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DATE: 9/8/16

TIME: 1:50 AM PM BY: EMD

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

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

In the Appeal of:

CORE TECH INTERNATIONAL CORP.,

Appellant,

and

**GUAM DEPARTMENT OF PUBLIC
WORKS,**

Purchasing Agency.

) CONSOLIDATED APPEALS NOS.
) **OPA-PA-16-007 AND OPA-PA-16-011**

) **DEPARTMENT OF PUBLIC WORKS**
) **SUPPLEMENTAL TO PROCUREMENT**
) **RECORD**

Comes now, Department of Public Work ("DPW"), and through its undersigned counsel,
herein files the partially executed Indefinite Delivery Indefinite Quantity contract.

Dated this 8th day of September, 2016.

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

By:

SHANNON TAITANO
Assistant Attorney General

THIS CONTRACTUAL AGREEMENT ("Contract") is made and entered into by and between the **Department of Public Works and the Guam Department of Education, Government of Guam**, (hereinafter collectively referred to as the "**Government**") and **Guam Educational Facilities Foundation, Inc.** (hereafter referred to as the "**Developer**").

RECITALS

WHEREAS, the Government desires to engage the Developer to provide professional services to the Government for the financing, design, demolition, renovation, rehabilitation, construction, equipping, and the providing of maintenance and insurance for a total of thirty-six (36) Guam Department of Education schools, with priority of Simon Sanchez High School, as well as the development of a comprehensive capital improvement plan ("CCIP") that takes into consideration the physical condition of each school along with attendance, area population, enrollment patterns and bussing logistics (the "Project") as solicited in the Request for Proposal Project No. 730-5-1055-L-YIG ("RFP") in accordance with the RFP, its Scope of Work, the Developer's submitted Proposal, and the other Contract Documents, all of which are incorporated herein by this reference; and

WHEREAS, the services to be rendered are of a special nature which has been determined to be in the best interest of the public and are to be performed under this Contract by professional personnel other than the employees in the classified services of the Government; and

WHEREAS, the Developer has submitted a proposal and an interest in providing such services; and

WHEREAS, the award of this Contract to the Developer has been made pursuant to a finding by the Evaluation Committee that the Developer is qualified based on the evaluation factors set forth in the RFP, that negotiations of compensation have been determined to be fair and reasonable, and provide delivery of the best value for Guam in meeting the objectives of Guam Department of Education and the Government of Guam; and

WHEREAS, the Government, after engaging in a competitive selection procurement process in accordance with the Guam Procurement Law (Title 5, Guam Code Annotated, Chapter 5) and Regulations (Title 2, Guam Administrative Rules and Regulations, Division 4), is prepared to award this contract to Developer as the most qualified, responsive, responsible offeror.

NOW THEREFORE, in consideration of the foregoing recitals and of the mutual terms, covenants, conditions set forth below, the parties **AGREE** as follows:

I.
SCOPE OF CONTRACT

1.1. **IDIQ Agreement.** This is an Indefinite Delivery Indefinite Quantity (IDIQ) Agreement for the financing, design, demolition, renovation, rehabilitation, construction, equipping, and the providing of maintenance and insurance for a total of thirty-six (36) Guam Department of Education schools, with priority of Simon Sanchez High School as well as the development of a CCIP. The CCIP will prioritize repairs of existing schools and renovation and construction of new school facilities in order to deal with GDOE's limited resources.

1.2. The Developer shall furnish all necessary labor, materials, equipment, tools and services necessary to perform and complete in a workmanlike manner all the work required for the Project, in strict compliance with the Contract Documents as defined in this Contract, which are hereby incorporated into and made a part of this Contract as though set forth verbatim herein.

1.3. Developer shall provide these services for the Government of Guam based on the following:

A. **As-Required Basis.** Developer shall provide services on "as required" basis.

B. **Assignments.** Project Assignments and actual scopes of work shall be determined by the Government. The Developer shall be available to discuss the Project Assignments and the associated scopes of work within five (5) business days after being notified by the Government.

C. **Task Orders.** The Government of Guam will issue Project Assignments by Task Orders. Such Task Orders will be negotiated in good faith consistent with the terms of this Contract issued only after the parties hereto mutually agree on: (1) the scope of work, (2) a fixed price to be paid to the Developer for the completion of all work required under the Task Order, and (3) the availability of financing to pay for such Task Orders, which may include the issuance of tax-exempt obligations authorized under Public Laws 32-120 and 32-121 or other alternative financing approved by *I Liheslaturan Guahan*. If the parties hereto are unable to agree on the scope and price for the Task Order, the Government shall have the right to accomplish the Project by other means, including without limitation, the right to retain another developer to complete the Task Order. Modifications of Scope of Work and cost can be made within each Task Order if determined that there is duplication of scope, surplus or shortfall of scope or funds in any task, with the exception of the Task Order for Simon Sanchez High School that shall be in an amount not to exceed Seventy Six Million Eight Hundred Sixty Seven Thousand and Three Hundred Thirty-Five and 00/100 Dollars (\$76,867,335.00), and shall be approved in writing by the Government of Guam.

D. **Scope of Services.** The Developer shall provide all services necessary to successfully implement the Project through the execution of Task Orders under this Contract.

E. **Financing.** The Developer shall arrange financing for the Task Orders, on terms acceptable to Guam Economic Development Authority based on the revenues and terms authorized pursuant to Public Law 32-120 and Public Law 32-121.

II.

TERM AND TIME OF PERFORMANCE

2.1. **Term of Contract.** The term of this Contract is for a period of **five (5) years** unless extended by mutual agreement. The parties agree that time is of the essence in the performance of the obligations under this Contract, and, therefore, the Developer agrees to commence work under this Contract beginning at the issuance of the NTP.

2.2. **Task Order Period of Performance.** Issuance of Task Orders, approved in writing by the DPW Director or Deputy Director, GEDA's Administrator or Deputy Administrator and the Superintendent or Deputy Superintendent of Education, shall be made within the term of the Contract as set forth in 2.1. The Developer shall complete such Task Order, within the time or date indicated in each Task Order, which time or date may extend beyond the term of the Contract.

2.3. **No Minimum Services Guaranteed.** The Government makes no guarantee whatsoever as to the minimum amount of services that will be required under this Contract and no fee adjustment will be made if the amount of the services requested is less than anticipated. The Government reserves the right to add to or delete any item from this Contract, which is deemed to be in the best interest of the Government of Guam.

III.

COMPENSATION AND PAYMENT FOR SERVICES

3.1. **Compensation and Payment for Services.** The Government will compensate the Developer for services rendered for Task Orders issued as provided in this Contract based on available funds and not to exceed One Hundred Million and 00/100 Dollars (\$100,000,000.00) pursuant to Section I (Scope of Contract), unless otherwise directed by the Director of DPW in writing and permitted by Public Laws 32-120 and 32-121 or any other law. The first and second Task Orders will be for Simon Sanchez High School and the CCIP.

A. **Fixed Fee.** All Task Orders shall be fixed fee and will be funded from financing arranged by the Developer pursuant to Section IV.

B. **Government to Issue Task Order.** The Government will furnish the Developer a Task Order specifying the services to be performed.

C. **Pricing.** The pricing and costs for all Task Orders will be developed using RS Means Facilities Construction Cost Data based on the most recent information, city cost indexes, location factors, unit prices, coefficient percentage factor and other factors of data as contained in the RS Means Facilities Construction Cost Data. Developer's coefficient attributed to each offering period is 1.3450%. Collateral equipment are not specified in the

RSMeans Cost Data Book, therefore the coefficient shall not apply. Developer shall not charge more than 15% overhead and profit of the direct cost of collateral equipment. GRT rate shall be added after the direct cost and 15% overhead and profit.

(i) **Deviation from RSMeans.** In order to account for higher cost of certain items on Guam, Developer may submit a request to the Government to deviate from RS Means costing. Such request must include a description of the item, the RS Means cost and three price quotes.

(ii) **Architect/Engineer Services.** The total cost of architect or engineer services shall not be included in the coefficient, must be separately itemized, and must not exceed 6% of the estimated cost of the construction project plus any fees for related services and activities such as set forth below:

a) Investigative services, including, but not limited to, determination of program requirements, including schematic or preliminary plans and estimates; determination of feasibility of proposed project; preparation of measured drawings of existing facility; subsurface investigation; structural, electrical, and mechanical investigation of existing facility; and surveys (topographic, boundary, utilities, etc.).

b) Special consultant services that are not normally available in organizations of architects or engineers and that are not specifically applied to the actual preparation of working drawings or specifications of the project for which the services are required.

c) Reproduction of approved designs through models, color renderings, photographs, or other presentation media; travel and per diem allowances other than those required for the development and review of working drawings and specifications; supervision or inspection of construction, review of shop drawings or samples and other services performed during the construction phase; and all other services that are not an integral part of the production and delivery of plans, designs and specifications.

d) The cost of reproducing drawings and specifications for bidding and their distribution to prospective bidders and plan file rooms.

3.2. Construction Monitoring. Unless otherwise instructed by the Government, monthly construction reports shall be prepared by an independent third party and submitted to the Government. Monthly construction reports shall contain an accurate and detailed accounting of the work accomplished to date and a draw to cover monthly progress payments. The monthly construction report shall also discuss any problems the Developer has encountered since the previous report, any problems it foresees, and a correction action plan for minimizing the effect of the problem(s) encountered. Changes in personnel shall also be documented in the report. In addition, representatives of the Government may attend weekly meetings between the Developer and subcontractors to receive updated information on the construction progress since the date of the last monthly report.

3.3. Task Order Acceptance and Final Payment. Final payment shall be made upon satisfactory delivery and acceptance of all services as herein specified and performed under each Task Order and this Contract. Prior to final payment and as a condition precedent thereto, the Developer shall execute and deliver to the Government a notarized release in a form approved by the Government, of claims against the Government arising under and by virtue of this Contract.

IV. FINANCING

Unless mutually agreed to in writing otherwise, funding to pay Task Orders issued pursuant to this Contract will be made available by the Developer through one or more lease-lease back agreements ("Lease Agreements") as outlined in Public Law 32-120 and Public Law 32-121. Such Lease Agreements shall be secured by the revenue authorized in PL 32-120 and PL 32-121 and the rental payments payable from the revenue sources outlined in these two public laws. The Lease Agreements shall include a "Non-Appropriation" clause providing that the Government shall not be obligated to make lease rental payments thereunder in the event sufficient funds are not appropriated prior to the beginning of any Renewal Term or otherwise not legally available for such purpose. Financing raised in the capital markets or from other sources will be held in escrow with a trustee bank ("Project Fund Escrow Account"), acceptable to the Government. Financing proceeds held in the Project Fund Escrow Account will be disbursed monthly to pay Tasks Order progress payments to the Developer upon the execution of an authorized payment requisition form approved by a designated representative of the Government. A completed payment requisition form submitted to the Government shall be deemed approved within ten (10) business days of the Government's receipt of the completed payment requisition unless the Government objects to specific aspects of the payment requisition.

Upon the execution of this Contract the Government and Developer hereby agree to commence work expeditiously and diligently on entering into a Lease Agreement and other related financing documents to facilitate the financing of the First Task Order as outlined in section 3.1 (A).

V. "CONTRACT DOCUMENTS" DEFINED

It is hereby mutually agreed that the following list of documents which are attached hereto, bound herewith or incorporated herein by reference shall constitute the Contract Documents, all of which are made part hereof, and collectively evidenced and constitute the Contract between the parties hereto, and they are as fully a part of this Contract, as if they were set out verbatim and in full herein:

- A. Request for Proposals and all attachments, forms, or exhibits thereto;
- B. Developer's Proposal;

- C. Formal Contract, Construction Contract or Project Development Agreement(s), Lease Agreement(s), Finance Documents;
- D. Notice of Intent to Award;
- E. Task Order(s);
- F. All Amendments or Addenda to the Request for Proposals; and
- G. All Amendments to Contract.

VI.
COORDINATION OF THE WORK

6.1. Program Administrator. The Superintendent of GDOE (“Program Administrator”) or designee appointed in writing shall be responsible for providing instructions to Developer for all or a specified portion of this Contract and each Task Order. In the event Developer effects any change at the direction of any person other than the Program Administrator, the change is considered to be made without authority and no adjustment will be made in the Task Order price to accommodate any increase as a result thereof.

6.2. Developer Single Point of Contact. Developer shall designate in writing a single point of contact on Guam to act as a liaison with the Program Administrator. Such point of contact may be changed in Developer’s discretion.

VII.
CHANGES IN SCOPE OF WORK AND SERVICES

7.1. Change Orders. By written order, at any time, and without notice to surety, the Government may, subject to all appropriate adjustments, make changes within the general scope of this contract in any one or more of the following:

(A) Drawings, designs, or specifications, if the supplies to be furnished are to be specifically manufactured for Guam in accordance therewith.

7.2. Adjustments of Price or Time for Performance. If any such change order increases or decreases the Developer's cost of, or the time required for performance of any part of the work under this Contract, whether or not changed by the order, an adjustment shall be made and the contract amended in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Guam Procurement Law and the Guam Procurement Regulations and PL 32-120 and PL 32-121.

Failure of the parties to agree to an adjustment shall not excuse the Developer from proceeding with the contract as changed, provided that the Government promptly and duly instructs the Project Fund Trustee to make such provisional adjustments in payment or time for performance as may be reasonable. By proceeding with the work, the Developer shall not be

deemed to have prejudged any claim for additional compensation, or an extension of time for completion.

7.3. Time Period for Claim. Within thirty (30) days after receipt of a written change order under Paragraph 6.1 ("Change Orders") of this clause, unless such period is extended by the Government in writing, the Developer shall file notice of intent to assert a claim for an adjustment. Later notification shall not bar the Developer's claim unless the Government is prejudiced by the delay in notification.

7.4. Claims Barred After Final Payment. No claim by the Developer for an adjustment hereunder shall be allowed if notice is not given prior to final payment under this contract.

7.5. Other Claims not Barred. In the absence of such a change order, nothing in this clause shall be deemed to restrict the Developer's right to pursue a claim arising under the contract. If pursued in accordance with the clause in the Guam Procurement Regulations entitled, "Claims Based on a Procurement Officer's Actions or Omissions, Notice of Claim Clause, or for Breach of Contract."

VIII. TERMINATION OF AGREEMENT

8.1. Termination by the Government. Nothing herein shall be construed to waive the rights of the Government of Guam to stop work or otherwise terminate this Contract as provided for, and in accordance with, Guam law. If the Government terminates this Contract for convenience, then it shall be responsible for the payment of any preparatory work, engineering, material ordered and labor expended up to the date of termination. The Government shall give written notice of the termination to the Developer specifying the part of the contract terminated and when terminated becomes effective. Any termination of this Contract by the Government shall not terminate any executed Task Orders and related agreements not in default.

IX. INDEMNIFICATION

Pursuant to this Contract, the Developer shall indemnify and hold harmless the Government and its respective officers, agents, and employees from any loss, damage, liability, expense, claims, suits, actions, costs of suit and attorney's fees because of damage to property or injuries to persons (including death) arising from any negligent act, omission, or breach on the part of the Developer, its agents, employees and subcontractors, in connection with this Contract, or from any breach of any of its obligations under this Contract.

The Developer shall defend at its own expense any suits or other proceedings brought against the Government, its officers, agents, and employees, based on any alleged negligent act, omission, or breach by the Developer, its employees, agents or subcontractors, in connection with this Contract, or from any breach of any of its obligations under this Contract, and shall pay all expenses and satisfy all judgments which may be rendered against the Government, or its

officers, agents or employees, based upon such negligent act, omission, or breach, including all costs, expenses of suit and attorney's fees.

X. **INSURANCE**

10.1. At its sole cost and expense, the Developer shall place and maintain with responsible insurance carriers who cover the region of Guam and scope of this contract, any insurance as required by the Government, and in form and with insurers acceptable to the Government.

All policies, with the exception of Workers Compensation Insurance and Professional Liability Insurance, shall be endorsed to include the Developer and the Government, and their respective officers, directors, agents and employees as additional insured.

10.2. Insurance Requirements. The Developer shall obtain and keep in force throughout the term of this Contract such policies of insurance with the limits and provisions as follows:

- A. Workers Compensation in accordance with the statutory requirements of Guam;
- B. Employer's Liability Insurance in the amount of \$1,000,000;
- C. Commercial General Liability in a broad form and in an amount not less than \$2,000,000 aggregate and per occurrence. This policy will provide coverage for personal and bodily injury, including death, for property damage, and include endorsements for contractual liability;
- D. Automobile Liability Insurance with limits not less than \$1,000,000 for bodily injury and property damage applicable to owned, rented, leased, or borrowed automobiles while in the custody of the insured or anyone driving such vehicles with insured's permission; and
- E. Professional Liability Insurance including errors and omissions in an amount not less than \$1,000,000 per claim and 10% of the project costs in the aggregate.

XI. **INDEPENDENT CONTRACTOR**

In the performance of this Contract, it is expressly understood that the Developer's status is that of an independent contractor and not as an agent, partner, joint venture or employee of the Government. The Developer's conduct shall be in accordance with that status. If the Developer is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

The Developer does not have, nor does it hold itself out as having, any right, power or authority to create any contract or obligation, either express or implied, on behalf of, in the name of, or binding upon the Government, or to pledge the Government's credit, or to extend credit in the Government's name. In addition, nothing contained in this Contract shall be deemed or construed by the parties hereto, or by any third party, to create the relationship of principal and agent, or a partnership or a joint venture, or of any association between the Government and the Developer.

The Developer is liable for document errors and damages (added costs) to the Government of Guam as a result of negligent performance as discussed below:

A. **Liability for Document Errors.** The Developer is liable for correcting errors or omissions for all data provided with respect to field inspection and observation, quality assurance monitoring, coordination and reporting, or other services furnished by the firm. Corrections are at no cost to the Government of Guam. This liability is not absolved by the Government of Guam review, approvals, acceptance of work, or payment of work by the end of project.

B. **Liability for Damages.** When the Government of Guam incurs additional costs that result from deficiencies as specified in subparagraph XI. A. (Liability for Document Errors), negligence, such as Contract modifications, the extent of the Developer liability is determined by the judgment of the Government of Guam (with the advice of technical personnel and legal counsel). The extent of liability is valued against four conditions:

- i. The construction management modifications must be attributed to all and/or any data or omission, negligence;
- ii. The data error or omission must stem from an act or omission, negligence by the Developer;
- iii. The act or omission on the Developer's behalf must result from failure to meet reasonable professional standards; and
- iv. The Government of Guam must have been damaged.

XII.

PERFORMANCE AND PAYMENT BONDS

Developer or its prime construction contractor must deliver to the Government for each Task Order an executed performance bond and an executed payment bond in such form as is acceptable to the Government in an amount equal to one hundred percent (100%) of the construction cost for Task Orders exceeding Twenty Five Thousand Dollars & 00/100 (\$25,000.00). The bonds must be issued by a surety company or companies authorized to transact business in Guam and listed in the U.S. Department of the Treasury's Listing of Approved Sureties (Circular 570).

XIII.
LIQUIDATED DAMAGES

Developer further agrees to pay to the Government the amount of one-fourth of one percent of the contract value per calendar day, not as a penalty, but as reasonable liquidated damages for breach of this Contract by Developer by its failing, neglecting or refusing to complete the work within the time herein specified and said sums shall be paid for each consecutive calendar day thereafter that Developer shall be in default after the time stipulated in the Contract until substantial completion of the work, subject to the Force Majeure events defined in Section 17.21.

XIV.
WARRANTIES

Developer hereby warrants that the work and equipment installed under each Task Order issued under this Contract shall be free of defect for a period of one year from the date of occupancy permit or final completion and acceptance. Developer further agrees to repair or replace, at no cost to the Government, any equipment (including air conditioners) that fails during the first year.

XV.
REPRESENTATIONS

The Developer has not knowingly influenced, and will not knowingly influence a government employee to breach any of the ethical standards set forth in Chapter 11 of the Guam Procurement Regulations.

The Developer has not violated, is not violating, and will not violate the prohibition against gratuities and kickbacks set forth in § 11107 of the Guam Procurement Regulations; and

The Developer is not aware of any current engagement or relationship with any public or private party that could potentially create a conflict of interest with the Government of Guam or any of its agencies or instrumentalities. The Government reserves the right to terminate or modify this Contract in the event any conflict or potential conflict arises or is discovered.

XVI.
SOVEREIGN IMMUNITY

Nothing in this Contract shall be construed to waive, or to act as a waiver of, the sovereign immunity of the Government of Guam or the applicability of the Guam Government Claims Act.

XVII.
MISCELLANEOUS PROVISIONS

17.1. Venue and Governing Law. The Developer hereby specifically consents and agrees to the jurisdiction and forum of the Superior Court of Guam with respect to any and all claims or disputes which may arise hereunder, and expressly waives any and all rights it may otherwise have had to contest the same or to proceed in a different jurisdiction or forum. At all times, this Contract shall be governed by and construed in accordance with the laws of Guam.

17.2. Compliance with Laws. The Developer shall comply with all applicable Federal, state and local laws, statutes and ordinances, and with all legal and applicable rules, regulations or orders of any governmental department, board, bureau or agency having jurisdiction over the subject of this Contract.

17.3. Interest of Members of the Department and Others. No officer, member, or employees of the Government who exercise any functions or responsibilities in the review or approval of the undertaking or carrying out of this Contract, shall participate in any decision relating to this Contract which affects his personal interest or have any personal or pecuniary interest, direct or indirect, in the Contract or the proceeds thereof.

17.4. Covenant Against Contingent Fees. The Developer warrants that it has not employed any person to solicit or secure this Contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the Contract or, as consideration, deduct the amount of such commission, percentage brokerage or contingent fee from the Contract price. This warranty shall not apply to commission's payable by Developer upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Developer for the purpose of securing business.

17.5. Other Contracts. The Government or other parties approved by the Government may award other contracts for additional work, and the Developer shall fully cooperate with such other contracts and carefully fit the work to that provided under other contracts as may be directed by the Government. The Developer shall not commit or permit any act which will interfere with the performance of work of any other Contractor.

17.6. MANDATORY DISPUTES CLAUSE.

The Government and the Developer agree to attempt resolution of all controversies which arise under, or are by virtue of, this Contract through mutual agreement. If the controversy is not resolved by mutual agreement, then the Developer shall request the Government in writing to issue a final decision within sixty days after receipt of the written request. If the Government does not issue a written decision within sixty (60) days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the Developer may proceed as though the Government had issued a decision adverse to the Developer.

The Government shall immediately furnish a copy of the decision to the Developer, by certified mail with a return receipt requested, or by any other method that provides evidence of receipt.

The Government's decision shall be final and conclusive, unless fraudulent or unless the Developer appeals the decision.

This subsection applies to appeals of the Government's decision on a dispute. For money owed by or to the Government under this Contract, the Developer shall appeal the decision in accordance with the Government Claims Act by initially filing a claim with the Office of the Attorney General no later than eighteen months after the decision is rendered by the Government or from the date when a decision should have been rendered. For all other claims by or against the Government arising under this Contract, the Office of the Public Auditor has jurisdiction over the appeal from the decision of the Government. Appeals to the Office of the Public Auditor must be made within sixty days of the Government's decision or from the date the decision should have been made.

The Developer shall exhaust all administrative remedies before filing an action in the Superior Court of Guam in accordance with applicable laws.

The Developer shall comply with the Government's decision and proceed diligently with performance of this Contract pending final resolution by the Superior Court of Guam of any controversy arising under, or by virtue of, this Contract, except where the Developer claims a material breach of this Contract by the Government. However, if the Government determines in writing that continuation of services under this Contract is essential to the public's health or safety, then the Developer shall proceed diligently with performance of the Contract notwithstanding any claim of material breach by the Government.

17.7. Contract Binding Upon Parties, Successors. It is agreed that this Contract and all of the Covenants hereof shall inure to the benefit of, and be binding upon, the Government and the Developer respectively and the Developer's partners, successors, assigns and legal representatives. Neither the Government, nor the Developer, shall have the right to assign, transfer, or sublet the Developer's interest or obligations hereunder without written consent of the other party.

17.8. Liens. It is hereby mutually agreed by and between the parties hereto that no mechanic, contractor, subcontractor, material supplier or other person can or will contract for or in any other manner have or acquire any lien upon the works covered by this Contract.

17.9. Non-Gratuity. The Developer further agrees to execute and file a Non-Gratuity Affidavit before final payment under the Contract is made by the Government.

17.10. Notices, Correspondence and Payments. All notices, correspondence, and payments required to be sent to either party hereunder shall be sent to the parties at the address stated below, either by mail or delivered personally or by facsimile and confirmed by letter. Service of any notice or demand by mail shall be by registered letter, receipt requested, and shall

be deemed effective ten (10) days after mailing or on the date actually received, whichever is first.

For the Government: Department of Public Works
542 North Marine Drive
Tamuning, Guam 96913
Attention: Glenn Leon Guerrero, Director
Telephone: (671) 646-3131 / 646-3217 / 646-3117
Facsimile: (671) 646-3169

Guam Department of Education
P.O. Box DE
Hagatna, Guam 96932
Attention: Jon Fernandez, Superintendent
Telephone: (671) 475-0462
Facsimile: (671) 472-5003

For the Developer: Guam Education Financing Foundation
c/o Mr. Richard B. Inman, Jr.
3060 Peachtree Road, Suite 1700
Atlanta Georgia 30305
Telephone: (404) 504-2772
Facsimile: (404) 504-2790

Each party may change its designated address by serving notice, in writing, on the other party as provided above.

17.11. Subcontractors. The Developer shall not be permitted to subcontract any portion of the Contract without the prior written consent of the Government. The Developer shall file a copy of subcontracts with the Government. The Government hereby approves Developer's subcontract with Guam Education Development Partners, who shall provide a bond through the prime general contractor as provided in Article XII. In the event Developer submits a subcontractor for approval and the Government does not respond within ten (10) business days the subcontractor shall be deemed approved. The Government's approval of a subcontract shall not, in any event, relieve the Developer of its responsibility under the Contract. Any attempted assignment or subcontract without the prior written consent of the Government shall be void. Where a subcontract is permitted, the Developer agrees to bind every subcontractor by the terms of this Contract and all Contract Documents. Nothing in this Contract or the Contract Documents shall be construed as creating any contractual relation between any subcontractor and the Government.

17.12. Severability. If a provision of this Contract, or the application thereof to any person or circumstances is rendered or decided illegal for any reason or shall be invalid or unenforceable, the remainder of this Contract and the application of such provision to other persons or circumstances shall not be affected thereby but shall be enforced to the greatest extent

permitted by applicable law. The parties agree to negotiate in good faith for a proper amendment to this Contract in the event any provision hereof is declared illegal, invalid, or unenforceable.

17.13. Proprietary Information. When concurrent written identification of Proprietary information is not feasible at the time of disclosure, the disclosing party shall provide such identification in writing promptly thereafter. Oral communications pertaining to the Services shall be presumed to be Proprietary Information unless otherwise indicated by the disclosing party.

Proprietary information shall not be disclosed to any other person except to those individuals who need access to such Proprietary information to ensure proper performance of services. Neither party shall be liable for disclosure or use of Proprietary information which:

- Is generally available to the public without breach of this Contract;
- Is disclosed with the written prior approval of the disclosing party; or
- Is required to be released by applicable law or court order.

Each party shall return all Proprietary Information relating to this Contract to the disclosing party upon request of the disclosing party or upon termination of this Contract, whichever occurs first. However, each party shall have the right to retain a copy of the Proprietary Information for its internal records and subject to ongoing compliance with the restrictions set forth in this Contract. This section shall survive termination of this Contract.

17.14. Access to Records & Audit Review. The Developer shall maintain all books, documents, papers, accounting records and other evidence pertaining to costs incurred and to make such materials available at its corporate offices or headquarters at all reasonable times during the term of this Contract and for three years from the date of final payment under this Contract, for inspection by the Government.

17.15. Deliverables. Upon payment in full of all rental payments due pursuant to the Lease Agreement(s), and unless otherwise agreed, Deliverables shall be the property of the Government. The Developer shall not disclose the Deliverables relating to the Services to a third party without the prior written authorization of the Government. The Government shall be solely responsible for any disclosure of the Deliverables, which may be required by law. Where applicable laws require immediate disclosure by the Developer, the Developer shall make its best efforts to give prior notice to the Government. At the Government's request and expense, the Developer will assist the Government in making such disclosures as may be required by law.

Notwithstanding the foregoing provisions of this Clause, the Government acknowledges that in the course of its performance under the Contract the Developer may use product materials and methodologies proprietary to the Developer, and the Government agrees that it shall have or obtain no rights in such proprietary products, materials and methodologies except pursuant to a separate written agreement (if any) executed by the parties. The Developer makes no

representation that Deliverables are suitable for reuse on any other project and any such reuse shall be at the sole risk of the Government.

17.16. Defective Work. Any errors or omissions caused by the negligence of the Developer with respect to its scope of services that may be discovered before the completion of any phase or within such time as required by the Task Order shall be fixed by the Developer to conform to the spirit and intent of the specifications and the Task Order. The fact that the Government may have overlooked defective work shall not constitute the acceptance of work. NO PAYMENT WHETHER PARTIAL OR FINAL SHALL BE CONSTRUED TO BE AN ACCEPTANCE OF DEFECTIVE WORK OR IMPROPER MATERIALS.

17.17 Wage Determination. The Developer is required to be in compliance with the Wage Determination (5 G.C.A. § 5801 and § 5802).

§ 5801 Wage Determination Established. In such cases where the government of Guam enters into contractual arrangements with a sole proprietorship, a partnership or a corporation ('contractor') for the provision of service to the government of Guam, and in such cases where the contractor employs a person(s) whose purpose, in whole or in part, is the direct delivery of service contracted by the government of Guam, then the contractor shall pay such employee(s) in accordance with the Wage Determination for Guam and the Northern Mariana Islands issued and promulgated by the U.S. Department of Labor for such labor as is employed in the direct delivery of contract deliverables to the government of Guam. The Wage Determination most recently issued by the U.S. Department of Labor at the time the contract is awarded to a contractor by the government of Guam shall be used to determine wages, which shall be paid to employees pursuant to this Article. Should any contract contain a renewal clause, then at the time of renewal adjustments, there shall be made stipulations contained in that contract for applying the Wage Determination, as required by this Article, so that the Wage Determination promulgated by the U.S. Department of Labor on a date most recent to the renewal date shall apply.

§ 5802. In addition to the Wage Determination detailed in this Article, any contract to which this Article applies shall also contain provisions mandating health and similar benefits for employees covered by this Article, such benefits having a minimum value as detailed in the Wage Determination issued and promulgated by the U.S. Department of Labor, and shall contain provisions guaranteeing a minimum of ten (10) paid holidays per annum per employee.

17.18. Warranty Against Employment of Sex Offenders (Public Law 28-98:2). The Developer warrants that no person in his employment who has been convicted of a sex offense under the provisions of Chapter 25 of Title 9 of the Guam Code Annotated, or convicted of an offense defined in Article 2 of Chapter 28 of Title 9 of the Guam Code Annotated regardless of the jurisdiction in which the conviction was obtained, shall provide services on behalf of the Developer relative to this Contract. If any person employed by the Developer and providing services under this Contract is convicted subsequent to the parties entering into this Contract, then the Developer warrants that it will notify the Government of the conviction within twenty-

four hours of the conviction, and will immediately remove such convicted person from providing services under this Contract. If the Government is found to be in violation of any of the provisions of this paragraph, then the Government shall give notice to the Developer to take corrective action. The Developer shall take corrective action within twenty-four hours of notice from the Government, and the Developer shall notify the Government when action has been taken. If the Developer fails to take corrective steps within twenty-four hours of notice from the Government, then the Government in its sole discretion may suspend this Contract temporarily.

17.19. Entire Agreement. This Contract and the Contract Documents constitute the entire agreement between the parties, and no prior or contemporaneous written or oral promises, representations or assurances shall be deemed to alter the provisions hereof.

17.20. Effective Date. The effective date of this Contract shall be the date of the Governor of Guam's signature on this Contract.

17.21. Force Majeure. Developer shall not be in default by reason of any failure in performance of this Contract or Task Order in accordance with its terms, including any failure by Developer to make progress in the prosecution of the performance under a Task Order, if the delay or the failure is due to causes out of the reasonable control of Developer, including, but not limited to acts of God; acts of public enemy; acts of DPW, GDOE or any other governmental body; governmental legislation, acts, orders, or regulation; fires; earthquake, floods, typhoons, or other natural catastrophes; unexpected or unsuitable soils conditions or discovery of hazardous materials on site; epidemics; quarantine restrictions; boycotts, strikes or other labor disputes; embargoes; shortages of labor materials; disruption in the financial markets; or severe weather.

17.22. Counterparts. This Contract may be executed in counterparts, each of which shall be binding as of the date first written above, and all of which shall constitute one and the same instrument. Each such counterpart shall be deemed an original, and it shall not be necessary in making proof of this Contract to produce or account for more than one such counterpart.

(Remainder of page left intentionally blank)


IN WITNESS WHEREOF, the parties hereto have executed this Contract on the day and year indicated by their respective names, which shall only become effective on the date it is signed by the Governor of Guam.

**DEPARTMENT OF PUBLIC WORKS,
GOVERNMENT OF GUAM**

By: 
FELIX BENAVENTE
Deputy Director

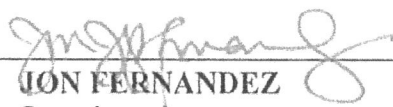
Date: _____

**GUAM EDUCATIONAL FACILITIES
FOUNDATION, INC.**

By: 
PHILIP J. FLORES
Director

Date: 5-18-16

GUAM DEPARTMENT OF EDUCATION

By: 
JON FERNANDEZ
Superintendent

Date: 5/26/16

**APPROVED AS TO LEGALITY AND FORM:
OFFICE OF THE ATTORNEY GENERAL OF
GUAM**

By: _____
ELIZABETH BARRETT-ANDERSON
Attorney General of Guam

Date: _____

**APPROVED:
GOVERNOR OF GUAM**

HONORABLE EDDIE BAZA CALVO

Date: _____