	11.385	11.385	11.385	11.385	11.385	11.385
at 50% Maximum Continuous Rating (MCR)		12.083	12.083	12.083	12.083	12.083	12.083	12.083	12.083
Baseline Heat Input Curve (MMBTU/h)									
at 100% Maximum Continuous Rating (MCR)		736,692	736,692	736,692	736,692	736,692	736,692	736,692	736,692
at 75% Maximum Continuous Rating (MCR)		563,578	563,578	563,578	563,578	563,578	563,578	563,578	563,578
at 50% Maximum Continuous Rating (MCR)		398,755	398,755	398,755	398,755	398,755	398,755	398,755	398,755
Heat Input Curve Regression Coefficients									
A	0.0152	0.0152	0.0152	0.0152	0.0152	0.0152	0.0152	0.0152	0.0152
B	8.7332	8.7332	8.7332	8.7332	8.7332	8.7332	8.7332	8.7332	8.7332
C	93.9794	93.9794	93.9794	93.9794	93.9794	93.9794	93.9794	93.9794	93.9794
Unit Availability (percent)	83.0%	84.0%	87.0%	87.0%	87.0%	90.0%	90.0%	90.0%	84.0%
Fixed Management Fees Escalation Rate (%)		1.7%	1.7%	1.7%	1.7%	1.7%	1.7%	1.7%	1.7%
O&M Spending Budget Escalation Rate (%)		3.0%	3.0%	3.0%	3.0%	3.0%	3.0%	3.0%	3.0%

Availability Savings / Costs (see Availability Calculations worksheet) (\$)	\$ 339,856.43	\$ 221,974.14	\$ 112,366.12	\$ 99,954.72	\$ 99,954.72
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NPV OF BIDDER'S PROPOSAL (\$)	(526,899,314.981)
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Fixed Management Fees (\$)	(86,611,233.24)
O&M Spending Budget Difference (\$)	(89,494,331.11)
Unit Availability Savings (+) / Costs (-) (\$)	(5766,384.69)
Anticipated Fuel Savings/Costs (\$)	(810,027,356.95)
Unit #1	(94,680,806.43)
Unit #2	(53,346,850.11)



# GUAM POWER AUTHORITY

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

## BID STATUS

January 18, 2008

Clarice Delphine and/or Juan Rodriguez  
O&M Energy, S.A.  
Parque Empresarial "La Finca"  
Paseo del Club Deportivo, 1  
28223 Pozuelo de Alarcon  
Madrid, Spain

**BID INVITATION:** GPA-013-07

**OPENED:** December 31, 2007

**DESCRIPTION:** Performance Management Contract (PMC) for Cabras 1 & 2 Steam Power Plants

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
- Rejected 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;
  - High price;
  - Others: Non-responsive based on the following Exceptions.**
    - A US\$200,000 limit on yearly unscheduled maintenance cost;
    - A US\$50,000 limit on yearly Performance Testing;
    - The cost of Management Staff vehicles and utilities are excluded from the proposal; and
    - A budget that is subject to negotiation of the escalation rate.

**Remarks:**

Bid is recommended for award to: Taiwan Electrical & Mechanical Engineering Services, Inc. (TEMES) in the amount of \$26,899,305.98.

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

PLS. ACKNOWLEDGE  
RECEIPT BY RETURN  
FAX AT 648-3165.  
THANKS.  
Jana T. Reyes

JOAQUIN C. FLORES, P.E.  
General Manager

RECD: \_\_\_\_\_

DATE: \_\_\_\_\_

**EXHIBIT**

Guam Power Authority  
Mr. Joaquín C. Flores, P. E.  
General Manager

Madrid, January, 27<sup>th</sup>, 2008

**Project** GPA -013 – 07 for PMC Cabras 1&2 multi-step bid  
**Subject** Bid Protest / Request for reconsideration and to review / copy procurement files

Dear Mr. Flores,

We are hereby formally requesting for a re-consideration of the above multi-step bid based on the following factual and legal grounds which we feel will be a basis for a finding that O&M Energy is the lowest responsible bidder and will support a finding deemed in the best interest of the Government, as follows:

**Factual grounds:**

1. On December 27<sup>th</sup>, 2007, O&M Energy, Inc. was "deemed qualified" by GPA after an exhaustive two months qualifying process. This was conducted under Phase 1 process under a multi-step bid procedure.
2. Subsequently on December 31<sup>st</sup>, 2007, GPA proceeded to Phase 2 of this multi-step process. Phase 2 is the public opening of the "Qualified Bidders" price proposal. Bid prices were opened and read aloud with the following results:

TEMES Bid Price:	[\$ 26,899,305.98]
O&M Energy, Inc Bid Price:	[\$ 20,841,155.78]
Bid Price difference in favour of O&M Energy (saving to GPA):	\$ 6,058,150.20

**Legal grounds:**

1. This bid was conducted under the Multi-Step Procedure under 5 GCA of the Guam Procurement Regulations and consistent with GPA Procurement Rules and Regulations governing this Bid.
2. Under this General Terms and Conditions GPA Bid # 013 – 07, it is stated as follows:

**EXHIBIT**

**" 6 "**

- Section 13 of Multi-Step Bidding Procedure states “... *bid prices will be considered only in the second phase and only from bidders whose unpriced technical offers are found acceptable in the First Phase*”.
- Under the 5 GCA, Chapter 5, Purpose, Rules and Applications Section 5001 (5) it is stated “... *to provide increased economy in territorial activities and to maximise to the fullest extent practicable the purchasing value of public funds in the territory*”.

**O&M Energy contends the following:**

1. The reason for GPA’s findings of “non-responsive” as cited in GPA letter of January 18<sup>th</sup>, 2008 [Bid Status letter] was erroneously misinterpreting as “exceptions” four assumptions that the Bidder has included in the Proposal.
2. The Bidder fully intended to comply with the original Firm Pricing of \$ 20,841,155.78; as submitted without any intention of increasing its original bid price, in spite of the four abovementioned assumptions.
3. The Bidders’s “assumptions” as indicated in its price proposals were pointed in good faith intentions of acting in the best interest of the Government and further inviting a mutually beneficial dialogue with GPA to clarify ambiguous issues not fully satisfied with the foregoing bid documents and the information available to the Bidder at the moment.
4. The Bidder further contends that even if the interpretation of GPA differs from the intention of the Bidder, the value of the four assumptions would have never reached the difference in price with its competitor (TEMES), thus expecting the opportunity to discuss and clarify these points.
5. Said this, O&M Energy remarks above all misunderstandings possible, that as stated in the O&M Engry Bid, the proposed price of \$ 20,841,155.78 is firm and continuous being, in spite of the four assumptions qualified by GPA as exceptions. These assumptions do not have an impact in the Firm Price presented.
6. The difference in Bid Price is substantial at \$ 6,058,150.78 and not in the best interest of GPA and its rate-payers considering the fact that O&M Energy has already been deemed as qualified by GPA as indicated in its December 27<sup>th</sup>, 2007 letter, in the First Phase of its lengthy but acceptable technical proposals and bid evaluations as conducted.
7. Does the statute under 5 GCA, 3 – 202.20, governing this Multi-Step Bid extend to a re-evaluation of a Bidders “responsiveness” after they have already been deemed responsible and acceptable under Phase One?
8. The Bidder was deemed “non-responsive” in spite of the fact that they were the Lowest Responsible Bidder with a Firm Price of \$ 20,841,155.78, that is \$ 6,058,150.78 lower than TEMES. The issue of law remains the focal point of legal inquiries as to the limits under 5 GCA 3-202.20 c) and the failure of GPA to properly quantify or clarify the Bidder’s Price Bids under its pricing “assumptions”, in spite of the fact that the Bidder did not intend to raise its prices after bid opening but simply to clarify and correct any “assumptions” contained therein. Does the above applicable statute prohibit GPA from clarifying, correcting or quantifying the items found to be “exceptions”?

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9. 5 GCA, Sections 3 – 202.18.2 a), b), c), d) (Conditions for use) for Multi-Step Bids also governs this particular bids as stated in the above procurement policies and will permit for... (b) "or ammend the purchase description", in this case the Bidder's Price "Assumptions" and therefore would permit subsection... (d) "to award the Contract to the lowest responsible bidder in accordance with the competitive sealed bidding procedures". This Multi-Step Sealed Bidding was employed by GPA herein to... (b) "conduct discussions for the purposes of facilitating understanding of the technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or admend the purchase description". The Bidder hereby contends that these conditions for use (3 – 202.18.2) was not properly applied by GPA's bid pricing analysis and erroneous findings not in the best interest of the Government and failed to award to the Lowest Responsible Bidder. GPA, at the very least, should have conducted the above requirements afforded under this Multi-Step Sealed Bidding (3 – 202.18) and Sections (3-202.18.2 a, b, c, d) and therefore "ammend the purchase description" contained in the Bidder's Price Proposals. Failure to apply this procurement policy would lead GPA to pay and additional PMC contract fees of \$ 6,058,150.78. This would not be consistent with Sections 3 – 203.02.1 policy defining "practicable" as distinguished from "advantageous" and connotes "a judgemental assessment of what is in the Territory's best interest"

Said all this, we respectfully ask for GPA's reconsideration taking into account the factual and legal grounds exposed and the benefits and savings that the original proposed bid of O&M Energy can bring to the Project.

Additionally we are requesting based on the Freedom of Information Act, to be provided with a complete copy of the bid proposal of the company Temes, save for information that can be considered protected by intellectual property rights and that have not relevance to this proposal. We reserve the right to amend this Letter of Protest if necessary after the reception of the requested information since it may be relevant to its contents and objectives.

We kindly request to review Procurement Files at GPA's convenience. Thank you, we await for your response.

Respectfully yours,

Juan Rodríguez Martín de los Santos  
Business Development Manager

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# GUAM POWER AUTHORITY

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

## *DENIAL OF PROCUREMENT PROTEST*

February 21, 2008 /

Mr. Juan Rodriguez Martin de los Santos  
Business Development Manager  
O&M Energy, S.A.  
Parque Empresarial "La Finca"  
Paseo del Club Deportivo, 1  
28223 Pozuelo de Alarcon  
Madrid Spain

**RE: Guam Power Authority's Response to O&M Protest dated January 27, 2008 for GPA-013-07 (PMC Cabras 1&2 multi-step bid)**

Dear Mr. Del los Santos:

I have reviewed your protest letter dated January 27, 2008, protesting Guam Power Authority's (GPA) Award of GPA-013-07 (PMC Cabras 1&2 multi-step bid) to Taiwan Electrical and Mechanical Engineering Services, Inc. You have also requested reconsideration of the bid based on your assertion that exceptions contained in O&M's revised price proposal were merely "assumptions" not affecting the price.

1. There is no merit to your claim that O&M's revised price proposal was responsive and complied with all the requirements requested by Guam Power Authority in the bid package. GPA reviewed the bid packages and provided a notice of intent to award to the lowest responsible and

**responsive** bidders. 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). Further, any bidder's offering which does not meet the acceptability requirements shall be rejected as non-responsive. 2 GAR, Div. 4, Chap. 3, §3109(n)(3)(c).

2. GPA-013-07 is a multi-step bid process in which GPA qualified all bidders first on whether the bidder met the technical specifications. In this case, GPA was provided with sealed price proposals from all bidders which were not opened by GPA. GPA sent out a letter dated December 11, 2007, a copy of which is attached hereto as Exhibit "A", and advised all bidders that they must resubmit their revised sealed price proposal as GPA "cannot accept any exceptions to the approved bid documents as amended."

3. In response to the GPA letter, all bidders, including O&M, submitted a revised sealed price proposal. O&M submitted a letter dated December 14, 2007, a copy of which is attached hereto as Exhibit "B", in which in raised some questions, but then signed on the last page "No response is needed Union Fenosa 12/19/07." The technical review committee qualified both O&M and TEMES as technically qualified under the multi-step process. On December 31, 2007, the sealed bid proposals of the two qualified bidders, O&M and TEMES, were opened in the presence of company representatives. O&M submitted a 10 page price proposal, a copy of which is attached hereto as Exhibit "C." Page 4 is entitled "B1-Assumptions base for price proposals" and following that is six pages of "Assumptions base for Commercial Proposal." Page 4/6 states that "This Budget is in 2007 USD and subject to escalation to be agreed between both Parties. Such index will reflect the escalation of the different costs included in both the Fixed Management Fee and the O&M Spending

Spending Budget. ... We assume a CAP for Unscheduled Maintenance of 200,000 USD per year. ... Performance Tests up to a limit of 50,000 USD per year.” There were other exceptions which were not responsive to the GPA bid documents, and these exceptions alone, would materially affect the O&M fixed price proposal.

Specifically, Amendment V clarified that the Fixed Management Fees are fixed for the contract period of five years. There can be no negotiation regarding fixed management fees after the sealed price proposal is opened. The bid documents provide that the PMC is responsible for all maintenance scheduled or unscheduled. Placing a limit affects the O&M spending budget in the price proposal. In this case, O&M specifically stated there would be a US\$200,000 cap on yearly unscheduled maintenance cost. Section 9.1.6 of Volume II states that the “PMC will procure performance testing services for each unit at the beginning of the first contract year and within 30 days of the contract year anniversary date ...” There is no cap allowed under the proposal, and O&M indicated a “US\$50,000 limit on yearly Performance Testing.”

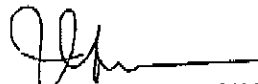
Water costs are excluded in the O&M proposal, but water (O&M object code 38) is a required part of O&M. Office furniture is also excluded from the price proposal, but is a required service under Section 11.1 of Volume II. Excluding these costs would materially affect the O&M spending amounts in the price proposal. While GPA does have an existing crane inside the plant, any other maintenance or work requiring a crane or heavy lifting equipment is the responsibility of the PMC to supply as part of O&M and also for CIP/PIP projects. O&M excludes disposal of hazardous waste from its price proposal, but disposal of hazardous waste falls under environmental compliance required under Section 6.1.2 of Volume II. O&M's price proposal indicates that all necessary tools

necessary tools (including special tools) for maintenance will be provided by GPA, but Section 7.1.4 of Volume II states that "the PMC may be required to secure tooling and equipment on its own to support the safe and reliable O&M practices of the plant."

Here the intent to award was made to TEMES, as it was deemed to be the lowest, responsive and responsible bidder for these items. Their bid was responsive to the multi-step bid and complied with the specifications set forth in the multi-step bid. There is no question that the O&M revised sealed price proposal materially deviates from the fixed price proposal requested by GPA. TEMES provided a responsive bid as required by GPA in its multi-step bid, unlike the bid submitted by O&M. Any modification of a bid received after the time and date set for opening of the bids at the place designated for opening is late. 2 GAR, Div. 4, Chap. 3, §3109(k)(2). Therefore, GPA hereby finds that there is no merit to O&M's claim that their bid was the lowest **responsive** bid.

O&M Energy Union Fenosa is hereby ON NOTICE that this is the Guam Power Authority's final decision concerning O&M Energy Union Fenosa's January 27, 2008 bid protest for the above described multi-step bid. You are hereby advised that O&M Energy Union Fenosa has the right to seek judicial review.

Sincerely,



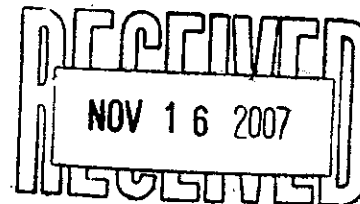
**JOAQUIN C. FLORES, P.E.**  
General Manager, Guam Power Authority

Attachments: 1) GPA letter dated 12/11/07  
2) O & M Letter dated 12/14/07  
3) O & M Price Proposal

Citibank



November 16, 2007



**IRREVOCABLE STANDBY LETTER OF CREDIT**

Guam Power Authority  
Government of Guam  
P.O. Box 2977  
Hagatna, Guam 96932  
USA

*2:11 pm.  
jre*

Gentlemen:

By order of our client, O & M Energy, S.A., we hereby issue this Irrevocable Standby Letter of Credit No. 03/2007 in your favor, for an amount(s) not to exceed ONE HUNDRED AND FIFTY THOUSAND US DOLLARS (USD 150,000.00), expiring at our office on 12 May 2008.

Funds under this Letter of Credit are available to you against your sight draft(s) drawn on us, mentioning thereon our Letter of Credit No. 03/2007. Each such draft must be accompanied by your signed written statement that O & M Energy, S.A. has failed to honor the submitted bid for IFB GPA-013-07 for Performance Management Contract (PCM) for Cabras 1 and 2 Steam Power Plant.

We hereby engage with you to honor each draft drawn under and in compliance with the terms of this Letter of Credit, if duly presented at this office located at 402 East Marine Drive, Hagatna, Guam 96910 on or before the stated expiration date.

Except as may be otherwise stated, this Letter of Credit is subject to the International Standby Practices ("ISP98") International Chamber of Commerce Publication No. 590.

CITIBANK, N.A.

**GUS NILO  
CPU HEAD  
Citibank N.A., Guam**

Authorized Signature

**EXHIBIT**

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