



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF,)	APPEAL NO: OPA-PA-17-001
)	
CORE TECH INTERNATIONAL CORP.)	DECISION
)	
Appellant)	

I. INTRODUCTION

This is the Decision of the Public Auditor for appeal number OPA-PA-17-001. Appellant CORE TECH INTERNATIONAL CORPORATION (Hereafter Referred to as "CTI") filed its appeal on March 16, 2017 regarding the DEPARTMENT OF PUBLIC WORKS, GOVERNMENT OF GUAM's (Hereafter Referred to as "DPW") March 2, 2017 Decision partially denying CTI's February 8, 2017 protest of DPW's method of solicitation DPW used for DPW-RFP-730-5-1056-L-YIG Lease Financing for Design, Renovation, Rehabilitation, Construction, and Maintenance of Public Schools (beginning with Simon Sanchez High School) (Hereafter Referred to as the "RFP"). The Public Auditor holds that: (1) CTI's Appeal was timely filed; (2) The RFP violates 5 G.C.A. § 58E104; (3) The Comprehensive Capital Improvement Plan fulfills the requirement for a Program Study; (4) DPW may procure insurance, maintenance, and collateral equipment for the remaining thirty-four (34) public schools; and (5) DPW may cancel or amend the RFP. Accordingly, CTI's appeal in OPA-PA-17-001 is hereby GRANTED in part and DENIED in part.

1 **II. FINDINGS OF FACT**

2 The Public Auditor in reaching this Decision has considered and incorporates herein the
3 procurement record, all documents submitted by the parties, and all arguments made during the
4 hearing, which was held on May 8, 2017. Based on the aforementioned record in this matter, the
5 Public Auditor makes the following findings of fact:
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7 1. On or about January 25, 2017, DPW issued the RFP.¹

8 2. The RFP stated, in relevant part, the following:

9 a. That the RFP was soliciting for a qualified firm to provide financing, design,
10 renovation and construction, and to provide collateral equipment, maintenance, and insurance as
11 mandated under Public Laws (P.L.) 32-120 and 32-121 for a total of thirty-five (35) Guam
12 Department of Education (Hereafter Referred to as “GDOE”) schools with priority of Simon
13 Sanchez High School (Hereafter Referred to as “SSHS”), as well as the development of a
14 Comprehensive Capital Improvement Plan (Hereafter Referred to as “CCIP”) as defined in 5
15 G.C.A. § 58D103(b) and § 58E101(a).²

16 b. The evaluation committee will review and score written proposals based on
17 the Evaluation Criteria set forth in Section 5 of the RFP.³

18 c. Section 5 of the RFP set forth the following Evaluation Criteria: (1)
19 Financing Capability; (2) Project Expertise and Experience; (3) Project Approach and
20 Innovation; and (4) Comprehensive Capital Improvement Plan.⁴

21 3. On February 8, 2017, fourteen (14) days after DPW issued the RFP, CTI filed a
22 protest concerning the procurement method DPW used for the RFP. Specifically, CTI alleged:
23 (1) That DPW failed to include cost as an evaluation factor in violation of 5 G.C.A. § 58D105
24 and § 58E103; and (2) That the RFP violates 5 G.C.A. Chapter (Chap.) 58E because it was
25 issued without a Program Study, because it improperly included requirements set forth in 5
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28 ¹ Page 3, RFP Tab 5, Procurement Record filed on March 24, 2017.

² Page 7, Section 2.0, Intent, Id.

³ Page 10, Section 2.5.3, Evaluation of Proposals, Id.

⁴ Page 39, Section 5.3, Evaluation Rating and Selection, Id.

1 G.C.A., Chap. 58E by combining the solicitation of maintenance work for the remaining 34
2 public schools and the construction of SSHA.⁵

3 4. On March 3, 2017, CTI received DPW's March 2, 2017 response to CTI's February 8,
4 2017 protest. DPW agreed to amend the RFP by including pricing as an evaluation factor.⁶
5 Further, DPW denied the portion of CTI's protest concerning the Program Study and it stated
6 that the Program Study cited by CTI refers to the CCIP and that nothing further is required of the
7 government.⁷

8 5. On March 16, 2017, thirteen (13) days after DPW granted in part and denied in part
9 CTI's February 8, 2017 protest, CTI filed this appeal.⁸

11 III. ANALYSIS

12 Pursuant to 5 G.C.A. § 5425(e) and 2 G.A.R., Div. 4, Chap. 12, § 12103 (a), the Public
13 Auditor shall review DPW's March 2, 2017 Decision partially granting and partially denying
14 CTI's February 8, 2017 Protest *de novo*. CTI's appeal raises two (2) main grounds: (1) Whether
15 CTI's Appeal was timely filed; and (2) Whether the RFP failed to follow the requirements of 5
16 G.C.A. Chap. 58E because the RFP included the procurement for 5 G.C.A. Chap. 58E. The
17 Public Auditor will first review whether CTI's appeal was timely filed.

19 A. CTI's Appeal was Timely Filed.

20 CTI asserts that its appeal was timely filed.⁹ CTI filed its protest on February 8, 2017,
21 which was 14 days after DPW issued the RFP and is within the 14 day protest filing requirement
22 pursuant to 5 GCA § 5425(e) . Generally, a protestant may appeal a purchasing agency's
23 decision on a procurement protest to the Public Auditor within fifteen (15) days after receipt by
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26 ⁵ CTI's Protest, Exhibit A, Notice of Appeal filed on March 16, 2017.

27 ⁶ DPW Protest Decision, Exhibit B, Id.

28 ⁷ Id.

⁸ Notice of Appeal filed on March 16, 2017.

⁹ Page 2, line 22, Id.

1 the protestant of the notice of decision. 5 G.C.A. § 5425(e). Here, as set forth above, on March
2 2, 2017 DPW issued its decision partially denying CTI's February 8, 2017 protest, which CTI
3 received on March 3, 2017. Further, as set forth above, CTI filed this appeal 13 days later on
4 March 16, 2017. The Public Auditor finds that CTI's appeal was timely because it was filed
5 within the 15-day time limit for filing such appeal set forth in 5 G.C.A. § 5425(e). The Public
6 Auditor will now review whether the RFP violates 5 G.C.A., Chap. 58E by including that
7 statute's provisions to rehabilitate the remaining 34 GDOE schools in the RFP.
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10 **B. The RFP violates 5 G.C.A. § 58E104.¹⁰**

11 CTI alleges that the RFP's solicitation of services to rehabilitate the remaining 34 GDOE
12 schools violates 5 G.C.A. § 58E104.¹¹ The Public Auditor agrees. As stated above, the RFP
13 solicits for a qualified firm to provide financing, design, renovation and construction, and to
14 provide collateral equipment, maintenance, and insurance as mandated under P. L. 32-120 and P.
15 L. 32-121 for a total of 35 GDOE schools with priority of SSHS, as well as the development of a
16 CCIP as defined in 5 G.C.A. § 58D103(b) and § 58E101(a).¹² The Public Auditor finds that the
17 RFP solicits for the services required for the reconstruction of SSHS set forth in 5 G.C.A., Chap.
18 58D and the services required for the rehabilitation of the remaining 34 GDOE schools set forth
19 in 5 G.C.A., Chap. 58E. However, before an RFP can be issued for the remaining 34 GDOE
20 schools, a Program Study that identifies and prioritizes potential projects to rehabilitate the
21 remaining 34 GDOE schools must be completed. 5 G.C.A. § 58E104. As will be explained
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25 ¹⁰ NOTE: There is a discrepancy between the numbering of sections in 5 G.C.A.,
26 Chap. 58E. P.L. 32-121 starts with 5 G.C.A. § 58E100 Legislative Findings
27 and Intent, whereas the official codification of P.L. 32-121 into 5 G.C.A.,
28 Chap. 58E begins with 5 G.C.A. § 58E101 Legislative Findings and Intent.
CTI's pleadings use P.L. 32-121's original section numbering. The OPA shall
use the section numbering as officially codified in 5 G.C.A., Chap. 58E.
See F.N.1, page 1, CTI's Remedies Brief filed on May 12, 2017.

¹¹ Page 3, Line 20, CTI's Hearing Brief filed on May 5, 2017.

¹² Page 7, Section 2.0 Intent, RFP, Tab 5, Procurement Record filed on March
24, 2017.

1 below, the Public Auditor finds that the terms “Program Study” and “CCIP” are synonymous.
2 Hence, albeit the RFP solicits for a qualified firm to develop a CCIP, it simultaneously solicits
3 for that same qualified firm to conduct the rehabilitation of the remaining 34 GDOE schools.
4 The Public Auditor finds that the RFP violates 5 G.C.A. § 58E104 because the law requires that
5 the CCIP or Program Study be completed prior to the issuance of an RFP for the rehabilitation
6 of the remaining 34 GDOE schools.
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8 DPW proposes to resolve this violation by dividing the RFP into two separate
9 solicitations. Despite a stipulation between parties in a procurement appeal, the Public Auditor
10 remains statutorily empowered to determine whether a purchasing agency’s decision on a protest
11 is in accordance with the terms and conditions of the solicitation. *Data Management Resources,*
12 *LLC., v. Office of Public Accountability, and Guam Department of Education*, 2013 Guam 27,
13 ¶50 (Supreme Court of Guam). Here, as set forth in the Public Auditor’s May 4, 2017 Decision
14 and Order Re Purchasing Agency’s Motion to Dismiss and Motion for Expedited Decision, DPW
15 agreed to amend the RFP by limiting it to the SSHS Project and the preparation of the CCIP for
16 the remaining 34 GDOE schools.¹³ In effect, the Public Auditor finds that this would require
17 DPW to amend the RFP by removing the RFP provisions concerning the financing, design,
18 renovation and construction, and the provision of collateral equipment, maintenance, and
19 insurance for the remaining 34 public schools. DPW intends to achieve this by amending the
20 current RFP to fulfill only the mandates in 5 G.C.A., Chap. 58D and by issuing a second RFP
21 that will address the mandates in 5 G.C.A., Chap. 58E.¹⁴ The Public Auditor must now
22 determine whether the RFP permits DPW to make such an amendment.
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27 ¹³ Page 2, Line 21, Decision & Order Re Purchasing Agency’s Motion to Dismiss
28 and Motion for Expedited Decision filed on May 4, 2017.

¹⁴ Testimony of DPW Deputy Director Felix Benavente at 01:09:50 to 01:10:27,
Part A, Formal Hearing on May 8, 2017.

1 The RFP authorizes DPW to make its proffered RFP amendment. The RFP states that
2 DPW reserves the right to revise or amend the RFP prior to the date set for opening proposals;
3 that they will be announced by an amendment or addendum to the RFP identifying them as such;
4 that any amendment shall refer to the portions of the RFP it amends; that amendments or
5 addenda shall be sent to all prospective offerors who have submitted the Acknowledgement of
6 Receipt Form to DPW; and that such prospective offerors must acknowledge receipt of all
7 amendments or addenda issued.¹⁵ The RFP states that the “RFP Due Date and Time” is March 9,
8 2017 at 4:00 P.M.¹⁶ The RFP also states that proposals shall not be opened publicly, and shall be
9 opened in the presence of two or more procurement officials.¹⁷ Based on the foregoing RFP
10 language, the Public Auditor finds that the RFP authorizes DPW to amend the RFP prior to the
11 date set for opening proposals. The Public Auditor also finds that this deadline has not passed
12 because the RFP does not specifically set the date for the opening of proposals. Accordingly, the
13 Public Auditor finds that DPW must not only make its proffered amendment, but it must also
14 amend the RFP by specifically setting a date and time for the opening of proposals to set an
15 actual deadline for future amendments or addendums to the RFP.
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17 DPW must also comply with statutorily imposed budget limits when it amends the RFP.
18 Currently, the RFP imposes a one-hundred-million-dollar (\$100,000,000) cap on the RFP’s
19 existing scope of work which includes the financing, design, renovation and construction, the
20 provision of collateral equipment, maintenance, and insurance for SSHS and the remaining 34
21 GDOE schools, and the development of the CCIP.¹⁸ The scope of work would be carried out by
22 Task Orders issued by DPW to the offeror awarded the RFP contract with the first task order
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27 ¹⁵ Page 8, Section 2.2.2, Amendments, RFP, Tab 5, Procurement Record filed on
28 March 24, 2017.

¹⁶ Page 6, Section 1, Schedule of Events, Id.

¹⁷ Page 15, Section 3.6, Receipt/Opening of Proposals, Id.

¹⁸ Page 18, Section 4.0, Overview, Id.

1 being issued for SSHS, the second task order being issued for the development of the CCIP, and
2 the remaining task orders being issued for the remaining thirty-four GDOE schools based on the
3 plan set forth in the CCIP.¹⁹ Under the current RFP, these various task orders could not exceed
4 the RFP's \$100,000,000 cap. DPW does not explain how it will divide this amount between the
5 amended RFP and the new solicitation it proposes to make.²⁰ The Public Auditor finds that
6 DPW must ensure that it does not exceed the RFP's \$100,000,000 cap when it makes its division
7 by carefully apportioning that amount between the existing RFP it seeks to amend by limiting it
8 to the SSHS and the CCIP projects and the new solicitation it will be making for the remaining
9 34 GDOE schools. The Public Auditor also finds that DPW must comply with the statutory
10 budget restrictions for these projects as well. Specifically, for the SSHS project, DPW is
11 prohibited from entering into a financing arrangement with the offeror awarded the contract that
12 would result in an annual payment exceeding five-million-fifty-one-thousand-nine-hundred-
13 seventy-seven-dollars-and-ninety-eight-cents (\$5,051,977.98). 5 G.C.A. § 58D109. The Public
14 Auditor finds that even with DPW's continued compliance with the RFP's existing \$100,000,000
15 cap by carefully apportioning it between its proposed amended RFP for SSHS and the CCIP,
16 and a separate solicitation for the remaining 34 GDOE schools, DPW must ensure that it is well
17 within the fiscal limit imposed by 5 G.C.A. § 58D109. For the remaining 34 public schools,
18 DPW must ensure that the financing arrangement with the offeror awarded the contract does not
19 exceed interest payments in the amount of two-million-five-hundred-sixty-four-thousand-and-
20 one-hundred-sixty-five-dollars (\$2,564,165) for the remainder of fiscal year (FY) 2017 and FY
21 2018. 5 G.C.A. § 58E108(a)(1). Further, the total amount of annual payments under said
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27 ¹⁹ Testimony of DPW Deputy Director Felix Benavente at 01:52:34 to 01:53:01,
28 Part A, Formal Hearing on May 8, 2017.

²⁰ Testimony of DPW Deputy Director Felix Benavente at 02:13:22 to 02:15:35,
Part A, Id.

1 contract for the remaining 34 GDOE schools must not exceed the amount of four-million-eight-
2 hundred-thousand-dollars (\$4,800,000) starting in FY 2019. 5 G.C.A. § 58E108(a)(3).

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4 Therefore, based on the foregoing, the Public Auditor finds that the RFP violates 5
6 G.C.A. § 58E104 because that statute requires that the CCIP or Program Study be completed
7 prior to the issuance of an RFP for the rehabilitation of the remaining 34 GDOE schools and the
8 RFP simultaneously solicits for both services instead. The Public Auditor accepts DPW's
9 proposed resolution of this issue and DPW may amend the RFP. However, if DPW chooses to
10 amend it, DPW must comply with the RFP's amendment procedure set forth in Section 2.2.2 on
11 page 8 of the RFP. Further, in an amended or new RFP, DPW must include a date and time for
12 the opening of proposals to set an actual deadline for future amendments or addendums to the
13 RFP. Finally, DPW must carefully apportion the RFP's \$100,000,000 cap between the amended
14 RFP, which limits the scope of work to the SSHS project and the development of a CCIP, and
15 the new solicitation for the rehabilitation of the remaining 34 GDOE schools to ensure that DPW
16 does not exceed the cap with the division of existing RFP's scope of work and to ensure that
17 DPW does not exceed the budgetary restrictions on the annual payments for the projects imposed
18 by 5 G.C.A. § 58D109 and § 58E108. The Public Auditor finds that DPW's agreement to amend
19 the RFP resolves most of the issues raised by CTI in its February 8, 2017 protest and this appeal
20 concerning whether the RFP's scope of work should be divided into two different solicitations.
21 The Public Auditor will now review whether CTI's remaining arguments have any merit.

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24 **C. The CCIP fulfills the requirement for a Program Study.**

25 As stated above, DPW denied CTI's February 8, 2017 Protest in part because it believed
26 that the Program Study that CTI referred to in its protest referred to the CCIP. The Public
27 Auditor agrees. The term "Comprehensive Capital Improvement Plan" is defined by 5 G.C.A.,
28 Chap. 58E as a plan that takes into consideration each school's physical condition, area

1 population, enrollment patterns, and how each school meets the instructional needs of GDOE,
2 and the plan prioritizes repairs of existing schools, and renovation and construction of new
3 school facilities in order to deal with GDOE’s limited resources. 5 G.C.A. § 58E102(a).
4 However, other than this definition, the term “Comprehensive Capital Improvement Plan” does
5 not appear anywhere else in 5 G.C.A., Chap. 58E. The term “Program Study” appears instead.
6 Under the Superintendent’s direction, GDOE shall utilize the Program Study and the Army
7 Corps of Engineer’s assessment report, to identify and prioritize potential projects to be
8 completed. 5 G.C.A. § 58E104. Upon receipt of the Program Study, the Superintendent shall
9 solicit requests for proposals through DPW, in compliance with the Guam Procurement Law, for
10 the financing, design, construction, and rehabilitation of the education facility according to the
11 needs of GDOE. *Id.* In cases involving statutory construction, the plain language of the statute
12 must be the starting point. *Aguon v. Gutierrez*, 2002 Guam 14, ¶6 (Supreme Court of Guam). In
13 looking at the statute’s language, the trier of fact’s task is to determine whether or not the
14 statutory language is plain and unambiguous, and this is determined by reference to the language
15 itself, the specific context the language is used, and the broader context of the statute as a whole.
16 *Id.* The Public Auditor finds that the language concerning the “Program Study” in 5 G.C.A. §
17 58E104 is neither plain nor unambiguous because the term “Program Study” is not defined by 5
18 G.C.A., Chap. 58E, and because said statute only defines the term “Comprehensive Capital
19 Improvement Plan”, which is not used anywhere else in the statute except for its definition in 5
20 G.C.A. § 58E102(a). To resolve this ambiguity, the Public Auditor must look to 5 G.C.A., Chap.
21 58E’s context. *Id.*, at ¶9. Determining a statute’s context includes looking at other provisions of
22 the same statute or related statutes. *Id.* Here, the CCIP defined by 5 G.C.A. § 58E102(a)
23 requires, in relevant part, identifying what GDOE’s needs are concerning its existing or future
24 facilities and prioritizing the repairs to GDOE’s existing schools, and the construction of new
25 school facilities. 5 G.C.A. § 58E102(a). The Program Study cited in 5 G.C.A. §58E104 requires
26 a similar, if not the same, type of identification and prioritization of potential projects to be
27 completed and gives a timeline for GDOE to begin soliciting for the required services after the
28 study is completed. 5 G.C.A. § 58E104. Based on these similarities and the overall statutory
context of identifying GDOE needs concerning repairs to its existing facilities and its current and

1 future needs to build new facilities, the Public Auditor finds that the term “Comprehensive
2 Capital Improvement Plan” in 5 G.C.A. § 58E102(a) is synonymous with the term “Program
3 Study” in 5 G.C.A. § 58E104.

4 The Public Auditor finds that CTI’s argument that the RFP at issue here contains no
5 evidence or reference to the Program Study has no merit.²¹ As stated above, the Public Auditor
6 found that the Program Study required by 5 G.C.A. § 58E104 is synonymous with the
7 Comprehensive Capital Improvement Plan defined by 5 G.C.A. § 58E102(a). Even assuming
8 *arguendo* that the two terms are not synonymous, the CCIP incorporates the requirements of the
9 Program Study in the RFP. A review of the RFP reveals that it solicits for the development of a
10 CCIP for GDOE that takes “into consideration the physical condition of each school, along with
11 attendance area population, enrollment patterns, and bussing logistics, it shall also include how
12 each school meets the instructional needs of GDOE and prioritizes repairs of existing schools
13 and renovation and construction of new school facilities in order to deal with GDOE’s limited
14 resources” as per section 2.0 as required by P.L. 32-120 and P.L. 32-121.²² The Public Auditor
15 finds that this language closely tracks the statutory language set forth in 5 G.C.A. § 58D103(a)
16 and 5 G.C.A. § 58E102(a) (cited above), which define the term “Comprehensive Capital
17 Improvement Plan,” as it is used in those respective statutes. Further, the Public Auditor finds
18 that the RFP language “as per section 2.0 as required by PL 32-120 and PL 32-121” means that
19 the CCIP must comply with the mandates set forth in 5 G.C.A., Chapters 58D and 58E because
20 these are the respective codifications of P.L. 32-120 and P.L. 32-121. This would include the
21 mandate for a Program Study set forth in 5 G.C.A. § 58E104. Hence, it is this reference that
22 creates a link between the terms “Comprehensive Capital Improvement Plan” and “Program
23 Study,” albeit an indirect one, in the RFP. Accordingly, the Public Auditor finds that CTI’s
24 argument that there is no evidence of or reference to the Program Study in the RFP has no merit.

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28 ²¹ Page 3, Line 20, CTI’s Hearing Brief filed on May 5, 2017.

²² Page 18, Section 4.0 Overview, RFP, Tab 4, Procurement Record filed on
March 24, 2017.

1 Further, the Public Auditor finds that DPW's argument that this issue is moot because of
2 its agreement to amend the existing RFP has no merit.²³ As stated in the Public Auditor's May 4,
3 2017 Decision and Order, DPW's agreement to amend the RFP did not render this issue moot
4 because DPW continued to challenge whether it was required to include a Program Study in the
5 existing RFP.²⁴ Hence, this issue was not moot and had to be determined by this Decision.

6 The Public Auditor also finds that DPW's argument that CTI lacks standing to raise the
7 issue of whether a Program Study is required has no merit.²⁵ Any actual or prospective bidder,
8 offeror, or contractor who may be aggrieved in connection with the method of source selection,
9 solicitation or award of a contract, may protest to the Chief Procurement Officer, the Director of
10 DPW, or the head of a purchasing agency. 5 G.C.A. § 5425(a) and 2 G.A.R., Div. 4, Chap. 9, §
11 9101(a)(1)(a). Here, as stated above, CTI's February 8, 2017 protest concerned, in part, the
12 RFP's lack of reference to the Program Study and DPW partially denied CTI's protest on the
13 ground that the CCIP fulfilled the requirement for a Program Study. Hence, CTI, as a
14 prospective offeror, had standing to raise this issue because it was aggrieved by the RFP's
15 language.

16 Based on the foregoing, the Public Auditor sustains DPW's March 2, 2017 decision to
17 partially deny CTI's February 8, 2017 protest on the grounds that the Program Study cited in
18 CTI's protest referred to the CCIP required by the RFP, because the term "Comprehensive
19 Capital Improvement Plan" in 5 G.C.A. § 58E102(a) is synonymous with the term "Program
20 Study" in 5 G.C.A. § 58E104. The Public Auditor will now review the remaining issue raised by
21 CTI concerning whether 5 G.C.A., Chap. 58E authorizes DPW to procure insurance and
22 maintenance services for the remaining 34 GDOE schools.

23 **D. DPW may procure Insurance, Maintenance, and Collateral Equipment for the**
24 **Remaining Schools.**

27 ²³ Page 3, DPW's Hearing Brief filed on May 5, 2017.

28 ²⁴ Page 3, line 1, Decision and Order Re Purchasing Agency's Motion to Dismiss
and Motion for Expedited Decision filed on May 4, 2017.

²⁵ Page 4, DPW's Hearing Brief filed on May 5, 2017.

1 CTI's arguments that statutes do not allow for the procurement of insurance,
2 maintenance, and collateral equipment for the remaining 34 GDOE schools have no merit.²⁶
3 Insurance is one of the contractual safeguards that shall be included in the construction contract
4 envisioned by 5 G.C.A., Chap. 58E. 5 G.C.A. § 58E106(e). The RFP complies with this
5 requirement by stating that task orders will be negotiated, issued, and released under the contract
6 rehabilitation and construction of the GDOE schools and that these task orders shall contain
7 contractual obligations including insurance.²⁷ Further, the offeror awarded the contract must also
8 provide fire, earthquake, and vandalism insurance for any of the schools leased under the RFP.²⁸
9 In the testimony of CTI's Chairman Ho Sang Eun, he discussed that insurance should be required
10 only for the schools with significant renovation costs in proportion to the total value of such
11 schools, but it would not be practical to require insurance and maintenance for all remaining
12 public schools.²⁹ The Public Auditor agrees. Further, the Public Auditor finds that these
13 insurance requirements, as they pertain to the remaining 34 GDOE schools may be negotiated as
14 deemed appropriate pursuant to 5 G.C.A. § 58E106(e).

15 Maintenance services are also required for the remaining 34 GDOE schools.

16 The offeror awarded the contract shall be fully responsible for carrying out maintenance of the
17 remaining 34 GDOE schools. 5 G.C.A. § 58E102(c). Maintenance, like the insurance services
18 described above, shall be one of the contractual safeguards included in the task orders.³⁰ Further,
19 the offeror awarded the contract may cooperate with another entity or entities in any manner it
20 deems appropriate to provide for the maintenance required by 5 G.C.A., Chap. 58E. 5 G.C.A. §
21 58E102(c). Additionally, to achieve the complex lease and leaseback financing mechanism
22 envisioned by 5 G.C.A., Chap. 58E, the Government of Guam and GDOE are permitted to lease
23 Government of Guam or GDOE real property to the offeror awarded the contract and then to
24 lease back such real estate from the offeror awarded the contract so that it will pay for, in

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26 ²⁶ Page 5, line 15, CTI's Hearing Brief filed on May 5, 2017.

27 ²⁷ Page 19, Section 4.1.e, Task Orders, RFP, Tab 5, Procurement Record filed
28 on March 24, 2017.

29 ²⁸ Page 21, Section 4.2.1.9, Offeror Requirements, Id.

30 ²⁹ Testimony of Ho Sang Eun at 00:55:24 to 00:58:30, Part A, Formal Hearing on
May 8, 2017.

³⁰ Page 19, Section 4.1.j, Task Orders, Id.

1 relevant part, the maintenance services required by 5 G.C.A., Chap. 58E over the leaseback term.
2 5 G.C.A. § 58E103. The RFP complies with this requirement by stating that a leaseback
3 agreement may be prepared once negotiations with the successful offeror have concluded on a
4 task order basis.³¹ The offeror awarded the contract must be able to fund the maintenance
5 services required by 5 G.C.A., Chap. 58E for the remaining 34 GDOE schools, using tax-exempt
6 obligations, taxable bond obligations, or other financial instruments or alternative methods of
7 financing. 5 G.C.A. § 58E109. The capital maintenance costs for the remaining 34 GDOE
8 schools shall be paid by GDOE. 5 G.C.A. § 58E105. The RFP complies with this requirement
9 by requiring the successful offeror to be capable of providing capital maintenance for any of the
10 schools leased as a result of the RFP, and that this will be funded by annual legislative
11 appropriation.³² Based on the foregoing, the Public Auditor finds that 5 G.C.A., Chap. 58E
12 requires the aforementioned maintenance services.

13 The statute expressly states that GDOE is responsible for all maintenance, repair, exterior
14 grounds keeping, landscaping, and upkeep of the remaining 34 schools. 5 G.C.A. § 58E110.
15 However, the Public Auditor finds that this statute and the other statutory provisions in 5 G.C.A.,
16 Chap. 58E do not prevent GDOE from soliciting a private contractor for these services. In fact,
17 as stated above, the aforementioned statutory provisions actually require that maintenance
18 services be provided and financed by the offeror awarded the RFP contract and that these
19 services be paid for by legislative appropriation. The Public Auditor acknowledges the inclusion
20 of this statutory provision because one of the legislative findings for 5 G.C.A., Chap. 58E was
21 the fact that GDOE was approximately ninety-million-dollars (\$90,000,000) behind in
22 maintenance projects for Guam's public schools as of August, 2013. 5 G.C.A. § 58E101. The
23 Public Auditor interprets the plain language of 5 G.C.A. § 58E110 to mean that, without
24 question, it is ultimately GDOE's sole responsibility to ensure that the maintenance, repair,
25 exterior grounds keeping, landscaping, and upkeep of Guam's public schools are properly carried
26 out. The Public Auditor finds that the maintenance of Guam's public schools envisioned by 5

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³¹ Page 24, Section 4.3, Offeror's Responsibilities, Id.

³² Page 21, Section 4.2.1.8, Offeror Requirements, Id.

1 G.C.A. § 58E110 is of paramount importance to ensure that the safe, nurturing, and clean
2 learning environment that Guam’s school children and GDOE’s staff rightfully deserve, becomes
3 and remains a reality. Further, the Public Auditor finds that GDOE, with the Government of
4 Guam’s assistance, must use all the statutory remedies available to rectify its current
5 maintenance issues and prevent falling behind on the future maintenance needs of Guam’s public
6 schools.

7 The statute does not expressly authorize DPW or GDOE to procure collateral equipment.
8 As stated above, the RFP, in relevant part solicited for collateral equipment.³³ However, the
9 Public Auditor is not persuaded by CTI’s argument that 5 G.C.A., Chap. 58E does not allow for
10 the procurement of services not specified by its statutory provisions.³⁴ One of the underlying
11 policies of Guam’s Procurement Law and regulations is to provide for increased economy in
12 Government of Guam procurement activities and to maximize to the fullest extent the purchasing
13 value of Government of Guam funds. 5 G.C.A. § 5001(b)(5) and 2 G.A.R., Div. 4, Chap. 1, §
14 1102(4). The Public Auditor finds that the solicitation of ancillary needs, such as collateral
15 equipment, in the RFP fulfills this policy because it promotes increased economy by eliminating
16 the need for a separate solicitation for collateral equipment, and it maximizes the purchasing
17 value of public funds because ultimately, the monthly leaseback payments made using public
18 funds will cover the costs of the collateral equipment.

19 Based on the foregoing, the Public Auditor finds that the RFP provisions soliciting for
20 insurance may be negotiated for the public schools determined to require significant renovation
21 costs in proportion to the total value of such schools, as authorized by 5 G.C.A. § 58E106.
22 Further, the RFP provisions soliciting for maintenance services for the 34 GDOE schools are
23 authorized by 5 G.C.A. Chap. 58E. In addition, the RFP provisions soliciting for collateral
24 equipment are authorized by 5 G.C.A. § 5001(b)(5) and 2 G.A.R., Div. 4, Chap. 1, § 1102(4)
25 because they promote the increased economy in Government of Guam procurement activities
26 and maximize the purchasing value of the Government of Guam funds.

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³³ Page 7, Section 2.0, Intent, Id.

³⁴ Page 5, line 17, CTI’s Hearing Brief filed on May 5, 2017.

1 **E. DPW May Cancel or Revise the Solicitation or the Proposed Award**

2 CTI argues that DPW should either cancel the RFP or amend it to comply with 5 G.C.A.,
3 Chap. 58D and 5 G.C.A., Chap. 58E. If prior to an award it is determined that a solicitation or
4 proposed award of a contract is in violation of law, then the solicitation or proposed award shall
5 be cancelled or revised to comply with the law. 5 G.C.A. § 5451 and 2 G.A.R., Div. 4, Chap. 9,
6 § 9105(a). Here, there is no award of the contract. Further, as shown above, the RFP violates 5
7 G.C.A. § 58E104. DPW may cancel the solicitation and start over by dividing the RFP’s scope
8 of work into two different solicitations, one for 5 G.C.A., Chap. 58D and the other for 5 G.C.A.,
9 Chap. 58E. DPW may also amend the RFP as it proposes by limiting it to the SSHS project and
10 the development of the CCIP and then issue a new solicitation for the services required to
11 rehabilitate the remaining 34 GDOE schools. Whichever route DPW decides to take, it must
12 ensure it complies with 5 G.C.A. § 58E104 by issuing the RFP for the rehabilitation of the
13 remaining 34 GDOE schools within thirty (30) days after it receives the CCIP for the said
14 schools.

15
16 **IV. CONCLUSION**

17 Based on the foregoing, the Public Auditor hereby determines the following:

- 18 1. CTI’s February 8, 2017 Protest and March 16, 2017 Appeal were timely.
- 19 2. The RFP violates 5 G.C.A. § 58E104 because that statute requires that the CCIP or
20 Program Study be completed prior to the issuance of an RFP for the rehabilitation of the
21 remaining 34 GDOE schools, which the RFP simultaneously solicits for both services instead.
- 22 3. DPW’s March 2, 2017 decision to partially deny CTI’s February 8, 2017 protest on
23 the grounds that the Program Study cited by CTI in its protest referred to the CCIP required by
24 the RFP is hereby SUSTAINED because the term “Comprehensive Capital Improvement Plan”
25 in 5 G.C.A. § 58E102(a) is synonymous with the term “Program Study” in 5 G.C.A. § 58E104.
- 26 4. CTI’s allegations that 5 G.C.A., Chap. 58E prohibits the solicitation of insurance,
27 maintenance, and collateral equipment for the remaining 34 GDOE schools has no merit. The
28 RFP provisions soliciting for insurance may be negotiated for the public schools determined to

1 require significant renovation costs in proportion to the total value of such schools, as authorized
2 by 5 G.C.A. § 58E106. Further, the RFP provisions soliciting for maintenance services for the 34
3 GDOE schools are authorized by 5 G.C.A. Chap. 58E. In addition, the RFP provisions soliciting
4 for collateral equipment are authorized by 5 G.C.A. § 5001(b)(5) and 2 G.A.R., Div. 4, Chap. 1,
5 § 1102(4) because they promote the increased economy in Government of Guam procurement
6 activities and maximize the purchasing value of the Government of Guam funds.

7 5. DPW may cancel or amend the RFP pursuant to 5 G.C.A. § 5451 and 2 G.A.R., Div.
8 4, Chap. 9, § 9105(a).


9 6. CTI's appeal is hereby DENIED in part and GRANTED in part.

10 7. The Public Auditor finds that CTI is not entitled to its reasonable costs incurred in
11 connection with the solicitation, including its bid preparation costs, its February 8, 2017 protest,
12 excluding attorney's fees, pursuant to 5 G.C.A. § 5425(h), because at the time of said protest,
13 there were no proposals submitted or evaluation of those proposals indicating that there was a
14 reasonable likelihood that CTI may have been awarded the contract but for DPW's violation of 5
15 G.C.A. § 58E104.

16 This is a Final Administrative Decision. The Parties are hereby informed of their right to
17 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
18 Article 9 of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative Decision.
19 5 G.C.A. § 5481(a).

20 A copy of this Decision shall be provided to the parties and their respective attorneys, in
21 accordance with 5 G.C.A. § 5702, and shall be made available for review on the Office of Public
22 Accountability's Website at www.opaguam.org.

23
24 **DATED** this 9th day of June, 2017.

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28 _____
DORIS FLORES BROOKS, CPA, CGFM
PUBLIC AUDITOR