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PROCUREMENT APPEALS

DATE: 11-07-17  
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FILE NO OPA-PA: 17-008

**BEFORE THE PUBLIC AUDITOR  
PROCUREMENT APPEALS  
TERRITORY OF GUAM**

IN THE APPEAL OF  
  
SHANGHAI ELECTRIC POWER  
JAPAN CO., LTD. and TERRA  
ENERGY, INC.,  
  
Appellants.

Appeal No. OPA-PA-17-008

**PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW SUBMITTED  
BY SHANGHAI ELECTRIC POWER  
JAPAN CO., LTD. and TERRA ENERGY,  
INC.**

The Appellants Shanghai Electric Power Japan Co., Ltd. and Terra Energy, Inc. ("SEPJ") submit the following proposed Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. The IFB which is the subject matter of this appeal, GPA-IFB-070-16 Phase II, was issued on May 13, 2016. On July 10, 2017, GPA recommended two awards to Hanwha Energy Corporation and Pacific Petroleum Trading Corp. ("Hanwha"), and two awards to the KEPCO and LG-CNS Consortium ("KEPCO"). See Exhibit 2 to SEPJ Notice of Procurement Appeal.

2. SEPJ timely filed a protest with GPA on July 24, 2017. See Exhibit 4 to SEPJ Notice of Procurement Appeal. GPA denied the SEPJ protest and SEPJ timely filed this appeal on August 21, 2017.

1           3.       The Office of Public Accountability (“OPA”) held hearings on the SEPJ  
2 appeal on October 24, 25, and 26, 2017. SEPJ was represented attorneys by Bill R. Mann  
3 and Daniel Berman of Berman O’Connor & Mann. The appellee GPA was represented  
4 by Attorney D. Graham Botha. Interested Party Hanwha was represented by Attorney  
5 Vincent C. Camacho of the Camacho Calvo Law Group, LLC. Interested Party KEPCO  
6 was represented by Attorney Anita P. Arriola of Arriola, Cowan & Arriola.

7           4.       In this appeal, SEPJ claims that an agreement between GPA and Hanwha  
8 to award two microgrids to Hanwha resulted in Hanwha’s bid being non-compliant  
9 with the IFB. As a result, SEPJ claims that Hanwha’s two bids should be rejected, and  
10 that SEPJ as first and second runner-up should be granted awards for its two bids.  
11 Alternatively, SEPJ claims that the procurement must be re-bid due to GPA’s (1)  
12 doubling the scope of the procurement after bid opening from 60 megawatts (“MW”) to  
13 120 MW, (2) the failure of GPA to unambiguously state whether it required overhead or  
14 underground transmission lines, and (3) in the event the Public Auditor finds that the  
15 term “actual current avoided cost” is equal to GPA’s LEAC rate, then the failure of GPA  
16 to disclose in the IFB that bids must be at or lower than its current LEAC rate.

#### THE MICROGRID ISSUE

17  
18           5.       At page 9 of 222 of the IFB (Volume I, Commercial Terms & Conditions),  
19 the IFB stated “The RI-ESS [Renewal Integration Energy Storage System] must be  
20 capable of the following functions for microgrid options (priced option) ...”, and listed  
21 certain functions.

22           6.       This language in the IFB generated a great many bidder questions. *See*  
23 SEPJ Hearing Ex. 1. On page 5 of that document, a bidder asked “Kindly explain the  
24 purpose of micro grid operation of RI-ESS as well as the required function.” GPA’s  
25 commenced its response by stating “GPA’s requirements for microgrid are  
26 informational. GPA will eventually develop plans and execute projects to establish  
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1 microgrids supporting major loads. GPA has communicated this opportunity and  
2 desire with some of its largest customers who might need additional energy security.  
3 Any cost information provided by Bidders is notational and not binding.” On page 17  
4 of this document, a bidder asked “We would like GPA to provide further details of  
5 technical requirements regarding RI-ESS in order to calculate the price option.” GPA  
6 provided the same response as before. On page 37, another bidder asked “There are no  
7 micro grid technical requirements provided in the IFB. Please provide all requirements  
8 including hourly load profiles, duration of operation, and frequency of service for the  
9 request micro grid operation to be priced”. Once again, GPA provided the same  
10 response. Additional bidder questions are found on page 39 and 43, with GPA’s same  
11 response.

12 7. GPA witness Jennifer Sablan, GPA’s Manager for Strategic Planning,  
13 testified that she did not believe that when the bidders submitted their price  
14 information for a microgrid, the bidders understood that an award could be based on  
15 that price information.

16 8. Hanwha, SEPJ, and KEPCO did complete the form provided by GPA for  
17 microgrid operation price information. Hanwha provided this price information for  
18 each of its two projects. *See* SEPJ Hearing Exs. 6 and 7. The sum of the annual fees for  
19 Hanwha’s two microgrids over a twenty-five year period total \$54,447,002.00. SEPJ also  
20 completed the microgrid forms. *See* SEPJ Hearing Exs. 8 and 9, totaling \$23,131,180.00.  
21 KEPCO likewise completed those forms. *See* SEPJ Hearing Exs. 10 and 11, totaling  
22 \$25,180,934.00.

23 9. GPA witness Jennifer Sablan could not explain why there was such a  
24 substantial difference in the microgrid prices submitted by Hanwha, SEPJ, and KEPCO.

25 10. SEPJ called Dale Gauthier as a witness. Mr. Gauthier is a registered  
26 mechanical engineer and Vice President of AECOM. AECOM is one of the largest  
27

1 global contractors for power station engineering and construction. Mr. Gauthier  
2 testified to his extensive experience in energy and power, including extensive  
3 experience in the field of alternative energy and electrical energy production and  
4 distribution. He testified that AECOM's role in the procurement was the Engineering,  
5 Procurement and Construction contractor. Mr. Gauthier's resume was introduced as  
6 SEPJ Hearing Ex. 31.

7 11. Mr. Gauthier testified that GPA did not provide any technical  
8 specifications for a microgrid in the IFB, and that he understood the price information  
9 requested by GPA for a microgrid was informational only. He testified that due to the  
10 lack of specifications, the SEPJ microgrid price submission did not provide any details  
11 as to the microgrid GPA would receive in return for the price stated. He testified that he  
12 further reviewed the Hanwha and KEPCO bid submissions with respect to the  
13 microgrid, and neither of those bid submissions provided details as to the microgrid  
14 GPA would receive. Due to the lack of detail, he could not explain the difference in the  
15 informational prices submitted by the bidders.

16 12. Mr. Gauthier further testified that the microgrid price information  
17 requested by GPA was for a stand-alone microgrid as opposed to an addition to the  
18 base bid. He testified that almost all of the cost of the microgrid was already included in  
19 the base bid. He testified that there would only be a de minimus cost to providing a  
20 microgrid in addition to the base bid if provided together. He estimated that cost at  
21 \$500,000.00 to \$1,000,000.00 for data and additional controls. He testified that SEPJ did  
22 not intend its informational prices for a microgrid to be added to its base bid, and it  
23 would be improper for GPA to do so. He testified that SEPJ would provide a microgrid  
24 to GPA in connection with its base bid at no additional expense to GPA.

25 13. Mr. Gauthier also reviewed SEPJ Hearing Ex. 4, and Exhibit B thereto. He  
26 testified that it was not proper for GPA to add Hanwha's annual microgrid operation  
27

1 price to Hanwha's base bid, since that would result in double compensation to Hanwha  
2 for the microgrids.

3 14. SEPJ Hearing Ex. 2 at page 2 reflects that GPA and Hanwha agreed to  
4 award the microgrid option fixed annual payment contract option to Hanwha. Exhibit  
5 B to SEPJ Hearing Ex. 4 shows that GPA utilized the exact same dollar amounts stated  
6 in Hanwha's microgrid price information sheet for the two microgrids over a twenty-  
7 five year period. This resulted in an increase in the amount of Hanwha's bids after bid  
8 opening in violation of 5 GCA § 5211(f).

9 15. SEPJ also called Eddie Woo, President of Terra Energy, Inc., as a witness.  
10 Mr. Woo testified to his personal involvement in approximately 400 MW of  
11 development projects, and the experience of SEPJ and its parent company in the  
12 development and management of approximately 120 Gigawatts ("GW") of power  
13 inclusive of 8 GW of solar power, one of the largest internationally. Mr. Woo testified  
14 that he understood the microgrid price information was provided for informational  
15 purposes only. With respect to SEPJ Hearing Ex. 2, he testified that the microgrid could  
16 not be awarded as part of the procurement since the bidders had provided  
17 informational pricing only.

18 16. Mr. Woo identified SEPJ Hearing Ex. 3 as a excerpt from the latest draft  
19 Power Purchase agreement ("PPA") in the procurement record. Mr. Woo testified that  
20 he believed the attachment of Hanwha's microgrid price information sheet to that draft  
21 PPA meant that GPA had agreed to award the microgrids to Hanwha.

22 17. Mr. Woo also identified SEPJ Hearing Ex. 5 as the Agenda for a  
23 Consolidated Commission on Utilities ("CCU") meeting on July 25, 2017. Paragraph  
24 4.1.4 states that the Power Purchase Agreement for Phase II was on the agenda for  
25 approval. Mr. Woo testified that the protest that SEPJ filed on July 24, 2017, prevented  
26 the CCU from approving any PPA.

27

1           18.     Neither GPA nor Hanwha denied that they had agreed to the award two  
2 microgrids to Hanwha at the price stated on Hanwha's price information sheets.

3           19.     Jennifer Sablan testified that following a preliminary System Impact Study  
4 ("SIS"), GPA realized that additional energy storage for the GPA grid would be  
5 required due to the output of the two Hanwha 30 MW Dandan facilities in addition to  
6 the NRG 26 MW facility, which created a large imbalance in the local area. She testified  
7 that including Hanwha's microgrids would lessen the system impact costs. The IFB  
8 provides that the successful bidder is responsible for the expense of upgrades to the  
9 GPA grid required by the SIS. *See* IFB Section 4.1.2 of Volume II (p. 212 of 15,026).

10          20.     Ms. Sablan identified SEPJ Hearing Ex. 36, and acknowledged that GPA  
11 had recently procured two energy storage facilities on Guam from LG CNS for \$40  
12 million. She acknowledged that that procurement was pursuant to an IFB, and was  
13 awarded through competitive bidding.

14          21.     Ms. Sablan also referred to Amendment VIII to the IFB (Hanwha Hearing  
15 Ex. F). Paragraph 4 of that Amendment requests that bidders price ancillary services  
16 including microgrid operation outside the main proposal. The Amendment states that  
17 "GPA will consider the optional pricing provided as the initial starting point for  
18 negotiating for these ancillary services with a Proponent/Bidder receiving an award  
19 under the non-optional bid scope." However, Ms. Sablan agreed that procurements on  
20 Guam are obtained by competitive bidding as opposed to negotiations.

21                           **DOUBLING OF THE SIZE OF THE PROCUREMENT**

22          22.     The IFB stated that GPA intends to acquire a total of 60 MW of renewable  
23 capacity. *See* SEPJ Hearing Ex. 12.

24          23.     No evidence was presented by any party of any indication from GPA  
25 prior to bid opening that GPA would procure more than 60 MW of renewable energy.

1           24.     After bid opening, GPA and the CCU approved an award of two 30 MW  
2 proposals each to Hanwha and KEPCO - totaling 120 MW. *See* SEPJ Hearing Ex. 4.

3           25.     KEPCO had no knowledge that GPA would increase the total  
4 procurement amount. *See* SEPJ Hearing Ex. 14.

5           26.     The only reference to changing the size of the procurement in the IFB is  
6 paragraph 12 of the Government's General Terms and Conditions. *See* SEPJ Hearing Ex.  
7 13. This is standard language which is included in all procurements.

8           27.     Eddie Woo testified that had the consortium composed of Terra Energy  
9 and Shanghai Electric Power Japan been aware that the procurement was for 120 MW,  
10 the consortium would have bid four 30 MW projects. KEPCO witness Chung Kook  
11 Choi also testified that KEPCO would have bid four projects in a 120 MW procurement.  
12 Mr. Woo further testified that economies of scale would have resulted in a lower price  
13 per unit of energy generated to the benefit of Guam ratepayers. He explained that SEPJ  
14 would have been able to obtain better prices for the larger quantities of materials and  
15 labor that would have been required for four 30 MW projects as opposed to only two 30  
16 MW projects.

17           28.     SEPJ witness Dale Gauthier also testified that economies of scale with four  
18 30 MW projects would lower the price per unit of energy produced. He testified this  
19 would result from better pricing for larger quantities of labor and materials, and also  
20 economies of scale in ongoing operation and maintenance.

21           29.     No other party presented evidence challenging the SEPJ testimony that a  
22 larger project size would have generated economies of scale, and lowered the price per  
23 unit of energy produced.

24                   UNDERGROUND vs. OVERHEAD TRANSMISSION LINES

25           30.     In response to a bidder question as to whether interconnection lines were  
26 required to be underground, GPA stated that "GPA strongly recommends underground  
27

1 lines for interconnection between the renewable generation and GPA power system for  
2 their substantially greater reliability, especially during destructive storms and typhoons  
3 Guam often experiences relative to overhead lines ..." See SEPJ Hearing Ex. 16 at p. 4.  
4 GPA went on to state that various factors would be considered, and it would approach  
5 the issue on a case to case basis.

6 31. SEPJ witness Dale Gauthier testified that he agreed with GPA's strong  
7 recommendation for underground lines given Guam's exposure to typhoons. Mr.  
8 Gauthier referred to the current experience in Puerto Rico as reflecting the fragility of  
9 overhead lines.

10 32. Mr. Gauthier further testified that there is a substantial difference in costs  
11 between underground and overhead lines, and referred to SEPJ Hearing Ex. 15 at p. 7  
12 which shows GPA's cost estimate of \$1,240,000.00 per mile for overhead transmission  
13 lines, and \$2,220,000.00 per mile for underground transmission lines.

14 33. SEPJ witness Eddie Woo testified that he was raised on Guam and was  
15 familiar with the destructive power of typhoons on Guam. He likewise agreed with  
16 GPA's strong recommendation for underground transmission lines. He testified that  
17 upon project completion, GPA would become the owner of the transmission lines, and  
18 be responsible for their maintenance and repair. He testified to the significant risk GPA  
19 would have in the future with overhead lines in the event of a typhoon.

20 34. Following the opening of the priced proposals, GPA requested by letter  
21 dated January 27, 2017, that KEPCO confirm that its price included underground  
22 transmission lines. See SEPJ Hearing Ex. 35. In response, KEPCO asked various  
23 questions which are restated in GPA's letter to KEPCO dated February 3, 2017, along  
24 with GPA's responses. See SEPJ Hearing Ex. 17. In response to KEPCO's question as to  
25 whether overhead lines could be used for all the routes estimated for its Site A and B,  
26 GPA stated "GPA recommends underground installation for new transmission lines.



1 Decreased reliability is associated with overhead lines due to exposure to natural  
2 elements such as high winds, rain, snakes, and other risks.”

3 35. In its responsive letter to GPA of February 6, 2017, KEPCO stated that it  
4 had “... no rational basis to assume that new transmission lines should be installed  
5 underground only ...” *See* SEPJ Hearing Ex. 18 at p. 2.

6 36. Although Hanwha had provided for underground transmission lines in  
7 its technical proposal which qualified it to submit a priced bid, *see* SEPJ Hearing Ex. 33,  
8 it was later permitted by GPA to change and utilize overhead lines. *See* SEPJ Hearing  
9 Ex. 32. Hanwha claimed this change was permitted by Amendment VIII to the IFB.  
10 That Amendment was dated November 10, 2016, after the bidders had submitted their  
11 technical proposals, but before they had submitted their priced proposals.

12 37. SEPJ witness Dale Gauthier testified that he understood the Amendment  
13 VIII permitting an overhead interconnection line from the Dandan Substation to the  
14 Umatac Substation to be an exception that proves the rule that GPA expected  
15 underground lines for all other interconnections.

16 38. GPA witness Jennifer Sablan testified that at project completion, GPA will  
17 become the owner of the transmission lines and will be responsible for their repair and  
18 maintenance.

#### RANKING OF SEPJ BIDS

19  
20 39. SEPJ witness Eddie Woo identified SEPJ Hearing Ex. 19, and testified that  
21 according to GPA’s Price Proposal Evaluation, SEPJ Site 2 ranked no. 5, and SEPJ Site 1  
22 ranked no. 7. Mr. Woo testified that the PSS bid was ranked no. 6, and that PSS and  
23 SolarCity is the same entity.

24 40. Mr. Woo also identified SEPJ Hearing Ex. 20, and testified that the  
25 highlighted part on page 2 was SolarCity’s request for an exemption from GPA’s  
26 prohibition of the use of its existing transmission line from the Dandan transfer station  
27

1 to the Talofoto substation. SolarCity stated that without this exemption, it would  
2 effectively be required to start over. In response, GPA denied SolarCity's request for an  
3 exemption.

4 41. Mr. Woo testified that without that exemption, SolarCity's bid ranked no.  
5 6 would not have interconnection with GPA's grid, which is a requirement of the IFB.  
6 Mr. Woo testified that this was confirmed by SEPJ Hearing Ex. 21, which references the  
7 SolarCity bid as being without transmission.

8 42. Mr. Woo testified that as a result the SolarCity bid ranked no. 6 does not  
9 comply with the IFB, that the SEPJ bid for its Site 1 should be ranked no. 6. Mr. Woo  
10 testified that as a result the two SEPJ bids were the first and second runners-up after the  
11 four awards to Hanwha and KEPCO.

#### LEAC

12  
13 43. In its Hearing Brief at p. 6-7, GPA claimed that 12 G.C.A. § 8306(3)  
14 precludes GPA from acquiring alternative energy at a price higher than its actual  
15 current avoided cost. GPA further claimed that its actual current avoided cost is the  
16 same as its LEAC [Levelized Energy Adjustment Cost] rate.

17 44. SEPJ witness Dale Gauthier identified SEPJ Hearing Ex. 22 where GPA, in  
18 answer to a bidder question as to whether the starting price had to be below the current  
19 LEAC rate, stated "No. But GPA would like to see bids close to or lower than the  
20 current LEAC."

21 45. Mr. Gauthier identified SEPJ Hearing Exs. 24 and 25, and testified that  
22 there is a difference between short run avoided cost and long run avoided cost. He  
23 testified that with respect to a twenty-five year procurement, long run avoided cost is  
24 applicable. He testified that he had been unable through his research to find any long  
25 run avoided cost calculation published by GPA. He testified that although he would  
26 not be able to calculate GPA's long run avoided cost due to the complexity of the data  
27

1 underlying the calculation, GPA should be able to do so. He further testified that he  
2 strongly believed GPA's long run avoided cost would be higher than its current LEAC  
3 rate.

4 46. SEPJ witness Eddie Woo identified SEPJ Hearing Ex. 28 as an Order of the  
5 Guam Public Utilities Commission ("PUC"), which approved the Renewable Energy  
6 Purchase Agreement between GPA and Quantum Guam Power LLC. Paragraph 13 of  
7 the Order states that the contract price per megawatt hour varies from \$196.00 [19.6  
8 cents per KWH] in year one to \$220.90 [22.09 cents per KWH] in year twenty-five.  
9 Paragraph 2 states that the PUC approved the award to Quantum on November 19,  
10 2011. Paragraph 4 states that approval of the contract was subject to completion of a  
11 System Impact Study.

12 47. Mr. Woo identified Exhibit D to SEPJ Hearing Ex. 4, which is a chart  
13 showing historical LEAC rates. Mr. Woo testified that as of November 19, 2011, the  
14 then current LEAC rate had been set on August 1, 2011 at 19.22 cents per kilowatt hour,  
15 which translates to \$192.22 per megawatt hour. Mr. Woo testified that the LEAC rate  
16 approved by the PUC for Quantum was higher than the LEAC rate at the time the PUC  
17 approved the award.

18 48. Mr. Woo also identified SEPJ Hearing Ex. 30, which is a PUC Order  
19 approving the Renewable Energy Purchase Agreement between GPA and Pacific Green  
20 Resources LLC. Paragraph 15 of that Order states the contract price per megawatt hour  
21 varies from \$216.50 [21.65 cents per KWH] in year one to \$287.28 [28.72 cents per KWH]  
22 in year twenty-five. Paragraph 2 of the Order states that the PUC had approved the  
23 award to Pacific Green Resources LLC on November 19, 2011. Mr. Woo testified that as  
24 of that date, the LEAC rate was 19.22 cents per kilowatt hour, or \$192.22 per megawatt  
25 hour. Mr. Woo testified that the rate approved by PUC for Pacific Green Resources LLC  
26 was also higher than the LEAC rate at the time the PUC approved the award.

1           49.     The LEAC rate is reset on a bi-annual basis. *See* SEPJ Hearing Ex. 23. The  
2 rate varies substantially over relatively short periods of time. *See* Exhibit D to SEPJ  
3 Hearing Ex. 5. The Public Auditor may take judicial notice that GPA is currently  
4 requesting an increase in the LEAC rate to 15 cents per KWH to cover all of its projected  
5 fuel costs, or 13 cents per KWH to cover one-half of the projected fuel costs. *See* Exhibit  
6 A attached hereto (excerpt from Guam Post regarding October 20, 2017 CCU meeting).  
7 That rate converts to \$130.00 to \$150.00 per megawatt hour, and is higher than SEPJ's  
8 Site 2 pricing of \$128.00 per megawatt hour and just below SEPJ's Site 1 pricing of  
9 \$161.00 per megawatt hour.

## CONCLUSIONS OF LAW

### THE MICROGRID ISSUE

12           1.     Guam's procurement law applies to every expenditure of public funds  
13 irrespective of their source. *See* 5 G.C.A. § 5004(b).

14           2.     The use of public funds by GPA for the procurement of a microgrid is  
15 subject to Guam's procurement law.

16           3.     In Amendment IV to the IFB dated August 10, 2016, GPA responded to  
17 various bidders' questions regarding the provision of a microgrid. In response to those  
18 questions, GPA made clear that its requirements for a microgrid are informational only,  
19 and that any cost information provided by Bidders is notational and not binding. GPA  
20 did not provide details of technical requirements for the microgrid despite bidders'  
21 request that it do so.

22           4.     Any procurement must include specifications for what is being procured.  
23 *See* 5 G.C.A. §§ 5260-5268. The Public Auditor concludes that at no point in time did  
24 GPA provide specifications for the microgrid necessary for competitive bidding.

25           5.     Amendment VIII to the IFB did not cure this defect. It did not provide  
26 specifications for the microgrid, but stated that GPA would consider the optional  
27

1 pricing provided as the initial starting point for negotiation. Procurement in Guam is  
2 obtained through Guam's procurement law, and not by negotiation.

3 6. The microgrid price information submitted by Hanwha of approximately  
4 \$54,000,000 is over twice as high as the microgrid price information submitted by SEPJ  
5 of approximately \$23,000,000, or by KEPCO of approximately \$25,000,000. GPA was  
6 unable to explain this difference in price, which the Public Auditor concludes resulted  
7 from the lack of specifications for the microgrid and competitive bidding.

8 7. The Public Auditor concludes that none of the bidders could have  
9 anticipated that the microgrid price information they provided would result in an  
10 award separate and in addition to the base bid.

11 8. Following a preliminary System Impact Study ("SIS"), GPA realized that  
12 additional storage capacity would be required as a result of Hanwha's two 30 MW solar  
13 facilities.

14 9. It is possible for GPA to procure storage capacity through the  
15 procurement process, and GPA had recently procured two energy storage facilities  
16 from LG CNS. However, rather than procure the needed additional storage capacity  
17 through the procurement process, GPA purported to award two microgrids to Hanwha.

18 10. A large portion of what is included in the bidders' price information for a  
19 microgrid is already included in the bidders' base bids. The additional expense of  
20 providing a microgrid in addition to the base bid is minimal. It is unclear what, if any,  
21 consideration Hanwha provided to GPA in exchange for the approximately \$54,000,000  
22 that Hanwha would receive from GPA over twenty-five years for its microgrids.

23 11. The Public Auditor concludes that a microgrid was never part of this  
24 procurement, and was not obtained through competitive bidding in violation of Guam's  
25 procurement law.

1           12.     The Public Auditor concludes that the agreement between Hanwha and  
2 GPA that Hanwha would be awarded two microgrids renders Hanwha's bids non-  
3 compliant with the IFB. Both of Hanwha's bids must therefore be rejected.

4                           **DOUBLING OF THE SIZE OF THE PROCUREMENT**

5           13.     The Public Auditor concludes that GPA intended to acquire a total of 60  
6 MW of renewable capacity in this procurement. There was no amendment to the IFB  
7 nor suggestion by GPA that it intended to acquire more than 60 MW of renewable  
8 capacity prior to bid opening. Nevertheless, after bid opening, GPA approved an award  
9 of two 30 MW projects apiece to Hanwha and KEPCO, totaling 120 MW.

10          14.     There is substantial legal authority that holds that when a government  
11 substantially expands the scope of a procurement after bid opening, that action is  
12 improper and the procurement must be rebid. For example, in *Cardinal Maintenance*  
13 *Service, Inc. v. U.S.*, 63 Fed. Cl. 98 (2004), the Court of Federal Claims held that the Air  
14 Force violated the Competition in Contracting Act (CICA) by materially changing a  
15 contract after awarding it rather than issuing a new procurement. The contract at issue  
16 was for custodial services at an Air Force base in Hawaii. The solicitation provided that  
17 the Air Force would have the right to expand or reduce the quantity and type of  
18 custodial services to be provided by the winning bidder following the award. After the  
19 initial award, however, the contract was modified eight times. The plaintiff argued that  
20 the Air Force violated the CICA by authorizing contract modifications outside the scope  
21 of the original contract, and that a new solicitation, affording bidders full and open  
22 competition, was required. The court noted that whether the Air Force violated CICA  
23 when it modified the contract depended on whether the modifications materially  
24 changed the scope of the original contract. The answer, the court held, turned on  
25 whether the original contract, as modified, called for essentially the same performance.  
26 The court found that the changes in the modification were considerable, and the

1 amount of additional work would nearly double the price of the contract that was  
2 awarded. Concluding that the originally awarded contract was materially changed in  
3 violation of CICA's competition requirements, the court ruled for the plaintiff and  
4 ordered that the government prepare a new procurement.

5       In *Krygoski Construction Co. Inc. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996), the  
6 Army had solicited bids for the demolition of an abandoned air field that contained  
7 asbestos contamination. The Army estimated that the asbestos removal would  
8 constitute about 10% of a total contract price of about \$400,000.00, or \$40,000.00. After  
9 the contract was awarded, the parties discovered that the asbestos removal work was  
10 greatly understated, and that the completion of the contract would require a change in  
11 its terms to allow approximately \$360,000.00 in additional asbestos removal costs. *Id.* at  
12 1544. Rather than implement this additional work with a change order, the Army  
13 decided to terminate the contract and rebid. A different contractor won on the rebid.  
14 The original contractor objected and sued, arguing that the Army acted improperly in  
15 terminating its contract. The court held that the Army had ample justification for  
16 conducting a competitive reprocurement. *Id.* at 1545. In that case, there was not a  
17 change in the nature of the work itself, which was for asbestos removal, but instead a  
18 dramatic increase of the scope of that work in the procurement. Fairness to the bidders  
19 and the public interest mandated a reprocurement.

20       15. KEPCO cites *American Apparel, Inc. v. United States*, 108 Fed. Cl. 11 (Ct.  
21 Claims 2012). That case involved the military procurement for all weather coats. The  
22 original procurement was for five different types of coats, which types were awarded  
23 separately. Two of the bidders received awards under the procurement. Two years  
24 later, the government issued a request for two additional types of coats to the two  
25 winning bidders pursuant to an Add/Delete Clause in the original procurement  
26 contract. Following competition based on price, one of the two bidders was awarded

1 the procurement for the two additional types of coats. The other bidder protested and  
2 argued that the procurement of the two additional types of coats was a new  
3 procurement, and that factors other than price should have been considered in the  
4 award as they would have been in a new procurement. The court held that the two  
5 additional types of coats were similar to the coats previously procured. Importantly,  
6 the Add/Delete Clause in the original procurement had specifically advised the bidders  
7 that additional types of coats may be procured by the government under the  
8 procurement contract. *Id.* at 37.

9 The court stated the general rule that modification after award is permissible  
10 only if within the scope of the original procurement. A contract cannot be modified to  
11 the extent that the modified contract is materially different from the original  
12 procurement. *Id.* at pp. 28-30. Since the additional two types of coats were generally  
13 similar to the coats procured under the original procurement, and the addition of new  
14 types of costs was specifically anticipated in the Add/Delete Clause of the contract, the  
15 court held that a new procurement was not required. The court specifically held that  
16 the bidders would reasonably have anticipated the addition of the two new coats to the  
17 contract by virtue of the Add/Delete Clause. *Id.* at p. 37.

18 By way of comparison to the Add/Delete Clause in the *American Apparel* case,  
19 the "change clause" in this procurement is found in paragraph 23 of the Government of  
20 Guam General Terms and Conditions. The Public Auditor does not accept that this  
21 standard language allows the Government to materially enlarge the scope of a  
22 procurement after bid opening. If the Government did so without restriction, there  
23 would have been no competitive procurement for the larger amount. If, for example, the  
24 Government issued a procurement for 1,000 computers with award based on the  
25 amount offered per computer, and then after bid opening increased the award to 10,000  
26 computers, there would be no way of knowing which bidder would have won the  
27



1 procurement for 10,000 computers. The Public Auditor declines to set a precedent  
2 which would allow the Government to increase the size of a procurement after bid  
3 opening without restriction.

4 16. SEPJ witness Eddie Woo testified that had the Terra Energy/Shanghai  
5 Electric Consortium been aware that the procurement was for 120 MW, it would have  
6 bid four 30 MW facilities. KEPCO witness Chung Kook Choi agreed that KEPCO would  
7 also have bid four projects on a 120 MW procurement. Mr. Woo further testified that as  
8 a result of economies of scale, better pricing could have been obtained for materials and  
9 labor for the larger project, which would have resulted in a lower cost to GPA per unit  
10 of energy produced to the benefit of Guam ratepayers.

11 17. SEPJ witness Dale Gauthier also testified that four 30 MW projects  
12 would have resulted in lower pricing for materials and labor, ongoing maintenance and  
13 repair costs. No other witness contradicted the testimony of Mr. Woo or Mr. Gauthier  
14 regarding economies of scale with a larger project.

15 18. The Public Auditor concludes that it is common sense that any of the  
16 bidders would have been able to obtain lower pricing for material and labor when  
17 bargaining for larger quantities. In addition to the legal prohibition against substantially  
18 increasing the size of a procurement after bid opening, the Public Auditor concludes  
19 that GPA would have received a lower price per unit of energy had it made bidders  
20 aware that it intended to procure 120 MW of renewable energy.

#### 21 OVERHEAD VERSUS UNDERGROUND TRANSMISSION LINES

22 19. Guam Procurement Law requires that those criteria that will affect the bid  
23 price must be objectively measurable. See 5 GCA § 5211(e). This provision is necessary  
24 to ensure that bidders are in fact bidding in all respects on the same procurement. This  
25 requirement is repeated in Guam's procurement regulations. 2 GAR § 4102(a)(1)  
26 provides in relevant part that "... Specifications shall be drafted with the objective of  
27

1 clearly describing the territory's requirements". 2 GAR § 3115(d)(2)(A)(ii) provides that  
2 a solicitation may be cancelled after bid opening if "... ambiguous or otherwise  
3 inadequate specifications were part of the solicitation ..." The Public Auditor has  
4 recognized that ambiguous or conflicting IFB requirements mandate that the solicitation  
5 be cancelled. See OPA Decision dated March 20, 2015, in *In the Appeal of Pacific Data*  
6 *Systems, Inc.*, OPA-PA-14-007. That ruling is consistent with case law on this issue.

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

20       20. In this procurement, GPA strongly recommended underground  
21 transmission lines given Guam's exposure to destructive typhoons. However, GPA did  
22 not require underground lines, nor did it provide any credit for bidders who proposed  
23 underground lines. Due to the substantial difference in cost between overhead and  
24 underground lines, the Public Auditor concludes that bids providing for underground  
25 lines cannot be compared with those bids providing overhead lines.



1 substation. As a result, the PSS bid ranked number 6 did not provide interconnection to  
2 GPA's grid and was non-compliant with the IFB.

3 26. GPA's ranking of bids is a ranking based on price only, and was not a  
4 statement of qualification.

5 27. SEPJ's two bids shall be ranked as number 5 and 6. SEPJ's two bids are  
6 therefore the first and second runner-up bids after the four bids from Hanwha and  
7 KEPCO.

### 8 APPLICABILITY OF LEAC

9 28. Although GPA claims that the term "actual current avoided cost" is the  
10 same as its LEAC rate, the Public Auditor concludes that GPA has failed to prove this.

11 29. In answer to a bidder question, GPA did not require bids to be lower than  
12 LEAC. The bidders had the right to reply on GPA's answer in submitting their bids.

13 30. In addition, the PUC has twice approved contracts for alternative energy  
14 at rates higher than the then current LEAC rate.

15 31. The Public Auditor concludes that the LEAC rate is variable over short  
16 periods of time, and should not be applied to calculate GPA's avoided cost over a long-  
17 term twenty-five year procurement.

### 18 CONCLUSION

19 32. The Public Auditor concludes that the agreement between GPA and  
20 Hanwha awarding Hanwha two microgrids constituted an impermissible change to  
21 Hanwha's priced bids after bid opening, and rendered Hanwha's bids non-compliant  
22 with the IFB. Both of Hanwha's bids are rejected.

23 33. The Public Auditor concludes that SEPJ's two bids are the first and second  
24 runner-up bids. The Public Auditor rejects SEPJ's argument that increasing the  
25 procurement to 120 MW was improper. GPA should make an award to SEPJ based on  
26 its two bids.

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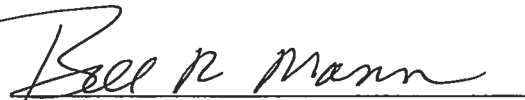
34. Alternatively, the Public Auditor concludes that this procurement must be cancelled and rebid. In any new IFB, GPA must (1) state the size of the procurement, whether 60 MW or 120 MW or some other capacity, (2) either require underground transmission lines or provide a credit to bidders who provide underground transmission lines, (3) if GPA wishes to procure microgrids as part of this procurement, state all specifications required for the microgrids, and (4) clearly specify any cap on the amount of the bids that will be considered by GPA.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2017.

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**DORIS FLORES BROOKS**  
Public Auditor

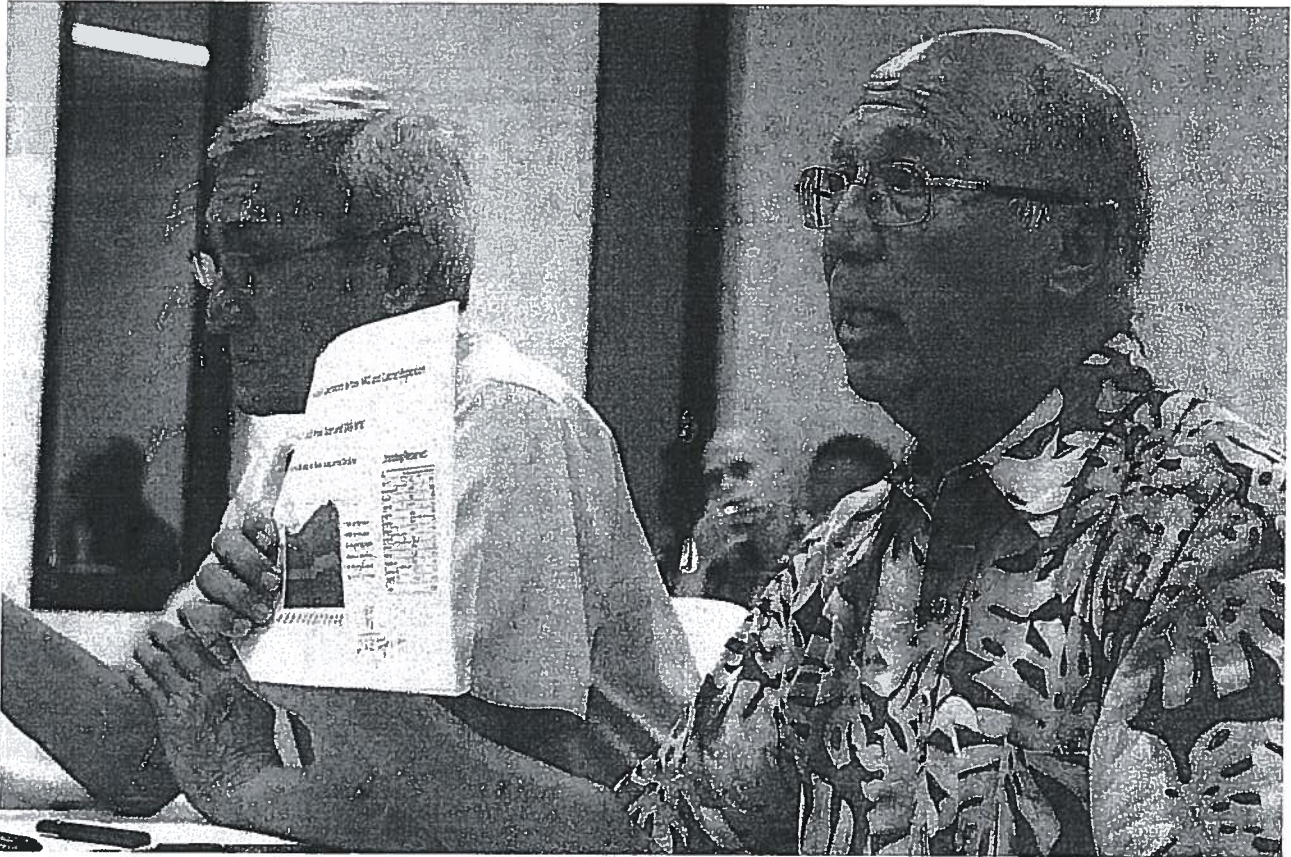
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## GPA outlines upcoming rate hike

John O'Connor | The Guam Daily Post 16 hrs ago



**BRIEFING:** Consolidated Commission on Utilities Chairman Joey Duenas, right, and Guam Power Authority General Manager John Benavente speak during a public hearing last October. GPA officials briefed commissioners on Oct. 20 on what potential rate increase the utility might present to the CCU for approval in December. Post file photo

Guam Power Authority customers may be looking at a nearly 2-cent increase or a more than 3-cent increase to monthly fuel surcharge costs come February, depending on whether the Consolidated Commission on Utilities allows a partial or full cost recovery plan and whether the Public Utilities Commission approves the hike.

**EXHIBIT "A"**

Rising fuel costs and the island's need for more expensive diesel fuel to run combustion turbine generators have led to two consecutive increases in the fuel surcharge, which GPA uses to recover its costs of fuel.

The fuel surcharge is normally adjusted every six months depending on the market. GPA officials briefed commissioners on Oct. 20 on what potential rate increase the utility might present to the CCU for approval in December. The PUC, which oversees all rate adjustments, will be approached afterward.

The current rate is at 11.7 cents per kilowatt hour. To recover all of its projected fuel costs, GPA would need to increase the rate to about 15 cents. To cover half of the costs, rates would need to be adjusted to about 13 cents.

The surcharge is intended to be revenue neutral, meaning that any adjustment should rise up only as needed to recover the costs of fuel. Conversely, if fuel costs decline, then so would the fuel surcharge for the following six-month period.

But as fuel prices rise above \$50 per barrel on average, GPA has instituted a 50 percent recovery policy for the past two surcharge adjustments.

This meant that its losses have grown in the past eight months. As of the Oct. 20 meeting, utility officials stated that GPA accumulated a \$10 million under-recovery. The loss of the Cabras 3 and 4 generators also have contributed to more fuel costs.

### **Combustion turbine generators**

In the absence of the baseload generators, which use cheaper residual fuel oil, GPA has been employing combustion turbine generators to augment the power system. The generators are also used because they are better able to adjust to sudden fluctuations in power from renewable energy sources, which the slower baseload units are not easily capable of doing.

These generators use ultra-low-sulfur diesel. A barrel of residual fuel costs about \$55 today while ultra-low-sulfur diesel costs about \$78 per barrel.

But GPA has been overhauling its remaining baseload units to become more efficient and generate more power. And by the next fuel surcharge period, GPA General Manager John Benavente said the utility would be working with about 80 percent baseload power and 20 percent combustion turbine power.

It is possible that GPA will proceed with another 50 percent fuel recovery policy in February, or another partial recovery plan.

### **CCU chairman urges caution**

However, CCU Chairman Joey Duenas cautioned the utility on its fuel expense losses.

"If prices stay low and you recover more of the under-recovery, then we can moderate ... but be aware that at some point, we need to start going to the 100 percent recovery," Duenas told GPA officials on Oct. 20.

"You can't let that go too big that we're going to end up with a big burden. You'll jeopardize the financial (position) for GPA."

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**John O'Connor**

Reporting on utilities, healthcare, education and other topics.