



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

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**In the Appeal of Track Me Guam LLC; OPA-PA-21-002**

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**Claire Pollard** <cpollard@rwtguam.com>

Wed, Aug 11, 2021 at 2:23 PM

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

Cc: "Joshua D. Walsh" &lt;jdwalsh@rwtguam.com&gt;, "Edwin J. Torres" &lt;etorres@rwtguam.com&gt;

Dear Mr. Hernandez:

Please see the attached *Motion for Discovery* to be filed in the above-referenced matter. Should you have any questions or concerns, please feel free to contact our office. Thank you.

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Regards,  
Claire Pollard**RAZZANO WALSH & TORRES, P.C.**

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**8.11.21 Motion for Discovery.pdf**

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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

**PART I.**

In the Appeal of

Track Me Guam, LLC

Appellant.

**DOCKET NO. OPA-PA-21-002**

**MOTION FOR DISCOVERY**

**I. MOTION**

Track Me Guam, LLC (“TrackMe” or “Appellant”), by and through its undersigned counsel, requests pursuant to 5 GCA § 9218, 2 G.A.R. §§ 12109(c) and 12105(g), that the Public Auditor issue an Order requiring the Guam Power Authority (“GPA”) to produce for a deposition a competent representative that can offer testimony regarding the specifications contained in Invitation for Bid GPA-GPA-024-21, Fleet and Fuel Management Software Services for the Authority’s Fleet (the “IFB”) and the protest filed by TrackMe regarding the IFB on April 6, 2021. This Motion is supported by the appended Memorandum in Support, all matters of record, and such further evidence as may be presented at a hearing on the matter.

## II. MEMORANDUM IN SUPPORT

### A. PROCEDURAL AND FACTUAL BACKGROUND

On June 30, 2021, TrackMe filed a Notice of Appeal with the Office of Public Accountability (“OPA”) following the denial of TrackMe’s protests at the agency level by procuring agency Guam Power Authority (“GPA”). That case is styled, *In the Appeal of Track Me Guam, LLC*, OPA-PA-21-002, and is premised on the understanding that PTI Pacifica, Inc. dba IT&E (“IT&E”) was not technically responsive to the IFB, and could not perform as specified by GPA.

As the Comments to the Agency Report detail, GPA failed to substantively engage with the merits of TrackMe’s protest grounds provided to the agency on April 6, 2021. GPA’s Agency Report confirms that it neither investigated nor addressed the substantive issues raised by the April 6, 2021, correspondence. TrackMe’s correspondence of April 6, 2021, set out the specific failure of IT&E to respond to the following requirements as grounds for the protest: Failure to Comply with Requirement C.1-17, Failure to Comply with Requirement B.6, Failure to Comply with Requirement C.1-13, and the Failure to Comply with Requirement C.2. Procurement Record (“PR”), Tab 16. GPA’s legal counsel directed the letter to the evaluation committee for action that same day. PR, Tab. 13 (pg. 247 of 1464). On April 19, 2021, the committee prepared an unsigned memorandum meant for the Supply Management Administrator seeking to have IT&E provide clarification on the various matters raised in the TrackMe’s letter. PR, Tab 13. (pg. 244 of 1464). It appears from the record that the Memo was never sent, no facts were developed

about the responsiveness issue, and no internal action was taken by GPA beyond GPA simply denying TrackMe's protest. PR, Tab 10. Because the record is unclear and incomplete as to GPA's investigation and resolution of the grounds presented in the April 6, 2021, correspondence, Appellant seeks an order compelling a deposition of a knowledgeable GPA representative.

**B. THE PUBLIC AUDITOR CAN ORDER THE DISCOVERY THAT TRACKME SEEKS**

TrackMe is seeking limited discovery in order to assist it in streamlining the eventual administrative hearing that will be held in this matter. The Hearing Officer in a procurement appeal has broad authority to order discovery and require that witnesses and documents be produced in procurement appeals. 2 G.A.R. § 12109(a) allows the Hearing Officer "to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion." The regulations also provide that the Hearing Officer has the authority to "Rule on motions, and other procedural items on matters pending before such officer." 2 G.A.R. § 12109 (d). Those same regulations also contemplate compelling testimony in the manner that TrackMe now seeks. 2 G.A.R. § 12109(c) authorizes the Hearing Officer to "require parties to produce for examination those relevant witnesses and documents under their control."

While GPA can correctly assert that the procurement rules of procedure themselves do not explicitly provide for the discovery that TrackMe seeks, and that such discovery has been denied in the past by the OPA, those rules rely upon the Administrative Adjudication Act which does allow for the deposition that the

Appellant wants to conduct. **The Procurement regulations direct that “Where not otherwise provided for by these rules and regulations or statute, and where not inconsistent herewith, hearings shall be conducted in accordance with the Administrative Adjudication Law in Chapter 9 of Title 5, Guam Code Annotated, including those provisions on subpoenas and contempt.”** 2 GAR § 12108(d) (emphasis added). The Administrative Adjudication Law explicitly allows for “Depositions” and explains that “an agency may order that the testimony of any material witness residing within or without the territory of Guam be taken by deposition in the manner prescribed by law for depositions in civil actions.” 5 GCA § 9218.<sup>1</sup>

The Guam Supreme Court has made it clear that the Administrative Adjudication Act—the Act that provides for the Deposition that TrackMe seeks — applies to administrative proceedings where hearings are required. *See, Guam Fed. of Teachers ex rel. Rector v. Perez*, 2005 Guam 25, ¶ 36 *citing* Article 2, Title 5 GCA § 9200 (2005) (“The procedure of any agency shall be conducted pursuant to the provisions of this Chapter in any proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after an agency hearing.”) The Supreme Court of Guam has also classified the OPA's

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<sup>1</sup> Black’s Law Dictionary makes it plain that a deposition is an event that occurs outside of the eventual hearing that will occur in this matter. It defines a “deposition” as “1. A witness’s out-of-court testimony that is reduced to writing (usu. by a court reporter) for later use in court or for discovery purposes. *See* Fed. R. Civ. P. 30; Fed. R. Crim. P. 15. — Also termed examination before trial. 2. The session at which such testimony is recorded.” DEPOSITION, Black's Law Dictionary (11th ed. 2019).

authority to resolve procurement protests as “administrative adjudication.” See, *Teleguam Holdings, LLC v. Territory of Guam*, 2015 Guam 13 ¶ 29. TrackMe is seeking a Deposition that is allowed implicitly by Guam’s Procurement Regulations, and explicitly by the Administrative Adjudication law.

Moreover, the Superior Court of Guam has confirmed this interpretation of Supreme Court precedent. In *GlidePath Marianas Operations, Inc. v. Office of Public Accountability, Guam Power Authority, and Engie Solar*, CV0767-20, Judge Iriarte granted the plaintiff’s request for discovery pursuant to *Teleguam Holdings* to supplement the procurement record that was incomplete. CV0767-20, Scheduling Order and Discovery Plan, Filed February 25, 2021.<sup>2</sup> Both Supreme and Superior Court precedent confirm that TrackMe is entitled to the deposition it is seeking in this appeal to the OPA. If this deposition is not granted, the first opportunity that the Appellant will have to understand the grounds for the protest denial will be at the merits hearing in this matter — a reality that would impermissibly prejudice TrackMe.

### III. CONCLUSION

GPA’s answer in its agency report to the Notice of Appeal filed by TrackMe does not provide any information as to how GPA dealt with the merits of TrackMe’s protest grounds raised on April 6, 2021. 2 G.A.R. § 12105(g) requires that the agency report be “fully responsive to the allegations of the Appeal.” Guam’s Administrative Adjudication Law allows that “an agency may order that the

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<sup>2</sup> A copy of Judge Iriarte’s Order is attached as **Exhibit A** for ease of reference.

testimony of any material witness residing within or without the territory of Guam be taken by deposition in the manner prescribed by law for depositions in civil actions.” 5 GCA § 9218.

Guam’s Procurement Regulations allow for the Hearing Officer to “require parties to produce for examination those relevant witnesses and documents under their control.” 2 G.A.R. § 12109(c). Precedent from the Supreme and Superior Courts of Guam also allow discovery to supplement an appeal when the procurement record is deficient. TrackMe asks that the OPA act in accordance with the law, and allow it to take the single deposition it seeks of a deponent qualified to respond to the specifications of the IFB and GPA’s response to the April 6, 2021, correspondence sent by TrackMe.

Submitted this 11<sup>th</sup> day of August, 2021.

**RAZZANO WALSH & TORRES, P.C.**

By:   
\_\_\_\_\_  
**JOSHUA D. WALSH**  
**EDWIN J. TORRES**  
*Attorneys for Appellant*

# **EXHIBIT A**



JOSEPH C. RAZZANO  
JOSHUA D. WALSH

**RAZZANO WALSH & TORRES, P.C.**

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2021 FEB 25 PM 1:47

CLERK OF COURT

BY: SM

*Attorneys for Plaintiff*

*GlidePath Marianas Operations, Inc.* CLERK'S OFFICE  
SUPERIOR COURT OF GUAM

**IN THE SUPERIOR COURT OF GUAM**

GLIDEPATH MARIANAS  
OPERATIONS, INC.,

Plaintiff

v.

OFFICE OF PUBLIC  
ACCOUNTABILITY, GUAM POWER  
AUTHORITY, AND ENGIE SOLAR,

Defendants.

CIVIL CASE NO. CV0767-20

*f* [PROPOSED]

**SCHEDULING ORDER AND  
DISCOVERY PLAN**

Pursuant to GRCP 16 and 26(f), and CVR 16.1, Plaintiff Glidepath Marianas Operations, Inc., the Defendants Office of Public Accountability, ENGIE Solar, and the Guam Power Authority, by their respective counsel, hereby submit the following Proposed Scheduling Order and Discovery Plan:

1. **Nature of Case.** This is a civil action for judicial review and appeal of the September 28, 2020, Decision of the Office of Public Accountability in consolidated appeals OPA - PA-19-010, OPA-PA-20-001, and OPA-PA-20-0057. The action is brought under 5 GCA §5480 and arises out of the Guam Power Authority ("GPA") Invitation for Bid GPA IFB-007017 (the "IFB") issued on November 16, 2017 for a contract to provide GPA and its ratepayers with solar power as part of Phase

III of GPA's renewable energy resource project. (the "Contract"). GlidePath Marianas Operations, Inc ("Glidepath") protested of the selection of ENGIE Solar ("ENGIE") as the highest ranked offeror and GPA's planned award of the contract to Engie. GlidePath filed three protests with GPA, claiming among other things that the bidders were led astray by the technical requirements of the IFB. All three protests were rejected by GPA, and Glidepath filed three appeals to the OPA. The OPA affirmed GPA's denial of all three protests, finding that no other bidders were led astray by the IFB requirements and only GlidePath failed to understand the requirements. The OPA also held that Engie's proposal was fully compliant with the bid requirements and was the lowest responsive bid.

The Parties met to discuss the Scheduling Order and Discovery Plan on February 9, 2021, at 10:00 A.M.

**2. Posture of Case**

- a. The following motions have been filed: None.
- b. The following motions have been resolved: None.
- c. The following discovery has been initiated: None.

**3. Scheduling Conference.** A Scheduling Conference shall be held in this matter on Tuesday, February 23, 2021, at 4:00 P.M.

**4. Status of Discovery**

- a. **Plaintiff's Position.** The Plaintiff's position is that, in accordance with *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2020 Guam 20, Procurement protest appeals filed in the Superior Court proceed as a civil action, and discovery is permitted in accordance with the Guam Rules of Civil Procedure.

Plaintiff disagrees that it articulated no basis for the need for potential additional discovery in this civil action. To the contrary, Plaintiff, when asked by ENGIE Solar to articulate why discovery may be needed, explained that one reason was that David Burlingame, a witness relied upon by both GPA and Engie Solar, was first discovered as the drafter of the key specification term at the center of this procurement dispute during the OPA hearing. Moreover, because GPA failed to produce a complete procurement record, correspondence between Mr. Burlingame and the agency was not produced until after Mr. Burlingame testified before the OPA, a delay that prejudiced Glidepath. More, Defendant GPA agreed to coordinate with Mr. Burlingame for deposition in the next two weeks. Plaintiff suggests the following limited discovery schedule:

(i) The times for disclosures under GRCP 26(a)(1) and (a)(2) are:

a) Disclosures of expert testimony, if applicable, under GRCP 26(a)(2) shall be made no later than on APR 28 2021

(ii) **Discovery Allowed.** The parties may propound written discovery including interrogatories, depositions, requests to produce documents and things and for entry upon land for

inspection and other purposes, or requests for admissions within the limits set by the Guam Rules of Civil Procedure and the Local Rules. If any party determines that the party needs to propound more discovery than permitted by the Rules, the parties will confer in good faith to accommodate reasonable discovery requests.

(iii) **Discovery Cutoff.** The discovery cut-off date (defined as the last day to file responses to discovery) is Wednesday,

April 21, 2021.

(iv) All discovery motions shall be filed on or before Wednesday,

May 5, 2021.

b. **Defendants' Position.** The position of all Defendants is that "factual findings made by the Public Auditor are ordinarily not to be re-litigated,' but that the Superior Court has full authority to resolve 'any outstanding and disputed factual questions.'" *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2020 Guam 20 at ¶ 43 (citing *Teleguam Holdings LLC v. Guam*, 2018 Guam 5 ¶ 32). The Defendants asked GlidePath what "outstanding and disputed factual questions" it wished to conduct discovery into during the 26(f) conference and Glidepath identified no such "outstanding and disputed factual questions." Therefore, there is no need for discovery.

Plaintiff has  
stated a basis  
for discovery per  
Teleguam, 2018 Guam  
¶ 31. Defendants  
may move to limit  
discovery if needed.  
Fd. epm

5. **Joinder of Parties and Claims.** All parties have been joined. Further Joinder of Parties may only occur through leave of Court.

6. **Amendment of Pleadings.** Pleadings may only be amended through leave of court.

7. **Dispositive Motions.** As this matter is before this court for judicial review of decision of the OPA, no Dispositive Motions are anticipated.

8. **Party Briefs and Transcripts.**

a. **Electronic Record.** The parties will arrange with Respondent OPA for an electronic record of the procurement proceedings, including an electronic copy of the procurement record, to be submitted to the Court by Wednesday, February 24, 2021.

b. Transcripts. The Plaintiffs shall designate to the Respondent OPA by Wednesday, February 24, 2021, which written transcripts should be produced in this appeal, certified by the OPA, and submitted to the Court.

c. **Plaintiff's Opening Brief.** The parties disagree on whether or not discovery should be allowed in this matter. In the event that this court allows discovery to proceed in this civil action, the Plaintiffs will file their Opening Brief within thirty days of the Discovery Cutoff. In the event that this court does not allow discovery, the Plaintiffs will file their opening brief within thirty days following the certification of written transcripts. Due MAY 21 2021 .

- d. **Defendants' Opening Briefs.** Defendants will file their Response Briefs within thirty days of the filing and service of the Plaintiff's Opening Brief. *Due JUN 21 2021.*
- e. **Plaintiff's Reply Brief.** Petitioner will file their Reply Brief within fifteen days of the filing and service of the Defendants' Opening Briefs. *Due JUL 06 2021.*
- f. The Court shall set a hearing for Oral Arguments on the parties' briefs on AUG 05 2021 at 9am. It is not contemplated that an evidentiary hearing is required for the just adjudication of this civil action, however the parties may move the court for such a hearing if any party believes such a hearing is needed.

9. **Status Conference.** A status conference shall be held on JUL 13 2021 at 9:10 a.m. (no later than twenty-one (21) days prior to oral argument date).

10. **Time for Hearing.** It is anticipated that it will take two (2) hours to present arguments in this case.

11. **Counsel.** The names of counsel in this case are:


- a. For the Plaintiff, Joseph C. Razzano and Joshua D. Walsh of Razzano Walsh & Torres, P.C.,
- b. For the Office of the Public Accountability, Mitchell Thompson, Law Offices of Thompson Thompson & Alcantara.

- c. For the Defendant Guam Power Authority, Graham Botha of the Guam Power Authority.
- d. For the Defendant interested party Engie, Anita Arriola of the Arriola Law Firm, and R. Marsil Johnson of Blair Sterling Johnson & Martinez, P.C.

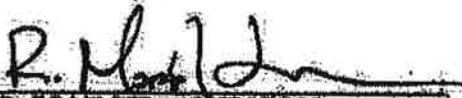
**APPROVED AS TO FORM & CONSENT:**

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

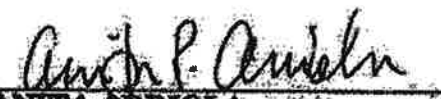
Dated: 2/15/21

By:   
**MITCHELL F. THOMPSON**  
*Attorney for Defendant*  
*Office of Public Accountability*

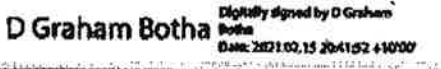
Dated: 2/17/21

By:   
**R. MARSIL JOHNSON**  
*Attorney for Defendant*  
**ENGIE Solar**

Dated: 02/13/21

By:   
**ANITA ARRIOLA**  
*Attorney for Defendant*  
**ENGIE Solar**

Dated: 2/16/21

By:   
**D Graham Botha**  
Digitally signed by D Graham Botha  
 Date: 2021.02.15 20:41:52 +1000  
**GRAHAM BOTHA**  
*Attorney for Defendant*  
**Guam Power Authority**

Dated: \_\_\_\_\_

IT IS SO ORDERED this 25 February, 2021.

*Elyze Iriarte*

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**HONORABLE JUDGE ELYZE M. IRIARTE**  
**Judge, Superior Court of Guam**