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D. GRAHAM BOTHA, ESQ.
Guam Power Authority
688 Route 15, Suite 302
Mangilao, Guam 96913
Ph: (671) 648-3203/3002
Fax: (671) 648-3290

Attorney for the Guam Power Authority

OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

IN THE APPEAL OF Shanghai Electric Power Japan Co., Ltd. and Terra Energy, Inc., Appellant.	DOCKET NO. OPA-PA-17-008 **APPELLEE'S [PROPOSED] FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

COMES NOW, the GUAM POWER AUTHORITY, by and through its counsel of record, D. GRAHAM BOTHA, ESQ., and submits its Proposed Findings of Facts and Conclusions of Law, as follows.

[PROPOSED] FINDINGS OF FACTS

The Public Auditor makes the following finds of fact:

1. On May 13, 2016, Guam Power Authority ("GPA") issued Multi-Step Invitation for Bid, GPA-070-16, Renewable Energy Resource Phase II. [Procurement Record ("PR"), Tab 1.]
2. 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. [PR, Tab 15-24].

3. Prior to submission of the technical proposals, the twelve bidders had an opportunity to submit questions regarding the IFB, and GPA issued amendments II to VII in response to these questions. [PR, Tab 7-12].

4. On October 20, 2016, the sealed technical proposals of the twelve bidders were opened and each bidder was provided a copy of the Abstract of Bids. [PR, Tab 14].

5. 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. [PR, Tab 25].

6. On November 10, 2016, Amendment No. VIII and letters were sent to the qualified bidders, and Phase I letters were sent to the non-qualified bidders. [PR, Tab 26 & 27].

7. Amendments IX to XIII were sent to the Phase II qualified bidders. [PR, Tabs 31-35].

8. On January 13, 2017, the sealed price proposals for the seven Phase II qualified bidders and fourteen project sites were opened in the presence of company representatives. [PR, Tab 38].

9. On January 27, 2017, the evaluation committee sent a price proposal clarification to Hanwha and KEPCO, and both Hanwha and KEPCO 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. [PR, Tab 42].

10. The evaluation committee recommended an award of Hanwha site 1 (30MW) and site 2 (30MW), and KEPCO site A (30MW) and site B (30MW) based on the technical price proposals submitted. [PR, Tab 43].

11. The Phase II- Bid Abstract reflect the Hanwha Site 1 price of **$.06245/kWh** and the Hanwha Site 2 price of **$.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**. [PR, Tab 43 and 38].

12. 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. [PR, Tab 44].

13. Notice of Intent to award letters, Bid Status letters, and Bid Analysis dated July 10, 2017, were sent to all seven Phase II bidders. [PR, Tab 46].

14. On August 22, 2017, Shanghai filed the instant Appeal from GPA's denial of Shanghai's protest. [PR, Tab 52].

15. During the hearing, witness Jennifer Sablan explained the benefit of a microgrid to help provide stability to the GPA grid, and that while the microgrid option was informational in nature, the System Impact Study determined that a microgrid would be beneficial, because of the requirement to limit the Hanwha output to 45MW. [Hearing, October 25, 2017].

16. Jennifer Sablan further testified that the batteries in the base bid were for ramping purposes and to smooth out fluctuations, and that a microgrid was different from those batteries provided for in the base bid. [Hearing, October 25, 2017.]

17. Amendment IV provided that the microgrid was notional and not binding until proponents specify a point of interconnection. [Hanwha, Tab A-3, PR Tab 4].

18. Amendment VIII requests that bidders price a microgrid as options, and that GPA will consider optional pricing as a starting point for negotiating for these ancillary services, and that any acceptance was at GPA's option. [Hanwha, Tab F].

19. The general terms and conditions of the IFB in ¶23 provided that the government reserves the rights to increase or decrease the quantity of items. [Shanghai, Tab 13].

20. Amendment VIII, ¶2, provided that there is no available 34.5kV breaker at Talofofo and that GPA will entertain a 34.5kV overhead interconnection from Dandan to Umatac, which impacted the Hanwha sites and one Shanghai site. [Hanwha, Tab F].

[PROPOSED] CONCLUSIONS OF LAW

21. Pursuant to 5 GCA §5703, the Public Auditor reviews GPA's denial of Shanghai's Protest *de novo*, and concludes that GPA's award of the bid to Hanwha for two (30MW) sites and KEPCO for two (30MW) sites was proper.

22. Procurement law requires that GPA make an award to the lowest responsible and **responsive** bidders. A responsive bidder is a person who has submitted a bid which confirms 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 requirement shall be rejected as non-responsive. 2 GAR, Div. 4, Chap. 3, §3109(n)(3)(c).

23. The Hanwha and KEPCO bids were clearly the lowest responsible and responsive bids submitted, at the Hanwha Site 2 price of $.06245/kWh and Hanwha Site 1 price of $.06599/kWh, and the KEPCO Site A and B price of $.0855/kWh, compared to the Shanghai prices of $.128/kWh and $.1613/kWh.

24. The bid specifications require that each bidder be evaluated based on the bidder's guaranteed minimum energy production and a price per kilowatt hour (kWh). 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, and the bidders, including Shanghai, Hanwha, and KEPCO, submitted a fixed price proposal for a micro-grid to GPA.

25. The bid terms allow for an increase or decrease in quantity of items, and GPA's bid places no restrictions on the number of projects that each bidder may submit, only that each project may not exceed 30MW per project.

26. The bid specifications did not require that a bidder use underground lines, and did not provide a bidder credit if the bidder used underground lines, and the use of underground or overhead transmission lines was not an evaluation criteria used by GPA in the bid specifications.

27. 5 GCA §5211(g) provides that "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 …". *Pacific Data Systems, Inc. vs. General Services Agency,* OPA-PA 15-012.

28. 5 GCA §5211(e) and 2 GAR, Div. 4, Chap. 3, §3109(n)(1) provides 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." *In the Appeal of 1-A Guam WEBZ,* OPA-PA 16-002.

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

30. GCA § 5001. Purposes, Rules of Construction. (a) Interpretation, provides that the underlying purposes and policies of this Chapter are: … (3) to provide for increased public

confidence in the procedures followed in public procurement; (4) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory; (6) to foster effective broad-based competition within the free enterprise system; (7) to provide safeguards for the maintenance of a procurement system of quality and integrity; and (8) to require public access to all aspects of procurement consistent with the sealed bid procedure and the integrity of the procurement process.

CONCLUSION

GPA requests that the appeal of Shanghai Electric 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 7th day of November, 2017, by:

D. GRAHAM BOTHA, ESQ.
GPA General Counsel