



**Office of the Attorney General
Elizabeth Barrett-Anderson**

Attorney General of Guam
Solicitor Division
590 S. Marine Corps Drive
Tamuning, Guam 96913 • USA
(671) 475-3324 • (671) 472-2493 (Fax)
www.guamag.org

Attorneys for the Government of Guam

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 09/02/2016

TIME: 9:15 AM PM BY: AB

FILE NO OPA-PA: 16-007/16-011

**THE OFFICE OF PUBLIC ACCOUNTABILITY
HAGÅTÑA, GUAM**

In the Appeal of:)	CONSOLIDATED APPEALS NOS.
)	OPA-PA-16-007 AND OPA-PA-16-011
CORE TECH INTERNATIONAL CORP.,)	
)	
Appellant,)	
)	
and)	DEPARTMENT OF PUBLIC WORKS
)	
GUAM DEPARTMENT OF PUBLIC WORKS,)	HEARING BRIEF
)	
Purchasing Agency.)	
)	
)	

I. INTRODUCTION

This is an appeal of the Purchasing Agency, the Department of Public Work ("DPW"), decisions to deny Core Tech International Corp's ("Core Tech") two protests related to a REQUEST FOR PROPOSALS PROJECT NO. 730-5-1055-L-YIG LEASE FINANCING FOR DESIGN, RENOVATION, REHABILITATION, CONSTRUCTION AND MAINTENANCE FOR PUBLIC SCHOOLS (BEGINNING WITH SIMON SANCHEZ HIGH SCHOOL).

ORIGINAL

Public Laws 32-120 and 32-121 ("Acts") authorized the government of Guam to solicit requests for proposals to finance, design, renovate and construct Department of Education ("DOE") education facilities. The intent was to select a contractor based on qualification and not lowest cost. The Acts required a negotiating committee comprised of the Superintendent of Education, and Deputy Directors of the Department of Public Works and Guam Economic Development Authority to negotiate with the most qualified offeror a contract that would deliver the best value for Guam's Department of Education.

II. ISSUES

OPA-PA-16-007

Core Tech takes issue with the Negotiating Committee negotiating with Guam Educational Facilities Foundation ("GEFF") by filing three protests with DPW. Section 2.0 of the RFP, Addendum No. 6 states "[o]nce a firm is selected, a scope of work and fee estimate will be negotiated to perform the required services for Simon Sanchez High School." Addendum No. 6 was acknowledged received by Jong Won of Core Tech on September 24, 2015. *See*, Procurement Record, Tab 5. Core Tech was notified on December 22, 2016 that it was ranked No. 2 by the Evaluation Committee and that their proposal *would not be subject to contract negotiations* at the time. *See*, Procurement Record, Tab 16. Core Tech elected not to protest at the time. By electing not to protest the ensuing negotiations with GEFF, Core Tech acknowledged that the Public Law Nos. 32-120 and 32-121 and RFP permit the Negotiating Committee to negotiate scope of work and fee estimate with only the highest ranked offeror.

As mentioned, the laws and the RFP permitted the Negotiating Committee to negotiate the scope of work and the fee estimate with the highest ranked offeror. The four alternative price estimates were not unauthorized attempts to modify proposals but were back and forth submissions

primarily used to educate the committee and achieve the best value for Guam in meeting the objectives of DOE.

Nor did the Negotiating Team modify the RFP as Exhibit A of the RFP is entitled "SIMON SANCHEZ HIGH SCHOOL CONSIDERATION" and not "technical requirements". In addition, RFP Addendum #6 Section 2.0 states: "[o]nce a firm is selected, a *scope of work and fee estimate will be negotiated* to perform the required services for Simon Sanchez High School." (emphasis added). As such, the Negotiating Committee was permitted to make minor adjustments at the request of DOE to the number of Simon Sanchez High School rooms and other items in the Exhibit A Considerations of the RFP. The number of schools listed in the RFP was an administrative error and not a proper basis for a procurement protest.

The cost savings resulting from the reduction of auditorium seating is also permissible as pricing was not a factor in selecting a contractor for the project. The Acts and the RFP intended to select the most qualified offeror and not the construction of an inexpensive or lowest bid construction cost and lower quality school. Instead, the directive was for the Negotiating Committee to negotiate with the highest qualified contractor to construct a solid school structure that will benefit Guam and its residents.

The final issue that Core Tech appeals in OPA-PA-16-011 is the determination for a bond. A Performance and Payment Bond is not required at this time. Therefore, DPW has not agreed to accept a bond from Guam Education Development Partners ("GEDP") or consented to a wholesale subcontract or assignment to GEDP, including GEF's or Hensel Phelps obligation to deliver a bond. The Performance and Payment Bond will be required once plans and specifications and a construction contract are in place. This is consistent with Public Laws 32-120 and 32-121 and the RFP.

OPA-PA-16-011

The IDIQ contract, as currently written, is consistent with the RFP and incorporates the terms of the RFP. Section 3.1 of the IDIQ incorporates Sections 4.0 and 4.4 of the RFP. By doing so, it explicitly caps the amount of payment at \$100,000,000.00 and references the laws that authorize such compensation. Whether these laws authorize a debt service in excess of the cap is an interpretation of law outside the Office of Public Accountability's jurisdiction. Regardless, Section 3.1 as currently written is not fatal to the procurement as it can be modified if necessary.

Also not fatal to this procurement is DPW's maintenance of the procurement record. DPW has provided everything in the record.

Title 5 GCA 5249(b) requires a log of all communications which the record contains. The record also contains numerous pages of communications and documents contemporaneous with the procurement. They record what transpired in the procurement process and support the log as a log is a convenient means to list information to be available at a glance and without having to sift through a number of documents to piece together information. An unfinished log can be completed. Therefore, canceling the RFP because the log is not yet finished is too harsh of an outcome when the log can be fixed.

Also, DPW in good faith complied with 5 GCA 5249(c). The requirement of recorded negotiations is subject to the same interpretation whether the law has a semi-colon or coma as each clause of the section is interpreted separately and therefore can be interpreted to mean negotiations are not to be recorded. *People ex re. Gwinn v. Kothari*, 83 Ca.; App. 4th 759, 768 (2000) (“Commas are used to separate items in a list. . . Their presence or absence in a statute is a factor to be considered in its interpretation.”); *Board of Trustees v. Judge*, 50 Cal. App. 3rd 920, 928 fn. 4 (1975). This is a reasonable interpretation of the statute as candid negotiations would elicit

discussions of confidential, trade secrets or other proprietary data. Sound recordings would inhibit discussions and ultimately prevent a fair and reasonable agreement between the parties. The replacement of the comma with the semicolon by the Guam Compiler of Laws is a permissible clerical change to carry out the law. *See* 1 G.C.A. § 1606.

Core Tech has not alleged anything improper occurred during negotiations thereby making sound recordings irrelevant to this appeal. Nonetheless, the documents contemporaneous to the negotiations are available in the record.

The parties have not been unduly prejudiced by DPW's maintenance of the procurement record.

CONCLUSION

Based on the foregoing argument, the Public Auditor should deny Core Tech's protest and dismiss this matter.

Dated this 2nd day of September, 2016.

OFFICE OF THE ATTORNEY GENERAL
Elizabeth Barrett-Anderson, Attorney General

By:



SHANNON TAITANO
Assistant Attorney General