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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
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Attorney for the Guam Power Authority

**OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS**

IN THE APPEAL OF)
) DOCKET NO. OPA-PA-19-010
GlidePath Marianas Operations, Inc.,) OPA-PA-20-001
)
Appellant.) **OPPOSITION TO MOTION FOR
DISCOVERY**
)
_____)

COMES NOW, the GUAM POWER AUTHORITY, by and through its counsel of record, D. GRAHAM BOTHA, ESQ., and hereby files its opposition to Appellant's motion for discovery.

GlidePath requests that the Public Auditor pursuant to 5 GCA §9218 and 2 GAR §§12109(c) and 12105(g) issue an Order requiring Guam Power Authority (GPA) to produce for deposition a competent representative to testify regarding the Technical Qualification proposal requirements contained in the bid, GPA-IFB-007-18, and Amendment XII to the IFB issued on January 25, 2019. The GlidePath documents submitted clearly establish that GPA never agreed to make available a representative for a deposition. At the status conference held on January 29, 2020, GPA made it clear that GPA declined to agree to a deposition. GlidePath conceded at that hearing, that the procurement rules of procedure do not provide for the discovery that GlidePath seeks from GPA.

The procurement rules of procedure are clear in this matter. GlidePath references 2 GAR §12109 (a), which references the authority of the Hearing Officer. The section states that

“the Hearing Officer shall receive written, oral, or otherwise presented testimony, evaluate such testimony and make recommendations to the Public Auditor. No prior determination shall be final or conclusive. The Hearing Officer has the power, among others, to:

(a) Hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matter that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer’s [Hearing Officer] own motion.”

2 GAR §12108(d) Hearing Proceedings, provides that:

“Hearings shall be as informal as may be reasonable and appropriate under the circumstances and shall not be bound by statutory rules of evidence or by technical or formal rules of procedure **except as provided by the Guam Procurement Law, Chapter 5 of Title 5, Guam Code Annotated**, and with these procurement appeals regulations. The testimony presented shall be written, oral or otherwise. The weight to be attached to evidence presented in any particular forum will be within the discretion of the Hearing Officer.... Where not otherwise provided for by these rules and regulations or statute, and where not inconsistent herewith, hearings shall be conducted in accordance with the Administrative Adjudication Law in Chapter 9 of Title 5, Guam Code Annotated, including those provisions on subpoenas and contempt.”

GlidePath references 5 GCA §9218 as a basis for allowing a deposition, despite the fact there is no provision for depositions in the procurement code. The section provides that:

“Depositions. On the **verified petition** of any party, an agency may order that the testimony of any material witness residing within or without the territory of Guam be taken by deposition in the manner prescribed by law for depositions in civil actions. The **petition** shall set forth the nature of the pending proceedings; the name and address of the witness whose testimony is desired, a showing of the materiality of his testimony, **a showing that the witness will be unable or cannot be compelled to attend**; and shall request an order requiring the witness to appear and testify before an office named in the petition for that purpose....”

There has been no verified petition filed by GlidePath as required under 5 GCA §9218, and no showing has been made that the witness will be unable or cannot be compelled to attend. GlidePath repeats the same arguments in its appeal and comments that GlidePath either didn’t understand the IFB and amendments, or that the amendments to the technical specifications were unclear. What GlidePath leaves out of this statement is that it had full opportunity to ask

questions regarding the technical specifications at all stages of the bid process.

GlidePath states that “ENGIE’s projects have included more solar generation capacity than allowed by the technical requirement of the IFB. Based on the significantly higher Guaranteed Net Annual Generation (“GNAG”) included, the ENGIE Priced Proposals when compared to the proposal submitted by GlidePath and all the other bidders, GlidePath’s technical experts are concerned that ENGIE may not have followed all of GPA’s technical requirements.” The ENGIE proposal meets the GPA bid requirement that “the MW rating of the ESS shall be equal to or greater than the 145% of the MW rating of the PV charging system.” GlidePath claims that GPA’s technical requirements limit solar system capacity to 20.7MW_{DC}. GPA’s bid did not limit the capacity of the PV installation, but does restrict the delivery of energy at the interconnection point which is 30MW_{ac}. Volume II- Technical Qualification Proposal Requirement, Section 1 Overview (pg 52 of 501) states: “1. The bidder’s renewable resource project shall have a **maximum export capacity of 30MW_{ac}**; this may be a combination of several generation units at one site.” Section 2.3.1. Minimum and Maximum Project Capacity (pg 56 of 501) states “there is no minimum nameplate project capacity that a Bidder may offer, **however the maximum export capacity shall be 30MW.**”

GlidePath itself sought clarification on this issue on February 11, 2019, which was addressed in Amendment XVII (pg. 2 of 17) in which GlidePath asks “what is the maximum procurement under this bid, could GPA select two 30MW_{ac} projects at each site for a total procurement of 60MW_{ac}? The GPA response was “Yes.”

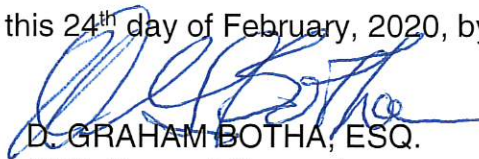
GlidePath states that the GPA limit on the ESS size to 30MW at each project site together with the 145% requirement effectively caps the size of the PV system to 20.7MW_{ac}. The IFB states that the intent of the 145% requirement is to require the ESS charge and discharge be

asymmetrical, with ESS discharge power required to be 30MW_{ac} at the point of connection and ESS charge power not to exceed 20.7MW. This requirement limits the maximum AC PV charging power on each site to 1/1.45 of the maximum AC export capacity. The “MW rating of the PV charging system” in ENGIE’s proposal, is equal to the power rating of the DC/DC converters, and is capped at 20.7MW (i.e. 1/1.45 of 30MW AC), in full compliance with the IFB requirements. Clarifications were provided in Amendment XVII for both GlidePath and ENGIE regarding the increased delivery period.

The failure of GlidePath to raise additional questions regarding its understanding of the technical specifications prior to submitting a bid, should not allow GlidePath now to request a deposition which is not provided for in the procurement rules. The OPA has already given a scheduling order for the parties, which requires the parties to provide pre-trial briefs establishing each party’s position on different issues. GlidePath can state its issue with the technical specifications in its pre-trial brief, and state its argument at that time regarding its comprehension of the technical specifications. GlidePath first argues that the OPA should not be bound by the technical rules of evidence, and next argues that GPA should be subject to a deposition pursuant to 5 GCA §9218, when GlidePath has failed to follow the procedures set forth in §9218, and the request for a deposition is not contained in the OPA hearing rules.

GPA requests that OPA deny the request for deposition submitted by appellant GlidePath, and allow them to examine witnesses at the hearing as provided for in the OPA hearing rules.

RESPECTFULLY SUBMITTED this 24th day of February, 2020, by:


D. GRAHAM BOTHA, ESQ.
GPA General Counsel