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 OFFICE OF THE PUBLIC AUDITOR
 PROCUREMENT APPEALS

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Attorneys for the Department of Public Works

BEFORE THE GUAM PUBLIC AUDITOR
Procurement Appeal

IN THE APPEAL OF:)	DOCKET NO. OPA-PA 09-005
)	
)	
)	
GUAM COMMUNITY IMPROVEMENT)	REPLY TO APPELLANT'S MEMO
FOUNDATION, INC.)	RE: DECLARATION OF
)	SUBSTANTIAL INTEREST
Appellant.)	
)	

Appellant filed its Memorandum re Declaration of Substantial interest on 3 September 2009. The Purchasing Agency, Department of Public Works, replies herewith, pursuant to ¶2.b. of the 16 September 2009, OPA Notice of Hearing and Scheduling.

Appellant concludes in ¶2 of its Memo that the temporary JFK facility at Tiyan meets the minimum standards of the Every Child is Entitled to an Adequate Public Education Act, §4, i.e., notwithstanding a dysfunctional cafeteria, marginal vocational education facilities, unsafe building material, unsafe layout/design, inadequate toilet facilities placement, unhealthful/unsafe student/teacher exposure to the elements, hazardous lack of exit from classrooms, truncated educational curriculae to cite just a few of the many non-conformities with the Act with the interim facility. Appellant suggests that there is no “substantial need” to rectify these statutory non-conformities with the earliest re-build of the real JFKHS.

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Appellant correctly confirms effective application of the August 2008 State of Emergency Declaration, underscoring the inherent “substantial interest” in fulfilling the objectives thereof with alacrity; not “death by committee” as would otherwise likely be the case.

Appellant states in its ¶6 that the “hardship has past” (sic), when contrariwise, it worsens with each passing day. In its next paragraph, Appellant implies it is acceptable for the students to endure continued “disruption”. The term “interim” is inherently disruptive, manifestly creating an intensifying “substantial interest” in the procurement process to parallel the protest appeal procedure to ensure the earliest re-construction of the JFKHS facility.

By an attempted portrayal of GovGuam delay, Appellant suggests that it is somehow government delay that caused the substantial interest situation. On the contrary, it was the filing of an eleventh hour, speculative protest by Appellant just as the project finance instruments were being executed that thwarted the conclusion of the procurement process leading to bid award at an enormous taxpayer cost and incalculable cost to the education of 2,300 students.

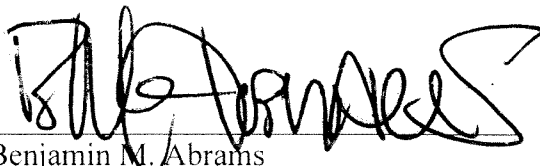
Courts have accorded great weight to a purchasing agency’s bid selection decisions. As here, Appellant “having presented no evidence or argument that Guam’s procurement law ... was not fully complied with by the parties ... courts are loathe to interfere in government procurement.... It is appropriate to interfere and substitute a court’s judgment for the administrator’s only where there appears no rational basis for the procurement decision.” Pacific Data Systems, Inc. v. Superior Court of Guam, 1990 WL 320357 (D.Guam A.D.). Citing the United States Supreme Court, the Pacific Data decision, the court included: “we have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer”. Id. at p.3. And even if a reviewing body may have handled the procurement differently does not mean the agency action should be set aside as arbitrary and capricious; “there must be instead, a showing that the agency has transgressed statutory

boundaries.” John W. Danforth Company v. Veterans Administration, 41 F.Supp 1062, 1070 (DCNY, 1978).

Inexorably, the procurement process must be allowed to culminate on a “substantial interest” basis. In the §1 words of the Every Child Entitled to Adequate Public Education Act: *the education of our children is the **top priority** of our Government.* (emphasis added). Webster’s defines “substantial” as “significantly large.... real, true, not imaginary, important, essential; significantly large”. Just what we have here.

Dated this 21st day of September 2009.

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Alicia G. Limtiaco, Attorney General

By: 
Benjamin M. Abrams
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