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# FAX

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**Re:** OPA-PA-19-010, OPA-PA-20-001, and OPA-PA-20-007 Decision

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 Jerrick Hernandez, Auditor  
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**BEFORE THE PUBLIC AUDITOR  
PROCUREMENT APPEALS  
TERRITORY OF GUAM**

IN THE APPEAL OF

GlidePath Marianas Operations Inc.,

Appellant,

Guam Power Authority (GPA)

Purchasing Agency.

APPEAL NOs. OPA-PA-19-010  
OPA-PA-20-001  
OPA-PA-20-007

**DECISION**

**I. INTRODUCTION**

This is the Decision of the Public Auditor for Consolidated Procurement Appeals, OPA-PA-19-010, OPA-PA-20-001, and OPA-PA-20-007. Appellant, GLIDEPATH MARIANAS OPERATIONS INC. (hereinafter collectively referred to as “GlidePath”) filed its appeals on November 13, 2019, January 21, 2020, and July 20, 2020. GlidePath’s appeal is made from a Decisions on Protest of Method, Solicitation or Award. GlidePath appeals the Guam Power Authority’s (“GPA”) October 31, 2019, January 10, 2020, and July 14, 2020 denials of GlidePath’s Protests.

The Appeal was heard on July 6, 7, 8, 9, and 14, 2020 before Public Auditor Benjamin J.F. Cruz. Joshua Walsh, Esq. and Joseph Razzano, Esq. appeared on behalf of GlidePath along with Institutional Representative Sean Baur. Additionally, GlidePath Institutional Representative Erin Hazen appeared virtually via Microsoft Teams. D. Graham Botha, Esq., appeared on behalf of

1 Purchasing Agency, GPA, along with agency representative Beatrice Limtiaco, GPA Assistant  
2 General Manager for Administration. R. Marsil Johnson, Esq. and Anita P. Arriola, Esq. appeared  
3 on behalf of Interested Party, ENGIE Solar (hereinafter collectively referred to as “ENGIE”) along  
4 with Institutional Representative Darin Mingo. Additional ENGIE Institutional Representatives  
5 Kotryna Kanapyte, Matteo Lionetti and Jeff Russell appeared virtually via Microsoft Teams.

7 In OPA-PA-19-010 Notice of Procurement Appeal, GlidePath raised the following issues: (1)  
8 GPA’s is ignoring the fact that ENGIE’s proposals do not comply with the Invitation for Bids (IFB)  
9 technical requirements; and (2) GPA’s acceptance of ENGIE’s bid as responsive significantly  
10 prejudiced the people of Guam, by allowing what is effectively a sole source procurement for  
11 projects worth nearly \$200 million. GlidePath requested that the Public Auditor order GPA to  
12 disqualify ENGIE from eligibility for award, as their proposal did not materially comply with the  
13 technical requirements of the IFB; and that GPA award both project sites detailed in the IFB to  
14 GlidePath as the next lowest responsive bidder.

16 In OPA-PA-20-001 Notice of Procurement Appeal, GlidePath raised the following issues: (1)  
17 GPA’s handling of the procurement was flawed by leading offerors like GlidePath to submit bids  
18 based on technical requirements that GPA now claims to not need to be met; and (2) GPA accepted  
19 ENGIE’s bid based on technical specifications that other offerors could not access. GlidePath again  
20 requested that the Public Auditor disqualify ENGIE from eligibility for award, and order GPA to  
21 award both project sites to GlidePath as the next lowest responsive bidder. In the alternative,  
22 GlidePath requested the Public Auditor order GPA to: (1) allow for a period of clarifications and  
23 discussion between GPA and offerors to eliminate all questions about the technical nature of the  
24 system required by GPA for the IFB; and (2) receive and review new technical and price proposals  
25 from all existing offerors.  
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1 In OPA-PA-20-007 Notice of Procurement Appeal, GlidePath mainly raised the issue that the  
2 procurement record is in disarray and not maintained in accordance with the law, and requested the  
3 Public Auditor determined that because the record was not maintained in accordance with Guam  
4 law, no procurement award can be made and the IFB must be canceled and reissued.

5 The Public Auditor holds that: (1) ENGIE's bid did comply with the IFB and GPA's acceptance  
6 of ENGIE's bid as responsive was valid; (2) GPA's handling of the IFB did not render a sole source  
7 procurement; and (3) the Procurement Record is not materially incomplete to prevent an award.  
8

## 9 **II. FINDINGS OF FACT**

10 The Public Auditor in reaching this Decision has considered and incorporates herein the  
11 procurement record and all documents submitted by the parties, and has considered the testimony  
12 and arguments made during the hearings that were held on July 6, 7, 8, 9, and 14, 2020. Based on  
13 the aforementioned record in this matter, the Public Auditor makes the following findings of fact:  
14

### 15 **A. Procedural Background**

- 16 1. On November 16 and 24, 2017, GPA issued a multi-step IFB No. GPA-IFB-007-18,  
17 Renewable Energy Resources Phase III ("the IFB") (Procurement Record (PR) Tab 71  
18 and 72).
- 19 2. The IFB sought to procure energy produced by means of solar renewable energy  
20 production plant with an included energy storage system, with each plant incorporating a  
21 photovoltaic (PV) array and an energy storage system (ESS) (hereinafter collectively  
22 referred to as "PV + ESS"). One PV + ESS plant would be constructed at a pre-  
23 determined South Finegayan site (Site 1) and the other would be constructed at a pre-  
24 determined Naval Base Guam site (Site 2). Each PV + ESS plant was to include full-time  
25 shifting, meaning that solar energy collected during the day would be stored in the ESS  
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- 1 and later discharged from the ESS to the GPA electrical grid. The design of each PV +  
2 ESS plant was subject to the additional technical restrictions. (PR Tab 71)
- 3 3. The IFB was a multi-step invitation for bid whereby prospective bidders would submit an  
4 unpriced technical proposal for consideration by GPA. Bidders who submitted an  
5 unpriced technical proposal that met the IFB's technical requirements, as determined by  
6 GPA, were permitted to move on to the second stage of the procurement where they could  
7 submit a price proposal. (PR Tab 71)
- 8
- 9 4. The technical requirements of the IFB are outlined on pages 52-63 of the IFB's main  
10 document and page 160-166 of Amendment XIII (PR Tab 71)
- 11 5. The IFB main document included a provision rendering any amendments issued by GPA  
12 binding to the same extent as if written in the originally issued IFB documents. (PR Tab  
13 71)
- 14
- 15 6. Prospective bidders were afforded an opportunity to submit requests for information to  
16 GPA, which were publicly answered in the form of various amendments. (PR Tab 71)
- 17 7. On December 4, 2017, GPA issued Amendment No. I (PR Tab 71 and Tab 69)
- 18 8. On January 18, 2018, GPA issued Amendment No. II (PR Tab 71 and Tab 68)
- 19 9. On February 9, 2018, GPA issued Amendment No. III (PR Tab 71 and Tab 66)
- 20 10. On March 1, 2018, GPA issued Amendment No. IV. (PR Tab 65)
- 21 11. On March 7, 2018, GPA issued Amendment No. V. (PR Tab 64)
- 22 12. On April 12, 2018, GPA issued Amendment No. VI. (PR Tab 63)
- 23 13. On May 19, 2018, GPA issued Amendment No. VII. (PR Tab 62)
- 24 14. On June 22, 2018, GPA issued Amendment No. VIII. (PR Tab 61)
- 25 15. On September 2, 2018, GPA issued Amendment No. IX. (PR Tab 71 and Tab 60)
- 26 16. On December 6, 2018, GPA issued Amendment No. X. (PR Tab 71 and Tab 59)
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- 1 17. On December 18, 2018 GPA issued Amendment No. XI. (PR Tab 58)
- 2 18. On January 11, 2019, GPA issued Amendment No. XII. (PR Tab 57)
- 3 19. On January 25, 2019, GPA issued Amendment No. XIII. (PR Tab 56)
- 4 20. On February 5, 2019, GPA issued Amendment No. XIV. (PR Tab 55)
- 5 21. On February 12, 2019, GPA issued Amendment No. XV. (PR Tab 54)
- 6 22. On April 8, 2019, GPA issued Amendment No. XVI. (PR Tab 71 and Tab 53)
- 7 23. On April 18, 2019, GPA issued Amendment No. XVII. (PR Tab 52)
- 8 24. On May 1, 2019, GPA issued Amendment No. XVIII. (PR Tab 71 and Tab 51)
- 9 25. On May 23, 2019, GPA issued Amendment No. XIX. (PR Tab 71 and 50)
- 10 26. On June 3, 2019, GPA received technical proposals from the following offerors for Step 1
- 11 of the IFB:
- 12
- 13 a. X-Elio (for Sites 1 and 2)
- 14 b. GlidePath (for Sites 1 and 2)
- 15 c. KEPCO & Hanwha Energy Corporation Consortium (for Sites 1 and 2)
- 16 d. ENGIE (for Sites 1 and 2)
- 17 e. Global Sourcing USA & General Electric Consortium
- 18 f. AES Distributed Energy Inc. (for Sites 1 and 2)
- 19
- 20 (PR Tab 48)
- 21
- 22 27. On June 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, and 27, 2019, the Bid Evaluation
- 23 Committee reviewed the proposals and sought clarification from several offerors during
- 24 their review. (PR Tabs 36, 35, 34, 33, 32, and 31)
- 25
- 26 28. On June 24, 2019, GPA issued Amendment No. XX (PR Tab 71 and 30)
- 27
- 28 29. On July 1, 2, 3, 5, 8, 10, 11, 12, 17, 18, 19, the Bid Evaluation Committee continued their
- review of the proposals and sought clarification from several offerors during their review.

- 1 30. On July 17, 2019, GPA issued Amendment No. XXI (PR Tab 71 and 26)
- 2 31. On July 24, 2019, GPA issued Amendment No. XXII (PR Tab 71 and 24)
- 3 32. On August 8, 2019, GPA issued Amendment No. XXIII (PR Tab 20)
- 4 33. On August 12, 2019, the Evaluation Committee issued a Memorandum to the Supply
- 5 Management Administrator indicated that they have completed Step One – Technical
- 6 Proposal Evaluation of the IFB and indicated the following proposals were acceptable and
- 7 deemed qualified to participate in Step Two of the IFB, Opening of Price Proposals:
- 8
- 9 a. AES Distributed Energy Inc. (for Site 1 and 2)
  - 10 b. ENGIE (for Site 1 and 2)
  - 11 c. KEPCO & Hanwha Energy Corporation Consortium (for Site 1 and 2)
  - 12 d. GlidePath (for Site 1 and 2)
  - 13 e. X-Elio (for Site 1 and Site 2)

14 (PR Tab 22)

15 34. On August 22, 2019, GlidePath submitted a Freedom of Information Act (FOIA) request

16 to GPA.

17 35. On August 26, 2019, GPA responded to GlidePath’s FOIA request. (PR Tab 19)

18 36. On September 10, 2019, GPA received price proposals from the following offerors for

19 Step 2 of the IFB:

- 20 a. AES Distributed Energy Inc. (for Site 1 and 2)
- 21 b. GlidePath (for Site 1 and 2)
- 22 c. KEPCO & Hanwha Energy Corporation Consortium (for Site 1 and 2)
- 23 d. ENGIE (for Site 1 and 2)
- 24 e. X-Elio (for Site 1 and Site 2)

25 (PR Tab 18)

- 1 37. On September 12, 2019, GlidePath submitted a second FOIA request to GPA (PR Tab 16)
- 2 38. On September 17, 2019, the Bid Evaluation Committee met to review the price proposals
- 3 and sought clarification from AEs Distributed Energy Inc. (PR Tab 17)
- 4 39. On September 17, 2019, GPA issued Amendment No. XXIV. (PR Tab 71 and 15)
- 5 40. On September 19, 2019, Pacific Energy Corporation submitted a FOIA request to GPA
- 6 (PR Tab 14)
- 7 41. On September 20, 2019, GPA responded to GlidePath's second FOIA request. (PR Tab
- 8 16)
- 9 42. On September 25, 2019, GPA responded to Pacific Energy Corporation's FOIA request.
- 10 (PR Tab 14)
- 11 43. On September 25, 2019, the Bid Evaluation Committee submitted a Memorandum to the
- 12 Supply Administrator indicated they have completed Step-Two – Price Proposal
- 13 Evaluation of the IFB and determined the following:
- 14
- 15 a. ENGIE's price for Site 1 was \$108.90 Megawatt hour (MWh) and \$110.90/MWh
- 16 for Site 2
- 17
- 18 b. AES's price for Site 1 was \$158.90 MWh and \$169.00/MWh for Site 2
- 19
- 20 c. GlidePath's price for Site 1 was \$191.50 MWh and \$196/MWh for Site 2.
- 21 GlidePath's alternate price for Site 1 was \$176.00 MWh and \$176.00/MWh with
- 22 the stipulation that both projects would need to be awarded to GlidePath in order
- 23 to receive the alternate price.
- 24 d. AES, as the next lowest bidder for Site 1, had a price that was 45.9% higher than
- 25 ENGIE's price. AES, as the next lowest bidder for Site 2, had a price that was
- 26 52.3% higher than ENGIE's price.
- 27
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- 1 e. ENGIE's bid for both Site 1 and Site 2 was the lowest responsive bid and  
2 recommended the IFB be award to ENGIE for both sites. (PR Tab 12)
- 3 44. On September 30, 2019, GlidePath submitted a letter to GPA in response to information  
4 received from their FOIA requests. (PR Tab 13)
- 5 45. On October 2, 2019, the GPA General Manager approved the Evaluation Committees'  
6 recommendation. (PR Tab 12)
- 7 46. On October 3, 2019, the Evaluation Committee met to discuss GlidePath's September 30,  
8 2020 letter to GPA. (PR Tab 11)
- 9 47. On October 4, 2019, GPA issued Amendment No. XXV (PR Tab 71 and 10)
- 10 48. On October 4, 2019, GPA issued the Notice of Intent to Award letter to ENGIE and Bid  
11 Status letters to all other offerors. (PR Tab 9)
- 12 49. On October 9, 2019, GlidePath filed a Bid Protest and third FOIA request with GPA (PR  
13 Tab 7)
- 14 50. On October 10, 2019, GPA issued a notice of Stay of Procurement due to the protest filed  
15 by GlidePath to all offerors. (PR Tab 7)
- 16 51. On October 11, 2019, the Evaluation Committee met to discuss GlidePath's protest (PR.  
17 Tab 6)
- 18 52. On October 28, 2019, GPA issued a letter of Denial of Protest to GlidePath, (PR. Tab 5)
- 19 53. On October 30, 2019, GPA issued notice lifting the Stay of Procurement to all offerors  
20 (PR Tab 5)
- 21 54. On November 13, 2019, GlidePath filed an appeal with the Office of Public  
22 Accountability (OPA), which was assigned appeal case number OPA-PA-19-010. (PR.  
23 Tab 3).
- 24 55. On November 13, 2019, GlidePath also filed a second protest with GPA (PR Tab 4)
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1 56. On December 12, 2019, GPA filed the procurement record for OPA-PA-19-010.

2 57. On January 2, 2020, a Status Conference was held for OPA-PA-19-010 where GlidePath  
3 noted a second potential appeal and asked that if it is filed, it would be consolidated with  
4 the first appeal. The parties also would stipulate to have one procurement record for the  
5 possible consolidated appeals.  
6

7 58. On January 7, 2020, GPA issued a letter of Denial of Protest to GlidePath

8 59. On January 17, 2020, GPA filed a Supplemental Procurement Record

9 60. On January 21, 2020, GlidePath filed a second appeal with OPA, which was assigned  
10 appeal case number OPA-PA-20-001.

11 61. On January 29, 2020, a Second Status Conference was held for OPA-PA-19-010, where  
12 the parties stipulated that the procurement record filed for OPA-PA-19-010 and the  
13 January 17, 2020 Supplemental Procurement record would be the procurement record also  
14 for OPA-PA-20-001. The parties also stipulated that the appeals may be consolidated.  
15

16 62. On January 30, 2020, OPA issued an Order Consolidating Appeals OPA-PA-19-010 and  
17 OPA-PA-20-001.

18 63. On July 6, 2020, the Formal Hearing started and continued on July 7, 8, and 9, 2020.

19 64. On July 9, 2020, GPA filed a Supplemental Procurement Record

20 65. On July 9, 2020, GlidePath filed a third protest and FOIA request

21 66. On July 14, 2020, GPA denied GlidePath's third protest.  
22

23 67. On July 14, 2020, the Formal Hearing continued and instead of moving forward with  
24 closing arguments, the parties agreed to stay appeal hearing proceedings until GlidePath  
25 files its third appeal, which they noted was likely to happen.  
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68. On July 15, 2020, GPA filed a Supplemental Procurement Record with additional attachments that were inadvertently not included in the July 9, 2020 Supplemental Procurement Record.
69. On July 20, 2020, GlidePath filed a third appeal with OPA, which was assigned appeal case number OPA-PA-20-007.
70. On July 22, 2020, the OPA issued an Order Consolidating Appeals OPA-PA-19-010, OPA-PA-20-001, and OPA-PA-20-007.
71. On July 29, 2020, the parties filed a stipulation that:
- a. The procurement record filed for OPA-PA-19-010 and adopted in OPA-PA-20-001 is adopted as the procurement record for OPA-PA-20-007, with GPA supplementing the procurement record as needed to account for new material discovered or otherwise generated from GlidePath’s third agency-level protest.
  - b. The Agency Report, Comments on the Agency Report, Rebuttal to Appellant’s Comments on Agency Report, and any Trial Brief as described and allowed in Chapter 12, Division 4, Title 2 of the Guam Administrative Rules and Regulations shall not be filed and are waived in the Third Appeal.
72. On July 29, 2020, OPA issued an Order to Vacate Hearing Continuation and Set Deadline for Findings of Fact and Conclusions of Law.
73. On August 11, 2020, GlidePath, GPA, and ENGIE filed their Proposed Findings of Fact and Conclusions of Law.

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### III. ANALYSIS

Pursuant to 5 G.C.A. § 5703, the Public Auditor reviews GPA’s denial of GlidePath’s Protests *de novo*. The Public Auditor addresses GlidePath’s appellate issues as follows.

**A. ENGIE’S BID DID COMPLY WITH THE IFB AND GPA’S ACCEPTANCE OF ENGIE’S BID AS RESPONSIVE WAS VALID**

In OPA-PA-19-010, GlidePath claims ENGIE did not meet the requirements of the IFB and ENGIE’s bid should be disqualified.

The IFB’s three relevant requirements:

1.) “[t]he Bidder’s renewable resource project shall have a maximum export capacity 30 MW (AC) at the interconnection point; this may be the combination of several generation units at one site.” This requirement limits each bidder’s project to providing no more than 30 megawatt (MW) (AC) of electricity at the interconnection point. The interconnection point is the point on the existing GPA transmission grid where the new plant will be connected. It was included to limit the impact of the Phase III system on GPA’s electrical grid, both so that the Phase III system would not overload GPA’s electrical grid and to limit the impact on GPA’s electrical grid should the Phase III system go down at any time. (PR Tab 71)

2.) The IFB required that “[t]he MW rating of the ESS shall be equal to or greater than the 145% of the MW rating of the PV charging system, up to a maximum capacity of 40 MW. For instance, for a PV installation of 27 MW, the ESS shall be rated at a minimum of 40 MW. For a PV capacity of 10 MW, the ESS shall be a minimum of 14.5 MW.” This requirement links the power rating of the PV charging system to the ESS’s MW rating. More specifically, for a given ESS MW rating (PESS), the PV charging system MW rating cannot exceed PESS/1.45. In other words, the PESS must be 145% or greater than the PV charging system MW rating. It was included so the ESS (the battery storage system) would charge at a slower rate throughout the day (over the

1 course of approximately 12 hours) and discharge at a faster rate after sunset (for approximately 4  
2 to 6 hours). (PR Tab 56 and 52)

3 3.) The IFB required that “[t]he MW output of PV used to charge the ESS should be maximized  
4 to the amount of capacity available on each site and any energy restrictions of the ESS.” This  
5 requirement required the bidders to maximize the solar production with their proposed design,  
6 within the site’s physical constraints and within the economic constraints dictated by each bidder’s  
7 need to submit a competitive bid. (Procurement Record Tab 56)

8  
9 In their trial brief, GlidePath claims “[t]he inclusion of more than 20.7 megawatt peak (MWp)  
10 of solar generation capacity at either of the project sites is explicitly and specifically prohibited in  
11 the IFB and rendered ENGIE’s proposal non-responsive to the IFB. GlidePath’s claim is  
12 contradicted by the testimony of GlidePath’s witness and representative, Peter Rood. During the  
13 hearing, Mr. Rood testified that the IFB did not specifically cap the PV module capacity at 20.7  
14 MWp. Mr. Rood went on to confirm that the 20.7 MWp cap was instead calculated by GlidePath  
15 through its interpretation of certain other requirements in the IFB. (P. Rood Testimony, July 6, 2020  
16 Hearing Audio Part B at 5:44 to 6:42)

17  
18 GlidePath’s claim was also contradicted by virtually every other witness who testified at the  
19 hearing. GlidePath expert witness Robert Charles also conceded that there is “no specific number  
20 of 20.7” as a limitation on MWp. (R. Charles Testimony, July 6, 2020 Hearing Audio Part A at  
21 01:19:34 to 01:19:36) GPA Consultant and Engineer David Burlingame, who assisted GPA in  
22 drafting the IFB and consulted in other GPA projects, testified that there was no limitation on the  
23 PV modules. (D. Burlingame Testimony, July 7, 2020 Hearing Audio Part B at 00:18:58 to  
24 00:19:01) GPA Engineer Jennifer Sablan testified that there was no limit on the size of the capacity  
25 of the PV array in the IFB. (J. Sablan Testimony, July 7, 2020 Hearing Audio Part B at 01:23:37 to  
26 01:24:04) ENGIE’s Vice President of Engineering and Profession of Engineering at Polytechnic  
27  
28

1 Milan, Daniele Rosati, testified that there is no limitation on the MWp of the PV system. (D. Rosati  
2 Testimony, July 8, 2020 Hearing Audio Part B at 02:07:52 to 02:08:28) ENGIE’s System Engineer  
3 and Lead Engineer on the Guam project, Dario Gigliotti, testified that there was no limitation on  
4 the PV capacity, to the contrary, the IFB allowed the bidders to maximize their PV capacity on both  
5 project sites. (D. Gigliotti Testimony, July 9, 2020 Hearing Audio at 00:43:25 to 00:43:48)  
6

7 Mr. Rood went on to admit that he could not confirm whether the term “megawatt peak”  
8 appeared in the IFB and that he did not doubt Attorney Anita Arriola’s claim that the term was not  
9 present in the IFB. Mr. Gigliotti confirms through his testimony that the term “megawatt peak” nor  
10 its abbreviation “MWp” appear in the IFB or its amendments. (D. Gigliotti Testimony, July 9, 2020  
11 Hearing Audio at 00:22:16 to 00:22:40)  
12

13 GlidePath claims that ENGIE was the only bidder who exceeded a 20.7 MWp PV module  
14 capacity in its design and that this provided ENGIE with an unfair advantage over other bidders.  
15 (GlidePath’s Trial Brief p. 27-28) This claim is not supported by the record as all bidders other than  
16 GlidePath included system designs for at least one of the two sites that exceeded GlidePath’s  
17 alleged 20.7 MWp limitation:

- 18 a.) AES proposal for Site 1 included 23.58 MWp.
- 19 b.) KEPCO/Hanwha proposal for Site 1 included 21.6 MWp and 21 MWp for Site 2.
- 20 c.) X-Elio proposal for Site 2 included 24.89 MWp.
- 21 d.) ENGIE’s proposal for Site 1 included 26.47 MWp and 27.6 MWp for Site 2.

22 (PR Tabs, 38, 40, 41, 42, and 47)  
23

24 GlidePath was the only one of the five bidders who limited the PV module capacity at both sites  
25 to below 20.7 MWp. (PR Tab 44) The fact that none of the other bidders limited their PV module  
26 capacity to 20.7 MWp at both sites shows that none of them interpreted the IFB and its amendments  
27 to include a requirement that PV module capacity was limited to 20.7 MWp at each site.  
28

1 Mr. Rood also testified that Question # 30 in Amendment XIII supported the 20.7 MWp  
2 limitation (P. Rood Testimony, July 6, 2020 Hearing Audio Part A at 01:46:09 to 01:47:10), which  
3 was:

4 **Question:**

5 30: Is this the nominal operating power per site? Is GPA seeking to procure 20  
6 MWac minimum ESS capacity per site: If the MWac capacity is not reached on one  
7 site, will GPA forego to deploy ESS at that site?

8  
9 **Answer:**

10 GPA is seeking the most cost effect project GPA has estimated prior to energy  
11 storage requirements that these Naval Base Guam and the South Finegayan sites  
12 could be developed for 20 MWac of Solar PV capacity. GPA would need to  
13 understand any reason for underdevelopment of site. Bidders must identify  
14 properties not used to address any modification son the sublease in regards to  
15 removal of sites.

(GlidePath’s Exhibit 5-00013)

16 The Public Auditor finds that Question 30 and the Answer do not contain any 20.7 MWp limitation  
17 on the installed capacity of the PV modules. The Procurement Record shows that numerous  
18 questions were submitted by the bidders, including GlidePath, which resulted in clarifications or  
19 Amendments to the IFB.

20 Requirement #2 referred to the charge and discharge rate of the ESS and it did not limit the  
21 PV Module Capacity of each Site, It is found in Exhibit B to Amendment XIII, in a document titled  
22 “Supplement & Update to Volume II – Technical Qualification Proposal Requirements Description  
23 of Operation/Key Characteristics & Technical Requirements December 2018”. More specifically,  
24 it is found on the first page of that document, in the section titled “2. Description of Operation and  
25 Key Characteristics” and as a bullet point under the heading: “**The capacity/discharge rate (MW)**  
26 **output and otherwise design of the ESS should be such that:”** (emphasis added) Requirement  
27 #2 stated:

1 The MW rating of the ESS shall be equal or greater than the 145% of the MW rating of the  
2 PV charging system, up to a maximum capacity of 40 MW. For instance, for a PV  
3 installation of 27 MW, the ESS shall be rated at a maximum of 40 MW. For a capacity of  
4 10 MW, the ESS rating shall be a minimum of 14.5MW.

(PR Tab 56)

5  
6 It requires that the ESS must be capable of discharging at a rate equal to or greater than 145% the  
7 maximum capacity of the PV charging system, and it was included in the IFB because GPA  
8 intended each PV + ESS plant to collect and store energy in the ESS throughout the day (from  
9 approximately 6 a.m. to 6 p.m.) and then discharge that energy from the ESS into GPA's electrical  
10 grid over the course of 4 to 6 hours at night. (PR Tab 52)

11 GlidePath asserts that the term "PV Charging System" refers only to the PV modules (also  
12 referred to as the solar array), but it does not. The PV + ESS plant described in the IFB is built  
13 around the ESS and consists of two primary control systems: a charging system and a discharging  
14 system. The charging system consists of the PV modules (the solar array) and a converter. The PV  
15 modules will not charge an ESS without a converter, which is a necessary component of the  
16 charging system. (D. Rosatti Testimony, July 8, 2020 Hearing Audio Part B at 00:31:19 to  
17 00:31:42) The discharging system consists of an inverter used to discharge the battery and convert  
18 the battery's DC current into AC current) and a step-up transformer, which adjusts the voltage of  
19 the electricity so that it can be introduced into GPA's electrical grid at the interconnection point.  
20 (D. Rosatti Testimony, July 8, 2020 Hearing Audio Part B at 00:33:25 to 00:42:01)

21  
22  
23 GPA used the term "PV charging system" in its IFB and its amendments only in reference to  
24 the sentence "[t]he MW rating of the ESS shall be equal to or greater than the 145% of the MW  
25 rating of the PV charging system, up to a maximum capacity of 40 MW." (PR Tab 56) Ms. Sablan  
26 testified that the term "PV charging system" refers to "that side of the battery that charges the  
27 battery", meaning the half of the PV + ESS plant that is devoted to charging the battery. Mr.  
28



1 Burlingame testified that the term “PV charging system”, as used in the IFB, does not refer to the  
2 capacity of the PV photovoltaic cells, but the capacity of the PV charging system.” (J. Sablan  
3 Testimony, July 7, 2020 Hearing Audio Part B at 01:42:57 to 01:42:08)

4 GlidePath uses the term “PV charging system” imprecisely in its briefs and testimony, treating  
5 the term as interchangeable with the terms “PV array”, “PV system”, “solar generation capacity”,  
6 and others. (GlidePath’s Trial Brief) However, the term “PV charging system” is used specifically  
7 in the IFB and is not interchangeable with the terms of PV array”, “PV system”, and “solar  
8 generation capacity” (PR Tab 56)

9  
10 ENGIE’s proposal did meet the requirements and criteria of the IFB. GPA determined that bids  
11 from AES, KEPCO/Hanwha, X-Elio, GlidePath, and ENGIE all the met technical requirements of  
12 the IFB and allowed them to submit price proposals. Ultimately, GPA determined ENGIE’s bid for  
13 both Site 1 and Site 2 was the lowest responsive bid and was recommended award of the IFB for  
14 both sites. GlidePath’s appeal on this assertion the ENGIE’s bid did not meet the IFB requirements  
15 is DENIED.

16  
17 **B. GPA’S HANDLING OF THE IFB DID NOT RENDER A SOLE SOURCE**  
18 **PROCUREMENT.**

19  
20 GlidePath asserts that GPA’s determination that no 20.7 MWp limitation existed in the IFB  
21 means that “the amendments, communications, and information provided to the bidders during the  
22 procurement process resulted in a flawed procurement where offerors were led into submitting bids  
23 that were limit by specifications that did not actually exist in GPA’s mind’s eye.” GlidePath claims  
24 that GPA’s decision to issue a notice of intent to award the contract to ENGIE engaged in  
25 “effectively a sole source procurement”. (GlidePath’s Trail Brief p. 27-28)

26 The Public Auditor finds that this award was indeed not a sole source procurement, as identified  
27 in 5 G.C.A. § 5214, which provides that:

1 A contract may be awarded for a supply, services, or construction item without competition  
2 when, under regulations promulgated by the Policy Office, the Chief Procurement Officer,  
3 the Director of Public Works, the head of a purchasing agency, or a designee of either officer  
4 above the level of the Procurement Officer determines in writing that there is only one  
5 source for the required supply, service or construction item.

6 GPA issued an IFB that solicited bids for unpriced technical proposals and then allowed bidders  
7 to submit price proposals (Procurement Record Tab 12). GlidePath's claim that the IFB was  
8 "effectively" sole source procurement is based on its assertion that GPA applied different  
9 requirements to its consideration of ENGIE's bid than the other bids, allowing ENGIE to exceed  
10 the alleged 20.7 MWp requirement. However, as noted above, every other bidder except GlidePath  
11 exceeded the alleged limitation. ENGIE was not the only bidder to submit a bid that exceeded  
12 GlidePath's alleged 20.7 MWp requirement.

13 GlidePath's failure to understand the requirements of the IFB did not affect the ability of any  
14 other bidder to correctly understand the requirements of the IFB and submit competing bids that  
15 conformed to the IFB's requirements. GPA's handling of the IFB did not render it a sole source  
16 procurement as defined in 5 G.C.A. § 5214. GPA engaged in a multi-step invitation for bid and  
17 allowed five bidders to submit price proposals after following their submission of unpriced  
18 technical proposals. GlidePath's appeal on this asserted basis is DENIED.

19 **C. PROCUREMENT RECORD IS NOT MATERIALLY INCOMPLETE TO**  
20 **PREVENT AN AWARD**

21 Glide Path asserts that "no procurement award can be made and the IFB must be canceled and  
22 reissued" because the IFB procurement record was not maintained in accordance with Guam law  
23 and it is "in disarray".

24 The procurement record was filed on December 12, 2019, with the OPA and served on the  
25 parties, and GPA asserts that the procurement record included references to the involvement of Mr.  
26 Burlingame and Electrical Power Systems in reviewing the technical requirements of the IFB. This  
27 meant GlidePath knew or should have known of their involvement and the absence of any record

28 *OPA-PA-19-010, 20-001, and 20-007*

*Decision*

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1 of communication between GPA and Mr. Burlingame or Electrical Power Systems as of December  
2 12, 2019, meaning that GlidePath was required to file a protest on the incompleteness of the record  
3 within 14 days of December 12, 2019. Their protest of July 9, 2020 does not fall within fourteen  
4 days of December 12, 2019.

5  
6 The procurement record included three copies of an email from Ms. Sablan and employees of  
7 NAVFAC. In the email, Ms. Sablan states that “[w]e are working on the following 1<sup>st</sup>  
8 amendment:”... “3. Any further ESS or interconnection requirements as recently discussed with  
9 Dave Burlingame and the EPS team.” (PR Tab 11)

10 In response to GPA’s denial of the third protest related to incomplete procurement record,  
11 GlidePath claims that the references to Mr. Burlingame and the Electrical Power Systems do not  
12 mean that that GlidePath knew or should have known about the reference or the extent of the  
13 communication, especially considering the “voluminous record” and the fact that Mr. Burlingame’s  
14 “name is repeated twice” in a procurement record of more than 12,000 pages themselves containing  
15 tens of dozens of names.” However, this claim by GlidePath that the December 12, 2019  
16 procurement record cannot be held against them due to the voluminous nature of the procurement  
17 record is not convincing. It is the bidder’s responsibility to diligently access the solicitation and to  
18 digest, prepare, and submit its protest within the requisite number of days afforded to them by  
19 Guam Procurement Law.  
20  
21

22 GlidePath has made no showing that the Procurement Record is materially incomplete and has  
23 made no showing that any documents it claims are missing from the procurement record are  
24 material to their first, second, or third appeals. GlidePath has made the vague claim that the absence  
25 of certain records it claims are missing from the procurement record “prejudice” GlidePath, though  
26 it has provided no facts to support this claim.  
27  
28

1 The records GlidePath claims are missing from the procurement record all refer to discussions  
2 between GPA, Mr. Burlingame, and Electrical Power Systems in drafting the technical  
3 specifications for the IFB. These records were not part of the IFB and were not part of any  
4 amendments to the IFB.

5  
6 GlidePath's procurement appeals allege that ENGIE's bid did not meet the requirements of the  
7 IFB and was therefore non-responsive. (GlidePath's Trial Brief) Any discussions between GPA,  
8 Mr. Burlingame, and Electrical Power Systems in drafting the technical specifications for the IFB  
9 are not material to the procurement or a determination of whether ENGIE's bid met the IFB  
10 requirements, because the requirements of the IFB, as stated in the IFB and its amendments speak  
11 for themselves. The inability of the Public Auditor to review the discussion held between GPA, Mr.  
12 Burlingame, and Electrical Power Systems in drafting the technical specifications for the IFB does  
13 not affect the Public Auditor's ability to determine whether ENGIE met the requirements of the  
14 IFB as stated in their final form in the IFB and its amendments.

15  
16 Guam Procurement law allows an aggrieved party to file a protest, but it requires that "the  
17 protest shall be submitted in writing within fourteen (14) days after such aggrieved party knows or  
18 should have known of the facts giving rise thereto." 5 G.C.A. § 5425(a). Having been served with  
19 the procurement record on December 12, 2019, GlidePath should have known about the presence  
20 of the email that mentioned communications between GPA and Mr. Burlingame and Electrical  
21 Power Systems and that the procurement record did not contain such communication. The volume  
22 of the procurement record has no bearing on the Bidder's responsibility to file a timely protest.  
23 GlidePath filed its third procurement protest related to the incomplete procurement record on July  
24 9, 2020, which is more than fourteen days after December 12, 2019, and therefore is untimely.

25  
26 As the appealing party, GlidePath has the burden of establishing that items missing from the  
27 procurement record were material to the procurement. *TeleGuam Holdings LLC vs. Guam*, 2018  
28

1 Guam 5, ¶39. While GlidePath goes into great detail in its OPA-PA-20-007 Notice of Appeal as to  
2 how it knows records are missing and what records it believes to be missing, it provides no facts to  
3 show that the missing records are material to their appeal. After review of the procurement record,  
4 all documents submitted by the parties, all testimony and evidence introduced during the formal  
5 hearings, and after careful consideration of the consequences of the incomplete nature of the  
6 procurement record, the Public Auditor hold that the Procurement Record is not materially  
7 incomplete.  
8

9 Although GPA is admonished for not including all communications in the procurement record  
10 prior to awarding the IFB, discussions between GPA, Mr. Burlingame, and Electrical Power  
11 Systems discussing the technical requirements of the IFB are not material to whether ENGIE met  
12 the technical requirements as made available to all bidders in their final form in the IFB and its  
13 amendments, because no party could have relied on the missing documents in drafting their bid.  
14  
15 GlidePath's appeal on this asserted basis is DENIED.

#### 16 **IV. CONCLUSION**

17 The Public Auditor holds that:

- 18 1. ENGIE bids did not violate the IFB and GPA's acceptance of ENGIE's bid as responsive  
19 was valid.
- 20 2. GPA's handling of the IFB did not render a sole source procurement.
- 21 3. The procurement record is not materially incomplete to prevent an award, and therefore the  
22 award to ENGIE stands.
- 23 4. GlidePath's appeals, including OPA-PA-19-010, OPA-PA-20-001, and OPA-PA-20-007  
24 are DENIED in their entirety.
- 25 5. The parties shall bear their respective costs and attorney's fees.  
26  
27  
28

1 This is a Final Administrative Decision. The Parties are hereby informed of their right to appeal  
2 from a Decision of the Public Auditor to the Superior Court of Guam in accordance with Part D of  
3 Article 9 of 5 G.C.A. §5481(a) within fourteen (14) days after receipt of a Final Administrative  
4 Decision. A copy of this Decision shall be provided to the Parties and their respective attorneys, in  
5 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA website at  
6 [www.opaguam.org](http://www.opaguam.org).  
7

8 **DATED this 28<sup>th</sup> day of September 2020.**

9  
10   
11 **BENJAMIN J.F. CRUZ**  
12 **Public Auditor of Guam**



Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;

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**OPA-PA-19-010, 20-001, and 20-007 Decision**

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**Jerrick Hernandez** <jhernandez@guamopa.com>

Mon, Sep 28, 2020 at 10:44 AM

To: "Joshua D. Walsh" &lt;jdwalsh@rwtguam.com&gt;, Graham Botha &lt;gbotha@gpagwa.com&gt;, "R. Marsil Johnson" &lt;rmarsjohnson@bsjmlaw.com&gt;, Anita Arriola &lt;anitaarriola@arriolacowan.com&gt;, "Joseph C. Razzano" &lt;jrazzano@civilletang.com&gt;

Cc: Vince Duenas &lt;vduenas@guamopa.com&gt;

Hafa Adai,

Please see attached Decision for OPA-PA-19-010, 20-001, and 20-007. This email will serve as an official notice in lieu of a transmittal via Fax.

Please confirm receipt of this email and the attached document. Thank you.

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Regards,

**Jerrick J.J.G. Hernandez, MA, CGAP, CICA**

Auditor

Office of Public Accountability – Guam

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