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Attorneys for the Government of Guam

RECEIVED
 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS

DATE: 01-11-19
 TIME: 3:35 AM PM BY: JW
 FILE NO OPA-PA: 18-007

**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

IN THE APPEAL OF:)	DOCKET NO. OPA-PA-18-007
)	
)	
MICRONESIA RENEWABLE ENERGY, INC.)	MOTION FOR SUMMARY JUDGMENT
)	
Appellant.)	

Comes now, the **Department of Public Works** (“DPW”) by and through the Attorney General of Guam and Thomas P. Keeler, assistant attorney general, who submits the following memorandum in support of its motion for summary judgment.

1. STATEMENT OF FACTS

On June 26, 2018, 2018, DPW’s Capital Improvement Projects Division (“DPW-CIP”), issued an Invitation to Bid for the installation of solar panels on three (3) DPW designated buildings, designated as Project No. 200-5-1041-F-TAM (the “**Project**”). See, IFB, Procurement Record. The IFB contemplated that the contract be awarded to a responsible offeror with a responsive offer with the lowest base bid within the amount of funds available for the project.

ORIGINAL

On July 27, 2018, DPW-CIP received two (2) timely bids for the Project. Bids were received by **Pacific Solar & Photovoltaics, Inc.** (“PSP”) and Micronesia Renewable Energy, Inc. (“MRE”). DPW’s director, Glenn Leon Guerrero, determined that both PSP and MRE were Responsive Bidders a copy of which is attached hereto as **Exhibit A**.

On September 14, 2018, 2018, DPW’s Director issued a Notice of Intent to Award contract to PSP as it submitted the lowest price for the Project. *See*, **Exhibit B**.

MRE filed a written protest on September 19, 2018, asserting two (2) claims. *See*, **Exhibit C**. MRE’s first claim was that the IFB was “clipped together” in violation of the Guam Procurement regulations and the IFB’s Instructions to Bidders. The basis of MRE’s second claim was not clearly stated however DPW understood MRE to assert that it believed that its product was superior to that of PSP. DPW issued its Agency Decision on November 14, 2018, denying both claims of MRE. *See*, **Exhibit D**. MRE appealed DPW’s denial of its protest as set forth in the November 26, 2018 Notice of Appeal and Protest.

II. ISSUES

A. Whether Appellant’s first claim should be dismissed because DPW documented that PSP’s sealed bid was submitted in compliance with IFB requirements and Guam law?

B. Whether DPW was obligated by the Guam law and the IFB requirements to award to the contract to a responsive and responsible contractor that submitted the lowest priced bid?

III. DISCUSSION

Applicable summary judgment standard

The court may grant summary judgment pursuant to Rule 56 of the Guam Rules of Civil Procedure when “the pleadings, deposition, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 8 (citing *Manvil Corp. v. E.C. Guzmum & Co.*, 1998 Guam 20 ¶ 6). The party moving for summary judgment bears the initial responsibility of demonstrating the “absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The party opposing motions for summary judgment cannot rest upon the mere allegations of his or her pleadings.

Instead, the opposing party must set forth specific facts showing that there is a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). In this regard, the party opposing the motion has the burden of presenting “affirmative evidence”. *Id.* at 257.

A. PSP’s bid was submitted in duplicate and in a sealed envelope in compliance with Guam’s procurement law and IFB instructions.

Appellant’s first claim should be dismissed because it is not supported by the facts. MRE’s first claim relies on the unsubstantiated statement of its business development assistant, Ms. Dorothy Shultice, that PSP’s Bid was “clipped together” in violation of the Guam Procurement regulations and the IFB’s Instructions to Bidders. DPW speculates that the papers Ms. Shultice saw DPW-CIP’s John Calanayan “shuffling through” when she first arrived to be the sign in sheet.

PSP’s bid was in fact submitted in duplicate, in a vanilla sealed envelope, as required by Guam’s procurement law and regulations, and the IFB’s Instructions to Bidders. A copy of DPW’s receipted copy of PSP’s sealed bid is attached hereto as **Exhibit E**. Also documenting the fact that IFB’s submitted bid fully complied with the procurement code and IFB requirements are the declarations of DPW-CIP staff members Mr. John Calanayan and Ms. Clarissa Guevara attached hereto as **Exhibit’s F and G**. In paragraph 6 of his Declaration Mr. Calanayan states as follows:

“PSP’s bid, which was submitted prior to DPW-CIP’s receipt of MRE’s bid, was properly submitted in a sealed envelope as required by Guam Procurement Regulations and IFB’s Instructions to Bidders. ...”

Ms. Guevara’s declaration fully supports Mr. Calanayan’s sworn statement that PSP’s bid was “submitted in a sealed envelope”. *Id.*

DPW does not know what documents Ms. Shultice saw but it wasn’t PSP’s bid. PSP’s bid fully complied with Guam Procurement law and regulations, and the IFB’s Instructions to Bidders.

B. DPW awarded the contract to the lowest responsive and responsible bidder as required by law.

DPW does not fully understand the basis of MRE's second protest. MRE's protest acknowledges that PSP's bid "was clearly lower in price" than its bid. *See, Exhibit D.* Otherwise MRE appears to base its protest on the belief that it can provide a superior product. *Id.* This however is not material. DPW is required by law to award an IFB contract to the contractor that submits a bid that is responsive, determined to be responsible and who submits the lowest price. A Responsive Bidder means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids. 5 GCA § 5201(g)).

The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another, but only to determine that a bidder's offering is acceptable as set forth in the IFB. *See, 2 GAR § 3109(n)(3).* It is improper to use responsibility related factors or subfactors, as MRE argues, if the evaluation is merely to determine acceptability. (Nash, Cibinic and O'Neal, p. 271.)

It is axiomatic that determination of the lowest responsive bidder focus on price considerations, not the qualification of the bidders. It would be improper for DPW to evaluate PSP and MRE's bids based on the ranking and selection of the most qualified company. (In the Appeal of JMI Medical Systems, Inc., OPA-PO-07-011, pp 10-11.). In a October 5, 2018 Memorandum to the procurement file, DPW's Director determined that PSP's bid was responsive and was also determined to be a responsible contractor.

DPW further notes that MRE's protest is not timely. If MRE objected to the IFB's terms and conditions the time for addressing such was at the time the IFB was issued and not after DPW made an award of contract.

CONCLUSION

DPW respectfully requests that the OPA dismiss this appeal for the reasons stated above.

///

RELIEF REQUESTED BY DPW

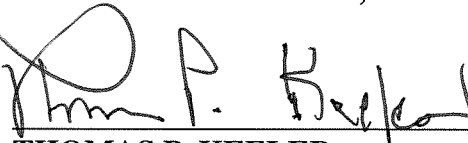
DPW respectfully request a ruling from the OPA as follows:

1. MRE's Appeal be dismissed; and
2. For such other relief that the OPA may determine is just and proper.

Submitted this 11th day of January, 2019.

OFFICE OF THE ATTORNEY GENERAL
Leevin Taitano Camacho, Attorney General

By:



THOMAS P. KEELER
Assistant Attorney General

In the Appeal of: Micronesia Renewable Energy, Inc.

Docket No. OPA-PA-18-007

MOTION FOR SUMMARY JUDGMENT

EXHIBIT A



The Honorable
EDDIE BAZA CALVO
Governor

The Honorable
RAY S. TENORIO
Lieutenant Governor



GLENN LEON GUERRERO
Director

ANDREW S. LEON GUERRERO
Deputy Director

OCT 05 2018

MEMORANDUM

TO: Procurement Record

FROM: Director, Department of Public Works and Procurement Officer

Re: **Project No. 200-5-1041-F-TAM**
Project Description: Solar Panel Project CIP

The following written determinations are made to justify the Department of Public Work's ("DPW") award of contract and denial of a bidder's protest on the above referenced procurement.

1. Determination of Responsiveness:

DPW issued an Invitation for Bid ("IFB") for the installation of solar panels at various locations at the department. Two (2) bidders, namely Pacific Solar & Photovoltaics, Inc. ("PSP") and Micronesia Renewable Energy, Inc.'s ("MRE"), submitted bids. At the time of bid opening, DPW Capital Improvement Project's ("CIP") Bid Evaluation and Tabulation sheets, copies of which are incorporated herewith, document that each bidder met the IFB's terms and conditions. Accordingly, it is my determination that both PSP and MRE were responsive bidders at the time of bid opening.

2. Determination of Responsibility:

DPW CIP staff documented that both PSP and MRE properly responded to the IFB. As documented by CIP's above referenced Bid Evaluation and Tabulation sheets, each company provided the items requested in the IFB.

Subsequent to Bid Opening and before DPW issued a Notice of Intent to Award Contract, CIP wrote PSP requesting that it submit certain materials (e.g., warranty, Project team members, etc.) needed to ensure that it was able to perform the Contract. CIP advises that PSP submitted the requested materials in a timely manner. It is my determination that PSP's Bid was responsive. It is my further determination that PSP having established that it has the capability in all respects to perform the contract requirements, and the integrity and reliability which assure that it will complete the project in a timely manner, is the lowest responsible bidder.

3. Determination that MRE's Protest is without Merit:

On September 19, 2018 MRE filed a protest claiming that the contract award was made to an unqualified, non-responsive bidder. MRE's protest is incorporated herein by reference. MRE's first claim was that PSP's bid was not submitted in a vanilla envelope as required by the IFB and Guam's Procurement Law. I interviewed CIP staff to see if MRE's claim was true. CIP informed me that OPS' bid was in fact submitted in duplicate, in a vanilla sealed envelope. CIP also provided me with a copy of PSP's Bid envelope that is marked stamped received by CIP. CIP speculates that MRE's staff who referenced CIP's "shuffling of papers", possibly mistook the tabulation and sign in sheet as PSP's bid. In any event I am satisfied that PSP's bid was properly submitted and determine that the first basis of MRE's protest is not factually correct.

Admittedly there is confusion as to exactly what the second ground of PSP's protest is. MRE seems to be asserting that it provides a superior product. While this may or may not be true, the procurement was in the form of an IFB, and not a Request for Proposals. In an IFB bidders are required to submit bids that conform to the IFB requirements. If a bidder is responsive and responsible, DPW is compelled under law to award the contract to the bidder with the lowest price. As CIP's Bid Evaluation and Tabulation sheets document that PSP was the lowest responsive and responsible bidder, it is my determination that MRE's protest should be denied.

Finally, this determination is made for the current Purchase order only.


GLENN LEON GUERRERO
Director and Chief Procurement Officer (Construction)

In the Appeal of: Micronesia Renewable Energy, Inc.

Docket No. OPA-PA-18-007

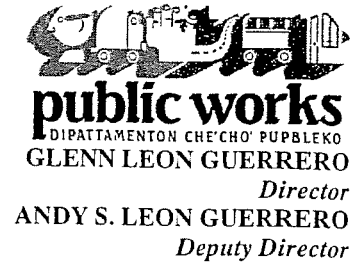
MOTION FOR SUMMARY JUDGMENT

EXHIBIT B



The Honorable
EDDIE BAZA CALVO
Governor

The Honorable
RAY TENORIO
Lt. Governor



September 14, 2018

Pacific Solar & Photovoltaic
389 Acho Latte Street
Dededo, Guam 96929

Subject: Department of Public Works Photovoltaic System at Various Location (Design-Build)
Project No.: 200-5-1041-F-TAM

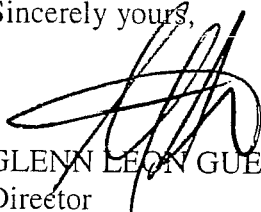
Gentlemen,

We are pleased to inform you that your SUBMITTED BID has been accepted as the lowest responsible responsive bid based on the evaluation for the above subject project. We are requesting that a Bid Confirmation letter be submitted to our office as soon as possible.

We look forward to work with you for the successful completion of the above subject project.

Should you have any question, please contact John F. Calanayan at 646-3225

Sincerely yours,

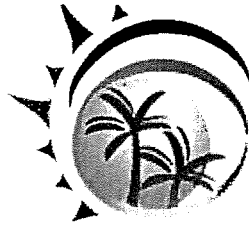

GLENN LEON GUERRERO
Director

In the Appeal of: Micronesia Renewable Energy, Inc.

Docket No. OPA-PA-18-007

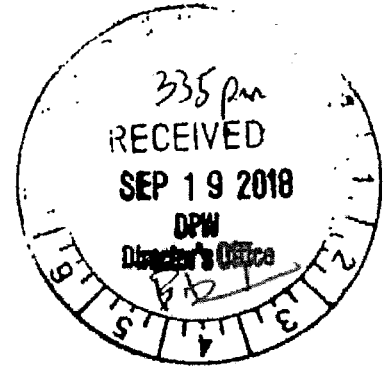
MOTION FOR SUMMARY JUDGMENT

EXHIBIT C



MICRONESIA
RENEWABLE ENERGY INC.

Public Works Department
542 North Marine Corps Drive
Tamuning, Guam 96913
Attn: Mr. Glenn Leon Guerrero, Director



Dear Mr. Leon Guerrero,

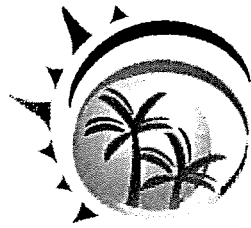
Please accept this letter as an official notice to protest the award of Project No: 200-5-1041-F-TAM. Our firm is protesting this award under the following conditions.

- 1.) Award to an unqualified, non-responsive bidder under the following conditions:
 - a.) On the morning of the bid opening, our business development assistant Ms. Dorothy Shultice was there for the bid opening, she observed the following and this is her statement: "When I walked into the room, I saw John Calanayan and a tall guy with dark hair from Pacific Solar shuffling through papers. When John saw me, he turned around and came back with a sign in sheet for us to fill in. He then had us place our bids into a wooden box with a slot. Pacific Solar's was clipped together, whereas MRE's was in a vanilla sealed envelope, as I thought was required. When John opened the box, he commented that he would open mine first. He stepped back several feet to a desk where another gentleman was writing the amounts he was reading to him. Then he did the same for Pacific Solar's unsealed bid." This is clearly not allowable under the Guam Procurement regulations. As stated in the Invitation for Bid and the Instructions to Bidders, receipt and Opening of Bids, Sealed bids in duplicate enclosed in a sealed envelope were to be submitted, this was clearly a violation of Guam Procurement Law.
 - b.) Pacific Solar and Photovoltaic was clearly lower in price than Micronesia Renewable Energy, Inc. but what is the Government of Guam getting for this capital outlay. MRE clearly stated the sizing of the system that we would provide for the price submitted, after numerous attempts to get this question answered we have not been able to. I believe this is a major disservice to the community of Guam, it would be like placing a bid out for an automobile and taking the lowest bid without knowing what kind of car you are getting.

Mailing Address: PO Box 7810, Tamuning Guam 96931

Physical Address: 167B E.T. Calvo Memorial Pkwy Tamuning, Guam 96913

Ph (671) 632-2613 Fax (671)647-8035
www.micronesiarenewableenergy.com

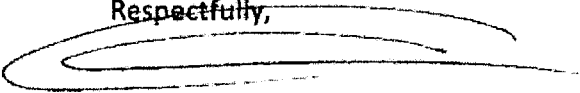


MICRONESIA
RENEWABLE ENERGY INC.

I am available to discuss this at your convenience, but I believe this project was awarded to a bidder that was non-responsive and this needs to be investigated. ;

Thank you very much!

Respectfully,


Jeffrey Voacolo
Chief Operations Officer
Micronesia Renewable Energy, Inc.

Mailing Address: PO Box 7810, Tamuning Guam 96931

Physical Address: 167B E.T. Calvo Memorial Pkwy Tamuning, Guam 96913

Ph (671) 632-2613 Fax (671)647-8035
www.micronesiarenewableenergy.com

In the Appeal of: Micronesia Renewable Energy, Inc.

Docket No. OPA-PA-18-007

MOTION FOR SUMMARY JUDGMENT

EXHIBIT D



The Honorable
EDDIE BAZA CALVO
Governor

The Honorable
RAY S. TENORIO
Lieutenant Governor



GLENN LEON GUERRERO
Director
ANDREW LEON GUERRERO
Deputy Director

RECEIVED
MISB
Alman

Jeffrey Voacolo
Chief Operations Officer
Micronesia Renewable Energy, Inc.
167B E.T. Calvo Memorial Parkway
Tamuning, Guam 96913

Re: Notice of Protest – Project No. 200-5-1041-F-Tam

Mr. Voacolo:

This serves to respond to Micronesia Renewable Energy, Inc.’s (“MRE”) protest in the above matter as set forth in your letter of September 19, 2018. MRE’s protest does not specifically state how the alleged violations are to be rectified but instead states that it is available to discuss the procurement. For the reasons stated herein the Department of Public Works (“DPW”) Contracting Officer has determined that Protestor’s written protest is without merit and is therefore denied.

MRE’s first claim is that Pacific Solar & Photovoltaics, Inc. (“PSP”) bid was “clipped together” in violation of the Guam Procurement regulations and the IFB’s Instructions to Bidders. This claim is not factually correct. Similar to MRE, PSP’s bid was submitted, in duplicate, in a vanilla sealed envelope. Enclosed is a copy of DPW’s receipted copy of PSP’s sealed bid. It appears your staff members reference to the “shuffling of papers” related to DPW’s tabulation and sign in sheet.

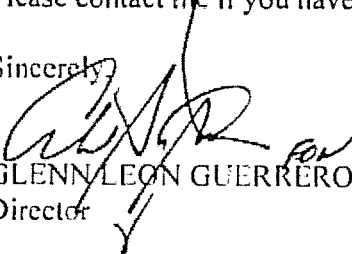
MRE also claims that PSP’s bid was “clearly lower in price than Micronesia Renewable Energy, Inc. but what is the Government of Guam getting for this capital outlay.” It isn’t clear, based on this and other related comments in MRE’s protest, what the grounds are for MRE’s second protest. While DPW appreciates that MRE believes its product to be superior to PSP, the department is obligated by law to award the contract to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the IFB. *See*, 5 GCA § 5211(g). DPW Capital Improvement Project’s Bid Evaluation and Tabulation sheets, copies of which are enclosed herewith, both document that PSP met the IFB’s terms and conditions. As such, DPW correctly awarded the contract to PSP being the lowest responsible bidder who met the requirements and criteria of the IFB.

///
///
///

This is a final decision of the Contracting Office concerning MRE's September 19, 2018 protest of the above referenced IFB. You are hereby advised that MRE has the right to seek any administrative or judicial review authorized by law. If MRE appeals to the Office of Public Accountability ("OPA") such must be filed within fifteen (15) days of this notice of final decision. See, 5 GCA M 5425(e).

Please contact me if you have any questions.

Sincerely,

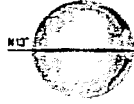

of GLENN LEON GUERRERO for 11/14/18
Director
HC

In the Appeal of: Micronesia Renewable Energy, Inc.

Docket No. OPA-PA-18-007

MOTION FOR SUMMARY JUDGMENT

EXHIBIT E



PACIFIC SOLAR &
PHOTOVOLTAICS
a Division of Hagens Inc.

7/27/18

Hagens
1:40 p.m.

To: Department of Public Works
Government of Guam
542 N. Marine Drive
Tamuning, Guam 96913

Attn: Glenn Leon Guerrero
Director

Re: Department of Public Works Photovoltaic System at
Various Location (Design Build),
Project No.: 200-5-1041-F-TAM

Solarhart
GUST

SUN EARTH

OutBack
POWER

SOLECTRIA
RENEWABLES

SMA

enphase
ENERGY

Fronius
SOLAR PANELS

PLATINUM
INSTALLER

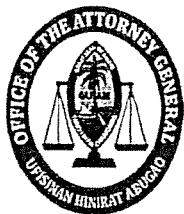
EXHIBIT "A"

In the Appeal of: Micronesia Renewable Energy, Inc.

Docket No. OPA-PA-18-007

MOTION FOR SUMMARY JUDGMENT

EXHIBIT F



Office of the Attorney General
Elizabeth Barrett-Anderson
 Attorney General of Guam
Solicitor Division
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 ITC Bldg., Ste. 706
 Tamuning, Guam 96913 • USA
 Tel. (671) 475-3324 Fax. (671) 472-2493
 www.guamag.org

Attorneys for the Government of Guam

**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

IN THE APPEAL OF:)	DOCKET NO. OPA-PA-18-007
)	
)	
MICRONESIA RENEWABLE ENERGY, INC.)	DECLARATION
)	
Appellant.)	

JOHN CALANAYAN makes this declaration under penalty of perjury under the laws of Guam and states:

1. I am employed by Guam Department of Public Works (“DPW”), Capital Improvements Projects (“DPW-CIP”), as an Engineer Supervisor.
2. I was primarily responsible for preparing the Invitation for Bids (“IFB”) issued by DPW-CIP for the purchase of solar panels (more detail needed?) designated as Project No. 200-5-1041-F-TAM (the “Project”).
3. Responses to the IFB were required to be submitted prior to July 27, 2018. At that time DPW-CIP employee, Mrs. Clarissa Guevara and I were responsible for receiving any bids submitted.

4. On July 27, 2018, DPW-CIP received two (2) timely bids for the Project. Bids were received by Pacific Solar & Photovoltaics, Inc. ("PSP") and Micronesia Renewable Energy, Inc. ("MRE").

5. As part of my duties with DPW-CIP I was provided a copy of MRE's September 19, 2018 written protest that claimed that Pacific Solar & Photovoltaics, Inc. ("PSP") bid was "clipped together" in violation of the Guam Procurement Regulations and IFB's Instructions to Bidders. MRE's claim is not factually correct.


6. PSP's bid, which was submitted prior to DPW-CIP's receipt of MRE's bid, was properly submitted in a sealed envelope as required by Guam Procurement Regulations and IFB's Instructions to Bidders. Attached to this Declaration as Exhibit "A" is a copy of PSP's Stamped Received envelope.

7. Also attached hereto is a copy of DPW-CIP's Bid Evaluation and Tabulation sheet for the Project.

I declare under penalty of perjury that the aforementioned is true.

Submitted this 4th day of December, 2018.

By:


JOHN CALANAYAN
DPW-CIP Engineer Supervisor
Department of Public Works

In the Appeal of: Micronesia Renewable Energy, Inc.

Docket No. OPA-PA-18-007

MOTION FOR SUMMARY JUDGMENT

EXHIBIT G



Office of the Attorney General
 Elizabeth Barrett-Anderson
 Attorney General of Guam
 Solicitor Division
 590 S. Marine Corps Drive
 ITC Bldg., Ste. 706
 Tamuning, Guam 96913 • USA
 Tel. (671) 475-3324 Fax. (671) 472-2493
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Attorneys for the Government of Guam

**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

IN THE APPEAL OF:)	DOCKET NO. OPA-PA-18-007
)	
)	
MICRONESIA RENEWABLE ENERGY, INC.)	DECLARATION
)	
Appellant.)	

CLARISSA GUEVARA makes this declaration under penalty of perjury under the laws of Guam and states:

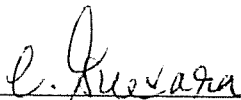
1. I am employed by Guam Department of Public Works (“DPW”), Capital Improvements Projects (“DPW-CIP”).
2. Responses to the Invitation for Bids (“IFB”) issued by DPW-CIP for the purchase of solar panels designated as Project No. 200-5-1041-F-TAM (the “Project) were required to be submitted prior to 2 p.m., July 27, 2018. At that time Mr. John Calanayn, DPW-CIP employee, and I were responsible for receiving any bids submitted.
3. On July 27, 2018, DPW-CIP received two (2) timely bids for the Project. Bids were received by Pacific Solar & Photovoltaics, Inc. (“PSP”) and Micronesia Renewable Energy, Inc. (“MRE”).

4. It is my understanding that DPW-CIP I was provided a copy of MRE's September 19, 2018 written protest on or about that same date. It is my further understanding that part of MRE's protest claims that PSP's bid was "clipped together" in violation of the Guam Procurement Regulations and IFB's Instructions to Bidders. MRE's claim is not factually correct.

5. PSP's bid, which was submitted prior to DPW-CIP's receipt of MRE's bid, was properly submitted in a sealed envelope as required by Guam Procurement Regulations and IFB's Instructions to Bidders. Attached to this Declaration as Exhibit "A" is a copy of PSP's Stamped Received envelope.

I declare under penalty of perjury that the aforementioned is true.

Submitted this 7th day of December, 2018.

By: 
CLARISSA GUEVARA
DPW-CIP Staff Member
Department of Public Works