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PROCUREMENT APPEALS

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FILE No. GPA-PA-08-004

9 Attorney for the Guam Power Authority

10 OFFICE OF THE PUBLIC AUDITOR  
11 PROCUREMENT APPEALS  
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15 IN THE APPEAL OF ) DOCKET NO. OPA-PA-08-004  
16 )  
17 O&M ENERGY, S.A. ) AGENCY REPORT  
18 )  
19 Appellant. )  
20 \_\_\_\_\_ )  
21 )

22 Appellee GUAM POWER AUTHORITY (GPA), by and through its attorney, D.

23 GRAHAM BOTHA, ESQ., hereby submits its Agency Report in the form required under 2

24 G.A.R. §12105:

25 (a) A copy of the protest: *Previously submitted to the Office of the Public Auditor*  
26 *("OPA") on March 14, 2008, by GPA.*

27  
28 (b) A copy of the bid or offer submitted by the Appellant and a copy of the bid or offer  
29 that is being considered for award or whose bid or offer is being protested, if any had been  
30 submitted prior to the protest: *Previously submitted to the Office of the Public Auditor ("OPA")*  
31 *on March 14, 2008, by GPA.*

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33 (c) A copy of the solicitation, including the specification or portions thereof relevant to  
34 the protest: *Previously submitted to the Office of the Public Auditor ("OPA") on March 14,*  
35 *2008, by GPA.*

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37 (d) A copy of the abstract of bids or offers or relevant or portions thereof relevant to  
38 the protest: *Previously submitted to the Office of the Public Auditor ("OPA") on March 14,*  
39 *2008, by GPA.*  
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ORIGINAL

1 (e) Any other documents which are relevant to the protest, including the contract, if one  
2 has been awarded, pertinent amendments, and plans and drawings: *Previously submitted to the*  
3 *Office of the Public Auditor ("OPA") on March 14, 2008, by GPA.*  
4

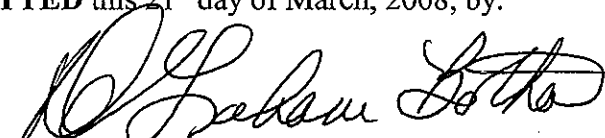
5 (f) The decision from which the Appeal is taken, if different than the decision  
6 submitted by Appellant: *Previously submitted to the Office of the Public Auditor ("OPA") on*  
7 *March 14, 2008, by GPA.*  
8

9 (g) A statement answering the allegation of the Appeal and setting forth findings,  
10 actions, and recommendations in the matter together with any additional evidence or information  
11 deemed necessary in determining the validity of the Appeal. The statement shall be fully  
12 responsive to the allegations of the Appeal: *Please see attached.*  
13

14 (h) If the award was made after receipt of the protest, the report will include the  
15 determination required under 2 G.A.R. §9101(e): *Not applicable. The bid award is stayed*  
16 *pending a decision on the protest.*  
17

18 (i) A statement in substantially the same format as Appendix B to this Chapter,  
19 indicating whether the matter is the subject of a court proceeding: *Please see attached.*  
20

21 **RESPECTFULLY SUBMITTED** this 21<sup>st</sup> day of March, 2008, by:

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25 D. GRAHAM BOTHA, ESQ.  
26 Legal Counsel for the Guam Power Authority  
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# EXHIBIT “1”

## STATEMENT ANSWERING ALLEGATIONS OF APPEAL

(As required by 2 G.A.R. §12105(g))

### I. RELEVANT BACKGROUND

#### A. GPA SOLICITS BIDS FOR MULTI-STEP BID GPA-013-07, PERFORMANCE MANAGEMENT CONTRACT (PMC) FOR CABRAS 1 & 2 STEAM POWER PLANT

On August 7, 2007, Guam Power Authority (“GPA”) issued Invitation for Multi-Step Bid, GPA-013-07, Performance Management Contract (PMC) for Cabras I and II Steam Power Plant. The IFB was a two step bid process consisting of the technical bid and submission of a sealed price proposal. Four companies submitted bids in response to the IFB, but only two companies were qualified in the phase I technical bid review process. Prior to submission of technical bids and sealed price proposals, the four bidders had an opportunity to submit questions regarding the IFB. GPA issued amendments in response to these questions, and other amendments to clarify the IFB.

Amendment III, dated September 14, 2007, instructed prospective bidders to download a worksheet for Volume IV. On the worksheet there are lines for both Fixed Management Fees, Proposed O&M Spending Budget, Fixed Management Fees Escalation Rate and O&M Spending Budget Escalation Rate. O&M asked several questions, dated October 1, 2007, during the bid process, and GPA responded to these questions in Amendment V. Question 4, “Point 4.16 - Taking into account our experience in O&M Contracts, we consider that price escalation is a general practice in this kind of agreements. We can propose an escalation clause to be discussed with Guam Power Authority.” GPA Answer - “No, Management fees are fixed for the first 5

years.” Other questions were asked regarding environmental costs and service costs, such as Question 25, which asked “Services of transport contracted” with the Answer “PMC is responsible for its own transportation.”

GPA sent out a letter dated December 11, 2007, a copy of which is contained in the procurement record at Tab “P”, which 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.” In response to the December 11, 2007, 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 contained in the procurement record at Tab “H” as Exhibit “B”, in which O&M raised some questions, but then signed on the last page “No response is needed Union Fenosa 12/19/07.”

The technical review committee qualified two of the four bidders, 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. The bid abstract, O&M and TEMES Price Proposals, are contained in the procurement record at Tab “L.” O&M submitted a 10 page price proposal, which was contained in its sealed price proposal. Page 4 of the O&M price proposal 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 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.

On January 18, 2008, GPA send a letter to O&M rejecting the O&M price proposal on the grounds that it was non-responsive to the bid documents. O&M filed a bid protest and request for reconsideration on January 27, 2008. On February 21, 2008, GPA denied O&M's protest. O&M filed an appeal with the OPA on March 7, 2008.

## II. DISCUSSION

### A. O&M'S BID WAS APPROPRIATELY REJECTED AS NON-RESPONSIVE, AND THE AWARD FOR THE PMC WAS PROPERLY AWARDED TO TEMES

Procurement law requires that GPA 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 Bid. 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).

O&M contends that it should be able to clarify its price proposal after the two bid proposal were opened on December 31, 2008. This is not only contrary to the bid specifications, but also to Guam procurement law which provides for the "fair and equitable treatment of all persons who deal with the procurement system" and provides "safeguards for the maintenance of a procurement system of quality and integrity." 2 G.A.R. §1102. 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).

The O&M price proposal opened on December 31, 2007, clearly states "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 Budget. ...” This statement alone, disregarding all of the rest of the deviations from the bid specifications by O&M, is sufficient proof that the O&M bid is non-responsive to the bid documents, amendments, and letters which clearly indicate that GPA requires a price proposal which contains a fixed price. This is clearly not a “minor informality” as defined in 2 G.A.R. §3109(m), which is a “matter of form, rather than substance, evident from the bid document or insignificant mistakes that can be waived or corrected without prejudice to other bidders ...”

In addition, the O&M price proposal contained other limitations such as “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.

Amendment V to the IFB 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 (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."

GPA is not required to address the materiality of the O&M's "assumptions" or to prove that the assumptions were material and would affect the O&M price proposal. The bid documents, amendments, and other letters to bidders clarify that GPA demanded a fixed price proposal. The O&M limitations and assumptions are clearly not minor informalities, and will affect the final fixed price proposal requested by GPA.


GPA had the duty and responsibility to make an award to TEMES, as it was deemed to be the lowest, **responsive** and responsible bidder for the PMC. 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.



CONCLUSION

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

**RESPECTFULLY SUBMITTED** this 21<sup>st</sup> day of March, 2008, by:



D. GRAHAM BOTHA, ESQ.

Legal Counsel for the Guam Power Authority

# EXHIBIT “2”

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*Attorney for the Guam Power Authority*

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

IN THE APPEAL OF	)	DOCKET NO. OPA-PA-08-004
	)	
O&M ENERGY, S.A.	)	<b>DECLARATION REGARDING</b>
	)	<b>COURT ACTION</b>
Appellant.	)	
_____	)	

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 21<sup>st</sup> day of March, 2008.

**GUAM POWER AUTHORITY (GPA)**

By:   
\_\_\_\_\_  
**JOAQUIN C. FLORES, P.E.**  
**General Manger**