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

In the Appeal of

GlidePath Marianas Operations Inc.,

Appellant.

DOCKET NOS. OPA-PA-19-010
OPA-PA-20-001

**MOTION FOR ORDER COMPELLING
AGENCY TO SUPPLEMENT RECORD**

MOTION

GlidePath Marianas Operations Inc. ("GlidePath" or "Appellant"), by and through its undersigned counsel, requests the Hearing Officer for the Office of Public Accountability ("OPA") to issue an Order compelling the Guam Power Authority ("GPA") to supplement the Procurement Record previously filed in this case, because it appears that GPA has not provided all documents to the OPA as part of its Procurement Record.¹

MEMORANDUM IN SUPPORT OF MOTION

The Public Auditor has the "power, among others, to (d) Rule on motions, and other procedural items on matters pending before such officer." 2 GAR § 12109. As the procuring agency in GPA-IFB-007-18 (the "IFP"), GPA has a statutory obligation to maintain an accurate and complete Procurement Record. *See*, 5 G.C.A. § 5249. Within five days after the filing of a procurement appeal, the agency must file a complete copy of the Procurement Record. 2 G.A.R. Div. § 12104(c)(3). The Agency must also file an Agency Report. *Id.* at § 12105. In addition to the

¹ This motion is submitted without prejudice to GlidePath's Motion of February 5, 2020, seeking an order allowing limited discovery.

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Procurement Record, GPA is required to submit in its Agency Report "[a]ny other documents which are relevant to the protest ... " *Id.* at §12105(e). While GPA submitted an Agency Report and Procurement Record, these records, while voluminous, appear to be incomplete.

GPA has apparently failed to provide material and relevant documents as part of its Procurement Record and Agency Report submitted in this proceeding. 5 G.C.A. § 5249 governs the contents of the Procurement Record. It appears that nowhere in the Procurement Record has GPA included "a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement," as required by 5 G.C.A. § 5429(b). The failure to provide a log of communications related to the procurement is a deficiency of the record that must be addressed by the Public Auditor. *See TLK v. Marketing Co., Ltd. V Guam Visitors Bureau et. al.*, Superior Court of Guam Civil Case No. CV0914-16, Decision and Order, Nov. 13, 2018.

Appellant believes GPA may have excluded other relevant documents from the Procurement Record in addition to the missing log of all communications. GlidePath's first protest and appeal was premised on the grounds that winning offeror ENGIE did not submit a technically responsive bid. GPA responded to that protest by attempting to explain that ENGIE's bid was responsive, since the technical requirements that GlidePath pointed toward were not, in the view of the agency, technical requirements. To make this claim, GPA points toward Amendment XIII to the IFB it issued on January 25, 2019. That amendment is called the "Supplement and Update to Volume II Technical Qualification Requirements." *See*, Attachment B to Amendment No.: XIII to Invitation for Multi-Step Bid No.: GPA-007-18 for Renewable Energy Resource Phase III issued on January 25, 2019, submitted as **Attachment F** to GlidePath's Notice of Appeal filed on November 13, 2019. That amendment required that the energy storage of the system shall be equal to or greater than the 145% of the megawatt rating of

the solar charging system. This 145% requirement was still coupled to GPA's other requirement that the energy storage be no larger than 30 megawatts at each project site. *See*, Technical Requirements Supplement, Section 2, bullet point 5, submitted as **Attachment G** to GlidePath's Notice of Appeal filed on November 13, 2019.

GPA should be compelled to supplement the procurement record since the record — a record spanning thousands of pages over 12 volumes—contains no information on how the technical requirements in the supplement of Amendment XIII came to be, thus leaving an information vacuum on an essential part of this appeal, *i.e.*, the Agency's communications with others and the technical reasoning behind creating Amendment XIII and how that Amendment impacted the other technical requirements of the project. GPA also now claims, again without citation to the Procurement Record as it exists, that the technical restrictions on the project that GlidePath believes existed were mistaken, since, in the view of GPA, the 20.7 MWp limit was not a limit on the system itself, but actually a cap of the "DC/DC converters." Denial of Procurement Protest, January 7, 2020, p. 2, submitted as **Attachment J** to GlidePath's Notice of Appeal filed on November 13, 2019. GPA should be compelled to supplement the record on how this "DC/DC" acceptance came to be, and to provide records kept by GPA showing the technical underpinnings of Amendment XIII since the procurement record in its current form is silent on that matter. GPA's Agency Report is no more helpful than the record that was produced. GPA's answer in its Agency Report to the Notice of Appeal filed by GlidePath spans six pages, of which, just two pages deal with the merits of GlidePath's claims. 2 G.A.R. § 12105(g) requires that the Agency Report be "fully responsive to the allegations of the Appeal." GPA should be compelled to make sure that the record is indeed, fully responsive to the issues in this Appeal.

The OPA can and should compel GPA to supplement its Procurement Record by producing: (1) a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement generally, and specifically the creation of Amendment XIII; and (2) any and all documents, communications and records explaining the Agency's technical reasoning behind creating Amendment XIII.

A complete Procurement Record must be provided to the Public Auditor without delay, and GPA should be compelled to provide a full and complete Procurement Record to the OPA and the Appellant. If GPA does not have or did not maintain a record in respect to either of the two categories of missing information, then the OPA should require the Procurement Officer and the General Manager, to submit a statement that the missing documents, record or file was not maintained, kept or, if appropriate, destroyed. *See* G.C.A. § 5250. ("No procurement award shall be made unless the responsible procurement officer certifies in writing under penalty of perjury that he has maintained the record required by § 5249 of this Chapter and that it is complete and available for public inspection.")

Respectfully submitted on February 20, 2020.

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By: _____


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