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PROCUREMENT APPEALS
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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-17-008
)	
Shanghai Electric Power Japan Co., Ltd.))	
and Terra Energy, Inc.,)	AGENCY REPORT
)	
Appellant.)	
_____)	

Appellee GUAM POWER AUTHORITY (GPA), by and through its attorney, D. GRAHAM BOTHA, ESQ., hereby submits its Agency Report in the form required under 2 G.A.R. §12105:

(a) A copy of the protest: ***Previously submitted to the Office of the Public Auditor ("OPA") on August 29, 2017, by GPA.***

(b) A copy of the bid or offer submitted by the Appellant and a copy of the bid or offer that is being considered for award or whose bid or offer is being protested, if any had been submitted prior to the protest: ***Previously submitted to the Office of the Public Auditor ("OPA") on August 29, 2017, by GPA.***

(c) A copy of the solicitation, including the specification or portions thereof relevant to the protest: ***Previously submitted to the Office of the Public Auditor ("OPA") on August 29, 2017, by GPA.***

(d) A copy of the abstract of bids or offers or relevant or portions thereof relevant to the protest: ***Previously submitted to the Office of the Public Auditor ("OPA") on August 29, 2017, by GPA.***

(e) Any other documents which are relevant to the protest, including the contract, if one has been awarded, pertinent amendments, and plans and drawings:

Previously submitted to the Office of the Public Auditor (“OPA”) on August 29, 2017, by GPA.

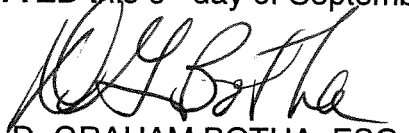
(f) The decision from which the Appeal is taken, if different than the decision submitted by Appellant: ***Previously submitted to the Office of the Public Auditor (“OPA”) on August 29, 2017, by GPA.***

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

(h) If the award was made after receipt of the protest, the report will include the determination required under 2 G.A.R. §9101(e): ***Not applicable.***

(i) A statement in substantially the same format as Appendix B to this Chapter, indicating whether the matter is the subject of a court proceeding: ***Previously submitted to the Office of the Public Auditor (“OPA”) on August 29, 2017, by GPA.***

RESPECTFULLY SUBMITTED this 6th day of September, 2017, by:


D. GRAHAM BOTHA, ESQ.
GPA General Counsel

STATEMENT ANSWERING ALLEGATIONS OF APPEAL

(As required by 2 G.A.R. §12105(g))

I. RELEVANT BACKGROUND

A. GPA SOLICITS BIDS FOR IFB GPA-070-16, RENEWABLE ENERGY RESOURCE PHASE II

On May 13, 2016, Guam Power Authority (“GPA”) issued Multi-Step Invitation for Bid, GPA-070-16, Renewable Energy Resource Phase II. Procurement Record, (Tab ”1”). Eighty-four bidders expressed interest in the IFB from May 20, 2016 to October 19, 2016. Twelve companies submitted bids in response to the Multi-Step IFB, LSIS, Hecate Energy, Global Sourcing USA Inc., Terra Solar, SEAN & NEXGEO Consortium, KEPCO-LG CNS, Pacific Progress LLC, Pacific Solar Storage, Hanwha Energy/Pacific Petroleum Trading Corp, Shanghai Electric Power Japan Co. Ltd & Terra Energy, Inc., Guam Clean Energy/Quantum Utility and Green Globe Solutions. Tabs 15-24. Phase I Bid Abstract, October 20, 2016. (Tab “14”). Prior to submission of the technical proposals, the twelve bidders had an opportunity to submit questions regarding the IFB. GPA issued amendments II to VII in response to these questions, and other amendments to clarify the IFB. Procurement Record, Tab “7-12”.

On October 20, 2016, the sealed technical proposals of the twelve bidders were opened in the presence of company representatives. The representatives were provided a copy of the Abstract of Bids which lists the technical proposals for the twelve bidders. The Bid Abstract-Phase I, is contained in the procurement record at Tab “14.” Each of the twelve bidders submitted technical proposals for either one site or two sites.

On November 8, 2016, the evaluation committee met and recommended that seven of the twelve bidders be deemed qualified under the Phase I technical evaluation, and five of the twelve bidders be deemed not qualified under the Phase I technical evaluation to proceed to Phase II – price proposals. Seven bidders with fourteen project sites were qualified, Pacific Solar Storage, Shanghai Electric Power Japan Co., Ltd & Terra Energy Inc. (“Shanghai”), Hanwha Energy Corporation/Pacific Petroleum Trading Corp. (“Hanwha”), KEPCO-LG CNS Consortium (“KEPCO”), LSIS, SEAN Engineering & Construction Co., Ltd., Guam Clean Energy/Quantum Utility Generation, LLC. (Tab “25”). Five bidders were not qualified in the Phase I technical proposal, Green Globe Solutions, Global Sourcing USA, Inc., Hecate Energy LLC, Pacific Progress, LLC and Terra Solar LLC. (Tab “25”).

Amendment No. VIII and letters were sent to the qualified bidders on November 10, 2016. (Tab “26”). Phase I letters were sent to the non-qualified bidders on November 10, 2016 (Tab “27”). Pacific Progress LLC protested the disqualification and a stay of procurement was issued on November 28, 2016. (Tab “29”). The protest was denied and a lift of stay was issued December 5, 2016. (Tab “30”). Amendment IX to XIII were sent to Phase II bidders. (Tabs “31-35”). On January 13, 2017, the sealed price proposals for the seven bidders and fourteen project sites were opened in the presence of company representatives. (Tab “38”). A denial of procurement protest letter dated January 17, 2017 was sent to Global Sourcing USA, Inc. citing a lack of bid bond as the basis for disqualification. (Tab “39”). Shanghai Electric Power Japan (SEPJ) sent a letter dated January 27, 2017, extending its technical price proposal for its two sites until December 31, 2017. (Tab “41”).

On January 27, 2017, the evaluation committee sent a price proposal clarification to

Hanwha and KEPCO. Hanwha and KEPCO both sent a response back to GPA dated February 6, 2017 confirming that their price proposals included all the infrastructure upgrades and interconnections required by GPA. (Tab “42”). The evaluation committee recommended award of Hanwha site 1 (30MW) and 2 (30MW), and KEPCO site A (30MW) and B (30MW) based on the technical price proposals submitted. (Tab “43”). The Phase II – Bid Abstract and evaluation committee memo reflect the Hanwha Site 2 price of **\$.06245/kWh** and the Hanwha Site 1 price of **\$.06599/kWh**, and the KEPCO Site A and Site B price of **\$.0855/kWh**. The Shanghai prices are SEPJ Site 2 of **\$.128/kWh** and SEPJ Site 1 of **\$.1613/kWh**. (Tab “43” and “38”).

A letter of intent to award, subject to CCU and PUC approval and the completion of a system impact study, interconnection agreement and power purchase agreement, was sent to Hanwha and KEPCO on February 8, 2017. (Tab “45”). The CCU Resolution No. 2017-25, dated June 6, 2017, approved the award of a power purchase agreement to Hanwha and KEPCO, subject to PUC approval, and completion of the interconnection agreement and system impact study. (Tab “44”). Notice of Intent to award letters, Bid Status letters, and Bid Analysis dated July 10, 2017, were sent to all seven Phase II bidders. (Tab “46”). On July 24, 2017, Shanghai submitted a letter of protest dated July 24, 2017. (Tab “47”). A Stay of Procurement letter was issued to all Phase II bidders on July 24, 2017. (Tab “48”). KEPCO responded to GPA on July 29, 2017 and Hanwha responded to GPA on August 1, 2017. (Tab “49”). GPA denied the Shanghai protest on August 3, 2017. (Tab “50”). GPA issued lift of stay letters on August 7, 2017. (Tab “51”). Shanghai filed a protest with the Office of Public Auditor on August 22, 2017. (Tab “52”). On August 22, 2017, GPA issued a Stay of Procurement, and letters were sent to

Phase II bidders. (Tab “52”).

II. DISCUSSION

- A. THE HANWHA AND KEPCO BIDS WERE RESPONSIVE, AND THE AWARDS FOR RENEWABLE ENERGY RESOURCE PHASE II WERE PROPERLY AWARDED TO HANWHA AND KEPCO AS BOTH BIDDERS MET THE SPECIFICATIONS IN THE MULTI-STEP IFB.

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).

Seven bidders submitted technical price proposals for fourteen sites which were opened by GPA on January 13, 2017. The evaluation committee recommended award of the four lowest site proposals each consisting of a 30MW solar project. The committee evaluation memo and the Bid Abstract – Phase II clearly sets forth the prices of the bidders, including Shanghai, Hanwha and KEPCO. Based on the bid abstract, the two proposals submitted by Shanghai Power, SEPJ Site 1 and SEPJ Site 2, based on price are the #5 and #7 bidder at a first-year price of \$.128/kWH for SEPJ Site 2 and \$.1613/kWh for SEPJ Site 1. This compares with the Hanwha Site 2 price of \$.06245/kWh and the Hanwha Site 1 price of \$.06599/kWh, and the KEPCO Site A and Site B price of \$.0855/kWh. In addition, even the least expensive bid submitted by Shanghai Power, the SEPJ Site 2 first year price of \$.128/kWh exceeds GPA’s avoided cost and the LEAC rate of \$.105/kWh at the time of the price proposal evaluation.

Shanghai states that its bids for 30MW solar projects should be ranked #5 and #6 based

on the disqualification of one of the Solar City bids which was #6 on the bid abstract. Shanghai acknowledges that it would not otherwise be awarded the bid, and therefore it contends that GPA's acceptance of the Hanwha bid and the proposed award of a microgrid option to Hanwha should result in the disqualification of the Hanwha bid. The bid specifications require that each bidder be evaluated based on the bidder's guaranteed minimum energy production and a price per kilo watt hour (kWh). GPA evaluated the technical price proposals for the fourteen sites based on the Strategist program for based fuel cost, high fuel cost, and the price proposals for years 1-25 and the proposed PV capacity of each proposal. GPA requested that bidders submit a fixed price proposal for a micro-grid as an option, which would not be considered in evaluating the price proposals of each bidder. The bidders, including Shanghai, Hanwha, and KEPCO, submitted a fixed price proposal for a micro-grid to GPA.

Shanghai claims that a proposed award of Hanwha to include a micro-grid demonstrates GPA's preferential treatment to Hanwha, but then correctly notes that the CCU has not approved the proposed PPA with Hanwha. What Shanghai fails to mention is that even if the Hanwha micro-grid were approved and the cost of the Hanwha micro-grid at \$1,287,082 per year is added to each of Hanwha's 30MW proposals, that the total Hanwha price per kWh will still be less than the KEPCO price of \$.0855/kWh and substantially less the Shanghai Site 2 first year price of \$.128/kWh and almost half the price of the Shanghai Site 1 first year price of \$.1613/kWh.

Hanwha's micro-grid price for each 30MW site is \$1,287,082 per year, and Hanwha has guaranteed a minimum energy guarantee (MWH) of 72,005,000 MWH per year. If the Hanwha micro-grid option were added to the bid price, the additional price, even assuming no additional energy guarantee, would be an additional \$.01787/kWh which would represent a Hanwha site 1

price of \$.06245/kWh + \$.01787/kWh (micro-grid) for a total Hanwha site 1 price of \$.08032/kWh. The Hanwha site 2 price would be \$.06599/kWh + \$.01787/kWh (micro-grid) for a total Hanwha site 2 price of \$.08386. Even the Hanwha site 2 price with a micro-grid option would represent approximately 2/3 of the Shanghai Site 2 price of \$.128/kWh and approximately 50% of the Shanghai Site 1 price of \$.1613/kWh.

Shanghai claims that doubling the size of the procurement to 120MW was improper and that the procurement must be rebid. GPA's bid places no restrictions on the number of projects that each bidder may submit. The only restriction is that each project may not exceed 30MW per project. Each of the seven Phase II qualified bidders submitted 2 project sites consisting of 30MW each. Shanghai now contends that had it known that GPA intended to award 120MW total, it would have bid four 30MW projects, and due to efficiencies of scale, would have "bid a lower price per unit of renewable energy." Yet the claimed "efficiencies of scale" for the 60MW bid submitted by Shanghai were clearly not present in its current bid, as it submitted prices of \$.128/kWh and \$.1613/kWh, the second price almost 30% higher than its first price. Given that its 2 sites are adjacent to each other, presumably with similar or identical land costs, these prices submitted by Shanghai don't demonstrate any efficiencies of scale. There would be no efficiencies of scale with regard to the land size needed, as additional solar PV panels would require additional land in proportion to the additional PV panels added for each 30MW project.

The AECOM Vice President, Dale Gauthier, states in his declaration that SEPJ could have negotiated more favorable pricing from material and service providers, including AECOM, Black Construction, EMCE and GHD. It appears that Mr. Gauthier is not familiar with the additional transmission line upgrades which would be incurred by projects exceeding 30MW.

One 30MW project may be able to be carried on a 34.5kV transmission line, but if the project size is increased, it may require installation of a 115kV transmission line, which is substantially more expensive per mile than the installation of an additional 34.5kV transmission line.

GPA did not award 120MW to a single bidder, as Shanghai is speculating it could have been awarded, but instead awarded two 30MW projects to two separate bidders, Hanwha and KEPCO, who each had proposals which were significantly lower than Shanghai. No bidder, including Shanghai, Hanwha, or KEPCO was aware that GPA would propose to award four 30MW projects instead of just two 30MW projects, and therefore no bidder was disadvantaged by the additional proposed award of an additional two 30MW projects. The expansion of the proposed award from two 30MW projects to four 30MW projects, and from one to two bidders is distinguishable from the cases cited by Shanghai's counsel. In the *Cardinal Maintenance Service, Inc. vs. U.S.* case cited by counsel, the court found that the changes were considerable, and the amount of additional work would nearly double the price of the contract. That is clearly distinguishable in this case, as there is no change in work required nor is there a change in the contract price. There is simply an increase in the number of 30MW projects awarded and the bidders increase from one bidder to two bidders.

Shanghai complains that the specifications are ambiguous and unfair and that the procurement must be rebid. It states that it didn't understand whether it could submit overhead or underground transmission lines. While it states that "SEPJ did not rule out the possibility of overhead transmission lines" it is somehow confused because GPA responded in the answers to bidders that GPA "strongly recommends underground lines for interconnection between the renewable generation and GPA power system ..." Nowhere in the bid specifications does GPA

require underground transmission lines only for any bidder. Shanghai speculates that other bidders were equally confused by the specification and therefore submitted a higher price than Shanghai. Shanghai acknowledges that in the IFB that “GPA identified transmission costs per mile of \$1.24M for overhead lines, and \$2.20M per mile for underground.”

As an effort to justify its substantially higher bid than both Hanwha and KEPCO, Shanghai claims that it took the “strong recommendation” for underground lines, and therefore its costs are higher. While Shanghai correctly cites 5 GCA §5211(e) that “bids shall be evaluated based on requirements set forth in the invitation for bids ... The Invitation for Bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the Invitation for Bids,” the use of underground or overhead transmission lines was not an evaluation criteria used by GPA in the bid specifications. Shanghai could not have relied on this as a bid evaluation criteria, which Shanghai’s counsel appears to acknowledge as he states “bidders whose bid used expensive underground lines did not get any extra points for this, and would inevitably lose.”

5 GCA §5211(g) provides that “Award. The contract shall be awarded with reasonable promptness by written notice to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids ...” as cited in *Pacific Data Systems, Inc. vs. General Services Agency*, OPA-PA 15-012. *In the Appeal of 1-A Guam WEBZ*, OPA-PA 16-002 also addresses the issue of bid evaluation and stated that “the invitation for bids shall set forth the evaluation criteria to be used and no criteria may be used in bid evaluation that are not set forth in the Invitation for bids.” 5 GCA §5211(e) and 2 GAR, Div 4, Chap 3, §3109(n)(1).

Shanghai also states that its bids are actually #5 and #6 due to the disqualification of the

actual #6 bidder, Solar City, on the price proposal evaluation, and “that means that the SEPJ sites 2 and 1 are the first and second runners-up.” Given that Shanghai acknowledges that at best it’s bid is #5 and #6, it appears to also acknowledge that GPA can award four 30MW sites as well. If GPA only awarded two 30MW sites, then Shanghai would not be the “first and second runners-up”, but would be the third and fourth runners-up if only two projects were awarded as Shanghai previously suggested would be appropriate.

Shanghai in its “Ruling Requested” requests that the Hanwha bids be disqualified and rejected, and SEPJ sites 2 and 1 be awarded, even though neither of the SEPJ bids meets the contracting restrictions found in 12 GCA, Chapter 8, Article 3, §8306(2) and (3). 12 GCA §8306(3) states that “no contract may be signed by the government of Guam or the Guam Power Authority to develop or purchase power from alternate energy sources (including power generated from windmills, solar ponds and Ocean Thermal Energy conversion), if such contract will result in increased expenses and costs for the Guam Power Authority. No such alternate energy contract may be signed until the board of directors of the Guam Power Authority has so certified that the agreement is consistent with all bond covenants and that the **price paid** for electricity pursuant to the agreement **does not exceed actual current avoided cost.**” The GPA actual current avoided costs are equivalent to the LEAC rate which at the time of the evaluation was \$.105/kWh. The Hanwha and KEPCO bid prices are clearly below the LEAC rate, and even the lowest Shanghai Site 2 price of \$.128/kWh clearly exceeds GPA’s current avoided costs. While the LEAC rate did increase on August 1, 2017, to \$.1177/kWh, which is after the bid evaluation period, the lowest Shanghai price exceeds the higher LEAC rate.

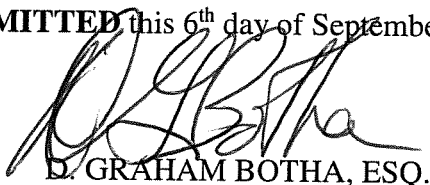
Procurement law requires that GPA award to the lowest responsible and **responsive**

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). GPA properly awarded two 30MW projects to Hanwha and KEPCO as the lowest responsible and responsive bidders. The price proposal evaluation and bid abstract clearly demonstrate that the Hanwha and KEPCO bids were the two lowest bidders for renewable energy. The bids were evaluated and awarded based on the Multi-Step bid specifications and evaluation criteria.

CONCLUSION

GPA requests that the appeal of Shanghai Electric Power Japan Co., Ltd. and Terra Energy, Inc., 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 6th day of September, 2017, by:


D. GRAHAM BOTHERA, ESQ.
GPA General Counsel

GPA-060-17 Bid Summary

Proponent	First Year (\$/MWH)	Last Year (\$/MWH)	Escalation Rate	Contract Term- Years
HANWAH 2	\$62.45	\$79.30	1.00%	25
HANWAH 1	\$65.99	\$83.79	1.00%	25
KEPCO-LG-CNS	\$85.50	\$108.56	1.00%	25
KEPCO-LG-CNS	\$85.50	\$108.56	1.00%	25
Shanghai Electric Power Japan/Terra Energy	\$128.00	\$162.53	1.00%	25
Shanghai Electric Power Japan/Terra Energy	\$161.30	\$204.81	1.00%	25
Pacific Solar Storage1 (Talofofo Substation Interconnection)	\$168.00	\$216.00	1.00%	25
LSIS Co. Ltd	\$200.00	\$248.00	1.00%	25
LSIS Co. Ltd	\$200.00	\$248.00	1.00%	25
Pacific Solar Storage 1 (Umatac Substation Interconnection)	\$202.00	\$250.00	1.00%	25
Clean Energy Site1	\$210.00	\$266.64	1.00%	25
Clean Energy Site2	\$210.00	\$266.64	1.00%	25
Sean ENC/NEX GEO	\$240.00	\$240.00	0.00%	25

Cost and Savings Breakdown: Hanwha Proposal 1&2 (60MW) and KEPCO Proposal 1&2 (60MW)

5-Year Calculation of Project Costs & Savings

Contract Year	Year 1	Year 2	Year 3	Year 4	Year 5	TOTALS
1 Hanwha Proposal 1 Energy Rate (\$/MWH)	62.45	63.08	63.71	64.35	64.99	
2 Energy Guarantee (MWH)	72,005	71,831	71,245	70,865	70,485	
3 Hanwha Proposal 2 Energy Rate (\$/MWH)	65.99	66.65	67.32	67.99	68.67	
4 Energy Guarantee (MWH)	72,005	71,831	71,245	70,865	70,485	
5 Hanwha Microgrid Operations Option	\$ 2,574,164	\$ 2,529,420	\$ 2,489,938	\$ 2,450,458	\$ 2,413,608	
6 KEPCO Proposal 1 Energy Rate (\$/MWH)	85.50	86.35	87.22	88.09	88.97	
7 Energy Guarantee (MWH)	74,542.29	73,974.68	73,604.26	73,233.84	73,058.88	
8 KEPCO Proposal 2 Energy Rate (\$/MWH)	85.50	86.35	87.22	88.09	88.97	
9 Energy Guarantee (MWH)	74,542.29	73,974.68	73,604.26	73,233.84	73,058.88	
10 Phase II Energy Costs (120MW)	\$ 24,569,089	\$ 24,624,093	\$ 24,664,354	\$ 24,731,048	\$ 24,834,838	\$ 123,423,421
11 Current LEAC Rate ¹ (\$/MWH)	115	115	115	115	115	
12 Current Energy Costs	\$ 33,705,877	\$ 33,535,306	\$ 33,315,330	\$ 33,142,734	\$ 33,015,092	\$ 166,714,339
13 Proposed Savings	\$ 9,136,788	\$ 8,911,213	\$ 8,650,976	\$ 8,411,687	\$ 8,180,254	\$ 43,290,919
Year	2019	2020	2021	2022	2023	TOTALS
14 Projected LEAC Rate ² (\$/MWH)	122.27	140.02	154.63	154.03	159.65	
15 Projected Energy Costs	\$ 35,836,916	\$ 40,831,807	\$ 44,795,805	\$ 44,391,646	\$ 45,833,287	\$ 211,689,461
16 Proposed Savings	\$ 11,267,827	\$ 16,207,714	\$ 20,131,451	\$ 19,660,599	\$ 20,998,449	\$ 88,266,040