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5 BEFORE THE OFFICE OF THE PUBLIC AUDITOR

6
7 In the Appeal of
8 O&M ENERGY, S.A.,
9
10 Appellant.

Docket No. OPA-PA-09-008

**COMMENTS TO STATEMENT
ANSWERING ALLEGATIONS OF
APPEAL**

11 Appellant O&M Energy, S.A.'s (hereinafter referred to as "O&M Energy") protest
12 centers on the contents of its July 27th and July 30th letters. Because of its allegations in those
13 letters, O&M Energy posits that Taiwan Electrical and Mechanical Engineering Services'
14 (hereinafter referred to as "TEMES") bid should be considered irresponsible and irresponsive
15 under the General Terms and Conditions, Section 17 which requires parties to act in good faith.
16 As will be seen in the paragraphs which follow, nothing could be further from the truth and it is
17 O&M Energy who should be put to task to justify its unsubstantiated allegations. This brief will
18 further supplement the Agency Report in highlighting the deficiencies of the O&M Energy
19 protest.

20 In their July 30th letter, O&M Energy reveals its modeling and performance charts to
21 show that the TEMES offer of an operation and maintenance budget of \$1million at 90%
22 availability is a "fleecing of the 46,000 Guam rate payers". First O&M Energy did not point out
23 its assumptions in its modeling and performance charts which are a "sine qua non" of modeling.
24 In short, one's model is as good as its assumptions. The assumptions are the premises upon
25 which the modeling is based. One's model cannot be verified as accurate without knowing the

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1 assumptions underlying your model. Second, the O&M Energy model did not allow for
2 improvements which TEMES can and will use to lower its operating and management expenses.
3 It assumes that TEMES and its environment would be static by relying on TEMES historical
4 data. This is a fatal flaw to their modeling. TEMES has not remained static but has working
5 diligently to ensure that it is being more efficient in the operation of the plant. One learns from
6 one's mistake and this TEMES has done.

7 The key question here is why must TEMES justify its O&M proposal? O&M Energy has
8 the burden of proving that TEMES' O&M proposal is impossible. GPA already agreed that
9 TEMES' O&M proposal is determined to be qualified by its technical review committee. That
10 should be enough. O&M Energy must come forth with specifics as to its allegations that
11 TEMES' O&M proposal is impossible.

12 In addition, TEMES agreed to place a performance bond not only to cover its Fixed
13 Management Fee (required under the RFP) but also its O&M fee (not required under the RFP).
14 TEMES did so because it was fully confident that its O&M proposal is reasonable and that
15 TEMES can live by it.

16 In their July 27, 2009 letter, O&M Energy contends that "a technical analysis of the
17 O&M Spending Budget with the information which has been provided to all bidders, show that
18 there is no way in which the facility can be operated and maintained with such a low budget
19 without seriously compromising plant personnel safety, prudent industry standards and condition
20 of the facility". This begs the question, what technical analysis are they talking about? It would
21 seem that they are making allegations here, cloaking it under the guise of technical analysis, and
22 then passing it off as the unadulterated truth. Unless they can substantiate the validity of their
23 "technical analysis" with cold, hard data they are just blowing smoke.

24 The historical costs listed in Atch 1 to the July 27, 2009 letter is used as an exhibit to
25 show that "based on industry standards [TEMES' costs] are unreasonable and fails to meet the

1 good faith required in the [procurement] process”. Did O&M Energy tell us what these industry
2 standards are? What are the industry standards they make reference to? Where can we find
3 them?

4 With respect to holding TEMES non-responsive and non-responsible which O&M
5 Energy concludes should be the case, a definition of terms is in order. "Responsive bidder"
6 means a person who has submitted a bid which conforms in all material respects to the Invitation
7 for Bid. 5 GCA § 5201(g). A "responsible offeror" means a person who has the capability in all
8 respects to perform fully the contract requirements, and the integrity and reliability which will
9 assure good faith performance. 5 GCA § 5201(f). Here, the evaluation board determined that all
10 three offerors were responsive and responsible. In fact to be able to get to the cost proposal
11 stage, you have to first be deemed to have qualified as responsive and responsible at step 1 of the
12 proposal. 5 GCA § 5211(h). This is very important. On the other hand, O&M Energy offers
13 nothing that would show that the TEMES bid is either nonresponsive or that TEMES is
14 irresponsible other than their bald assertion that TEMES' \$1,000,000 O&M proposal is too low.

15 Finally, we are about to begin the biggest military buildup in our nation's history.
16 TEMES has been running the power plant successfully the past eight (8) years and has
17 accumulated a wealth of knowledge of the complex machinery involved in running a power
18 plant. Are we to "change horses in midstream" for a company that makes unsubstantiated
19 allegations about the way a power plant should be run? This is ludicrous.

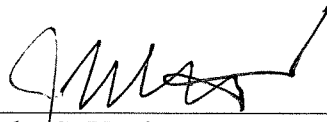
20 TEMES provided a responsible bid as required by GPA and had the lowest price for the
21 five (5) year contract, as reflected in the highest net present value. The five (5) year net present
22 value for TEMES was calculated at \$9,394,142.33 and the net present value for O&M Energy
23 was calculated at \$5,343,497.28 which represents a savings of approximately four (4) million
24 dollars (\$4,000,000.00) over five years. This is far too huge a savings to ignore.

1 Based on all of the foregoing, we ask that O&M Energy's protest be held to be without
2 merit, TEMES has the highest five year Net Present Value and therefore TEMES should be
3 awarded the contract.

4 Dated this 23rd day of November, 2009.

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6 **The Law Offices of John S. Unpingco
& Associates, LLC**

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8 By: _____

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11 Attorneys for TEMES
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