

1 Ignacio C. Aguigui, Esq.
2 **THE LAW OFFICES OF**
3 **IGNACIO CRUZ AGUIGUI**
4 A Professional Corporation
5 Suite 310, RK Plaza
6 341 S. Marine Corps Drive
7 Tamuning, Guam 96913
8 Telephone (671) 989-9253/987-9914
9 Facsimile (671) 989-9255
10 General Email: admin@aguigui.com

7 Janalynn Cruz Damian, Esq.
8 **CALVO FISHER & JACOB LLP**
9 259 Martyr Street, Suite 100
10 Hagåtña, Guam 96910
11 Telephone: (671) 646-9355
12 Facsimile: (671) 646-9403

11 *Attorneys for Interested Party*
12 *Guam Educational Facilities Foundation, Inc.*

13 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
14 **PROCUREMENT APPEALS**

16
17 IN THE APPEAL OF:

18 CORE TECH INTERNATIONAL CORP.,

19
20 Appellant.

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 10/14/2016
TIME: 4:05 AM PM BY: MSB
FILE NO OPA-PA: 16-007/16-011

21
22
23
24
25
26
27
28
CONSOLIDATED APPEAL NOS.:
OPA-PA-16-007
OPA-PA-16-011

INTERESTED PARTY GUAM
EDUCATIONAL FACILITIES
FOUNDATION INC.'S REMEDIES BRIEF

1 **GUAM EDUCATIONAL FACILITIES FOUNDATION, INC.** (“GEFF”), an
2 interested party and the offeror selected as the most qualified in the instant procurement, hereby
3 submits its remedies brief.

4 Appellant Core Tech International Corp.’s (“Core Tech”) two administrative protests that
5 form the basis for Core Tech’s June 23 and August 10 Notices of Appeal with the OPA were
6 untimely. Accordingly, the OPA lacks jurisdiction to review the issues raised in Core Tech’s two
7 Notices of Appeal, and therefore these Consolidated Appeals should be dismissed. Timeliness is
8 a jurisdictional matter, and cannot be conceded to by the Government or waived.

9 However, even if the OPA should find that Core Tech’s protests were timely, GEFF
10 submits that the subject procurement was carried out in accordance with the applicable law,
11 regulations and the subject RFP No. 730-5-1055-L-YIG - Lease Financing for Design,
12 Renovation Rehabilitation, Construction and Maintenance of Public Schools (Beginning with
13 Simon Sanchez High School) (the “RFP”). Accordingly, all of Core Tech’s grounds for appeal
14 are without merit and should be denied.

15 **I. BACKGROUND**

16 Recognizing the worsening deplorable conditions at Simon Sanchez High School
17 (“SSHS”) and the need to assess the conditions of the other public schools, the Guam Legislature
18 passed Bills 225-32 and 226-32, which the Governor signed into law on February 10, 2014, as
19 Public Laws 32-120 and 32-121, respectively.¹ In furtherance of the Public Laws, on June 15,
20 2015, the Department of Public Works (“DPW”) issued the RFP,² which was amended eight (8)
21 times.³

24
25 ¹ Core Tech Exhibit (“CT Ex.”) 1, pp. 70 and 89.

26 ² CT Ex. 1.

27 ³ CT Ex. 2.

1 Following the submission of proposals by Core Tech, Pernix Guam, LLC, and GEF, the
2 proposals were evaluated by a statutorily mandated evaluation committee.⁵ GEF was selected as
3 the most qualified offeror and negotiations between GEF and the Government commenced in
4 February 2016, following DPW's denial of Core Tech's first protest which was filed on January
5 7, 2016.⁶ Following three months of negotiations, GEF and the Government agreed on a
6 program for the design and construction of SSS. ⁷ A notice of intent to award to GEF was
7 issued to all proposers on May 13, 2016, although no award of the contract has been made yet due
8 to the filing of Core Tech's second and third protests. The Governor and the Attorney General
9 have yet to review or sign the negotiated contract (called the "IDIQ Contract").⁸ The May 13
10 Notice of Intent to Award included the negotiating committee's negotiation memo, both of which
11 were received by Core Tech on May 13, 2016.⁹

12 Fourteen days later, on May 27, 2016, Core Tech filed a second protest with DPW, and
13 then a third protest on July 15, 2016.¹⁰ Both protests were denied by DPW on June 8 and August
14 3, 2016, respectively.¹¹ Notices of Appeal were filed by Core Tech with the OPA on June 23 and
15 August 10, 2016, respectively, and were consolidated by the OPA on August 22, 2016. The
16 hearing on this Consolidated Appeal began on September 7. Core Tech presented its case-in-
17 chief on September 7, 8, 15, 16, 19, 22, and 23, 2016. DPW commenced its case-in-chief on

18
19 ⁴ Procurement Record ("Proc. Rec."), Tab 11, Ex. K.

20 ⁵ Proc. Rec. Tab 13, Ex. M. Public Law 32-120, §2 (codified at 5 GCA § 58D105) and
Public Law 32-121, §2 (codified at 5 GCA § 58E103).

21 ⁶ DPW Exs. I, U-1 and V; GEF Ex. y. DPW denied Core Tech's first protest, and Core
22 Tech failed to appeal the denial.

23 ⁷ GEF Ex. w - bbb.

24 ⁸ CT Ex. 40.

25 ⁹ CT Exs. 11 and 12.

26 ¹⁰ CT Exs. 14 and 20.

27 ¹¹ CT Exs. 15 and 22.

1 September 23. Following a week-long break of the hearing of this matter because of the
2 unavailability of Core Tech's counsel, DPW resumed and completed its case-in chief on October
3 3, 2016, and GEFf presented its case-in chief on October 3, 5, and 7, 2016. The hearing on this
4 Consolidated Appeal concluded on October 7, 2016.

5 II. AVAILABLE REMEDIES

6 The OPA lacks jurisdiction to consider an appeal based upon an untimely protest. *See In*
7 *the Appeal of Guam Community Improvement Foundation, Inc.*, OPA-PA-09-005, Decision at 11-
8 12 (Public Auditor's jurisdiction is limited to reviewing issues raised in the appellant's protest
9 and the government's decision denying the protest); *In the Appeal of Able Industries of the*
10 *Pacific*, OPA-PA-13-007, Order (dismissing the appeal because the appellant did not file a timely
11 protest or a timely appeal). If the OPA finds that Core Tech's second and/or third protests were
12 untimely, then the Consolidated Appeal must be dismissed in its entirety.

13 The Public Auditor is charged with determining "whether a **decision on the protest** of
14 method of selection, solicitation or award of a contract, or entitlement to costs **is in accordance**
15 **with the statutes, regulations, and the terms and conditions of the solicitation.**" 2 GAR Div.
16 4 § 12201 (emphasis added). With regard to the issues properly raised in this Consolidated
17 Appeal, if the OPA finds that the solicitation was carried out by the Government and GEFf in
18 accordance with applicable laws, regulations, and the terms and conditions of the RFP, then the
19 Consolidated Appeal must be denied. If the OPA finds, with regard to the issues that Core Tech
20 *properly raised* in this Consolidated Appeal, that there was a violation of applicable laws,
21 regulations, or the terms and conditions of the RFP, then the remedies available are as provided
22 by statute, 5 GCA § 5451:

23 § 5451. Remedies Prior to an Award.

24 If prior to award it is determined that a solicitation or proposed award of a
25 contract is in violation of law, then the solicitation or proposed award shall be:

- 26 (a) cancelled; or
- (b) revised to comply with the law.

27 5 GCA § 5451.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. ISSUES ON APPEAL

The statement of grounds of appeal raised in Core Tech’s two Notices of Appeal are as follows:

First Notice of Appeal, OPA-PA-16-007:

1. “Core Tech’s Appeal Was Timely Filed.”
2. “DPW Violated 2 GAR § 3114 When It Allowed GEFf To Submit Four New Proposals.”
3. “The Negotiating Team Did Not Have the Authority to Modify the RFP or to Accept GEFf’s New Proposal.”
4. “The Offeror Must be Bondable and a [sic] 100% Performance and Payment Bond.”¹²

The foregoing issues were raised in Core Tech’s second protest,¹³ and addressed in DPW’s denial of the protest.¹⁴

Second Notice of Appeal, OPA-PA-16-011:

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.”¹⁵

¹² Core Tech First Notice of Appeal filed June 23, 2016.

¹³ CT Ex. 14.

¹⁴ CT Ex. 15. Core Tech’s second protest also raised one additional issue, namely that “The Involvement of FOL Guam, LLC and E.C. Development Is a Conflict or a Potential Conflict Which Had to be Disclosed.” (CT Ex. 14, p. 6.) However, Core Tech subsequently abandoned and therefore waived that issue by failing to include it in its Second Notice of Appeal. This abandoned ground for protest was denied by DPW. (CT Ex. 15 (“Core Tech’s final objection presents an unsubstantiated speculation of possible conflicts of interest. This objection is unsubstantiated by fact and is without merit.”).)

¹⁵ Core Tech Second Notice of Appeal filed August 10, 2016.

1 The foregoing issues were raised in Core Tech’s third protest and addressed in DPW’s denial of
2 the protest.¹⁶

3 **IV. CORE TECH’S SECOND AND THIRD PROTESTS WERE UNTIMELY -**
4 **DISMISSAL IS THE APPROPRIATE REMEDY**

5 **A. Core Tech’s Second Protest is Untimely and Should be Dismissed**

6 The issues raised by Core Tech in its second protest (filed May 27, 2016) that “DPW
7 Violated 2 GAR § 3114 When It Allowed GEFf To Submit Four New Proposals” and that “DPW
8 Was Not Allowed to Modify the RFP and Should Not Have Allowed GEFf to Submit New
9 Proposals” are actually challenges to the negotiation by the Government and GEFf of the scope
10 of work and fee during the negotiation phase of the RFP. A great deal of testimony was given as
11 to whether Exhibit A of the RFP (as amended)¹⁷ should be construed as either minimum
12 requirements that were set in stone¹⁸ or *flexible* considerations.¹⁹ As the Procurement Record and
13 testimony revealed, it was undisputed that Exhibit A of the RFP was developed by the SSSH
14 principal and her department chairs without the assistance of a professional school planner.²⁰

15 The fundamental grounds for these two protest issues – i.e., that price and scope of work
16 were negotiated during the contract negotiations phase – are founded upon the *language* of the
17 **RFP and its amendments**, which clearly provide that “scope of work and fee” shall be negotiated
18 with the most qualified offeror.²¹ The original RFP was issued on June 15, 2015 and picked up

19
20 ¹⁶ CT Exs. 20 and 22.

21 ¹⁷ CT Ex. 2, pg. 16.

22 ¹⁸ Testimony of Michael Makio (Sept. 22, 2016) and Ho S. Eun (Oct. 3, 2016).

23 ¹⁹ Testimony of Jon Fernandez (Sept. 19, 2016), Richard Inman (Sept. 16, 2016), Sean
24 Easter (Oct. 4, 2016), Elizabeth C. Gayle (Oct. 4, 2016) and Declaration of Jon Fernandez (Ex. O
to DPW’s Agency Report).

25 ²⁰ GEFf Ex. II; Testimony of Jon Fernandez (Sept. 19 and 22, 2016) and Randy Romero
26 (Sept. 15, 2016); Supplements to Proc. Rec. filed September 6, 8, and 9, 2016.

27 ²¹ CT Ex. 1, pg. 7 (“Once a firm is selected, a scope of work and fee estimate will be
negotiated to perform the required services for each selected school.”); CT Ex. 2, pg. 7 (“Once a

(Footnote continues on following page.)

1 by Core Tech on or about that same day.²² Addendum 6 was issued on September 25, 2015, and
2 received by Core Tech on or about the same day.²³ Core Tech's protest is therefore untimely
3 because it knew or should have known about such grounds long ago, i.e., upon issuance of the
4 RFP and its addenda in 2015.

5 Core Tech's second protest filed May 27, 2016 was filed way beyond the 14-day protest
6 period. Under the applicable provisions of law, protests shall be in writing and shall be "filed in
7 duplicate within 14 days after the protestor knows or should have known of the facts giving rise
8 thereto.... Protests filed after the 14 day period shall not be considered." 2 GAR Div. 4 §
9 9101(c)(1). *See also In the Appeal of Dick Pacific Construction Co.*, OPA-PA-07-007 ("A person
10 who believes that the actual invitation to bid was itself improper or illegal should seek to enjoin
11 the bid process. A protestor who submits a bid pursuant to the IFB cannot claim after its bid has
12 been submitted and the deadline for submission has passed that the invitation for bid was contrary
13 to law. *L.P. Ganacias Enterprises dba Radiocom, vs. Guam International Airport Authority and*
14 *Guam Cell Communications*, Civil Case No. CV1787-00, Decision and Order dated November
15 13, 2000, Page 19 (Superior Court of Guam)."). Accordingly, because Core Tech's protest
16 grounds relating to the "four new proposals" are untimely, the appropriate remedy is for the OPA
17 to dismiss those grounds of appeal.

18 **B. Core Tech's Third Protest is Untimely and Should be Dismissed**

19 The two grounds for Core Tech's third protest (filed July 15, 2016) (which resulted in the
20 second Notice of Appeal filed August 10, 2016) are likewise untimely. Core Tech's "\$100
21 million cap" ground is based on the language of the RFP and Public Laws 32-120 and 32-121, as

22 _____
23 (Footnote continued from previous page)

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

25 ²² Proc. Rec. Tab 3, Ex. C.

26 ²³ CT Ex. 2, pg. 6; Proc. Rec. Tab 5, Ex. E (acknowledgement of receipt of Addendum 6
27 by Core Tech).

1 well as section 3.1 of the proposed IDIQ Contract. Core Tech claims it only received a copy of
2 the IDIQ Contract on July 1, 2016 when DPW responded to its June 14, 2016 Sunshine Act
3 request.²⁴ However, Core Tech knew as early as May 13, 2016 that the IDIQ Contract existed
4 when it received DPW's Notice of Intent to Award.²⁵

5 As to the procurement-record grounds, Core Tech could have inspected the procurement
6 record well before July 1, 2016. It only asked for copies of the Procurement Record in its June
7 14, 2016 Sunshine Act request, which Core Tech sent *over a month* after it received the Notice of
8 Intent to Award on May 13, 2016.

9 Guam's Sunshine Act permits any member of the public to request inspection of a public
10 document. See 5 GCA § 10103. Core Tech *delayed and waited more than thirty (30) days* after
11 it received the May 13, 2016 Notice of Intent to Award – i.e., until June 14, 2016 – to make a
12 request to DPW under the Sunshine Act. DPW responded on July 1, 2016. Core Tech filed its
13 third protest on July 15, 2016.

14 Core Tech was clearly able to make a Sunshine Act request *much earlier* and it should
15 have done so. Previously, Core Tech made a Sunshine Act request to DPW on January 4, 2016²⁶
16 based on a letter it received just eleven (11) days earlier, on December 24, 2015.²⁷

17 This untimeliness applies to the procurement-record grounds for its protest (i.e., the
18 communications log, and sound recordings), as well as the "\$100 million cap" grounds since Core
19 Tech requested copies of the "procurement record" in its June 14, 2016 Sunshine Act request.

20 Because Core Tech could have made its request well before June 14, 2016, and because
21 DPW would have responded sooner than July 1, 2016, Core Tech "should have known" of the
22

23 ²⁴ CT Ex. 20, pg. 2 (stating that protest is based on DPW's response to Core Tech's
24 Sunshine Act request).

25 ²⁵ CT Exs. 11 and 12.

26 ²⁶ GEF Ex. u.

27 ²⁷ DPW Ex. U-2; Testimony of Ho S. Eun (Oct. 3, 2016).
28

1 facts constituting the basis of its third protest prior to July 1, 2016.²⁸ The law says that
2 procurement protests shall be “filed in duplicate within 14 days after the protestor *knows or*
3 *should have known* of the facts giving rise thereto... Protests filed after the 14 day period *shall*
4 *not be considered.*” 2 GAR Div. 4 §9101(c)(1) (emphasis added). Core Tech’s third protest was
5 therefore untimely and the appropriate remedy is for the OPA to dismiss Core Tech’s second
6 Notice of Appeal (OPA-PA-16-011) in its entirety.

7 **V. DPW DID NOT VIOLATE 2 GAR DIV. 4 § 3114 BY ALLOWING GEFF TO**
8 **SUBMIT “FOUR NEW PROPOSALS” DURING NEGOTIATIONS, AND**
9 **THE NEGOTIATING COMMITTEE DID NOT MODIFY THE RFP –**
10 **DENIAL OF THESE TWO GROUNDS OF APPEAL IS THE**
11 **APPROPRIATE REMEDY**

12 Two of Core Tech’s grounds of appeal contained in its second protest – i.e., that “DPW
13 Violated 2 GAR § 3114 When It Allowed GEFF To Submit Four New Proposals” and “The
14 Negotiating Team Did Not Have the Authority to Modify the RFP or to Accept GEFF’s New
15 Proposal” – will be discussed together as they both are essentially challenges to the negotiation of
16 scope of work and fee during the negotiation phase of the RFP. In the event that the OPA finds
17 that either or both of these two grounds of appeal were timely protested, the OPA should still
18 deny these grounds of appeal on the merits since the government and GEFF conducted
19 negotiations in accordance with applicable law and regulations and the terms of the RFP.

20 The negotiating committee and GEFF adhered to applicable laws and regulations and the
21 terms and conditions of the RFP when it engaged in negotiations of scope of work and price
22 during the second phase of the solicitation process. There is no such thing as GEFF’s “four new
23 proposals.” The “new proposals” (as Core Tech misleadingly calls them) were four alternative
24 school programs or scenarios (along with their associated cost estimates) that resulted from
25 GEFF’s negotiations with the government over a four-month period following GEFF’s selection
26 as the most qualified offeror and concluding with the issuance of the Notice of Intent to Award

27 ²⁸ For example, if Core Tech had requested copies within 11 days after May 13, 2016 –
28 i.e., by May 24, 2016 – (as it did previously) DPW would have responded by June 10, 2016, and
Core Tech should have filed its protest by June 24, 2016.

1 and negotiating committee Memorandum.²⁹ These alternative programs were a natural part of the
2 negotiations between GEFF and the government regarding price and, inherent in price, the scope
3 of work (i.e., details about SSHS construction – design, space utilization, programming etc.) and
4 are permitted by law and the RFP:

5 • The authorizing legislation, Public Laws 32-120 and 32-121 (codified at 5 GCA §
6 58D105 and § 58E103), called for the issuance of a request for proposals – the government of
7 Guam “*shall* solicit Requests for Proposals (RFP) through the Department of Public Works, in
8 compliance with the Guam procurement law...”

9 • Under the procurement law and regulations, in the request for proposal process the
10 most qualified offeror is selected based on evaluation criteria set forth in the RFP and then price
11 and scope of work are negotiated by the government and most qualified offeror:

12 (l) Negotiation and Award of Contract.

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

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

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

22 ...

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

26 2 GAR Div. 4 § 3114(l) (emphasis added).

27 • The RFP at § 2.0 explicitly contemplated negotiation of scope of work and price
28 with the most qualified offeror.³⁰

29 GEFF Ex. w – bbb; Testimony of Sean Easter (Oct. 4, 2016).

30 CT Ex. 1, pg. 7; CT Ex. 2, pg. 7.

1 • The refinement of Exhibit A of the RFP was always contemplated. As the
2 Procurement Record and testimony shows, Exhibit A of the RFP was developed by SSHS faculty
3 and staff *without* the assistance of a professional school planner.³¹ Exhibit A is a “wish list” and
4 outlines what the new SSHS should contain, but was not intended to be a rigid set of minimum
5 requirements.³² Exhibit A of the RFP was intended to provide a basis from which the government
6 and successful offeror could negotiate the final scope of work for construction of SSHS,³³ which
7 is exactly what the Government and GEFf did.³⁴

8 Further, the negotiating committee followed applicable laws and regulations and the terms
9 and conditions of the RFP by **not** considering the cost estimate in their evaluation of the
10 proposals, for example:

11 • RFP Section 5.3 (as amended by Addendum 7) delineated the evaluation criteria to
12 be followed by the evaluation committee in the evaluation of the proposals submitted. The
13 Evaluation Criteria did *not* include the cost estimate.³⁵

14 • In Addenda 6 and 7 to the RFP, answers to questions from prospective offerors
15 confirmed that the cost estimate/price would *not* be evaluated:

16 Question: Will there be an amendment to include the cost as part of
17 proposal evaluation?

18 Answer: No, cost will have no evaluation factor.³⁶

20 ³¹ GEFf Ex. II; Testimony of Jon Fernandez (Sept. 19 and 22, 2016) and Randy Romero
21 (Sept. 15, 2016); Supplements to Proc. Rec. filed September 6, 8, and 9, 2016.

22 ³² Testimony of Jon Fernandez (Sept. 19 and 22, 2016), Richard Inman (Sept. 16, 2016),
23 Sean Easter (Oct. 4, 2016), Elizabeth Gayle (Oct. 5, 2016).

24 ³³ See CT Ex. 1, pg. 7, RFP section 2.0 (“Once a firm is selected, a scope of work and fee
25 estimate will be negotiated...”),

26 ³⁴ GEFf Ex. bbb (negotiating committee memorandum).

27 ³⁵ CT Ex. 2, pg. 48.

28 ³⁶ CT Ex. 2, page 35.

1 Question: In your response to question on Section 4.0.1, it was stated
2 that “cost will have no evaluation factor” please confirm that
3 government will not evaluate the cost estimate for Simon Sanchez HS
4 even if it is still required to be submitted in our proposal.

5 Answer: Confirmed.³⁷

6 • The OPA has also confirmed that in the request for proposal process, cost is *not* a
7 factor in evaluation. See *In the Appeal of Guam Education Financing Foundation, Inc.*, OPA-
8 PA-09-007, Decision at 8-9 (Guam OPA, Jan. 6, 2010) (in the request for proposal method of
9 solicitation, cost is *not* a factor in determining the best qualified offeror).

10 There is also no merit to the baseless suggestion made by Core Tech during the course of
11 this Consolidated Appeal that its cost estimate was purportedly improperly revealed to *GEFF*.
12 Richard Inman and Sean Easter testified that neither Core Tech’s nor Pernix’s cost estimates were
13 disclosed to *GEFF* during the solicitation process (evaluation or negotiation), and *GEFF* had no
14 knowledge of such. With regard to the Government’s request that *GEFF* present a program with
15 a budget of \$60 million, Jon Fernandez testified the number came from Mana Tajjeron and Ms.
16 Tajjeron testified that she came up with the amount after doing a rough breakdown of the \$100
17 million cap as follows - \$35 million for the 35 schools (\$1 million per school) and \$65 million for
18 *SSHS*.³⁸ Core Tech presented absolutely no evidence that Core Tech’s or Pernix’s cost estimates
19 were disclosed to *GEFF*. And even the March 14, 2016 email that Core Tech presented *for the*
20 *first time* on October 7, 2016 – during closing arguments – does nothing to support Core Tech’s
21 baseless insinuation. The March 14 email is nothing more than an *internal DPW email* and no
22 evidence was presented by Core Tech that the email or its contents were disclosed to *GEFF*.
23 Significantly, Core Tech cites to no law that prohibited dissemination of Core Tech’s initial cost
24 estimate (which was given no evaluation weight in any event) to other Government officials.

25
26 ³⁷ *Id.* at page 50.

27 ³⁸ Testimony of Jon Fernandez (Sept. 19, 2016) and Mana Silva Tajjeron (Sept. 23, 2016).
28

1 Contrary to Core Tech's claims, the testimony and record show that the Government and
2 GEFf acted in accordance with applicable law and regulations and the terms of the RFP when
3 conducting negotiations. Accordingly, Core Tech's grounds of appeal – that "DPW Violated 2
4 GAR § 3114 When It Allowed GEFf To Submit Four New Proposals" and "The Negotiating
5 Team Did Not Have the Authority to Modify the RFP or to Accept GEFf's New Proposal" – are
6 wholly without merit and the appropriate remedy is for the OPA to deny these two grounds of
7 appeal.

8 **VI. HENSEL PHELPS, GEFf'S PRIME CONTRACTOR, IS PROVIDING A**
9 **100% PAYMENT AND PERFORMANCE BOND AS REQUIRED UNDER**
10 **APPLICABLE LAW, REGULATIONS, AND THE TERMS AND**
11 **CONDITIONS OF THE RFP – DENIAL OF THIS GROUND OF APPEAL**
12 **IS THE APPROPRIATE REMEDY**

13 Core Tech also asserted its flawed argument that, in violation of the RFP, either GEFf is
14 not able to provide the 100% performance and payment bond or that the payment and
15 performance bond is being improperly provided by GEFf's team member and subcontractor
16 developer, Guam Education Development Partners ("GEDP"). Such assertions are wholly
17 unsupported by the record and testimony. The Government acted in accordance with applicable
18 law and regulations and the terms of the RFP by allowing the required performance and payment
19 bond to be provided by the prime contractor, Hensel Phelps.

20 • Per Public Law 32-120, a payment and performance bond shall be provided with
21 the construction contract. *See* Public Law 32-120, section 2 (codified at §58D112). Here, the
22 "construction contract" is *not* the IDIQ Contract, but is rather the Task Order to be executed for
23 the construction of the new SSSHS.

24 • The RFP permits the *prime contractor* to obtain the performance and payment
25 bond.³⁹

26 ³⁹ CT Ex. 1, pg. 21, RFP §4.2.1.5 (as amended by RFP Addendum 6 at p.4 (CT Ex. 2, pg.
27 9)) ("A one hundred percent (100%) performance and payment bond must be obtained by
28 *Awardee or its prime Contractor.*") (Emphasis added).

1 • GEFF’s proposal shows, and the testimony of Richard Inman and Sean Easter
2 confirmed, that a 100% payment and performance bond will be provided by Hensel Phelps, who
3 is sufficiently bondable, up to approximately \$1 billion.⁴⁰

4 There is no doubt that, as permitted by the RFP and Public Law 32-120, Hensel Phelps,
5 GEFF’s prime contractor, will be providing the required payment and performance bond when
6 the construction contract is signed. Accordingly, this ground of Core Tech’s appeal is wholly
7 without merit and the appropriate remedy is for the OPA to deny it.

8 **VII. THE IDIQ CONTRACT DOES NOT VIOLATE THE \$100 MILLION CAP**
9 **SET FORTH IN THE RFP – DENIAL OF THIS GROUND IS THE**
10 **APPROPRIATE REMEDY**

11 Notwithstanding the plain language of the IDIQ Contract and the incorporation of the RFP
12 into the terms of the IDIQ Contract, Core Tech persists in its flawed and meritless assertion that
13 the IDIQ Contract violates the \$100 million cap set forth in the RFP. However, the record and
14 testimony show that the IDIQ Contract is limited to \$100 million dollars and does not violate
15 applicable law or the RFP.

16 • The proposed IDIQ Contract, which is still subject to review and approval by the
17 Attorney General and Governor, itself incorporates by reference the RFP and makes it part of the
18 contract. Section 3.1 of the IDIQ Contract therefore cannot be read or interpreted to “violate” the
19 RFP, as Core Tech contends, because the RFP *is part of the IDIQ Contract*. Section V of the
20 IDIQ Contract provides:

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

27 A. Request for Proposals and all attachments, forms, or exhibits
28 thereto; ...⁴¹

26 ⁴⁰ Since July 22, 2016, GEFF has offered to make its proposal available for *in camera*
27 review by the OPA. The letter evidencing the Hensel Phelps’s bondability is contained in the
28 proposal.

1 • Felix Benavente, Jon Fernandez, Mana Silva Taijeron, Richard Inman, and Sean
2 Easter all confirmed and acknowledged that the IDIQ Contract is capped at \$100 million.

3 Accordingly, the IDIQ Contract is in accordance with applicable laws, regulations,
4 and the terms and conditions of the RFP and the appropriate remedy is for the OPA to deny this
5 ground of appeal.

6 **VIII. DPW HAS TESTIFIED THAT THERE IS A CERTIFIABLE**
7 **PROCUREMENT RECORD IN ACCORDANCE WITH APPLICABLE**
8 **LAW – DENIAL OF THIS GROUND OF APPEAL IS THEREFORE THE**
9 **APPROPRIATE REMEDY**

10 Section 5249 of the Procurement Law provides as follows with regard to the record that is
11 required to be maintained:

12 § 5249. Record of Procurement Actions. Each procurement officer shall
13 maintain a complete record of each procurement. The record shall include the
14 following:

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

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

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

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

27 (e) the requesting agency's determination of need.
28 5 GCA § 5249.

(Footnote continued from previous page)

⁴¹ CT Ex. 40, pg. 5, Section V.

1 • With regard to subsection (a), DPW maintained information on the date, time,
2 subject matter, and attendees for meetings related to the RFP. These records can be found at –
3 Proc. Rec. Exs. F, H, L, Q, V; Supplement to Proc. Rec. filed September 6 and 8, 2016; GEFF
4 Ex. w – aaa; Testimony of John Calanayan (Oct. 3, 2016).

5 • With regard to subsection (b), DPW stated at the hearing that it will complete the
6 required log of communications prior to submission for review by the Attorney General’s Office.
7 Subsection (b) does *not* require a log of all communications with any and every person ever
8 involved in the procurement. Rather it only requires a log of communications between certain
9 individuals, i.e., between Government employees on the one hand and (1) any member of the
10 public, (2) vendor, or (3) manufacturer related to the RFP.⁴² To be clear, DPW is not required by
11 subsection (b) to maintain a log of communications between individuals *not* specified in the
12 statute. Therefore, a log is *not* required as to communications between or among Government
13 employees. Nor is a log required for communications between government employees and the
14 most qualified “proposer” or “offeror” (in this instance, GEFF). The second category of persons
15 under subsection (b) – i.e., “potential bidder” – does not even apply here, since the subject
16 solicitation in this case is *an RFP* (with corresponding “offerors” or “proposers”), and not an IFB
17 (i.e., “bidders”). Further, once the RFP was issued, under the terms of the RFP itself, offerors
18 were mandated to communicate directly with Mr. Calanayan, the single point of contact.⁴³ Mr.
19 Calanayan testified that he received two phone calls from the public regarding the RFP and both
20 were from Sean Easter of GEFF.⁴⁴ On both occasions Mr. Easter was inquiring about the
21 interview and on both occasions Mr. Calanayan instructed Mr. Easter to put his request in
22
23

24
25 ⁴² Testimony of John Calanayan (Oct. 3, 2016).

26 ⁴³ CT Ex. 1, pg. 14, Section 3.2.

27 ⁴⁴ Testimony of John Calanayan (Oct. 3, 2016). *See also* Proc. Rec. Exs. U and W.
28

1 writing.⁴⁵ Mr. Calanayan, the record-keeper for the RFP, testified that he is able to create the
2 communications log required by subsection (b), at the appropriate time.

3 • With regard to sub-section (c), there are no sound recordings of “pre-bid
4 conferences” because this solicitation is an *RFP* (which involves “pre-proposal” conferences),
5 and not an IFB. *See* 2 GAR Div. 4 § 3109 (g)(4) (explaining “pre-bid conferences” in the IFB
6 process) and § 3114 (g) (explaining “pre-proposal conferences” in the RFP process). As for
7 request for proposal negotiations, it is GEFf’s position the proper interpretation of Section
8 5249(c) is that sound recordings of RFP negotiations are **not** required by law. (*See* GEFf’s
9 Opening and Closing Statements for the hearing.) This interpretation is further consistent with
10 the requirement that a *written* memorandum of request for proposal negotiations be prepared
11 setting forth the principal elements of the negotiations including the significant considerations
12 relating to price and the other terms of the contract. *See* 2 GAR Div. 4 § 3114(m)(2). This
13 interpretation is also consistent with DPW’s interpretation of the statute and prior practice, per the
14 testimony of John Calanayan of DPW. Until late spring 2016, DPW’s overall practice was *not* to
15 do “sound recordings” of negotiation meetings.⁴⁶ Further, it was also GDOE’s practice *not* to do
16 sound recordings of request for proposal negotiations, as confirmed by Randy Romero.⁴⁷
17 Deference should be given to agency interpretation of the Procurement Law. *See Carlson v.*
18 *Guam Tel. Auth.*, 2002 Guam 15, ¶ 17 (“if a statute is silent or ambiguous, courts should defer to
19 the agency’s reasonable interpretation of the statute. ... Deference is given to the agency
20 interpretation so long as that interpretation neither contravenes clear legislative intent nor
21 frustrates the policy that legislature sought to implement.”).

22
23 ⁴⁵ *Id.*

24 ⁴⁶ *Id.* It is GEFf’s recollection that Mr. Calanayan testified on October 3, 2016, that in or
25 around April or May 2016 he had discussed, in the context of another procurement, maintenance
26 of the communications record with Assistant AG Mooney. This discussion between Mr.
27 Calanayan and AAG Mooney would have occurred around the time that negotiations between
28 GEFf and the Government had effectively concluded.

⁴⁷ Testimony of Randy Romero (Sept. 15, 2016).

1 • However, notwithstanding the foregoing, if the OPA should hold as a matter of
2 law that sound recordings of request for proposal negotiations are required to be maintained
3 (although GEFf’s position is that such an interpretation of the statute would be erroneous), a
4 wholesale cancellation of the RFP under 5 GCA § 5451(a) would still *not* be warranted.
5 Significant written records already exist of the meetings that occurred during the negotiations
6 stage as found in the procurement record and GEFf Exs. w – aaa. Further, pursuant to 2 GAR
7 Div. 4 § 3114(m)(2) a memorandum of negotiations was prepared detailing the negotiation
8 process and how the negotiation committee approved of GEFf’s Program No. 4 as the best value
9 for GDOE.⁴⁸ In light of these significant records, the OPA should find that the
10 solicitation/procurement record has been conformed to comply with the law.

11 • With regard to subsection (d), Mr. Calanayan said that submittals and
12 specifications have not yet been prepared because the process has not yet reached the design
13 phase.⁴⁹

14 • With regard to subsection (e), Mr. Calanayan said that the agency’s determination
15 of need is reflected in the two public laws authorizing the RFP, namely, Public Laws 32-120 and
16 32-121. There is no doubt that those laws accurately and explicitly explain the need for the
17 construction of a new SSSHS, a comprehensive capital improvement plan (“CCIP”) for the
18 remaining schools, and improvements to those schools in accordance with the CCIP.

19 Based on the record and testimony, DPW maintained and/or has asserted that it will
20 complete and certify the procurement record required by 5 GCA § 5249. Accordingly, the
21 appropriate remedy is for the OPA to deny this particular ground of appeal.
22
23
24

25
26 ⁴⁸ GEFf Ex. bbb.

27 ⁴⁹ Testimony of J. Calanayan (Oct. 3, 2016).
28

1 **IX. ALL OTHER ISSUES NOT MENTIONED IN CORE TECH'S NOTICES**
2 **OF APPEAL ARE COMPLETELY OUTSIDE THE SCOPE OF THE**
3 **OPA'S JURISDICTION AND SHOULD BE DISREGARDED**

4 All other issues that were raised by Core Tech during the hearing and in its post-Notice of
5 Appeal filings, but which were *not* contained in Core Tech's Notices of Appeal, are *not* properly
6 before the OPA. These improperly raised issues include, but are not limited to:

- 7 • Alleged ethical violations by GEDA Board Chairman EJ Calvo.⁵⁰
- 8 • Alleged "wholesale subcontract of GEFf's developer's obligations under the IDIQ
9 Contract."⁵¹
- 10 • Alleged non-responsiveness of GEFf's proposal, with regard to identity and
11 experience,⁵² and with regard to any other factor including GEFf's initial cost estimate submitted
12 as part of its November 20, 2015 proposal;
- 13 • Alleged disclosure of Core Tech and Pernix's cost estimates.⁵³

14 None of the above issues were raised in Core Tech second or third protests, DPW's
15 decisions on said protests, or in either of Core Tech's two Notices of Appeal. Accordingly, the
16 appropriate remedy is for the OPA to disregard, reject, and/or summarily dismiss these claims and
17 issues.

18 **X. CONCLUSION**

19 Core Tech's second and third protests were not timely filed and on that basis Core Tech's
20 appeals should be DISMISSED in their entirety. However, should the OPA find that the
21 underlying protests were timely, the OPA should nonetheless DENY Core Tech's appeals on the
22 merits for the reasons stated herein.

23 ⁵⁰ Core Tech Hearing Brief (filed Sept. 2, 2016) at 3, II.F.

24 ⁵¹ Core Tech List of Issues (filed Aug. 30, 2016) at Issue no. 5.

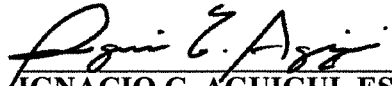
25 ⁵² See GEFf's Opposition to Core Tech's Request for Determination that GEFf's
26 Proposal was Non-Responsive filed October 14, 2016.

27 ⁵³ See pg. 10, supra.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: October 14, 2016.

**THE LAW OFFICES OF
IGNACIO CRUZ AGUIGUI**



By: IGNACIO C. AGUIGUI, ESQ.
Suite 310, RK Plaza
341 S. Marine Corps Drive, Tamuning, Guam 96913
Telephone (671) 989-9253/987-9914
Facsimile (671) 989-9255

CALVO FISHER & JACOB LLP
259 Martyr Street, Suite 100, Hagåtña, Guam 96910
Telephone: (671) 646-9355
Facsimile: (671) 646-9403
Attorneys for Guam Educational Facilities Foundation, Inc.