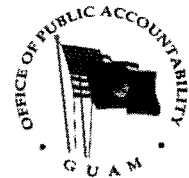


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 238 Archbishop Flores St.  
 Hagåtña, Guam 96910



# FAX

<b>To:</b>	<b>Mr. John M. Benavente, P.E.</b> <b>General Manager</b> Guam Power Authority P.O. Box 2977 Hagåtña, Guam 96932 Fax: (671) 648-3165	<b>From:</b>	<b>Benjamin J.F. Cruz</b> <b>Guam Public Auditor</b> Office of Public Accountability
	<b>Mr. D. Graham Botha, Esq.</b> <b>General Counsel</b> Guam Power Authority 688 Route 15, Suite 302 Mangilao, Guam, 96913 Phone: (671) 648-3203/3002 Fax: (671) 648-3290	<b>Pages:</b>	13 (including cover page)
<b>CC:</b>	<b>Mr. Joshua D. Walsh, Esq.</b> <b>Mr. Joseph C. Razzano, Esq.</b> Civile & Tang PLLC Attorneys for Appellant GlidePath Marianas Operations Inc. 330 Hernan Cortez Avenue Ste. 200 Hagatna, Guam 96910 Phone: (671) 472-8868/9 Fax (671) 477-2511	<b>Date:</b>	November 14, 2019
		<b>Phone:</b> <b>Fax:</b>	(671) 475-0390 x. 208 (671) 472-7951

**Re:** OPA-PA-19-010 Notice of Receipt of Appeal

For Review

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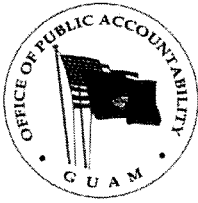
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[jhernandez@guamopa.com](mailto:jhernandez@guamopa.com)



## OFFICE OF PUBLIC ACCOUNTABILITY

Suite 401 Pacific News Building, 238 Archbishop Flores St., Hagåtña, Guam 96910  
Phone: (671) 475-0390 / FAX: (671) 472-7951

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November 14, 2019

John M. Benavente, P.E.  
General Manager  
Guam Power Authority  
P.O. Box 2977  
Hagåtña, Guam 96932

**VIA FACSIMILE: (671)648-3165**

Re: Notice of Receipt of Appeal – OPA-PA-19-010

Dear Mr. Benavente,

Please be advised that GlidePath Marianas Operations Inc. (hereinafter referred to as “GlidePath”) filed an appeal with the Office of Public Accountability (OPA) on November 13, 2019, regarding the Guam Power Authority’s (GPA) denial of GlidePath’s protest related to the procurement for Phase III of its Renewable Energy Resource project (GPA-IFB-007-18). OPA has assigned this appeal case number OPA-PA-19-010.

Immediate action is required of GPA pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA’s office and on its website at [www.opaguam.org](http://www.opaguam.org). The first ten pages of the notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeal. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

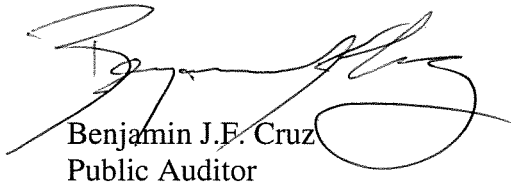
Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), the submission of one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated is required no later than **Thursday, November 21, 2019**, five work days following this Notice of Receipt of Appeal. We also request one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Division 4, Chapter 12, §12105, by **Friday, November 29, 2019**, ten work days following receipt of this notice.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to GlidePath. Although the Guam Procurement Law and Regulations require only one copy of the procurement record, OPA respectfully asks that you

provide one original and two copies of the said record, which will be distributed as follows: Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 208 or [jhernandez@guamopa.com](mailto:jhernandez@guamopa.com) should you have any questions regarding this notice.

Sincerely,



Benjamin J.F. Cruz  
Public Auditor

Enclosure: First Ten Pages of the Notice of Appeal – OPA-PA-19-010

Cc: Joshua D. Walsh and Joseph C. Razzano, Civile & Tang, PLLC, Attorneys for Appellant  
Glide Path

JOSHUA D. WALSH  
JOSEPH C. RAZZANO  
CIVILLE & TANG PLLC  
330 HERNAN CORTEZ AVENUE STE. 200  
HAGATNA, GUAM 96910  
TEL: (671) 472-8868/9  
FAX: (671) 477-2511

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

**PART I.**

In the Appeal of

GlidePath Marianas Operations Inc.,

Appellant.

DOCKET NO. OPA-PA- 19-010

**NOTICE OF APPEAL**

## PART II: APPELLANT INFORMATION

Appellant's Name	GlidePath Marianas Operations Inc.
Appellant's Mailing Address	132 N. York St., Suite 3L Elmhurst, IL 60126
Appellant's Business Address	706 Dandan Road , Inarajan, Guam 96915
Appellant Representative's Direct Email Address	prood@glidepath.net

Appellant is represented by legal counsel in this appeal. For purposes of this appeal, please direct correspondence to GlidePath Marianas Operations Inc.'s counsels, Joshua D. Walsh and Joseph C. Razzano of Civile & Tang, PLLC.

Counsel's Mailing Address	330 Hernan Cortez Avenue Suite 200, Hagatna, Guam 96910
Counsel's Telephone	671-472-8868
Counsel's Facsimile	671/477-2511
Counsel's Direct Email Address	jdwalsh@civilletang.com

## PART III: APPEAL INFORMATION

- A. Purchasing Agency: Guam Power Authority.
- B. Solicitation Number: GPA-IFB-007-18, Renewable Energy Resources Phase III.
- C. The Decision being appealed was provided to the Appellant on Thursday, October 31, 2019. The Decision was made by the Head of the Purchasing Agency, Mr. John M. Benavente, P.E.
- D. Appeal is made from a Decision on Protest of an Award. The Denial of Procurement Protest issued by the Agency has also revealed flaws in the method and procedures of selection for award.
- E. The names of competing offerors known to Appellant are as follow:
  - 1. AES Distributed Energy, Inc.;
  - 2. Korea Electric Power Corporation and Hanwha Energy Corporation (consortium);
  - 3. X-Elio Energy North America Development Holdco, LLC; and

4. ENGIE Solar.

#### **PART IV: STATEMENT OF GROUNDS FOR APPEAL**

##### **A. THE GROUNDS FOR APPEAL**

###### **1. Relevant Procedural and Factual History**

The Guam Power Authority (“GPA”) is pressing forward with Phase III of its Renewable Energy Resource project. The procurement for Phase III saw GPA implement a Multi-Step Bid in an ongoing effort to comply with Public Law 29-62, which requires GPA to establish renewable energy portfolio standard goals and add additional renewable capacity. Phase III also involved a land use partnership between GPA and United States Navy, where Navy property would be leased to the Government of Guam for use in the Phase III power operation. Phase III would be built on two different sites – Navy Base Guam and South Finegayan—and bidders were invited to respond to operate solar power production at either or both of the locations.

GlidePath Marianas Operations Inc. (“GlidePath” or “Appellant”), a Guam based company that qualifies for the local procurement preference proscribed in 5 GCA §5008, submitted a bid to provide solar production at both sites. GlidePath is well experienced on Guam, is buttressed by an extensive corporate support system that is well versed in solar production, is staffed by solar industry professionals who understand competitive procurement, and currently operates the Dandan solar project, which was awarded a contract under Phase I by GPA. GlidePath submitted its bid on June 3, 2019, and was informed on August 14, 2019, that it had passed technical review and was eligible for consideration in Step 2 of the Procurement where the offerors would submit their prices.

Prices were submitted to GPA pursuant to a price submission worksheet that included explaining the cost of power to GPA’s rate payers in the form of the cost of a megawatt of power

per hour (MWh). Price submissions were opened at a public venue on September 10, 2019, and ENGIE Solar (“ENGIE”) had bid a price of \$110.90/MWh for the Navy Base Guam location and \$108.90/MWh for the South Finegayan location. As allowed by the IFB, GlidePath submitted several pricing plans for GPA’s consideration, and its bid price was \$149.60/MWh for both sites, as adjusted for the local procurement preference. Other offerors had submitted bids more expensive than the bid price offered by GlidePath. ENGIE had also offered a Guaranteed Net Annual Generation (“GNAG”)—a number that reflects the amount of gross electricity generation a generator produces minus the electricity used to operate the power plant—that was significantly higher than any other offer, a feat that was technically impossible given the specific IFB requirements set down by GPA.<sup>1</sup>

Given the significant price and GNAG disparity between ENGIE and all other bidders, GlidePath submitted requests under the Guam Sunshine Act on August 22, 2019, and again on September 12, 2019, to GPA requesting, among other documents, copies of the technical proposals submitted by the other bidders so that GlidePath’s engineers could review the technical details of their proposed projects. GlidePath was concerned that, given the complexity of the technical requirements and numerous amendments to the IFB, that other bidders may not have complied with the various requirements put forth by GPA in its IFB. Specifically, GlidePath was concerned about the sizing of various project components, compliance with unique requirements in the Navy lease, and detailed electrical requirements and wanted to confirm that all bidders, especially ENGIE, had properly included these requirements. GPA never substantively responded to the information requests, and withheld ENGIE’s technical proposal from disclosure.

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<sup>1</sup> As designed by the IFB, the GNAG changes from year to year during the life of the contract.

On October 4, 2019, GlidePath was notified by GPA that it was not selected for award, and instead GPA's procurement team had recommended award for both of the projects included in the IFB to ENGIE.<sup>2</sup> ENGIE was selected for award because it presented GPA with a price that was at least 35% lower than the next offeror. While GPA continues to withhold ENGIE's technical proposal from public scrutiny, ENGIE moved ahead and released information confirming that its bid was not compliant with the requirements of the IFB. On October 7, 2019 ENGIE issued a press release indicating that "[the] systems proposed by ENGIE integrate more than 50 MWp of solar PV with approx. 300 MWh of battery energy storage...."<sup>3</sup> The inclusion of more than 20.7 MWp<sup>4</sup> of solar generation capacity at either of the project sites is not allowed by the IFB. ENGIE's press release made it clear that ENGIE's proposed projects do not meet the technical requirements in the IFB. The ENGIE proposals should have been deemed non-compliant by GPA and should not have been awarded contracts as part of the IFB. On October 9, 2019, GlidePath submitted its Bid Protest to GPA. GPA denied the protest via correspondence received by GlidePath on October 30, 2019.<sup>5</sup> This appeal followed.

## **2. GPA is ignoring the fact that ENGIE's Proposals Do Not Comply with the IFB's Technical Requirements**

ENGIE has confirmed that its Phase III solution is built upon a system that integrates "more than 50 MWp of solar PV with approx. 300 MWh of battery energy storage..."<sup>6</sup> The inclusion of more than 20.7 MWp of solar generation capacity at either of the project sites is prohibited by the IFB, and rendered ENGIE's proposal technically unresponsive to the IFB.

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<sup>2</sup> The Notice to GlidePath that it was not selected for Award is attached to this appeal as **Attachment A**.

<sup>3</sup> The ENGIE press release is submitted as **Attachment B**.

<sup>4</sup> MWp stands for Mega-Watt peak, a measure used in the solar industry to describe what the peak maximum power generation capabilities of the system are.

<sup>5</sup> The Denial of Procurement Protest is submitted with this appeal as **Attachment C**.

<sup>6</sup> The ENGIE press release is submitted as **Attachment B**.



GPA was very clear in the nature and production output of the solar systems it was seeking to procure. Offerors were provided with a specific formula within which to shape the solar systems that would be offered. These systems had to comply with specific requirements about the maximum mega-watt peak of the system (the “MWp”) as well as the minimum Energy Storage System capacity of the system (the “ESS”).<sup>7</sup> Numerous requests for information were sent by various offerors to GPA over the course of the procurement, and GPA, in response to those inquiries, issued numerous amendments to the procurement that helped confirm the outer formula contours to be applied to the systems that would be offered.

On January 25, 2019, GPA issued Amendment XIII, an amendment called the “Supplement and Update to Volume II Technical Qualification Requirements.”<sup>8</sup> The amendment required that the **ESS shall be equal to or greater than the 145%** of the MW rating of the PV charging system.<sup>9</sup> This 145% requirement was coupled to GPA’s other requirement that the **ESS be no larger than 30MW** at each project site.<sup>10</sup> Therefore, it was relatively simple to determine that **GPA wanted an ESS system that was both no larger than 30MW, but was also at least 145% greater than the mega-watt rating of the PV charging system.** This meant that the system to be procured would be limited to a peak mega-watt capacity of 20.7 MWp, since 145% of a 20.7 MWp system would be no larger than the 30MW ESS maximum demanded by GPA in its IFB.

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<sup>7</sup> The ESS operates like a battery that allows for solar power to be collected at peak solar energy production times, stored, then returned to the power system for use at times when the power is needed at night or when the day is darker.

<sup>8</sup> See, Attachment B to Amendment No.: XIII to Invitation for Multi-Step Bid No.: GPA-007-18 for Renewable Energy Resource Phase III issued on January 25, 2019, submitted as **Attachment D** to this appeal.

<sup>9</sup> See, Technical Requirements Supplement, Section 2, bullet point 5, which is submitted as **Attachment E** to this appeal. (emphasis added)

<sup>10</sup> See, IFB Volume I, Section 1, Bullet 6 (page 9 of 501); IFB Volume II, Section 1 Item 1; Section 2.2.5, Section 2.3.1, submitted as **Attachments F, G, H** to this appeal.

ENGIE's confession that it offered a system to GPA—a system that GPA accepted—of 50 MWp means that it is impossible for ENGIE's proposal to be mathematically compliant with the IFB. ENGIE either ignored the 145% requirement, or ignored the 30 MW maximum ESS size requirement. This means that ENGIE did not have to limit its bid to the technology that supports a 20.7 MWp system, and as such, was not faced with the same price restrictions that other bidders, including GlidePath, were meant to confront.

GPA's acceptance of ENGIE's decision to ignore the 145%/30 MW requirements of the IFB gave ENGIE an unfair price advantage, since ENGIE was no longer bound by the 20.7MWp system maximum that the 145%/30MW requirement commanded. ENGIE's completely different 50MWP system allowed it to submit pricing numbers to GPA—numbers based upon the Guaranteed Net Annual Generation (“GNAG”) production quantities nearly 20% higher than the other offers— that were significantly lower than any other bidder.

**3. GPA's acceptance of the ENGIE bid as responsive significantly prejudices the people of Guam, by allowing what is effectively a sole source procurement for projects worth nearly \$200,000,000.<sup>11</sup>**

GPA, by allowing ENGIE to submit a project for consideration that did not hold to the 20.7 MWp system parameters set by the IFB that all other offerors held 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 failure lays squarely at the feet of GPA, since the acceptance of ENGIE's project means that GPA either (1) accepted a non-conforming proposal from ENGIE, or (2) issued system standards that were sufficiently unclear so as to cause every other offeror—offerors that include some of the biggest and most experienced players in the world of solar power production—to be led astray. This has resulted

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<sup>11</sup> The IFB commits GPA and its rate payers to purchasing nearly \$200,000,000 worth of power from the awardee of this IFB over the 20-year lifetime of the contract.

in a competitive bid process that wasn't competitive at all, *i.e.*, the ENGIE projects have substantially more capacity than 20.7 MW per project that limited other offerors' proposals. This meant that ENGIE's proposal, as accepted by GPA, increased the projects' solar power production and allowed for the fixed project costs—the costs that form the basis of an offeror's price submission to GPA—to be distributed across more MWhs resulting in a lower net cost per month.

Most frustrating about GPA's failures in this procurement is the fact that GlidePath noted in its Technical Proposal and elsewhere in its interactions with GPA that a lower cost to the people of Guam may be possible if the limits on solar capacity were eased. Rather than violate the technical requirements of the IFB, GlidePath, like the other offerors, designed its project in compliance with the terms of the IFB. ENGIE was an outlier in submitting a non-compliant project that included more than 20.7 MWp of solar charging capacity, and GPA is rewarding that entity with a contract Award despite the fact that GPA has, simply put, based its price analysis on a comparison between apples and oranges.

**B. RULING REQUESTED**

GlidePath respectfully requests that the Office of Public Accountability Order the following:

- (1) That GPA disqualify ENGIE from eligibility for Award under this IFB, as ENGIE's proposal did not materially comply with the technical requirements of the IFB established by GPA; and
- (2) That GPA award both project sites detailed in GPA-IFB-007-18, relative to Renewable Energy Resources Phase III, to GlidePath as the next lowest price responsive bidder to the IFB

In the alternative, the Office of Public Accountability should order GPA to:

- (1) Declare affirmatively to all offerors that there is no cap of 20.7 MWp of solar charging capacity required by GPA for the Renewable Energy Resources Phase III ; and
- (2) Receive and review new technical and price proposals from all existing offerors in GPA-IFB-007-18 that desire to move forward with competition for award, and then award the Phase III project to the lowest responsive bidder from amongst those offerors.

**C. SUPPORTING EXHIBITS, EVIDENCE OR DOCUMENTS**

Submitted with this appeal are the following supporting exhibits, evidence, and documents:

- (1) The Notice of Award is attached to this appeal as **Attachment A**.
- (2) The ENGIE press release is submitted as **Attachment B**.
- (3) The Denial of Protest is submitted with this appeal as **Attachment C**. \_\_\_
- (4) Attachment B to Amendment No.: XIII to Invitation for Multi-Step Bid No.: GPA-007-18 for Renewable Energy Resource Phase III issued on January 25, 2019, is submitted as **Attachment D** to this appeal.
- (5) Technical Requirements Supplement, Section 2, bullet point 5, is submitted as **Attachment E** to this appeal.
- (6) IFB Volume I, Section 1, Bullet 6 (page 9 of 501) is submitted as **Attachment F** to this appeal.
- (7) IFB Volume II, Section 1, Item 1 is submitted as **Attachment G** to this appeal.
- (8) Section 2.2.5 and Section 2.3.1 are submitted as **Attachment H** to this appeal.

As was noted in Section II(A)(1), *Supra*, GlidePath submitted to GPA requests under the Guam Sunshine Act on August 22, 2019, and again on September 12, 2019, that went largely ignored. GlidePath also anticipates providing further documentation, including independent expert engineering reports, to substantiate its claims when GPA submits the full contracting procurement record to the OPA, and allows GlidePath and its experts to finally review the procurement record in full.

Also, submitted with this appeal pursuant to 2 GAR §12104 (5), is a copy of the prior decision by GPA denying Appellant's protest and compelling this appeal. That is attached as **Attachment C** to this appeal.


**PART V: DECLARATION RE COURT ACTION**

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of Public Accountability within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

**Respectfully Submitted** this 13<sup>th</sup> day of November, 2019.

**CIVILLE & TANG, PLLC**

By:   
**JOSHUA D. WALSH**  
**JOSEPH C. RAZZANO**  
*Attorneys for Appellant*  
*GlidePath Marianas Operations Inc.*

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	Mr. D. Graham Botha, Esq. <b>General Counsel</b> Guam Power Authority 688 Route 15, Suite 302 Mangilan, Guam, 96913 Phone: (671) 648-3203/3002 Fax: (671) 648-3290	<b>Pages:</b>	13 (including cover page)
<b>CC:</b>	Mr. Joshua D. Walsh, Esq. Mr. Joseph C. Razzano, Esq. Civile & Tang PLLC Attorneys for Appellant GlidePath Mariannas Operations Inc. 330 Hernan Cortez Avenue Ste. 200 Hagatna, Guam 96910 Phone: (671) 472-8868/9 Fax (671) 477-2511	<b>Date:</b>	November 14, 2019
		<b>Phone:</b> <b>Fax:</b>	(671) 475-0390 x. 208 (671) 472-7951

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