

R. MARSIL JOHNSON
RICHARD L. JOHNSON
BLAIR STERLING JOHNSON & MARTINEZ
 A PROFESSIONAL CORPORATION
 238 ARCHBISHOP FLORES ST STE 1008
 HAGÁTÑA GU 96910-5205
 TELEPHONE: (671) 477-7857

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ANITA P. ARRIOLA, ESQ.
ARRIOLA LAW FIRM
 259 MARTYR STREET, SUITE 201
 HAGÁTÑA, GUAM 96910
 TEL: (671) 477-9730/33
 FAX: (671) 477-9734
 EMAIL: aarriola@arriolafirm.com

Attorneys for Party in Interest ENGIE Solar

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

In the Appeal of)	Docket No. OPA-PA-19-010
)	OPA-PA-20-001
GlidePath Marianas Operations, Inc.)	OPA-PA-20-007
)	
Appellant.)	INTERESTED PARTY
)	ENGIE SOLAR'S PROPOSED
)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW

This consolidated procurement appeal, was heard by the Public Auditor, Benjamin J.F. Cruz, from July 6, 2020 to July 9, 2020 and on July 14, 2020. Appellant **GLIDEPATH MARIANAS OPERATIONS, INC.** ("GlidePath") was represented by Joseph C. Razzano and Joshua D. Walsh. **GUAM POWER AUTHORITY** ("GPA"), the procuring agency, was represented by D. Graham Botha. R. Marsil Johnson and Anita P. Arriola appeared as counsel for Interested Party, and successful bidder, **ENGIE SOLAR** ("ENGIE"). Following the hearing held concerning OPA-PA-19-010 and OPA-PA-20-001, the parties stipulated to forego closing argument in said appeals and

a hearing on OPA-PA-20-007 and to instead submit Proposed Findings of Fact and Conclusions Of Law. On July 29, 2020, an order was issued by the Public Auditor vacating the July 30, 2020 continuation of the hearing and ordering the parties to file Proposed Findings of Act and Conclusions of Law before 5 p.m. on August 7, 2020. On August 4th, 2020, the Public Auditor issued an order postponing the filing deadline for the Proposed Findings of Fact and Conclusions of Law until before 5 p.m. on August 11, 2020.

FINDINGS OF FACT

1. The Office of Public Accountability, in reaching this Decision, has considered and incorporates herein the procurement record and all documents submitted by the parties, and all arguments made during the formal hearing held from July 6, 2020 through July 9, 2020 and on July 14, 2020, and the proposed findings of fact and conclusions of law filed by the parties on August 11, 2020. Based on the record in this matter, the Public Auditor makes the following findings of fact:

2. The consolidated appeals all concern Guam Power Authority Invitation for Bid GPA-IFB-007-18, Renewable Energy Resources Phase III (the "IFB").

3. GPA issued the IFB on or about November 16, 2017. PR at Tab 74, PR 11914 (IFB Commercial Terms & Conditions).

4. The IFB sought to procure energy produced by means of a solar renewable energy production plant with an included energy storage system (referred to throughout this brief as a "PV + ESS plant"). Each PV + ESS plant would incorporate a photovoltaic (PV) array and an energy storage system (ESS). One PV + ESS plant would be constructed at a pre-determined South Finegayan site and the other would be constructed at a pre-determined Naval Base Guam site. Each PV + ESS plant was to include full-time shifting, meaning that solar energy collected during the day would be stored in the ESS and later discharged from the ESS to the GPA electrical grid. The

design of each PV plus ESS plant was subject to additional technical restrictions, described below. PR at Tab 74, PR 11921-11922 (IFB Commercial Terms & Conditions).

5. The IFB was a multi-step invitation for bid whereby prospective bidders would submit an unpriced technical proposal for consideration by GPA. Bidders who submitted an unpriced technical proposal which met the IFB's technical requirements, as determined by GPA, were permitted to move on to the second stage of the procurement where they could submit a price proposal. PR at Tab 74, PR 11923 (IFB Commercial Terms & Conditions).

6. The technical requirements of the IFB are outlined on pages 52-63 of the IFB main document and on page 160-166 of Amendment XIII.

7. The IFB main document included a provision rendering any amendments issued by GPA binding to the same extent as if written in the originally issued IFB documents.¹

8. Prospective bidders were afforded an opportunity to submit requests for information to GPA, which were publicly answered in the form of various amendments issued. PR at Tab 50 – 69.

9. All bidders submitted their unpriced technical proposals on June 3, 2019. Six unpriced technical proposals were submitted. Five bids were determined by GPA to meet the technical requirements and those bidders were allowed to proceed to the next step of bidding.

¹ The IFB main document includes the following provision on page 16 of 501:

2.3 IFB Amendment

Any amendment, modification or addendum issued by the Guam Power Authority, prior to the opening of the bids, for the purpose of changing the intent of the Technical Requirements, clarifying the meaning or changing any of the provisions of this IFB, shall be binding to the same extent as if written in the originally issued IFB documents.

See PR at Tab 74, PR 11927 (IFB Commercial Terms & Conditions).

Those five bidders were: ENGIE, GlidePath, AES, X-Elio, and a consortium of KEPCO and Hanwa.

10. On September 10, 2019, the sealed price proposals of the five bidders and ten project sites were opened in the presence of company representatives. ENGIE's price for the Naval Base Guam site was \$110.90/MWh and its price for the South Finegayan site was \$108.90 MWh, making it the lowest bidder for both sites. *See* PR at Tab 12, PR 357-360 (Evaluation committee recommendation memorandum for Step Two-Price Proposal Evaluation dated September 25, 2019).

11. AES's price for the Naval Base Guam site was \$169.00/MWh and its price for the South Finegayan site was \$158.90 MWh. GlidePath's price for the Naval Base Guam site was \$196.00/MWh and its price for the South Finegayan site was \$191.50 MWh. GlidePath's alternate price for the Naval Base Guam site was \$176.00/MWh and its alternate price for the South Finegayan site was \$176.00 MWh with the stipulation that both projects would need to be awarded to GlidePath in order to receive the alternate price. *See* PR at Tab 12, PR 357-360 (Evaluation committee recommendation memorandum for Step Two-Price Proposal Evaluation dated September 25, 2019).

12. AES, as the next lowest bidder on the Naval Base Guam site, had a price that was 52.3% higher than ENGIE's price. AES, as the next lowest bidder on the South Finegayan site, had a price that was 45.9% higher than ENGIE's price. *See* PR at Tab 12, PR 357-360 (Evaluation committee recommendation memorandum for Step Two-Price Proposal Evaluation dated September 25, 2019).

13. GPA completed its price proposal and evaluation and determined that the lowest responsive bidders for the Naval Base Guam site and the South Finegayan site was ENGIE. The

evaluation committee recommended award of the Naval Base Guam site and the South Finegayan site to Engie, based on the technical and price proposals submitted. *See* PR at Tab 12, PR 356 (Evaluation committee recommendation memorandum for Step Two-Price Proposal Evaluation dated September 25, 2019).

14. On November 13, 2019, GlidePath filed a Notice of Appeal with the OPA following the denial of its agency level protest by procuring agency GPA. That case is styled, *In the Appeal of GlidePath Marianas Operations Inc.*, OPA-PA-19-010 (the “First Appeal”). *See* GlidePath Notice of Appeal, November 13, 2019.

15. On January 21, 2020, GlidePath filed a Notice of Appeal with the OPA following GPA’s denial of its second agency level protest. That case is styled, *In the Appeal of GlidePath Marianas Operations Inc.*, OPA-PA-20-001 (the “Second Appeal”). *See* GlidePath Notice of Appeal, January 21, 2020.

16. The First Appeal and the Second Appeal were consolidated by Order of the Public Auditor on January 30, 2020. *See* Order Consolidating Appeals/Scheduling Order, January 30, 2020.

17. A hearing was held before the Public Auditor on July 6, 7, 8, 9, and 14.

18. On July 20, 2020, GlidePath filed a third Notice of Appeal, docketed as OPA-PA-20-007 (the “Third Appeal”), appealing GPA’s decision of July 14, 2020, denying GlidePath’s third protest related to the IFB. *See* GlidePath Notice of Appeal, July 20, 2020.

19. On July 22, 2020, the Public Auditor ordered that all three appeals be consolidated. *See* Order Consolidating Appeals, July 22, 2020.

20. On July 29, 2020, the parties stipulated to waive closing argument in the formal hearing; stipulated that the procurement record prepared and submitted in OPA-PA-19-101 and

adopted in OPA-PA-20-007, with GPA supplementing the procurement record as needed to account for any new material discovered or otherwise generated from GlidePath's third protest; and waive filing of the Agency Report, Comments on the Agency Report, Rebuttal to Appellant's Comments on Agency Report, and any Trial Brief in the Third Appeal. *See* Stipulation, July 29, 2020.

21. On August 4th, 2020, the Public Auditor issued an order postponing the filing deadline for the Proposed Findings of Fact and Conclusions of Law until before 5 p.m. on August 11, 2020.

A. THE PARTIES

22. GlidePath operates one PV system in the world. That PV system is the Dandan Phase I project located in Guam (the "Dandan System"). The Dandan system is not a PV + ESS plant. It is a PV only system. The Dandan system has no energy storage system (ESS). GlidePath did not design the Dandan System. GlidePath did not build the Dandan System. GlidePath purchased the Dandan System in 2019.²

23. ENGIE operates numerous PV systems, including PV + ESS plants. ENGIE has 2.6 GW of installed solar capacity worldwide, including 1.74 GW in the United States. ENGIE operates multiple PV + ESS plants on islands throughout the world, including systems operating in the Comoro Islands, in Lifou Islands (New Caledonia), and Flinders Island (near Tasmania).

² "We only have one operating PV project, it's the Dandan project here in Guam." *See* Hearing Audio, July 6 2020 Part B at 01:02:17 to 01:02:26, P. Rood Testimony.

Johnson: Who did the work in constructing the Dandan project?

Mingo: I believe the EPC contractor was named Sonora. That's the contractor I bid to.

See Hearing Audio, July 8, 2020 Part A at 00:23:29 to 00:23:25, D. Mingo Testimony.

ENGIE was recently awarded a PV + ESS plant contract in Hawaii by Hawaiian Electric for a system similar in size to the system put out to bid in the IFB.³

24. GPA is in Phase III of its Renewable Energy Acquisition Program. It has successfully bid Phase I and Phase II of that program, including a PV system currently operated by GlidePath. *See* PR at Tab 74, PR 11921.

B. THE FIRST APPEAL

25. In the First Appeal, GlidePath claims ENGIE did not meet the requirements of the IFB and ENGIE's bid should be disqualified. *See* GlidePath Notice of Appeal, November 13, 2019.

1. The IFB's Three Relevant Requirements

26. Three requirements of the IFB are relevant to this appeal.

27. First, GPA required that "[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."⁴ ("Requirement #1"). PR at Tab 71, PR 11921 and 11964.

28. Second, GPA 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 rating shall be a minimum of 14.5 MW."⁵ ("Requirement #2"). *See* PR at Tab 56, PR 6715.

29. Third, GPA required that "[t]he MW output of PV used to charge the ESS should be maximized to the amount of capacity available on each site and any energy restrictions of the ESS."⁶ ("Requirement #3"). PR at Tab 56, PR 6715.

³ *See* Hearing Audio, July 8, 2020 Part A at 00:04:03 to 00:10:57, D. Mingo Testimony.

⁴ Multi-StepBidGPA-007-18 – Main IFB document, page 52 – issued by GPA on November 24, 2017.

⁵ Multi-StepBidGPA-007-18 – Amendment XIII, page 160 – issued by GPA on January 25, 2019.

⁶ Multi-StepBidGPA-007-18 – Amendment XIII, page 160 – issued by GPA on January 25, 2019

30. Requirement #1 limits each bidder's project to providing no more than 30 MW (megawatt) (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. PR at Tab 71, PR 11968.

31. Requirement #1 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.

32. Requirement #2 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. See PR at Tab 56, PR 6715.

33. Requirement #2 was included so the ESS (the battery storage system) would charge at a slower rate throughout the day (over the course of approximately 12 hours) and discharge at a faster rate after sunset (for approximately 4 to 6 hours). See PR at Tab 52, PR 5823.

34. Requirement #3 required the bidders to maximize the solar production with their proposed design, within the site's physical constraints and within the economic constraints dictated by each bidder's need to submit a competitive bid. PR at Tab 56, PR 6715.

2. GlidePath's Assertion that the IFB Limited PV Module Capacity to 20.7 MWp is Incorrect

35. In its trial brief, GlidePath claims "[t]he inclusion of more than 20.7 MWp⁷ of solar generation capacity at either of the project sites is explicitly and specifically prohibited in the IFB and rendered ENGIE's proposal unresponsive to the IFB." See GlidePath Trial Brief, p. 13.

⁷ PV module capacity (measured using the term "megawatt peak"—abbreviated as "MWp") is an engineering team used the maximum output of a PV module under standard conditions. The actual out put of a PV module depends, on any given moment, on a number of environmental factors including temperature and radiance.

36. GlidePath's claim is contradicted by the testimony of GlidePath witness and representative, Peter Rood. During the hearing, Mr. Rood testified that the IFB did not specifically cap the PV module capacity at 20.7 MWp.⁸ Mr. Rood went on to confirm that the 20.7 MWp cap was instead calculated by GlidePath through its interpretation of certain other requirements in the IFB.⁹

37. GlidePath's claim was also contradicted by virtually every other witness who testified at the hearing. GlidePath's expert witness Robert Charles also conceded that there is "no specific number of 20.7" as a limitation on MWp. See Hearing Audio, July 6 2020 Part A at 01:19:34 to 01:19:36, R. Charles Testimony.

⁸ Rood: I believe that there is a cap in the total project size of 30 MW. I believe there is a ratio that describes the sizing of the ESS relative to the sizing of the solar part of—portion of the project. And because the ESS, the project size, is capped at 30 that calculation although the PV itself is not specifically capped, you can't meet the other requirement with a higher than 20.7 solar system.

Arriola: Sorry, did you just say that the PV system is not specifically capped?

Rood: That's right. Well no. Sorry. The ratio is set. As you mentioned, I do believe there is not a 20.7 number you talked about. That's not—I agree that is not in the IFB. It would be helpful if it was. If it was, we wouldn't be here today. It's not. There's a ratio that you calculate from to determine the size of these projects.

Arriola: Well, if it was in there, we wouldn't be here right? There would be a clear 20.7 MWp requirement if it were specifically stated in the IFB and the amendments, but it is not. Is that true?

Rood: Right. The ratio is in the IFB and the ratio makes it clear.

See Hearing Audio, July 6 Part B at 5:44 to 6:42, P. Rood Testimony.

⁹ Arriola: So when you're talking about ratio, you're saying that GlidePath interpreted the requirements of the IFB and the amendments to become a mathematical calculation involving a ratio which leads us to the 20.7 MWp, correct?

Rood: I'm saying that we calculated the 20.7 using the ratio and the maximum project size, that's correct.

See Hearing Audio, July 6 Part B at 5:44 to 6:42.

38. GPA Consultant and Engineer David Burlingame, who assisted GPA in drafting the IFB and consulted in other GPA projects, testified that there was no limitation on the PV modules. See Hearing Audio July 7, 2020 Part B at 00:18:58 – 00:19:01, D. Burlingame Testimony.

39. GPA Engineer Jennifer Sablan testified that there was no limit on the size or capacity of the PV array in the IFB. See Hearing Audio July 7, 2020 Part B at 01:23:37 – 01:24:04, J. Sablan Testimony.

40. ENGIE’s Senior Vice President of Engineering and Professor of Engineering at Polytechnic Milan Daniele Rosati testified that there is no limitation on the MWp of the PV system. See Hearing Audio July 8, 2020 Part B at 02:07:52 – 02:08:28, D. Rosati Testimony.

41. ENGIE’s System Engineer and Lead Engineer on the Guam project Dario Gigliotti testified that there was no limitation on the PV capacity, to the contrary, the IFB allowed the bidders to maximize their PV capacity on both project sites. See Hearing Audio July 9, 2020 at 00:43:25 – 00:43:48, D. Gigliotti Testimony.

42. Mr. Rood went on to admit that he could not confirm whether the term “megawatt peak” appeared in the IFB and that he did not doubt Attorney Arriola’s claim that the term was not present in the IFB.¹⁰

43. ENGIE engineer, Dario Gigliotti, confirmed through his testimony that neither the term “megawatt peak” nor its abbreviation “MWp” appear in the IFB or its amendments.¹¹

¹⁰

Johnson: Just to confirm, does the term “megawatt peak”, spelled capital “M” – capital “W” - lower case “p”, show up at all in the invitation for bid?

Gigliotti: No. megawatt peak was not present in the IFB.

Johnson: And what about the amendments?

Gigliotti: Neither in the amendments.

See Hearing Audio, July 9 at 00:22:16 to 00:22:40, D. Gigliotti Testimony (emphasis added).

44. GlidePath claims in its trial brief that ENGIE was the only bidder who exceeded a 20.7 MWp PV module capacity in its design and that this provided ENGIE with an unfair advantage over other bidders.¹² GlidePath's claim is unsupported by the record. All bidders other than GlidePath included system designs for at least one of the two sites that exceeded 20.7 MWp.

45. The AES proposal for the South Finegayan Site included 23.58 MWp, which exceeds GlidePath's alleged 20.7 MWp limitation. See PR at Tab 38, PR 1574.

46. The KEPCO/Hanwha proposal for the South Finegayan site included 21.06 MWp and the KEPCO/Hanwha proposal for the Naval Base Guam site included 21 MWp. Both proposals exceed GlidePath's alleged 20.7 MWp limitation. See PR at Tab 42, PR 3300.

47. The X-Elio proposal for the Naval Base Guam site included 24.98 MWp, which exceeds GlidePath's alleged 20.7 MWp limitation. See PR at Tab 47, PR 5144.

48. ENGIE's proposal for the South Finegayan site included 26.47 MWp and ENGIE's proposal for the Naval Base Guam site included 27.6 MWp. Both proposals exceed GlidePath's alleged 20.7 MWp limitation. See PR at Tab 40, PR 2086 and Tab 41, PR 2323.

49. Among the five bidders, GlidePath alone limited its PV module capacity at both sites to below 20.7 MWp. PR at Tab 44, PR 4117 and PR at Tab 45, PR 4503.

50. The fact that none of the other five bidders limited their PV module capacity to 20.7 MWp at both sites shows that none of the other bidders interpreted the IFB and its amendments to include a requirement that PV module capacity was limited to 20.7 MWp at each site.

¹² In its trial brief, GlidePath stated that: "GPA issued amendments creating a mandatory 145% link to the total PV system size. This meant that the project included an installed solar capacity threshold, but GPA is now ignoring that standard. **The effect of GPA's technical amendments, and the refusal by GPA to now accept those amendments for the system requirements that they were, is that the ratepayers of Guam will be purchasing solar energy from a sole source provider whose offered price could not intelligently be compared to any other offeror.**" See GlidePath Trial Brief, p. 27-28 (emphasis added).

51. Mr. Rood also testified that Question #30 and its Answer in GlidePath Exh. 5-00013 supported the 20.7 MWp limitation. See Hearing Audio July 6, 2020 Part A at 1:46:09 – 1:47:10, P. Rood Testimony. Question 30 and the Answer read:

QUESTION:

30. Document Reference: Amendment XIII – P27/948: “nominal operation is 20 MWac”

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

ANSWER:

GPA is seeking the most cost effective project GPA has estimated prior to energy storage requirements that these NBG and the South Finegayan sites could be developed for 20 MWac of solar PV capacity. GPA would need to understand any reason for underdevelopment of site. Bidders must identify properties not used to address any modification on the sublease in regards to removal of sites.

See GlidePath Exh. 5-00013.

52. The Public Auditor finds that Question 30 and the Answer do not contain any 20.7 MWp limitation on installed capacity of the PV modules.

53. The Procurement Record shows that numerous questions were submitted by the bidders, including GlidePath, which resulted in clarifications or Amendments to the IFB.

54. GlidePath had more sufficient opportunity to clarify whether the 20.7 MWp limitation was required in the IFB or any of the Amendments by submitting questions relating to this issue, but chose not to.

3. Requirement #2 Referred to the Charge and Discharge Rate of the ESS and it did not limit the PV Module Capacity of Each Site

Requirement #2 stated 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, 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 capacity of 10 MW, the ESS rating shall be a minimum of 14.5 MW.

See PR at Tab 56, PR 6716 (Amendment XIII, p. 160 of 948, PDF format).

55. Requirement #2 is found in Exhibit B to Amendment XIII, in a document titled: “Supplement & Update to Volume II – Technical Qualification Proposal Requirements Description of Operation/Key Characteristics & Technical Requirements December 2018.” More specifically, Requirement #2 is found on the first page of that document, in a section titled “2. Description of Operation & Key Characteristics” and as a bullet point under the heading: **“The capacity / discharge rate (MW) output and otherwise design of the ESS should be such that:”**. *Id.* (emphasis added).

56. Requirement #2 requires that the ESS must be capable of discharging at a rate equal to or greater than 145% the maximum capacity of the PV charging system.

57. Requirement #2 was included in the IFB because GPA intended each PV + ESS plant to collect and store energy in the ESS throughout the day (from approximately 6 a.m. to approximately 6 p.m.) and then discharge that energy from the ESS into GPA’s electrical grid over the course of 4 to 6 hours at night. See PR at Tab 52, PR 5823.

58. GlidePath asserts that the term “PV Charging System” refers only to the PV modules (also referred to as the solar array).¹³ It does not.

59. The PV + ESS plant described in the IFB is built around the ESS and consists of two primary control systems: a charging system and a discharging system.

¹³ “GlidePath has contended that GPA is incorrect, as GPA's instructions explain 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, up to a maximum capacity of 40 MW.’ **Given that the PV array—the part of the project consisting of the actual solar panels—is the generator in the system, these commands also serve as the rating of the charging system.**” See GlidePath Notice of Appeal (July 20, 2020), p. 6 (emphasis added).

60. The charging system consists of the PV modules (the solar array) and a converter. The PV modules will not charge an ESS without a converter. A converter is a necessary component of the charging system.¹⁴

61. The discharging system consists of an inverter (used to discharge the battery and convert the battery's DC current into AC current) and a step-up transformer, which adjusts the voltage of the electricity so that it can be introduced into GPA's electrical grid at the interconnection point.¹⁵

62. GPA used the term "PV charging system" in its IFB and its amendments only in reference to the sentence "[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." See PR at Tab 56, PR 6715.

63. Jennifer G. Sablan P.E., GPA witness and Manager of GPA's Strategic Planning and Operations Research Division (SPORD), testified that the term "PV charging system" refers to "that side of the battery that charges the battery", meaning the half of the PV + ESS plant that is devoted to charging the battery.¹⁶

¹⁴ "But you have to think that starting from this that the entire PV system is composed of the PV modules or the array of the modules that you want to install and a dedicated converter, that is the second part—the important part of the system. And this part, the PV modules plus the PV converter are the part of the system that will work during the day, during the charging phase of the battery." See Hearing Audio, July 8 Part B 0:29:34 – 0:30:06, D. Rosatti Testimony. "But it's the converter that defines the power of the entire PV charging system and it's the converter that drives and extracts the power from the PV field and push this power into the energy storage system, into the battery." See Hearing Audio, July 8 Part B 00:31:19 – 00:31:42, D. Rosatti Testimony.

¹⁵ "There is a first phase during the day, extracting the power from the PV modules and pushing the power into the ESS and it's the PV charging system converter that drives this operation. During the night it's the first converter is shutting down and there is the second converter that extract the power from the batteries, stored during the day, and push this power into the grid." See Hearing Audio, July 8 Part B 00:33:25 – 00:42:01 D. Rosatti Testimony.

¹⁶ Razzano: Why don't you tell me what you think a PV charging system is.

Sablan: The PV charging would be that side of the battery that charges the battery.

Razzano: Ok.

64. Mr. Burlingame, GPA's expert witness, testified that the term "PV charging system", as used in the IFB, does not refer to the capacity of the PV photovoltaic cells, but the capacity of the PV charging system."¹⁷

65. GlidePath's uses the term "PV charging system" imprecisely in its briefs and testimony, treating the term as interchangeable with the terms "PV array", "PV system", "solar generation capacity", and others. See GlidePath Trial Brief, June 5, 2020.

66. These term "PV charging system" is used specifically in the IFB and is not interchangeable with the terms "PV array", "PV system", and "solar generation capacity". See PR at Tab 56, PR 6715.

4. ENGIE's Proposed PV + ESS Plant Meets the Requirements of the IFB

67. ENGIE's proposed PV + ESS plant meets Requirement #1, because the maximum export capacity of the plant is 30 MW AC. See PR at Tab 40, PR 2161 and 2397.

68. ENGIE's proposed PV + ESS plant meets Requirement #2, because the MW rating of the ESS, as measured at the ESS inverter, is equal to 145% of the MW rating of the PV charging system, as measured at the DC/DC converter. The MW rating of the ESS is 30MW and the MW rating of the PV charging system is 20.7, which meets Requirement #2. Even if the nameplate capacity is used, the MW rating of the ESS is 36 MVA and the MW rating of the PV charging

See Hearing Audio, July 7 Part B at 01:42:57 to 01:42:08, J. Sablan Testimony.

¹⁷ Razzano: No. I'm just asking you if you were my teacher and I was in engineering school and I asked you the question "Professor Burlingame, what does PV capacity mean, what would you tell me?"

Burlingame: Depends on what the system and what it is used as. In the bullet point—in the fifth bullet point here—the PV charging system is the PV capacity. **It's not the capacity of the PV photovoltaic cells** it's the capacity of the PV charging system and that's really how it's used throughout this document.

See Hearing Audio, July 7 Part B at 00:42:03 to 00:42:43, D. Burlingame Testimony (emphasis added).

system is 24 MW, which also meets Requirement #2. PR at Tab 40, PR 2161-2164, PR at Tab 41, PR 2397-2400, and Hearing Audio July 9, 2020, 00:30:29 – 00:31:54, D. Gigliotti Testimony.

69. ENGIE’s proposed PV + ESS plant meets Requirement #3, because ENGIE maximized the MW output of the PV by utilizing iterative modeling techniques and using an east-west PV module configuration to maximize PV production, instead of a south-facing configuration typically used in PV plants installed north of the equator.¹⁸

B. THE SECOND APPEAL

70. In the Second Appeal, GlidePath asserts that GPA’s determination—in response to GlidePath’s first protest—that no 20.7 MWp limitation existed in the IFB means that “the amendments, communications, and information provided to the bidders during the procurement process resulted in a flawed procurement where offerors were led into submitting bids that were limited by specifications that did not actually exist in GPA’s mind’s eye.” See GlidePath’s July 20, 2020 Notice of Appeal p. 6. GlidePath claims that GPA’s decision to issue a notice of intent to award the contract to ENGIE engaged in “effectively” a sole source procurement.¹⁹

71. GlidePath’s claim is without support in the record.

¹⁸ “We maximized, I mean we tried to maximize as much as possible our land, our site, in order to maximize the PV capacity. We had done a great job in doing a lot of iteration, iterative process, to define the best for instance technical configuration for the PFV, the best capacity and then for each of them we evaluate which is the optimum ESS capacity and then we work by which is the impact on the tariff—so on the economics. At the end, we landed to a design in which we have an east-west configuration for the PV. East-west configuration in the PV field is not faced toward the south, but half of it is faced towards the east and the other half toward the west. See Hearing Audio, July 9 at 00:33:54 – 00:35:02, D. Gigliotti Testimony.

¹⁹ “The effect of GPA’s technical amendments, and the refusal by GPA to now accept those amendments for the system requirements that they were, is that the ratepayers of Guam will be purchasing solar energy from a sole source provider whose offered price could not intelligently be compared to any other offeror.” See GlidePath Hearing Brief, p. 27-28.

“GPA’s acceptance of an ENGIE bid based upon technical specifications that other offerors could not access, by allowing what is effectively a sole source procurement for projects worth nearly \$200,000,000.” See GlidePath Notice of Appeal (Protest 2), p. 10.

72. Sole source procurement procedures are set forth in 5 G.C.A. § 5214, which provides that:

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

5 G.C.A. § 5214.

73. The IFB is was not issued without competition. GPA solicited bids for unpriced technical proposals and then allowed five bidders to submit price proposals. *See* PR at Tab 12, PR 357-360 (Evaluation committee recommendation memorandum for Step Two-Price Proposal Evaluation dated September 25, 2019).

74. GlidePath's claim that the IFB was "effectively" a sole source procurement is based on its assertion that, GPA applied different requirements to its consideration of ENGIE's bid than the other bids, allowing ENGIE alone to exceed the alleged 20.7 MWp requirement.²⁰

75. As noted above, every bidder except GlidePath exceeded the alleged limitation. ENGIE was *not* the only bidder that submitted a bid that exceeded GlidePath's alleged 20.7 MWp limitation.

76. GlidePath's failure to understand the requirements of the IFB did not affect the ability of any other bidder to correctly understand the requirements of the IFB and submit competing bids that conformed to the IFB's requirements.

²⁰ "GPA, by allowing ENGIE to submit a project for consideration that did not hold to the system parameters GPA led the other offerors to, did not compare equivalent projects and, therefore, their selection of ENGIE as the lowest bidder was in error because their proposal was materially different than the other bidders. ... This has resulted in a competitive bid process that wasn't competitive at all, i.e., the ENGIE projects have substantially more capacity than the 20.7 MW per project that limited other offerors' proposals." *See* GlidePath Notice of Appeal (January 21, 2020), p. 10.

77. The IFB was not a sole source procurement, “effective” or otherwise.

C. THE THIRD APPEAL

78. In the Third Appeal, GlidePath asserts that “no procurement award can be made and the IFB must be cancelled and reissued” because the IFB was not maintained in accordance with Guam law and the Procurement Record is, according to GlidePath, “in disarray.” *See* GlidePath Notice of Appeal (July 20, 2020), p. 11-12.

1. Timeliness of GlidePath’s Protest

79. GPA asserts that the procurement record, filed by GPA and served on the parties on December 12, 2019, included references to the involvement of Mr. Burlingame and Electrical Power Systems in reviewing the technical requirements of the IFB, meaning that GlidePath knew or should have known of their involvement and the absence of any record of communication between GPA and Mr. Burlingame or Electrical Power Systems as of December 12, 2019, meaning that GlidePath was required to file a protest on the incompleteness of the record within 14 days of December 12, 2019. *See* GPA Denial of Procurement Protest (July 14, 2020).

80. July 9, 2020 does not fall within fourteen days of December 12, 2019.

81. GPA denied GlidePath’s third protest, filed on July 9, 2020, on grounds that it was untimely. *See* GPA Denial of Procurement Protest (July 14, 2020).

82. The Procurement Record was filed and served on each party by GPA on December 12, 2019. *See* GPA Procurement Record (December 12, 2019).

83. The Procurement Record included three copies of an email from Jennifer Sablan employees of NAVFAC. In the email, Ms. Sablan states that “[w]e are working on the following for the 1st amendment:” ... “3. Any further ESS or interconnection requirements as recently discussed with Dave Burlingame and the EPS team.” *See* PR at Tab 11, PR 10051, PR 10069, and PR 10073.

84. The three copies of that email are included in the Procurement Record at PR 10051, PR 10069, and PR 10073. See PR at Tab 11, PR 10051, PR 10069, and PR 10073.

85. In response to GPA's denial of the third protest, GlidePath claims that the references to Mr. Burlingame and the Electrical Power Systems do not mean that GlidePath knew or should have known about the references or the extent of the communication, especially considering the "voluminous record" and the fact that Mr. Burlingame's "name is repeated twice in a procurement record of more than 12,000 pages themselves containing tens of dozens of names." See GlidePath Notice of Appeal (July 20, 2020), p. 11-12.

86. GlidePath's claim that the references to the Mr. Burlingame and Electrical Power Systems in the Procurement Record filed on December 12, 2019 cannot be held against them due to the voluminous nature of the procurement record is not convincing. It is the bidder's responsibility to diligently access the solicitation and to digest, prepare and submit its protest within the requisite number of days afforded to them by Guam procurement law.²¹

2. GlidePath's Claim the Procurement Record is Incomplete

²¹ Like Guam's procurement law, Hawaii's procurement law is based on the ABA Model Procurement Code and includes similar language relating to the deadline by which an aggrieved party may file a procurement protest. It is worth noting that Hawaii procurement law provides an even shorter deadline to file a protest than Guam law, allowing only five working days within which to file a protest instead of the fourteen calendar days allowed in Guam. Considering a similar situation, the State of Hawaii Department of Commerce and Consumer Affairs Office of Administrative Hearings held that:

The commencement of the 5-day period within which to submit a protest, however, does not depend on a party's ability to 'digest' the RFP or to 'become aware of the problems giving rise to the protest.' Rather, the period commences once the aggrieved party knows or should have known of the facts giving rise to its protest. Thus, once provided with access to the information upon which its protest is eventually based, it is the bidder's responsibility to diligently access the solicitation and to 'digest', prepare and submit its protest within the requisite 5 working days.

In the Matter of Maui County Community Television, Inc. dba Akaku Maui Community Television vs. Dept. of Accounting and General Services, State of Hawaii, PCX-2010-3, p. 7 (July 9, 2010).

87. Glidepath has made no showing that the Procurement Record is materially incomplete and has made no showing that any documents it claims are missing from the procurement record are material to the First Appeal, the Second Appeal, or the Third Appeal. See GlidePath Notice of Appeal (July 20, 2020).

88. GlidePath has made the vague claim that the absence of certain records it claims are missing from the Procurement Record “prejudice” GlidePath, though it has provided no facts to support this claim.²²

89. The records GlidePath claims are missing from the Procurement Record all refer to discussions between GPA, Mr. Burlingame, and Electrical Power Systems in drafting the technical specifications for the IFB. See GPA Supplemental Procurement Record (July 8, 2020) and GPA Supplemental Procurement Record (July 15, 2020).

90. The records GlidePath claims are missing were not part of the IFB and were not part of any amendments to the IFB.

91. GlidePath’s procurement appeals allege that ENGIE’s bid did not meet the requirements of the IFB and was therefore non-responsive. See GlidePath Trial Brief, p. 13 (June 5, 2020).

92. Any discussions between GPA, Mr. Burlingame, and Electrical Power Systems in drafting the technical specifications for the IFB are not material²³ to the procurement or a determination of whether ENGIE’s bid met the IFB requirements, because the requirements of the

²² 5 G.C.A. § 5250 does not include a prejudice requirement. *Teleguam Holdings LLC v. Guam*, 2018 Guam 5, ¶ 36 (“However, PDS reads a prejudice requirement into 5 GCA § 5250 that does not exist and fails to capture the complete harm that may result from an incomplete record.”).

²³ *Teleguam Holdings LLC v. Guam*, 2018 Guam 5, ¶ 39 (“Missing procurement records are material when, as a result of their absence, judicial review is thwarted in determining whether the appealing party is entitled to the relief requested”).

IFB, as stated in the IFB and its amendments speak for themselves. See GPA Supplemental Procurement Record (July 8, 2020) and GPA Supplemental Procurement Record (July 15, 2020).

93. The inability of the Public Auditor to review discussions held between GPA, Mr. Burlingame, and Electrical Power Systems in drafting the technical specifications for the IFB does not affect the Public Auditor's ability to determine whether ENGIE met the requirements of the IFB as stated in their final form in the IFB and its amendments.

CONCLUSIONS OF LAW

1. ENGIE's bid met the requirements and criteria set forth in the IFB and was the lowest bid for both sites. ENGIE's responsibility is not in dispute. Therefore, the contract must be awarded to ENGIE because ENGIE was the lowest responsible bidder whose bid met the requirements and criteria set forth in the IFB. 5 G.C.A. § 5211(g).

2. GPA's handling of the IFB did not render it a sole source procurement as defined in 5 G.C.A. § 5214. GPA engaged in a multi-stage invitation for bid and allowed five bidders to submit price proposals after following their submission of unpriced technical proposals. The failure of GlidePath alone to understand the IFB's requirements, while the other four bidders correctly understood them, does not render the IFB a sole source procurement and does not render the IFB defective.

3. Guam procurement law allows an aggrieved party to file a protest, but requires that "the protest shall be submitted in writing within fourteen (14) days after such aggrieved party knows or should know of the facts giving rise thereto." 5 G.C.A. § 5425(a). Having been served with the procurement record on December 12, 2019, GlidePath should have known about the presence of the email included on PR 10051, PR 10069, and PR 10073 and thus should have been aware that the procurement record did not contain any reference to discussions between GPA, Mr. Burlingame, and Electrical Power Systems. The volume of the procurement record has no bearing

on the Bidder's responsibility to file a timely protest. It is the bidder's responsibility to diligently access the procurement record, read it, and submit its protest within the fourteen-day deadline provided in 5 G.C.A. § 5425(a). GlidePath filed its third procurement protest on July 9, 2020, which is more than fourteen days after December 12, 2019. Therefore, GlidePath's third protest is untimely.

4. As the appealing party, GlidePath has the burden of establishing that items missing from the procurement record were material to the procurement. *Teleguam Holdings LLC v. Guam*, 2018 Guam 5, ¶ 39. While GlidePath goes into great detail in its Notice of Appeal as to how it knows records are missing and what records it believes to be missing, it provides no facts to show that the missing records are material to the First Appeal, the Second Appeal, or the Third Appeal and has thus failed to meet its burden. After review of the Procurement Record, all documents submitted by the parties, all testimony and evidence introduced during the formal hearing held on July 6, 2020 through July 9, 2020 and on July 14, 2020, and the proposed findings of fact and conclusions of law filed by the parties on August 11, 2020 and after careful consideration of the consequences of the incomplete nature of the Procurement Record²⁴, the Public Auditor holds that the Procurement Record is not materially incomplete. Discussions between GPA, Mr. Burlingame, and Electrical Power Systems discussing the technical requirements of the IFB are not material to whether ENGIE met the technical requirements as made available to all bidders in their final form in the IFB and its amendments, because no party could have relied on the missing documents in drafting their bids.

GlidePath's appeals, including the First Appeal, the Second Appeal, and the Third Appeal are hereby DENIED.

²⁴ The Public Auditor must engage in a substantial analysis of the procurement record when party has established that the procurement record is incomplete. *See Teleguam Holdings LLC v. Guam*, 2018 Guam 5, ¶ 39.

This is a Final Administrative Decision. The Parties are hereby informed of their right to appeal from a Decision by the OPA to the Superior Court of Gaum, in accordance with Part D of Article 9, of 5 G.C.A. § 5702, and shall be made available for review on the OPA Website www.opaguam.org.

SO ORDERED this _____ day of _____, 2020.

Benjamin J.F. Cruz
Public Auditor of Guam

SUBMITTED BY:

BLAIR STERLING JOHNSON & MARTINEZ
A PROFESSIONAL CORPORATION

BY: 

R. MARSIL JOHNSON

Attorneys for Party in Interest ENGIE Solar

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