

# **In the Appeal of Core Tech Int'l Inc.**

Consolidated Appeals:

OPA-PA-16-007 & OPA PA-16-011

**Hearing, Sept. 7 – Oct. 7, 2016**  
**Office of Public Accountability**



THE LAW OFFICES OF  
**IGNACIO CRUZ AGUIGUI**  
A PROFESSIONAL CORPORATION

**Calvo Fisher & Jacob LLP**  
Guam Saipan San Francisco

# **CLOSING STATEMENT**



**Guam Educational Facilities Foundation Inc.**

# THE UNDERLYING PROCUREMENT

- **Type: Request for Proposals (RFP)**
- **Name: 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).”

# TWO APPEALS ARISING FROM CORE TECH'S SECOND AND THIRD PROTESTS:

- **OPA-PA-16-007**
  - Core Tech's Notice of Appeal (filed June 23, 2016)
  - Based on its Second Protest Filed May 27, 2016
  
- **OPA-PA-16-011**
  - Core Tech's Notice of Appeal (filed August 10, 2016)
  - Based on its Third Protest Filed July 15, 2016

# Core Tech Failed to Appeal its First Protest – The January 7, 2016 Protest

- **Core Tech’s January 7, 2016 Protest (DPW Exh. V) was Core Tech’s First Protest**
  - Core Tech asserted that “cost” should have been part of the evaluation factors of the RFP.
  - DPW denied the protest on January 19, 2016 (DPW Exh. I)
- **Core Tech Did Not Appeal Denial of that Protest**
  - Therefore, any argument by Core Tech that “costs” should have been considered in the evaluation of proposals, has been waived and forfeited.

# ISSUES NOT MENTIONED IN CORE TECH'S NOTICES OF APPEAL ARE IMPROPER AND OUTSIDE OF THE OPA'S JURISDICTION

- All issues *not* mentioned in Core Tech's notices of appeal are completely outside the scope of the OPA's jurisdiction to hear or decide.
- They must all be disregarded and dismissed

# Core Tech's 1<sup>st</sup> Notice of Appeal

OPA-PA-16-007

Filed June 23, 2016

# 1<sup>st</sup> Notice of Appeal

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**RECEIVED**  
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7 **PROCUREMENT APPEAL**  
8 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

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11 In the Appeal of  
12 Core Tech International Corp.,  
13 Appellant.  
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DOCKET NO. OPA-PA- 16-007  
NOTICE OF APPEAL



# There Are Four Grounds in Core Tech's 1<sup>st</sup> Appeal

## Quoted from Notice of Appeal:

1. "Core Tech's Appeal Was Timely Filed."
2. "DPW Violated 2 GAR § 3114 When It Allowed GEF To Submit Four New Proposals."
3. "The Negotiating Team Did Not Have the Authority to Modify the RFP or to Accept GEF's New Proposal."
4. "The Offeror Must be Bondable and a [sic] 100% Performance and Payment Bond"

# First Ground: Core Tech's 1<sup>st</sup> Notice of Appeal

“1. Core Tech's Appeal Was Timely Filed.”

1<sup>st</sup> Notice of Appeal

*More on the issue of **timeliness** later....*

# #1. From Notice of Appeal, 6/23/16, p.3

3 procurement file. *See Id.* Core Tech filed a protest on May 27, 2016. *See* Core Tech's 5/27/16  
4 Protest, attached as **Exhibit 6**. DPW denied Core Tech's protest on June 8, 2016. *See* 6/8/16  
5 DPW's Denial of Core Tech's Protest, attached as **Exhibit 7**.

## 7 **IV. STATEMENT OF GROUNDS FOR APPEAL**

### 8 **A. Core Tech's Appeal Was Timely Filed.**

9 Core Tech's protest filed on May 27, 2017 was based on the Notice of Intent to Award, the  
10 Negotiating Committee Memo, the RFP and Addenda, the Request for Information and Guam  
11 Procurement Law and Regulations. The protest was filed within 14 days of Core Tech's receipt of  
12 the Notice of Intent to Award; thus, the protest was timely filed and the 5 GCA §5425(g) automatic  
13 stay applies.

### 14 **B. DPW Violated 2 GAR §3114 When It Allowed GEF to Submit 15 Four New Proposals.**

16 The Negotiating Committee allowed GEF to submit four new proposals after the proposal  
17 submittal deadline had passed, DPW violated Guam Procurement Law and the RFP. *See*, 2 GAR  
18 §3114. Specifically, the Negotiating Committee Memo released by DPW states that the Negotiating  
19 Committee "engaged in numerous meetings and communications during which GEF submitted four  
20 (4) [new] separate proposals." *Id.* (emphasis added). The price difference of GEF's four new  
21 proposals ("New Proposals") was approximately \$25.6 million, ranging from a high of \$89,332,258  
22

# Second Ground: Core Tech's 1<sup>st</sup> Notice of Appeal

2. "DPW Violated 2 GAR § 3114 When It Allowed GEF To Submit Four New Proposals."

1<sup>st</sup> Notice of Appeal

# #2, From Notice of Appeal, 6/23/16, p.3

3 procurement file. *See Id.* Core Tech filed a protest on May 27, 2016. *See* Core Tech's 5/27/16  
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20 (4) [new] separate proposals." *Id.* (emphasis added). The price difference of GEF's four new  
21 proposals ("New Proposals") was approximately \$25.6 million, ranging from a high of \$89,332,258  
22

## There is no such thing as GEF's “Four New Proposals”

- The “new proposals” (as Core Tech misleadingly calls them) were **alternative program designs (along with their associated price estimates)** that resulted from GEF's **negotiations** with GovGuam, which occurred after GEF's selection as the most qualified offeror.
- These **alternative programs** were a natural part of the negotiations between GEF and GovGuam regarding price and, inherent in price, the scope of work (i.e., details about SSHS construction – design, space utilization, programming etc.).

- Core Tech says: “Unfair to allow GEF to submit these four new proposals after DPW evaluated all proposals from all offerors and ranked all offerors.”
- That argument is flawed. GEF’s alternative programs with associated price estimates  $\neq$  Proposals to evaluate offeror qualifications (i.e., the proposals submitted by offerors on Nov. 20, 2015).

## Summary of GEFF's Negotiated Alternative Programs and Price Estimates for SSHS

(Negotiated with GovGuam After GEFF's selection as the Most Qualified Offeror)

Program	Date	Construction Costs	All-in Costs	SF	Ref: GEFF Ex.
1	2/29/2016	\$73.2 M	\$89.3 M	278,850	dd
2	3/21/2016	\$50.3 M	\$63.7 M	193,766	ii
3	4/1/2016	\$59.7 M	\$74.9 M	234,739	rr
<b>4 *</b>	<b>4/22/2016</b>	<b>\$61.6 M</b>	<b>\$76.8 M</b>	<b>244,816</b>	<b>xx</b>

(\*Final accepted program)



# This is a Request for Proposal (RFP), not an Invitation for Bid (IFB)

- RFP:
- (1) all proposers submit proposals by deadline to convince the purchasing agency they are the most qualified offeror;
- (2) purchasing agency reviews proposals to determine who is most qualified, and then ranks proposers (1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, etc.). ***Price is not a factor in evaluating/determining who is the most qualified proposer.***
- (3) after ranking of all offerors, purchasing agency first ***negotiates solely*** with 1<sup>st</sup> ranked offeror as to price and work to be performed;
- (4) If agreement can be reached with 1<sup>st</sup> ranked offeror, then contract is executed. If not, the gov't negotiates with 2<sup>nd</sup> ranked. And so forth....

- In an IFB process:
- There are ***no negotiations*** with bidders.
- The gov't provides inflexible specifications as to the particular product it wants to purchase, and invites potential bidders to bid.
- All bidders submit their bid price by the deadline.
- Bids are opened, and the bid is awarded to ***lowest*** responsive, responsible bidder.

# Negotiating Price and Scope of Work in an RFP

## *What governs?*

- The terms of the RFP
- The Procurement Law

# Negotiating price and scope of work in an RFP: What did the RFP say?

“

Once a firm is selected, a scope of work and fee estimate will be negotiated to perform the required services for Simon Sanchez High School.

”

**RFP § 2.0 at paragraph 4**  
(RFP Addendum No. 6 at 2 (amendments to section 2.0),  
issued last year on Sept. 25, 2015)  
(CT Exh. 2, p.7)

# Negotiating price and scope of work in an RFP: What does the procurement law say?

“

§ 3114.....

(I) Negotiation and Award of Contract.

(1) General. The head of the agency conducting the procurement or a designee of such officer shall negotiate a contract with the best qualified offeror for the required services at compensation determined in writing to be fair and reasonable.

(2) Elements of Negotiation. **Contract negotiations** shall be directed toward:

(A) making certain that the offeror has a clear understanding *of the **scope of work***, specifically, the essential requirements involved in providing the required services;

...

(C) agreeing upon **compensation** which is fair and reasonable, **taking into account** the estimated value of the **required services, and the scope, complexity, and nature of such services**.

”

- 2 GAR Div. 4 § 3114 (I)

# Conclusion

- Did “DPW Violate[] 2 GAR § 3114 When It Allowed GEF To Submit Four New Proposals.”
- Answer: ***NO.***

# Third Ground: Core Tech's 1<sup>st</sup> Notice of Appeal

3. “The Negotiating Team Did Not Have the Authority to Modify the RFP or to Accept GEF’s New Proposal.”

1<sup>st</sup> Notice of Appeal

# #3. From Notice of Appeal, 6/23/16, p.5

11 negotiated to perform the required services for Simon Sanchez High School.” See, *Letter Response*  
12 *from DPW* at 2, attached as **Exhibit 7**; RFP, §2.0 at 7. As a matter of law, the RFP must yield to  
13 the enabling legislation and the regulations governing procurement, and thus the negotiations  
14 between GEF and DPW must only be directed towards agreeing upon compensation. See, 2 GAR  
15 §3114(l). The Negotiating Committee, in allowing GEF to submit the New Proposals and accepting  
16 the New Proposals, exceeded its authority and violated §3114(l) of the Procurement Regulations.  
17 The OPA should therefore invalidate the purported award to GEF. *Id.*

18  
19 **C.) The Negotiating Team Did Not Have the Authority to Modify the**  
20 **RFP or to Accept GEF’s New Proposal.**

21 GEF’s final proposal attached to the Negotiating Committee Memo was non-responsive  
22 because it did not comply with the technical requirements of the RFP. Furthermore, the Negotiating  
23 Committee did not have the authority to modify the RFP, in this particular case, the technical  
24 requirements relating to the Program of Spaces. See, **Exhibit 4**, Negotiating Committee Memo,  
25 Program of Spaces at 10-12. The below modifications to the Program of Spaces and technical  
26 requirements of the RFP were improper:

- 27  
28
1. **The Number of Classrooms Was Reduced.** The number of classrooms in GEF’s final proposal (Program of Spaces) does not meet the requirements of the RFP. For example, GEF’s proposal includes only 18 of the 22 required English classrooms, 14 of the 15 required science



## Core Tech's Third Ground is a *variation* of its Second Ground:

- The *core* of Core Tech's claim (no pun intended) is that DPW was *not* allowed to modify **Exh. A** of the RFP in accepting GEFF's negotiated alternative programs and price estimates to build SSHS.
- Exh. A is part of the RFP, and is an 12-page general document entitled "Simon Sanchez High School ***Considerations***"
- Exh. A is a ***flexible*** "wish list" and outlines what the new high school should contain, e.g., # of classrooms, offices, etc.
- Developed by SSHS Principal and Staff (Romero, Fernandez, Easter testimony & GEFF Exh. II). No professional assistance in developing Exh. A.

# Exhibit A to RFP (Addendum 6)

## EXHIBIT A

### SIMON SANCHEZ HIGH SCHOOL **CONSIDERATIONS**

#### New High School Considerations:

- a) 2,300 students
- b) 120 classroom teachers

#### Offices needed

- Administrative office (5 administrators)
- Student Support (Discipline) w/ unisex restroom and holding area
- 2 Conference rooms 25pax
- 1 Business Office with security
- 1 Nurse's Office (with private triage room, separate lobby area to receive students that can't see the sick beds)
- 9 Counselor Offices (w/ small counseling conference room, segregated waiting area for visitors, 2 clerical desks)
- ESL Coordinator's Office- with small testing room
- 4 small SPED CRT Office - a medium size (12pax) conference area for IEP meetings
- Male and Female PE Offices (accommodate 6 teachers each office), ROTC (Secured Armory for weapons/sensitive items), Librarian,
- 1 School Resource Officers Office (2 pax)
- 1 parent holding/waiting area

SUBJECT	NUMBER OF CLASSROOMS NEEDED
English <i>Regular Classrooms</i>	22
Math <i>15 Regular Classrooms and 1 Math Department Work Room</i>	16

# Exhibit A was *flexible*

- Called “**Considerations**” rather than mandatory “Requirements”
- Intended to consist of *flexible* guidelines and *general* parameters, which would provide a basis from which the government and successful offeror could negotiate the final scope of work for construction of SSHS. See RFP section 2.0 (“Once a firm is selected, a scope of work and fee estimate will be negotiated...”); 2 GAR Div. 4 § 3114 (l) (1)-(2).

## Exhibit A to the RFP contains “Considerations”

“

Exhibit A to the RFP was prepared by GDOE. As the title states it was intended to provide considerations, and not requirements, for the construction of Simon Sanchez High School.

”

**Jon Fernandez, GDOE Superintendent**  
(Fernandez Decl., DPW Agency Report (7/11/2016), Exh. P)

# Testimony and the Record on flexible “Considerations”

- Testimony supporting flexibility:
  - Jon Fernandez, GDOE Superintendent;
  - Romero (Exh. A was developed by SSHS Principal and staff)
  - Richard Inman, GEFf President
  - Sean Easter, GEFf Vice President (including negotiation meeting notes and records);
  - Elizabeth Concepcion Gayle, Setiadi Engineer/Project Manager;
  - Michael Hall Declaration (Fanning Howey).
  - *Contrast flawed CT witnesses: M. Makio (credible? – mistook Exh. A as having been developed with assistance of professional school planner); Ho Eun (testimony based on flawed personal views of “public v. private” procurements).*
- Conclusion: Exh. A was intended to consist of **flexible** guidelines and **general** parameters, which would provide a basis from which the government and successful offeror could negotiate the final scope of work for construction of SSHS. See RFP section 2.0 (“Once a firm is selected, a scope of work and fee estimate will be negotiated...”); 2 GAR Div. 4 § 3114 (l) (1)-(2).

## Exhibit A “Considerations” Gave DPW Flexibility to Negotiate an Efficiently Designed School

*GEFF’s approach was to work closely with GDOE to design an efficient school. GEFF utilized the professional expertise of its team to develop an improved school design effective at meeting GDOE’s needs.*

“

GEFF will design Simon Sanchez High School on the basis of the school considerations as shown in Exhibit A of the RFP with some changes in features to achieve appropriate right-sizing and correct space utilization.

”

**Negotiating Committee Memo, p.2 (5/13/2016)**  
(DPW Agency Report (7/11/2016), Exh. K)

# Examples of Right-Sizing the Design for SSHS

- Right-sized number of English classrooms from 22 to 18. The 22 classrooms were excessive.
- Right-sized auditorium from 700 (750) to 500 seats. 700 (750) seats was excessive and would result in an underutilized facility.

*(Easter testimony, and negotiation meeting notes; Negotiating Committee Memo)*

# Fourth Ground: Core Tech's 1<sup>st</sup> Notice of Appeal

4. “The Offeror Must be Bondable and a [sic] 100% Performance and Payment Bond”



# #4. From Notice of Appeal, 6/23/16, p.7

1 gave GEFf an unfair advantage over all other offerors.

2 **D. The Offeror Must be Bondable and a 100% Performance**  
3 **and Payment Bond**

4 The RFP states that all construction task orders shall contain contractual obligations which  
5 include, among other things, Performance and Payment Bonds. *See*, RFP, §4.1. The *Ma Kahat Act*  
6 *of 2013* provides that the construction contract *shall* contain contractual obligations typically found in  
7 government of Guam construction contracts, including, but *not* limited to ... performance and  
8 payment bonds....” 5 GCA §58D112.

9 A requirement of proposals submitted is that the *Offeror* must submit a bid bond for 15% of  
10 the 100 million to be financed, *See*, §4.2.1.4, RFP).

11 The RFP also requires the *Offeror* (*Awardee*) to be bondable:

12 4.2.1.5. **The Offeror [awardee] must be bondable as required by this RFP**  
13 **and by law. A one hundred percent (100%) performance and**  
14 **payment bond must be obtained by Offeror or its prime**  
15 **Contractor.** The bond must be issued by a company authorized to do  
business on Guam, and listed in the U.S. Department of the Treasury’s  
Listing of Approved Sureties (Circular 570).

# Core Tech's Fourth Ground is Without Merit

- As DPW points out in its Agency Report (7-11-16), no bond is due at this time.
- The RFP permits the **prime contractor** to obtain the performance and payment bond. RFP §4.2.1.5 (as amended by RFP Addendum 6 at p.4 “Section 4.2 Amendments”)
- GEFf’s prime contractor Hensel Phelps is bondable up to approx. **\$1 billion**. (Testimony of R. Inman, S. Easter, GEFf Proposal (available for OPA *in camera*)).
- Hensel Phelps is one of the largest general contractors in the U.S.

# Back to the First Ground: 1<sup>st</sup> Notice of Appeal

“1. Core Tech’s Appeal Was Timely Filed.”

1<sup>st</sup> Notice of Appeal

# Core Tech's May 27, 2016 Protest Was NOT Timely Filed

- The fundamental grounds for the protest – i.e., that price and scope of work were negotiated during contract negotiations – are founded upon the language of the RFP.
- Core Tech's protest is therefore untimely because it knew about such grounds long ago, i.e., upon issuance of the RFP (and its addenda) in 2015.
- The May 27, 2016 protest was filed way beyond the 14-day protest period . Protests shall be in writing and shall be “filed within 14 days after the protestor knows or should have known of the facts giving rise thereto.... Protests filed after the 14 day period shall not be considered.” 2 GAR Div. 4 § 9101.

# Core Tech's 2<sup>nd</sup> Notice of Appeal

OPA-PA-16-011

August 10, 2016

# 2<sup>nd</sup> Notice of Appeal

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8 **PROCUREMENT APPEAL**  
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14 Appellant.

DOCKET NO. OPA-PA- \_\_\_\_\_

NOTICE OF APPEAL AND  
REQUEST FOR CONSOLIDATION

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18 **RECEIVED**  
19 OFFICE OF PUBLIC ACCOUNTABILITY  
20 PROCUREMENT APPEALS

DATE: 8/10/16 \_\_\_\_\_

TIME: 3:10  AM  PM BY: EMD \_\_\_\_\_

21 FILE NO OPA-PA: 16-011 \_\_\_\_\_

# There Are Three Grounds in Core Tech's 2<sup>nd</sup> Appeal

## Quoted from 2<sup>nd</sup> Notice of Appeal:

1. "Core Tech's Appeal Was Timely Filed."
2. "The IDIQ Contract Envisions GEFf Circumvention of the \$100M Cap In Violation of the RFP."
3. "DPW Failed to Maintain a Complete Procurement Record Required Under Guam Procurement Law."

# First Ground: 2<sup>nd</sup> Notice of Appeal

“1. Core Tech’s Appeal Was Timely Filed.”

2<sup>nd</sup> Notice of Appeal

*More on timeliness later ...*



# #1. From Notice of Appeal, 8/10/16, p.3

4 Protest"). DPW denied Core Tech's protest on August 3, 2016. See, DPW's 8/3/16 Denial of Core  
5 Tech's Protest, **Exhibit 9**. In this appeal, Core Tech is appealing the denial of its July 15, 2016  
6 protest ("Second Appeal").  
7

8 Because the parties, the procurement record, and witnesses are identical, in the interest of  
9 judicial economy and expediting the resolution of the pending appeals, Core Tech requests that the  
10 Second Appeal be consolidated with the First Appeal.  
11

## 12 **IV. STATEMENT OF GROUNDS FOR APPEAL**

### 13 **A. Core Tech's Appeal Was Timely Filed**

14 Core Tech's protest filed on July 15, 2016 was filed within 14 days of receiving the  
15 Procurement Record filed in OPA-PA-16-007 and DPW's response to Core Tech's Sunshine Act  
16 requests, both served on Core Tech on July 1, 2016; thus, the protest was timely filed and the 5 GCA  
17 §5425(g) automatic stay applies.

### 18 **B. The IDIQ Contract Envisions GEFf Circumvention of the \$100 19 Million Cap In Violation of the RFP.**

20 Section 4.0 of the RFP, as amended by *Addendum 6*, explicitly restricts the amount of the  
21 RFP to \$100 million:

22 The scope of work for this RFP includes financing and lease financing for  
23 rehabilitation, construction, expansion and renovation (inclusive of  
24 architectural and engineering design) of thirty-six (36) schools **with a total  
cost of up to One Hundred Million Dollars (\$100,000,000.00).**

# Second Ground: 2<sup>nd</sup> Notice of Appeal

2. “The IDIQ Contract Envisions GEF F Circumvention of the \$100M Cap In Violation of the RFP.”

2<sup>nd</sup> Notice of Appeal

# #2. From Notice of Appeal, 8/10/16, p.3

5 Protest"). DPW denied Core Tech's protest on August 3, 2016. See, DPW's 8/3/16 Denial of Core  
6 Tech's Protest, **Exhibit 9**. In this appeal, Core Tech is appealing the denial of its July 15, 2016  
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23 rehabilitation, construction, expansion and renovation (inclusive of  
24 architectural and engineering design) of thirty-six (36) schools **with a total  
cost of up to One Hundred Million Dollars (\$100,000,000.00).**

## Whether the IDIQ violates the terms of the RFP with regard to a so-called “\$100 million cap” is a non-issue.

- The proposed IDIQ contract (negotiated, but not yet fully executed – e.g., AG and Governor have to sign) itself incorporates by reference the RFP and makes it part of the contract.
- The RFP itself and all of its attachments, amendments, and addenda are “made part” of the IDIQ contract. IDIQ Contract, § V.
- Section 3.1 of the IDIQ therefore cannot be read or interpreted to “violate” the RFP, as Core Tech contends, because the RFP is part of the IDIQ.

## In any event, the Government and GEF have acknowledged the \$100 million cap.

- Testimonial examples: Benavente, Taijeron, Inman, Easter.
- Again, this is a *non-issue*. Core Tech is inventing issues where there are none.

# Third Ground: 2<sup>nd</sup> Notice of Appeal

3. “DPW Failed to Maintain a Complete Procurement Record Required Under Guam Procurement Law.”

# #3. From Notice of Appeal, 8/10/16, p.7

1           **B.   DPW Failed to Maintain a Complete Procurement Record Required**  
2           **Under Guam Procurement Law.**

3           As the procuring agency for the RFP, DPW has a statutory obligation to maintain an accurate  
4 and complete Procurement Record. 5 G.C.A. §5249 provides as follows:

5           Each procurement officer shall maintain a complete record of each  
6 procurement. The record shall include the following:

7           (a) the date, time, subject matter and names of participants at any  
8 meeting including government employees that is in any way related to a  
9 particular procurement;

10          (b) a log of all communications between government employees and  
11 any member of the public, potential bidder, vendor or manufacturer which is in  
12 any way related to the procurement;

13          (c) sound recordings of all pre-bid conferences; negotiations arising  
14 from a request for proposals and discussions with vendors concerning small  
15 purchase procurement;

16          (d) brochures and submittals of potential vendors, manufacturers or  
17 contractors, and all drafts, signed and dated by the draftsman, and other papers  
or materials used in the development of specifications; and

(e) the requesting agency's determination of need.

# Core Tech's Third Ground Should be Rejected

- Core Tech claims that DPW purportedly does not have (1) a log of communications, and (2) “sound recordings” of negotiations (5 GCA § 5249).
- The 5,000-page procurement record (including all supplements) as it currently exists is replete with drafts, communications, minutes of meetings, evaluations, and a detailed memorandum of negotiations between the Government and GEF.
- DPW states that the communications log can and will be completed prior to certification of the record and the award of the IDIQ. (Agency Report 8-23-16, pp. 6-7). Core Tech's protests have stayed the procurement thus far. Certification of procurement record is usually done right before submission of contract to AG for review.



# The “Log” is only for certain communication

- Section 5429(b) only requires a “log of all communications between government employees and **any member of the public**, potential **bidder**, vendor or manufacturer which is in any way related to the procurement”
  - Does ***not*** require a log of communications between, for example, the government employees and:
    - Other government employees and officials;
    - Potential ***proposers*** for an RFP (as opposed to “potential bidders”);
    - Actual ***proposers*** (as opposed to “actual bidders”);
    - The most qualified proposer.
  - In any event, under terms of the RFP, questions from public must be “in writing” and all communications addressed to the designated single-point-contact (i.e., Mr. Calanayan). (RFP sections 2.3.1 (questions in writing), 3.2 (single point of contact) – CT Ex. 2, pp. 8 & 14.)
  - Calanayan testimony (10/3/16) – He is able to create a log. He can recommend certification of record. DPW’s practice was ***not*** to do sound recordings. Changed only this year around April/May when sound recordings were discussed with other AAG in context of a different procurement.

# “Sound Recordings” Are Not Mandatory

- Both the original text of the statute (P.L. 18-44) and the published version under 5 GCA § 5249, can be read to require sound recordings only for “pre-bid conferences”
- Until late spring 2016, DPW’s practice was to **not** do “sound recordings” of negotiation meetings. (Calanayan testimony 10/3/16).
- GDOE’s practice is to **not** do sound recordings. (Romero testimony 9/15/16).

## 5 GCA § 5249 (Compiler of Laws, published version)

“

Each procurement officer shall maintain a complete record of each procurement. The record shall include the following:

....

(c) Sound recordings of all pre-bid conferences; negotiations arising from a request for proposals and discussions with vendors concerning small purchase procurement....

”

5 GCA §5249

“

Each procurement officer shall maintain a complete record of each procurement. The record shall include the following:

....

(c) Sound recordings of all pre-bid conferences, negotiations arising from a request for proposals and discussions with vendors concerning small purchase procurement....

”

**P.L. 18-44, § 16**

Why the semicolon in the published version? This was most likely a typographical correction, not a typographical error.

“

In preparing the Guam Code Annotated, the Guam Administrative Rules and Regulations, court reports and other publications of the Office, the Compiler of Laws may:

....

(g) Correct manifest clerical errors or typographical errors.

”

1 GCA § 1606(g)

## Bill No. 743 (LS) (18<sup>th</sup> Guam Legis.)

“

The process of procurement shall be documented at each step of the process, regardless of the manner of procurement authorized for the particular goods or services to be delivered to the government.

(a) All pre-bid conferences shall be tape recorded and a transcript of the tape recordings shall be made available to any member of the public who requests it within ten (10) days of the pre-bid conference.

”

Bill No. 743 (LS)  
(See *GEFF Comments (9-2-16)* on  
*Agency Report*, at pp. 6-7 & Exhs. 1-2)

# Bill 743 (LS)

7 represented by such person."  
8 Section 15. Subsection (c) of §6980.6 of the Government Code is  
9 amended to read:

10 "(c). Contract Clause. The prohibition against gratuities [and]  
11 kickbacks and favors to the territory prescribed in this section shall  
12 be conspicuously set forth in every contract and solicitation therefor."

13 Section 16. A new §6964.4 is added to the Government Code to read:

14 "6964.4. Record of Procurement Actions Taken Pursuant to This  
15 Title. The process of procurement shall be documented at each step  
16 of the process, regardless of the manner of procurement authorized for  
17 the particular goods or services to be delivered to the government.

18 (a) All pre-bid conferences shall be tape recorded and a  
19 transcript of the tape recordings shall be made available to any  
20 member of the public who requests it within ten (10) days of the  
21 pre-bid conference.

22 (b) All specifications drawn up by the government for  
23 procurement purposes shall state within the specifications themselves  
24 what sources were used for drawing them up, who was consulted about  
25 their preparation, and who drew up the specifications.

26 (c) All decisions made concerning procurement shall be in writing  
27 and shall contain the bases for the decision, including a record of the  
28 underlying reasoning and process of deliberations. Copies of any  
29 decision shall be available to any member of the public who requests it  
30 immediately after the issuance of such decision."

31 Section 17. Section 6969.5 of the Government Code is amended to  
32 read:

33 "§6959.5. Emergency Procurements.

# “Pre-bid conferences” do not apply to RFPs.

- “Pre-bid conferences” occur only in an Invitation for Bid (IFB) process, and ***not*** an RFP.
- The Guam Procurement Regulations distinguish between “**pre-bid** conferences” in the IFB process, and “**pre-proposal** conferences” in an RFP process. *See* 2 GAR Div. 4 § 3109 (g)(4) (explaining “pre-bid conferences” in the IFB process), § 3114 (g) (explaining “pre-proposal conferences” in the RFP process).



# Documentation and the Procurement Record

- The voluminous 5,000 + page procurement record consists of items including the following (not exhaustive) (see complete Procurement Record Indices):
  - “Logs of Distribution” (Tabs 5, 7);
  - “Minutes or Summary of Pre-Submission Conferences...” (Tab 6);
  - “Logs of Attendees of Pre-Submission Conferences...” (Tab 7);
  - “Written Questions from Bidders or Offerors...” (Tab 8);
  - “Any and All Communications from or to Anyone Concerning Any Part of ITB or RFP” (Tab. 17)

(Tab references are from Procurement Record filed 7-1-16)

- Sufficient documentation and notes of meetings during negotiation period with GEFf which documented negotiation process: At least 18 meetings were held. (Easter Testimony & GEFf Exhs. w-bbb.)

# Back to First Ground: 2<sup>nd</sup> Notice of Appeal

“1. Core Tech’s Appeal Was Timely Filed.”

2<sup>nd</sup> Notice of Appeal

# Core Tech's July 15, 2016 Protest Was NOT Timely

- Both grounds are untimely.
- The “\$100 million cap” ground is based on the language of the RFP and Public Laws 32-120 and 32-121, as well as section 3.1 of the proposed IDIQ.
- Core Tech claims it only received a copy of the IDIQ **on July 1, 2016** when DPW responded to its **June 14, 2016 Sunshine Act request**. However, Core Tech knew **as early as May 13, 2016** that such a contract existed when it received DPW's Notice of Intent to Award.
- As to the procurement-record grounds, Core Tech could have inspected the procurement record well **before July 1, 2016**. It only asked for copies of the Procurement Record on **June 14, 2016, over a month after** it received the Notice of Intent to Award on **May 13, 2016**.

# May 13, 2016 Notice of Intent to Award

Deputy Director

May 13, 2016

## NOTICE OF INTENT TO AWARD REQUEST FOR PROPOSAL (RFP) NO. 730-5-1055-I-YIG

Subject: **Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Public Schools (Beginning with Simon Sanchez High School)**  
Project No.: 730-5-1055-L-YIG

Gentlemen:

*Hafa Adai!* The Government of Guam announces its intent to award the above referenced RFP for the Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Public Schools (Beginning with Simon Sanchez High School) Contract ("Contract") to:

**Guam Educational Facilities Foundation, Inc.**

The Contract is in an amount not to exceed one hundred million and 00/100 dollars (\$100,000,000.00). A Task Order has been negotiated for the Reconstruction of Simon Sanchez High School at a price not to exceed seventy six million eight hundred sixty seven thousand and three hundred thirty-five and 00/100 dollars (\$76,867,335.00).

The RFP's Negotiating Committee's May 13, 2016 Memorandum memorializing the steps taken in selecting Guam Educational Facilities Foundation, Inc. is attached to this Notice.

As provided for in the RFP, this Notice of Award is subject to execution of a written contract.

Offerors not listed above will not be awarded a contract pursuant to RFP No. 730-5-1055-L-YIG.

Should you require additional information regarding this matter, please contact John F. Calanayan, Engineer in Charge at 646-3189.

Sincerely,



**FELIX C. BENAVENTE**  
Deputy Director

# Guam's Sunshine Act (5 GCA § 10103)

- Guam's Sunshine Act permits any member of the public to request inspection of a public document. 5 GCA § 10103.
- Core Tech **delayed** and **waited more than 30 days after** it received the **May 13, 2016** Notice of Intent to Award – i.e., until **June 14, 2016** – to make a request to DPW under the Sunshine Act. DPW responded on July 1, 2016. Core Tech filed its (3<sup>rd</sup>) protest on July 15, 2016.
- Core Tech was clearly able to make a Sunshine Act request **much earlier** and it should have done so. Previously, Core Tech made a Sunshine Act request to DPW on **January 4, 2016** (GEFF Ex. u) based on a letter it received just 11 days earlier, on **December 24, 2015** (DPW Ex. U-2). (Ho testimony, 10/3/16).
- This untimeliness applies to the procurement-record grounds for its protest (i.e., the communications log, and sound recordings), as well as the “\$100 million cap” grounds. Core Tech requested copies of the “procurement record” in its **June 14, 2016** letter. (CT Exh. 16.)
- Because Core Tech could have made its request well **before** June 14, and DPW would have responded **sooner than July 1, 2016**, **Core Tech “should have known” of the facts constituting the basis of its protest prior to July 1, 2016.** For example, if Core Tech has requested copies within 11 days after May 13, 2016 – i.e., by May 24, 2016 – DPW would have responded by June 10, 2016, and ***Core Tech should have filed its protest by June 24, 2016.***
- The law says that procurement protests shall be “filed within 14 days *after* the protestor knows or **should have known** of the facts giving rise thereto... Protests filed after the 14 day period shall **not** be considered.” 2 GAR Div. 4 §9101.
- Core Tech's protest was therefore untimely. **TIMELINESS IS JURISDICTIONAL – It cannot be waived or conceded by any party, including the Govt.**

# Core Tech's June 14, 2016 Sunshine Act Letter (CT Exh. 16.)

## CIVILLE & TANG, PLLC

www.civilletang.com

Sender's Direct E-Mail:  
jtang@civilletang.com

June 14, 2016

### VIA HAND DELIVERY

Mr. Felix C. Benavente  
Deputy Director & Acting Chief Procurement Officer  
GUAM DEPARTMENT OF PUBLIC WORKS  
542 North Marine Corp Drive  
Tamuning, Guam 96913

*JS*  
JUN 14 2016

Re: **Sunshine Act Request** to DPW Regarding the Request for Proposal for the Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Public Schools (Beginning with Simon Sanchez High School), Project No. 730-5-1055-L-YIG

Dear Mr. Leon Guerrero:

**Core Tech International Corp.** ("Core Tech") requests the following documents, pursuant to the Guam Sunshine Act set forth at 5 G.C.A. §10101 *et seq.*:

1. **The Procurement Record** for the Department of Public Works' ("DPW") Request for Proposal for the Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Public Schools (Beginning with Simon Sanchez High School), Project No. 730-5-1055-L-YIG (the "Project").
2. Any and all correspondence, emails and documents from or to DPW officials, employee, consultant or staff ("DPW Staff") relating to Core Tech's May 27, 2016 letter protesting the Intent to Award Contract for the Project.
3. **Any and all correspondence, e-mails and documents, including drafts, of the Notice of Intent to Award dated May 13, 2016, from DPW to offerors relating to the Project.**
4. Any and all correspondence, e-mails and documents, including drafts, of the Memorandum dated May 13, 2016 from the Negotiating Committee attached to the Notice of Intent to Award dated May 13, 2016, relating to the Project.

**Core Tech's Belatedly-Raised and Improperly-  
Raised Issues Are Beyond the OPA's  
Jurisdiction**

# Core Tech whittled down its original 11 issues to...

1 Core Tech International Corp. ("Core Tech") respectfully submits its List of Issues to be  
2 determined at the September 7, 2016 hearing in this matter:

- 3 1. Whether DPW violated 2 GAR §3114 of Guam Procurement Law when it allowed  
4 GEFF to submit and when it considered four new and materially different proposals  
5 from GEFF *after* DPW completed the evaluation and ranking of proposals.
- 6 2. Whether the Negotiating Committee made unauthorized modifications to the RFP  
7 when it allowed GEFF to submit and when it considered four new and materially  
8 different proposals.
- 9 3. Whether DPW and the Negotiating Committee violated 2 GAR § 3114 and the terms  
10 and requirements of the RFP and the Guam Procurement Law when they accepted the  
11 fourth of the four proposals which did not meet the specifications and requirements of  
12 the RFP.
- 13 4. Whether DPW violated §4.2.1.5 of the RFP and the Guam Procurement Law when it  
14 agreed to accept the performance and payment bond of Guam Education Development  
15 Partners ("GEDP"), a company that is not the Offeror, Awardee, or the prime  
16 contractor to GEFF, when such acceptance constitutes an unauthorized modification of  
17 the RFP.
- 18 5. Whether DPW violated the RFP and Guam Procurement Law when it consented to the  
19 wholesale subcontract of GEFF's developer's obligations under the IDIQ Contract to  
20 GEDP, an entity owned by Cooper Ridge Partners and FOL Guam, LLC, including  
21 GEFF's obligations to deliver a performance and payment bond.
- 22 6. Whether GEFF is a non-responsible bidder because it did not meet the bonding  
23 requirements of §4.2.1.5 of the RFP.
- 24 7. Whether DPW violated the RFP and Guam Procurement Law when it agreed to and  
25 accepted the form of an IDIQ Contract which, on its face, allows the procuring  
26 agency and GEFF to circumvent the RFP's \$100 million debt limitation.
8. Whether the Guam Public Laws 32-120 and 32-121 impose a cap (maximum amount)  
on the debt and debt service of \$100 million.
9. Whether DPW, in agreeing to an IDIQ Contract which exceeded the RFP's \$100  
million cap, gave GEFF a far more lucrative contract than the contract on which other  
proposals were based.
10. Whether DPW failed to maintain a complete procurement record required under 5  
G.C.A. § 5249.

1 11. Whether Edward J. ("EJ") Calvo violated 5 GCA §5601 *et seq.* of the Guam  
2 Procurement Code.

3 Respectfully submitted this 29<sup>th</sup> day of August, 2016.

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CIVILLE & TANG PLLC

By: 

Joyce C.H. Tang  
Attorneys for Appellant  
Core Tech International Corp.

Core Tech's  
List of Issues  
as of 8-29-16



# ... Only Six issues (6).

23 *Consolidating Cases and Revised Expedited Briefing Schedule, August 22, 2016).*

24 **II. ISSUES IN THE CONSOLIDATED APPEAL**

25  
26 A. WHETHER DPW VIOLATED 2 GAR §3114'S EXPLICIT LIMITATION OF  
27 NEGOTIATIONS TO THE ISSUE OF COMPENSATION BY INVITING  
28 AND ACCEPTING FOUR NEW PROPOSALS FROM GEFF AFTER DPW  
COMPLETED EVALUATION AND RANKING.

2

1 B. WHETHER THE NEGOTIATING COMMITTEE MADE UNAUTHORIZED  
2 MODIFICATIONS THE RFP WHEN IT ALLOWED GEFF TO SUBMIT  
3 NEW PROPOSALS IN VIOLATION OF PROCUREMENT LAW.

4 C. WHETHER DPW THE NEGOTIATING COMMITTEE VIOLATED THE  
5 BONDING REQUIREMENTS OF THE RFP IN VIOLATION OF  
6 PROCUREMENT LAW.

7 D. WHETHER DPW VIOLATED THE RFP BY NEGOTIATING THE  
8 INDEFINITE DELIVERY INDEFINITE QUANTITY ("IDIQ") CONTRACT  
9 TO CIRCUMVENT THE \$100M CAP.

10 E. WHETHER DPW MAINTAINED A COMPLETE PROCUREMENT  
11 RECORD.

12 F. WHETHER EDWARD J. ("EJ") CALVO VIOLATED 5 GCA §5601 *et seq.*  
13 OF THE GUAM PROCUREMENT CODE.

14 Based on the arguments to follow, the Public Auditor should find that DPW violated Guam  
Procurement Law and should (1) cancel the proposed award pursuant to 5 GCA §5451, if the contract

Core Tech's Hearing  
Brief, as of 9/2/16

## The OPA Rules Provide:

“ “ The written Appeal [to the OPA] shall be in substantially the same format as Appendix A to this Chapter, and include at a minimum the following: ... (2) ... A concise, logically arranged, and direct statement of the grounds for Appeal;.... ” ”

The last issue # 6 (letter “F”) is improper, as well as all other issues belatedly and improperly raised by Core Tech in its filings and during the hearing

- Core Tech never raised this meritless “issue” (re: Mr. EJ Calvo) in any of its notices of appeal filed June 23, 2016, and August 10, 2016
- Moreover, at the hearing, Core Tech abandoned this issue.
- The issue is therefore not within the OPA’s jurisdiction.
- **ALL OTHER ISSUES NOT MENTIONED IN CORE TECH’S NOTICES OF APPEAL ARE COMPLETELY OUTSIDE THE SCOPE OF THE OPA’S JURISDICTION.**
- They must all be **disregarded and dismissed.**

# The contents of proposals submitted on Nov. 20, 2015 is NOT properly before the OPA

- The initial SSHS “cost estimate”
  - Impermissible for GovGuam to evaluate costs – “the government will **not** evaluate the cost estimate for [SSHS] even if it is still required to be submitted” (CT Exh. 2, p 50).
  - Cost is **not** part of the evaluation factors of the RFP. (CT Exh. 2, p. 48)
  - If “cost estimate” **had been** evaluated, this would have **violated the RFP**.
- There was no finding made by the Govt that any proposer was non-responsive. If any proposer is aggrieved by that, it **must** first protest to DPW and get a decision on that protest. Remedy is to file new appeal to OPA.

# CONCLUSION

THE OPA SHOULD **DENY** BOTH OF  
CORE TECH'S APPEALS (OPA-PA-16-007 & OPA-PA-16-011)



THE LAW OFFICES OF  
**IGNACIO CRUZ AGUIGUI**  
A PROFESSIONAL CORPORATION

**Calvo Fisher & Jacob LLP**  
Guam Saipan San Francisco

***THANK YOU***



**Guam Educational Facilities Foundation Inc.**