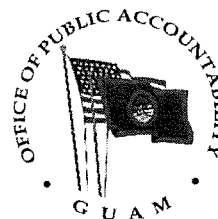


Suite 401 DNA Building
 238 Archbishop Flores St.
 Hagåtña, Guam 96910



FAX

To:	John M. Benavente, P.E. General Manager D. Graham Botha, Esq. General Counsel Guam Power Authority P.O. Box 2977 Agana, Guam 96932	From:	Doris Flores Brooks Public Auditor Office of Public Accountability
Phone: Fax:	(671) 648-3225/3203/3002 (671) 648-3290/648-3165	Pages:	17 (including cover page)
CC:	Daniel J. Berman, Esq Berman O'Connor & Mann Attorney for Appellant Shanghai Electric Power Japan Co., Ltd. and Terra Energy, Inc. Suite 503, Bank of Guam Bldg. 111 Chalan Santo Papa Hagatna, Guam 96910	Date:	August 22, 2017
Phone: Fax:	(671) 477-2778 (671) 477-4366	Phone: Fax:	475-0390 x. 208 472-7951

Re: OPA-PA-17-008 Notice of Receipt of Appeal

Urgent For Review Please Comment Please Reply Please Recycle

Comments:

Please acknowledge receipt of this transmittal by re-sending this cover page along with your firm or agency's receipt stamp, date, and initials of receiver.

Thank you,
 Jerrick Hernandez
 Auditor
jhernandez@guamopa.org

This facsimile transmission and accompanying documents may contain confidential or privileged information. If you are not the intended recipient of this fax transmission, please call our office and notify us immediately. Do not distribute or disclose the contents to anyone. Thank you.



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

August 22, 2017

John M. Benavente
General Manager
Guam Power Authority
P.O Box 2977
Hagatna, Guam 96932-2977

Re: Notice of Receipt of Appeal – OPA-PA-17-008

Dear Mr. Benavente,

Please be advised that Shanghai Electric Power Japan Co., Ltd. and Terra Energy, Inc. (SEPJ) filed an appeal with the Office of Public Accountability (OPA) on August 21, 2017 regarding the Guam Power Authority's (GPA) response to SEPJ and Terra Energy's protest relative to Invitation for Bid No.: GPA-IFB-070-16; a procurement solicitation for Renewable Energy Resource Phase II. OPA has assigned this appeal case number OPA-PA-17-008.

Immediate action is required of GPA pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA's office and on its website at www.opaguam.org. The notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeals. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), please submit one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated, to OPA by **Tuesday, August 29, 2017**, five work days following receipt of this notice of appeal; and one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Div. 4, Chap. 12, §12105, by **Wednesday, September 6, 2017**, ten work days following receipt of this notice of appeal.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to SEPJ. In addition, OPA respectfully asks that the Legislature provide one original and two copies of the procurement record and agency report as the Guam Procurement Law and Regulations require only one copy. The three copies requested by OPA are

distributed as follows: Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 208, or jhernandez@guamopa.com, should you have any questions regarding this notice.

Sincerely,

A handwritten signature in black ink, appearing to read 'Llewelyn Terlaje', with a stylized flourish extending to the right.

Llewelyn Terlaje
Audit Supervisor

Enclosure: First 14 Pages of Notice of Appeal – OPA-PA-17-008

Cc: Daniel J. Berman, ESQ, Attorney for SEPI

1 DANIEL J. BERMAN, ESQ.
2 BERMAN O'CONNOR & MANN
3 Suite 503, Bank of Guam Bldg.
4 111 Chalan Santo Papa
5 Hagåtña, Guam 96910
6 Telephone No.: (671) 477-2778
7 Facsimile No.: (671) 477-4366

8 Attorneys for Appellants:
9 SHANGHAI ELECTRIC POWER JAPAN CO., LTD. and
10 TERRA ENERGY, INC.

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FILE NO OPA-PA: 17-008

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

9 IN THE APPEAL OF

10 SHANGHAI ELECTRIC POWER
11 JAPAN CO., LTD. and TERRA
ENERGY, INC.,

12 Appellants.

Appeal No. OPA-PA-17-008

NOTICE OF PROCUREMENT APPEAL

13
14 Appellant Information

15 Name: Shanghai Electric Power Japan Co., Ltd. and Terra Energy,
16 Inc. ("SEPJ")

17 Mailing Address: 32F Marunouchi Building, 2-4-1
18 Marunouchi, Chiyoda-ku, Tokyo, Japan

19 For purposes of this Appeal, please direct filings and
correspondence to SEPJ's legal counsel:

20 Daniel J. Berman, Esq.
21 Berman O'Connor & Mann
22 Suite 503, Bank of Guam Building
111 Chalan Santo Papa
Hagatna, Guam 96910

23 Business Address: 32F Marunouchi Building, 2-4-1
Marunouchi, Chiyoda-ku, Tokyo, Japan

24 Email Address: djberman@pacificlawyers.law

25 Daytime Contact No.: 477-2778

26 Fax No.: 477-4366

1 Appeal Information

2 A. Purchasing Agency: Guam Power Authority

3 B. Procurement No.: GPA-IFB-070-16, Phase II

4 C. Decision being appealed was made on August 3, 2017, by John M.
5 Benavente, P.E., GPA General Manager, which was received by undersigned counsel on
6 August 4, 2017. A copy of said Decision (without exhibits) is attached hereto as Exhibit
7 "1".

8 D. Appeal is made from a Decision on Protest of Method, Solicitation or
9 Award.

10 E. Names of competing Bidders, Offerors, or Contractors known to
11 appellant: Hanwha Energy Corporation and Pacific Petroleum Corporation
12 ("Hanwha"); Korea Electric Power Corporation and LG CNS Consortium ("KEPCO");
13 LSIS; Quantum Utility Generation; Sean and NexGeo Consortium; and Pacific Solar
14 Storage ("PSS" or "SolarCity").

15 Statement Supporting the Appeal

16 1. Background

17 GPA-IFB-070-16, Phase II, was issued on May 13, 2016. On July 10, 2017, GPA
18 recommended awards to Hanwha and KEPCO. See Exhibit "2". SEPJ was notified that
19 its bids were rejected due to high price in GPA's "Bid Status" dated July 10, 2017. See
20 Exhibit "3". SEPJ timely filed its protest with GPA on July 24, 2017. A copy of the SEPJ
21 protest is attached as Exhibit "4" (without exhibits).

22 This procurement is for renewable energy resources. The IFB provides that
23 "... GPA intends to acquire a total of 60 MW [Megawatt] of renewable capacity ..." See
24 IFB, Volume I, Introduction, p. 9 of 222. Despite its stated intention to limit the
25 procurement to 60 MW, GPA made four awards for 30 MW apiece. According to the
26 GPA Price Proposal Evaluation, which was attached to GPA's Denial of Procurement
27 Protest, and is attached hereto as Exhibit "5", the lowest bid was that of Hanwha
28

1 Energy Corporation and Pacific Petroleum Trading Corporation (“Hanwha”) for its Site
2 2. GPA also determined that Hanwha was the second lowest bidder for its Site 1. GPA
3 determined that the third and fourth lowest bids were from KEPCO for its proposed
4 Site A and Site B.

5 Hanwha and KEPCO had each submitted two bids for 30 MW apiece, totaling
6 60 MW for each of those two bidders, which was in accordance with this 60 MW
7 procurement. By accepting the bids for all four projects, GPA doubled the size of the
8 procurement from 60 MW to 120 MW. The effect of this doubling the size of the
9 procurement after bid opening will be discussed in a subsequent section of this appeal.

10 SEPJ Site 2 was ranked as the fifth lowest bidder by GPA, so the SEPJ Site 2 was
11 first runner-up. One of SolarCity’s bids was ranked sixth. However, GPA had refused
12 to make an exception necessary to accept that SolarCity bid. SEPJ Site 1 was ranked
13 seventh, but due to the inability of GPA to accept the SolarCity bid, SEPJ Site 1 is
14 actually sixth among compliant bids. Thus the SEPJ Sites 2 and 1 were the first and
15 second runners-up. Although GPA’s procurement denial letter referred to its LEAC
16 rate, there is no requirement in the IFB that a bid be lower than GPA’s LEAC rate.

17 **2. GPA’s Acceptance Of The Hanwha Bids Violated The IFB**

18 In Part III of its Protest to GPA, SEPJ protested what it claimed was an improper
19 sole source award to Hanwha of a microgrid. In its rejection of SEPJ’s protest, GPA
20 stated in paragraph 3 that “... a reading of the entire IFB would indicate that GPA
21 allowed all bidders, including Shanghai Power, to bid on an option for a microgrid.”
22 This is incorrect because a microgrid was not even part of what was being procured in
23 the IFB, and any award for a microgrid is improper.

24 At page 9 of 222 of the IFB (Volume I Commercial Terms & Conditions), the IFB
25 stated “The RI-ESS [Renewable Integration Energy Storage System] must be capable of
26 the following functions for microgrid options (priced option) ...”, and lists certain
27 functions. This language is repeated on page 50, but there is no further reference to a
28

1 microgrid in the IFB. These statements do not imply that a microgrid is part of the
2 procurement, but only that the submitted projects must be capable of certain functions
3 for microgrid operations.

4 That language in the IFB generated a whole host of bidder questions. Attached
5 as Exhibit "6" are excerpts from GPA's answers to bidders' questions dated August 10,
6 2016. The first question regarding the microgrid appears on page 5: "Kindly explain
7 the purpose of microgrid operation of RI-ESS as well as the required function." GPA
8 responded that "GPA's requirements for microgrid are informational. GPA will
9 eventually develop plans for and execute projects to establish microgrids supporting
10 major loads ..." (emphasis added). On page 10, another bidder asked a question
11 regarding the microgrid, and GPA made the same exact response. On page 17, a bidder
12 requested GPA to provide further details regarding the microgrid, and GPA provided
13 the same exact response. On page 37, a bidder pointed out that there are no microgrid
14 technical requirements provided in the IFB, and requested GPA to provide all
15 requirements. Once again, GPA gave the same exact response. Other bidders asked
16 similar questions on page 39 and 43, and received the same response from GPA. GPA
17 provided its standard answer in response. It is clear that GPA was merely requesting
18 an informational bid for a microgrid in the event it determined to procure a microgrid
19 in the future. The actual procurement of a microgrid was simply not part of this IFB.

20 The problem here first came to light when GPA requested its governing entity,
21 the Consolidated Commission on Utilities ("CCU"), for authorization to petition the
22 Public Utilities Commission for approval to award two 30 MW proposals each to
23 Hanwha and KEPCO. A copy of the CCU Resolution No. 2017-25 is attached hereto as
24 Exhibit "7". On page 1 at lines 16-17, the CCU stated that "... in addition to its base
25 proposal, Hanwha submitted a fixed price proposal for a GPA requested microgrid
26 operations option ...", incorrectly assuming that a microgrid was part of what was
27 being procured, as opposed to a mere request for an informational bid. CCU then
28

1 stated on lines 20-22 that "GPA is considering the Hanwha microgrid operations option
2 to improve management of system generation and dispatching which would be in
3 addition to the proposed energy rate. Exhibit "B" [to CCU Resolution] provides a
4 summary of the Hanwha microgrid operations..." Exhibit "B" in turn refers to
5 Hanwha's "MicroGrid Operation Fixed Annual Fee". In year 1, the annual fee is stated
6 to be \$1,287,082 for each of Hanwha's two proposals, totaling a fixed fee of \$2,574,164 in
7 the first year alone. Annual fees for microgrid operations are listed for the next 24
8 years.

9 The fixed annual fee for Hanwha's microgrid over a 25 year period totals
10 \$27,223,501, times two microgrids, this total is an astounding \$54,447,002. This is a vast
11 award based on a mere informational bid. SEPJ believes this provides the explanation
12 for Hanwha's impossibly low bid as it detailed in its protest to GPA. One does not have
13 to be paranoid to conclude that Hanwha is receiving preferential treatment from GPA.
14 GPA did not have any right to even consider an arrangement whereby Hanwha would
15 receive \$54,447,002 over 25 years based on a mere informational bid. However, GPA
16 has included Hanwha's microgrid in the Renewable Energy Purchase Agreement
17 ("PPA") as shown by the attached excerpt from the draft PPA as of June 19, 2017. See
18 Exhibit "8". The approval of the PPA was scheduled for approval at CCU meeting on
19 July 25, 2017, see Exhibit "9", which approval did not occur because of this protest.

20 Further evidence of Hanwha's preferential treatment is found in the other
21 informational bids. Hanwha's two bids (one each for its two projects) are attached as
22 Exhibits "10" and "11". SEPJ's two bids are in a far lower amount. See Exhibits "12"
23 and "13". KEPCO's bids are in an amount slightly higher than SEPJ. See Exhibits "14"
24 and "15". Hanwha's informational bids are three times higher than the SEPJ and
25 KEPCO informational bids. Thus GPA is attempting to convert an informational bid
26 from Hanwha, which is three times as high as other informational bids, into an award
27 to Hanwha of \$54,447,002. Since a microgrid is not even part of this procurement, this is
28

1 an improper sole source award. Both of Hanwha's proposals should be disqualified
2 and rejected.

3
4 **3. GPA's Action In Doubling The Size Of The Procurement To 120 MW Was
Improper And The Procurement Must Be Rebid**

5 In its Protest to GPA, SEPJ protested the action of GPA in doubling the size of the
6 procurement from 60 MW to 120 MW after bid opening. The IFB makes abundantly
7 clear that it is only for 60 MW of renewable energy. There is no hint in the IFB that GPA
8 may award 120 MW.

9 In its rejection of SEPJ's protest, GPA stated in paragraph 1 that there was no
10 change made to the size of the maximum 30 MW per location, and bidders were not
11 prohibited from submitting as many 30 MW projects as they deemed appropriate. This
12 entirely misses the point. It is only common sense that a vastly larger project may result
13 in efficiencies of scale which result in lower bids. For example, everything else being
14 equal, a 4-bedroom house does not cost 100% more than a 2-bedroom house, and the
15 construction cost per square foot would naturally be lower for a 4-bedroom house. That
16 is the situation here as explained in the Declaration of Diao Xu (General Manager of
17 SEPJ), attached as Exhibit "16", and the Declaration of Dale Gauthier (Vice-President of
18 AECOM, Engineering/Plan/Design for SEPJ), attached as Exhibit "17". Had SEPJ been
19 aware that GPA intended to award 120 MW, it would have bid four 30 MW projects,
20 and due to efficiencies of scale of this much larger project, bid a lower price per unit of
21 renewable energy. SEPJ acknowledges the same is probably true for the other bidders
22 whose bids were rejected due to high price.

23 There is abundant legal authority that holds that when a government
24 substantially expands the scope of a procurement after bid opening, that action is
25 improper and the procurement must be rebid. For example, in *Cardinal Maintenance
26 Service, Inc. v. U.S.*, 63 Fed. Cl. 98 (2004), the Court of Federal Claims held that the Air
27 Force violated the Competition in Contracting Act (CICA) by materially changing a
28

1 contract after awarding it rather than issuing a new procurement. The contract at issue
2 was for custodial services at an Air Force base in Hawaii. The solicitation provided that
3 the Air Force would have the right to expand or contract the quantity and type of
4 custodial services to be provided by the winning bidder following the award. After the
5 initial award, however, the contract was modified eight times. The plaintiff argued that
6 the Air Force violated the CICA by authorizing contract modifications outside the scope
7 of the original contract, and that a new solicitation, affording bidders full and open
8 competition, was required. The court noted that whether the Air Force violated CICA
9 when it modified the contract depended on whether the modifications materially
10 changed the scope of the original contract. The answer, the court held, turned on
11 whether the original contract, as modified, called for essentially the same performance.
12 The court found that the changes in the modification were considerable, and the
13 amount of additional work would nearly double the price of the contract that was
14 awarded. Concluding that the originally awarded contract was materially changed in
15 violation of CICA's competition requirements, the court ruled for the plaintiff and
16 ordered that the government prepare a new procurement. *See also Executive Business*
17 *Media, Inc. v. United States*, 3 F.3d 759 (4th Cir. 1993).

18 In *Krygoski Construction Co. Inc. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996), the
19 government did the right thing. The Army had solicited bids for the demolition of an
20 abandoned air field that contained asbestos contamination. The Army estimated that
21 the asbestos removal would constitute about 10% of a total contract price of about
22 \$400,000.00, or \$40,000.00. After the contract was awarded, the parties discovered that
23 the asbestos removal work was greatly understated, and that the completion of the
24 contract would require a change in its terms to allow approximately \$360,000.00 in
25 additional asbestos removal costs. *Id.* at 1544. Rather than implement this additional
26 work with a change order, the Army decided to terminate the contract for convenience,
27 and rebid the contract. A different contractor won on the rebid. The original contractor
28

1 objected and sued, arguing that the Army acted improperly in terminating its contract.
2 The court held that the Army had ample justification for conducting a competitive
3 reprocurement. *Id.* at 1545. In that case, there was not a change in the nature of the
4 work itself, which included asbestos removal, but instead a dramatic increase of the
5 scope of that work in the procurement. Fairness to the bidders and the public interest
6 mandated a reprocurement.

7 The test is whether the bidders would have expected the expanded scope of the
8 procurement to fall within the contract's changes clause. *See AT&T Communications, Inc.*
9 *v. Wiltel Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993). There was no way for the bidders here
10 to anticipate that a procurement stated to be for 60 MW would turn out to be a
11 procurement for 120 MW.

12 It is easy to see the mischief which will follow from the government issuing a
13 solicitation for a stated quantity of goods or services, and then greatly increasing the
14 amount after bid opening. When that happens, there is no competition for the larger
15 amount. The government could, for example, issue a procurement for 1,000 computers
16 with the award based on the amount offered per computer, and then increase the award
17 to 10,000 computers at that price per computer. In that case, there is no way of knowing
18 which bidder would have won the procurement for 10,000 computers. In fact, the
19 larger procurement might have prompted a bid from a vendor who had not been
20 interested in bidding on the smaller procurement. *See CCL, Inc. v. United States*, 39 Fed.
21 Cl. 780, 790 (Ct. Cl. 1997) (non-bidder may protest award that should have been subject
22 to procurement).

23 As applied to this case, it can be concluded with confidence that due to
24 efficiencies of scale, the bids for a 120 MW procurement would have been less per unit
25 of power than a procurement for 60 MW. The only way to determine how much lower
26 will be a rebid of this procurement for 120 MW.

1
2 **4. A Crucial Portion Of The Specifications Are Ambiguous And Unfair And The**
3 **Procurement Must Be Rebid**

4 In its Protest to GPA, SEPJ referenced certain correspondence between KEPCO
5 and GPA. This included a letter dated February 3, 2017 from GPA to KEPCO, marked
6 as Exhibit "6" to SEPJ's Protest, and attached hereto as Exhibit "18". In question 4,
7 KEPCO inquires whether it is possible to interconnect its two Sites with overhead lines.
8 GPA responded by recommending the underground installation of transmission lines
9 based on considerations of reliability. KEPCO responded to GPA by letter dated
10 February 6, 2017, which was attached as Exhibit "3" to the Protest, and is attached
11 hereto as Exhibit "19". In its letter, KEPCO makes clear that despite GPA's
12 recommendation, it based its bid on overhead rather than underground lines. Despite
13 this reservation and apparent lack of agreement between KEPCO and GPA on this and
14 other issues, the GPA Evaluation Committee recommended an award to KEPCO the
15 next day, February 7, 2017. See Exhibit "20", which was attached as Exhibit "5" to the
16 SEPJ protest.

17 GPA had made its position regarding overhead versus underground
18 transmission lines clear well before the time for bid submission. Attached hereto as
19 Exhibit "21" is an excerpt from GPA's answers to bidder questions dated July 15, 2016.
20 Question 13 on page 4 asked whether interconnection lines may be overhead, or
21 whether they had to be underground. GPA responded that it "... strongly recommends
22 underground lines for interconnection between the renewable generation and GPA
23 power system for their substantially greater reliability, especially during destructive
24 storms and typhoons Guam often experiences relative to overhead lines ...". (emphasis
25 added).

26 Having said that, SEPJ recognizes that GPA did not rule out the possibility of
27 overhead transmission lines, and that KEPCO's proposals may not be rejected solely
28 because KEPCO utilizes above ground transmission lines. The problem is that

1 underground lines are far more expensive to install than above ground lines. On page
2 54 of the IFB, GPA stated its recommendation for underground lines, and identified the
3 transmission costs per mile of \$1.24M for overhead lines, and \$2.20M per mile for
4 underground. SEPJ estimates that between one-fourth and one-third of the total cost of
5 the bidders' submissions is for the interconnection of the power producing facility and
6 GPA's electric grid. Thus a bidder's choice between above ground lines or
7 underground lines has a massive effect on the amount of its bid.

8 SEPJ used underground lines in its bid based on GPA's "strong
9 recommendation". SEPJ assumes other bidders likewise provided for underground
10 lines given that their bids were higher than the bids of SEPJ.¹ The failure of GPA to
11 make a clear choice in the IFB between underground lines and above ground lines
12 resulted in the bids not being apple to apple. That means that a bidder which followed
13 GPA's "strong recommendation" to provide underground lines is in effect penalized.
14 That is extremely unfair to bidders, such as SEPJ, that took seriously GPA's strong
15 recommendation that underground lines be utilized. This problem is compounded by
16 the fact that once bidders were qualified, low price is all that counted. Bidders whose
17 bid used expensive underground lines did not get any extra points for this, and would
18 inevitably lose.

19 Guam procurement law provides in relevant part at 5 GCA § 5211(e) that:

20 ... Bids shall be evaluated based on requirements set forth in
21 the invitation for Bids, which may include criteria to
22 determine acceptability such as inspection, testing, quality,
23 workmanship, delivery and suitability for a particular
24 purpose. Those criteria that will affect the bid price and be
25 considered in evaluation for award shall be objectively
26 measurable, such as discounts, transportation costs, and
27 total or life cycle costs. The Invitation for Bids shall set forth

28 ¹ Pursuant to 2 GAR § 3109(v)(2)(d), the unpriced technical offers of bidders who were not awarded the contract are not available to SEPJ. However, that section does permit inspection when essential to assure confidence in the integrity of the procurement process. The Public Auditor thus has the authority to review other bids that were rejected due to high price to determine whether those bids were based on underground transmission lines.

1 the evaluation criteria to be used. No criteria may be used in
2 bid evaluation that are not set forth in the Invitation for Bids.
(emphasis added)

3 This provision is necessary to ensure that bidders are in fact bidding in all respects on
4 the same procurement. This theme is repeated in Guam's procurement regulations. 2
5 GAR § 4102(a)(1) provides in relevant part that "... Specifications shall be drafted with
6 the objective of clearly describing the territory's requirements". 2 GAR
7 § 3115(d)(2)(A)(ii) provides that a solicitation may be cancelled after bid opening if
8 "... ambiguous or otherwise inadequate specifications were part of the solicitation ..."
9 The Public Auditor has recognized that ambiguous or conflicting IFB requirements
10 mandate that the solicitation be cancelled. See OPA Decision dated March 20, 2015, in
11 *In the Appeal of Pacific Data Systems, Inc.*, OPA-PA-14-007. That ruling is consistent with
12 case law on this issue.

13 In *Inferno Associates v. Division of Administration*, 692 So.2d 1280 (La. App. 1997),
14 the state issued an IFB for construction and installation of three medical waste
15 incinerators. Two bids were submitted. The lowest bidder failed to provide
16 specifications for the construction. Although the IFB required that detailed construction
17 specifications be furnished with the bid package, it did not define what was meant by
18 "detailed construction specifications". The hearing officer determined that the IFB was
19 ambiguous as to what information was required, and when it was required. The
20 hearing officer ordered that the solicitation be set aside as a result of this ambiguity. On
21 appeal, the court upheld the decision of the hearing officer, concluding that the
22 evidence demonstrated that the specifications as written could not fairly be used to
23 evaluate the bids. *Id.* at p. 1284. See also *Caber Systems, Inc. v. Dept. of General Services*,
24 530 So.2d 325 (Ct. App. Fla. 1988); *Mark Dunning Industries, Inc. v. Perry*, 890 F.Supp.
25 1504 (M.D. Ala. 1995); *Gale v. City of St. Paul*, 98 N.W.2d 377 (1959).

26 The point is that bids must be apple to apple. If the specifications are
27 incomplete, as in the *Inferno Associates* case, this is not possible. It is respectfully
28

1 submitted that the situation here is far more egregious. The problem is not that GPA
2 failed to specify what it wanted, since it “strongly recommended” underground
3 transmission lines, but instead that the solicitation was highly misleading since above
4 ground transmission lines were not prohibited. It is predictable that the more
5 responsible bidders would provide for expensive underground lines in their bid based
6 on GPA’s strong recommendation. It then becomes inevitable that a bidder who
7 ignores GPA’s recommendation and provides for above ground lines will be the
8 winner. That is extremely unfair.

9 The only fair result is that GPA be ordered to clearly decide whether this
10 procurement requires above ground transmission lines or underground transmission
11 lines, and issue a new solicitation so that all bidders will be bidding on the same project.

12 **5. The SolarCity Bid Ranked Number 6 Was Not Accepted By GPA**

13 Although in the GPA Price Proposal Evaluation, Exhibit “5”, a SolarCity (also
14 referred to as PSS) bid was ranked number 6, that bid could not be accepted since GPA
15 refused to grant an exemption to SolarCity, which exemption was necessary for that
16 SolarCity bid to be compliant with the IFB.

17 Attached hereto as Exhibit “22” is a list of bidder questions to which GPA
18 responded on December 9, 2016. In its question on page 2, SolarCity explained that in
19 its bid submission, it understood that it could use the existing GPA transmission line
20 from Dandan transfer station to the Talofofu substation to interconnect with the GPA
21 grid. It acknowledged that possibility was eliminated by Item 1 of Amendment VII to
22 the IFB. SolarCity stated that had it known that the use of the GPA transmission line
23 was not viable, it likely would have pursued other options and proposed a different
24 technical solution. It stated that altering its approach at this point would effectively
25 require it to start over.

26 For that reason, SolarCity requested an exemption to Item #1 of Amendment
27 VIII. However, GPA’s response was that it was unable to grant the requested
28

1 exemption. As a result, SolarCity's bid ranked number 6 is contrary to Item #1 of
2 Amendment VIII. Its bid ranked number 6 has no interconnection to the GPA grid, and
3 cannot be considered. This is confirmed by abstract of the SolarCity bid prepared by
4 GPA and attached as Exhibit "23". The less expensive SolarCity bid, ranked as number
5 6, was noted to be "w/out transmission". The Price Proposal Evaluation should be
6 understood as a ranking based on price, and not as a statement of qualification. As a
7 result, the SEPJ Site 1, which is ranked at number 7 on the Price Proposal Evaluation,
8 should in fact rank as number 6. That means that the SEPJ Sites 2 and 1 are the first and
9 second runners-up.

10 **Ruling Requested**

11 SEPJ requests that the Hanwha bid submission for both of its Sites be
12 disqualified and rejected, and that SEPJ as first and second runner-up be granted an
13 award for its Site 2 and Site 1 in accordance with the terms stated in the SEPJ bid
14 submission.

15 Alternatively, SEPJ requests that the Public Auditor order a rebid of this
16 procurement due to the expansion of the scope of the procurement after bid opening
17 resulting from GPA's doubling its size from 60 MW to 120 MW, and the failure of GPA
18 to unambiguously state whether it required above ground or underground
19 transmission lines in the IFB, and the resulting inevitable failure of the bidders to
20 submit parallel bids.

21 **Declaration Re Court Action**

22 Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise
23 expresses interest in a decision by the Public Auditor, the Office of Public
24 Accountability will not take action on any appeal where action concerning the protest
25 or appeal has commenced in any court.

26 The undersigned party does hereby confirm that to the best of his or her
27 knowledge, no case or action concerning the subject of this Appeal has been
28

1 commenced in court. All parties are required to and the undersigned party agrees to
2 notify the Office of Public Accountability within 24 hours if court action commences
3 regarding this Appeal or the underlying procurement action.

4 DATED this 21st day of August, 2017.

5 Respectfully submitted,

6 **BERMAN O'CONNOR & MANN**
7 Attorneys for Appellants
8 SHANGHAI ELECTRIC POWER JAPAN CO.,
9 LTD. and TERRA ENERGY, INC.

10 By:

11 
12 _____
13 DANIEL J. BERMAN

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Phone: Fax:	(671) 648-3225/3203/3002 (671) 648-3290/648-3165	Pages:	17 (including cover page)
CC:	Daniel J. Berman, Esq. Berman O'Connor & Mann Attorney for Appellant Shanghai Electric Power Japan Co., Ltd. and Terra Energy, Inc. Suite 503, Bank of Guam Bldg. 111 Chalan Santo Papa Hagåtña, Guam 96910	Date:	August 22, 2017
Phone: Fax:	(671) 477-2778 (671) 477-4366	Phone: Fax:	475-0390 x. 208 472-7951

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003	699	4774366	09:26:30 a.m. 08-22-2017	00:05:16	17/17	1	EC	HS	CP19200