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PROCUREMENT APPEALS

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ORIGINAL

8 **PROCUREMENT APPEAL**
9 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

10
11 In the Appeal of

12 Core Tech International Corp.,

13 Appellant.

14 and

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16 Guam Department of Public Works,

17 Purchasing Agency.
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DOCKET NO. OPA-PA-17-001

**CORE TECH INTERNATIONAL CORP.'S
HEARING BRIEF**

1 I. INTRODUCTION

2 On January 25, 2017, the Department of Public Works (“DPW”) issued a Request for
3 Proposals for the Lease Financing for Design, Renovation, Rehabilitation, Construction and
4 Maintenance of Public Schools (Beginning with Simon Sanchez High School), Project No. 730-5-
5 1056-L-YIG (the “RFP”). *See*, Ex. 1 Core Tech Hearing Exhibits (“CT Ex.”), *RFP* § 2.0, at CT7. A
6 successful awardee would receive a contract to provide “financing, design, renovation and
7 construction, and to provide collateral equipment, maintenance and insurance as mandated under
8 Public Laws 32-120 and 32-121.” *Id.* The period of performance of the IDIQ contract is five (5)
9 years from the date of award, and during this period, the Simon Sanchez High School Facility
10 (“SSHS”) has to be completed within 730 days. The RFP states the period to complete the IDIQ
11 work for the remaining thirty-four (34) schools will take place after the completion of the
12 Comprehensive Capital Improvement Plan (“CCIP”) as outlined in the Army Corps of Engineering
13 Assessment Report (Attached as A-14 to the RFP). *See Id.* at §2.0 and §2.1.1. The period within
14 which to complete the CCIP is 365 days from the award of the task order. *Id.*

15 The total lease-back period for *each school* cannot exceed thirty (30) years from the date of
16 completion of the educational facility. *Id.* at §2.1.2. Priority would be given to SSSHS and the
17 development of a comprehensive capital improvement plan. *Id.*

18 Core Tech filed a protest on February 8, 2017, raising two claims. *See*, CT Ex. 3, *Protest*, at
19 CT181. The first claim addressed the failure of the RFP to include cost as an evaluation factor for
20 best value. The second claim was that RFP failed to follow the requirements of 5 GCA 58E – which
21 among other things, required DPW to issue a separate solicitation for this procurement. DPW issued
22 its Agency Decision on March 2, 2017, granting the first claim Core Tech raised in its Protest and
23 denying the second. *See*, CT Ex. 4, *Agency Decision*, CT185.

24 On March 16, 2017, Core Tech timely appealed the partial denial of its February 8, 2017
25 protest to the OPA. *See, In the Appeal of Core Tech International Corp.*, OPA-PA-17-001.

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II. ISSUES IN THE CONSOLIDATED APPEAL

- A. WHETHER DPW VIOLATED GUAM LAW WHEN IT COMBINED THE PROCUREMENTS IN 5 GCA CHAPTER 58D AND CHAPTER 58E.
- B. WHETHER 5 GCA CHAPTER 58E AUTHORIZES THE PROCUREMENT OF SERVICES SUCH AS INSURANCE AND MAINTENANCE FOR THE REMAINING THIRTY-FOUR (34) SCHOOLS FOR UP TO 30 YEARS.

Based on the arguments below, the Public Auditor should find that DPW violated Guam Procurement Law and should require DPW to amend the RFP to conform with the law, or alternatively, cancel the RFP in its entirety. The OPA should also award Core Tech reasonable attorney’s fees and costs of the underlying protest and this Appeal.

III. DISCUSSION

A. DPW VIOLATED GUAM PROCUREMENT LAW WHEN IT COMBINED THE PROCUREMENTS IN 5 GCA CHAPTER 58D AND CHAPTER 58E.

5 GCA Chapter 58D authorizes DPW to issue an RFP for the financing, design, renovation or construction of an education facility, including insurance and maintenance of the education facility over the lease-back period, and for the development of a comprehensive improvement plan. *See*, 5 GCA §58D105. “Education facility” is defined in Chapter 58D as “the renovation or construction of a new high school, and to include its athletic facilities to be located on the existing site of [SSHS].” 5 GCA §58D103(f). Chapter 58D’s specific purpose was to procure services for SSHS, produce a CCIP, and allow Government to enter into a long-term lease to fund the services required for the SSHS procurement.

5 GCA Chapter 58E authorizes the issuance of an RFP for the financing, design, construction and rehabilitation of an education facility based on a list of projects identified and prioritized by GDOE utilizing a Program Study and the report generated by the Army Corps of Engineers. *See*, 5 GCA 58E102 & 58E103. “Education facility” is defined in Chapter 58E as “public elementary and secondary schools on Guam, to include its athletic fields and playgrounds, excluding the five leased schools under the education agency.” 5 GCA §58E101(e). The purpose of Chapter 58E was to

1 procure services for rehabilitation of the remaining thirty-four (34) public schools and the long-term
2 leases that the Government can enter into to fund the services needed for these schools.

3 5 GCA §58E103 specifically sets out the conditions precedent to DPW’s issuance of the RFP
4 for the maintenance of the remaining public schools. It provides as follows:

5 **§ 58E103. Identification of Projects and Procurement.**

6 Under the Superintendent of Education’s direction, the education agency *shall*
7 **utilize the Program Study**, and the report generated by the Department of Interior
8 (DOI)-funded assessment report by the Army Corps of Engineers, to identify and
9 prioritize potential projects to be completed. The list of projects *shall* be included
10 in a Request for Proposals developed by the education agency. Upon receipt of the
11 Program Study, the Superintendent of Education *shall* solicit Requests for
12 Proposals (RFP) through the Department of Public Works, in compliance with the
13 Guam Procurement Law, for the **financing, design, construction and**
14 **rehabilitation of the education facility**, according to the needs of the education
15 agency and consistent with this Chapter. The choice of the contractor *shall* be
16 made by a selection committee comprised of the Superintendent of the Department
17 of Education, serving as Chairman, and including the Director of the Department
18 of Public Works or Deputy Director, the Director of the Department of Land
19 Management or Deputy Director, the Administrator of the Guam Environmental
20 Protection Agency or Deputy Administrator, and the Administrator of the Guam
21 Economic Development Authority or Deputy Administrator. The committee *shall*
22 assess the prior performance of the contractor on similar projects, and *shall* be free
23 to disqualify any contractor that *does not* have a successful record of project
24 completion on Guam.

16 **The selection of a contractor *shall* be based upon the proposal that delivers
17 the best value for Guam in meeting the objectives of the education agency.**

17 **The RFP *shall* be issued within thirty (30) days after the receipt of the
18 Program Study for the design, renovation, rehabilitation, construction or
19 maintenance of the education facility.**

20 5 GCA §58E103 (emphasis supplied). Section 58E103 mandates that the Program Study must be
21 completed before any RFP for maintenance of the 34 remaining schools can be issued. The current
22 RFP does not contain a list of projects and there is no evidence of, or reference in the RFP to, the
23 DOE Program Study required under §58E103. DPW has not provided any evidence that any such
24 Program Study has been conducted or exists. In its Agency Report, DPW disputes that GDOE is
25 required to complete a Program Study, and argues that the “the CCIP was intended in lieu of the
26 Program Study.” *See, Agency Report* at 3. However, Chapter 58E does not use the terms “CCIP” and
27 “Program Study” interchangeably. 5 GCA §58E101(a) defines CCIP as “a plan that takes into
28 consideration the physical condition of each school along with attendance area population, enrollment

1 patterns, and bussing logistics. It shall also include how each school meets the instructional needs of
2 GDOE, and prioritizes repairs of existing schools and renovation and construction of new school
3 facilities in order to deal with GDOE limited resources.” 5 GCA §58E101(a). However, 5 GCA
4 §58E103 conditions the issuance of the second RFP on production of a “Program Study,” without
5 reference to the CCIP defined earlier in the Chapter. DPW has not presented any evidence that the
6 Legislature intended the CCIP and Program Study to be interchangeable; indeed, the fact that Chapter
7 58E uses different terms for the Program Study and the CCIP suggests that the Legislature intended
8 to distinguish between the two.

9 Chapter 58E is clear that no RFP can be issued until a condition precedent – the completion of
10 the Program Study -- is met. Therefore, the respective RFPs for Chapter 58D and Chapter 58E
11 cannot be combined because the RFP for Chapter 58E cannot be issued until the Program Study is
12 complete. The enabling legislations, read together, plainly mandate the issuance of separate RFPs.

13 Section 58E103 further provides that “the selection of a contractor *shall* be based on the
14 proposal that delivers the best value for Guam in meeting the objectives of the education agency.”
15 The RFP requires consideration of best value in the evaluation criteria. *See, RFP* at §2.0. The RFP
16 must include price or cost as factor in the Evaluation Criteria to comply with the requirement that
17 *selection* of an offeror *shall* be based upon the proposal that delivers best value. It is simply
18 impossible for DPW to develop a scope of work on which a Contractor can base its proposal, or to
19 know which contractor will provide the best value without a completed Program Study.

20 Further, Chapter 58E requires that the maintenance services by procured by RFP, not by task
21 orders issued to the contractor selected to construct SSHS. Rather than following the legal
22 requirement to conduct a Program Study and select its contractor based on that study, DPW is
23 subverting Chapter 58E’s requirements by improperly piggybacking this procurement onto the SSHS
24 RFP, and requiring the contractor selected in the SSHS solicitation to create a program study after the
25 fact.

26 In its Agency Report, DPW agreed to limit the RFP to SSHS and preparation of the CCIP, but
27 denies that the law requires it to do so. Instead, DPW insists that its agreement to so limit the RFP is
28 based on the legislative mandate to prioritize SSHS. *Agency Report*, at 3. DPW cannot sweep its

1 unlawful conduct under the rug by arguing the issue is now moot because DPW has agreed to modify
2 the current RFP by limiting the procurement it to SSHS. This is not DPW's first or second violation
3 of Guam Procurement Law. DPW's numerous violations of Guam Procurement Law on the Simon
4 Sanchez procurement are well documented, and DPW continues to violate Guam Procurement Law.
5 Without a definitive finding by the Public Auditor, more likely than not, DPW will simply issue a
6 new RFP with the same violations. The likely recurrence of DPW's challenged conduct in the
7 absence of an express order from the Public Auditor will subject Core Tech to yet another round of
8 protests, at great expense to Core Tech, the Public Auditor, and the community. A reasoned opinion
9 now will prevent future hearings on the same issue. Accordingly, the Public Auditor should require
10 DPW to issue separate RFPs as required by 5 GCA Chapters 58D and 58E. \

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12 **B. 5 GCA CHAPTER 58E DOES NOT AUTHORIZE DPW TO**
13 **PROCURE SERVICES SUCH AS INSURANCE AND**
14 **MAINTENANCE FOR THE REMAINING THIRTY-FOUR (34)**
SCHOOLS FOR UP TO 30 YEARS.

15 Sections 58E102 and 58E103 clearly state that procurement of services and the long-term
16 leases allowed under Chapter 58E are for the limited purpose of procuring services for the "financing,
17 design, construction and rehabilitation of the education facility" only. The statutes do not allow the
18 Department of Education ("DOE") to procure other types of services, such as procurement of
19 insurance for 34 schools during the lease back period, maintenance of the schools after rehabilitating
20 the facility, or providing collateral equipment. In comparison, the *Ma Kahat Act* of 2013 allows for
21 the procurement of the "comprehensive improvement plan, the financing, design renovation or
22 construction of the education facility, together with insurance and maintenance of the education
23 facility over the lease back period." 5 GCA §58D105.

24 While Chapter 58D expressly allows for the procurement of insurance and maintenance,
25 Chapter 58E does not authorize the procurement of insurance and maintenance for the 34 education
26 facilities over the lease-back period. *See*, 5 GCA §58D105. There is a very good reason why
27 insurance and maintenance contracts for all of the remaining 34 education facilities for the 30 year
28 lease back period were not included in §58E – the cost would be astronomical. The Government

1 cannot afford to insure all of 34 schools for the 30 year leaseback period, when it does not even have
2 the funds needed to maintain the schools today.

3 It is suspect that DPW again refuses to concede this point, and it is imperative that the Public
4 Auditor expressly instruct DPW that the law does not allow for it to procure such services for the 34
5 schools. DPW has argued that this issue is not ripe because it involves a future procurement. DPW
6 ignores the fact that this is an issue before the Public Auditor because the current RFP allows for the
7 procurement of such services for the 34 schools. However, DPW has signaled its intent in the
8 procurement at issue in this Appeal, which attempts to procure these services. The issue of whether
9 Chapter 58E authorizes these services is properly before the Public Auditor in this Appeal, and the
10 Public Auditor should order DPW to comply with the law.

11 12 **C. DPW'S MOOTNESS ARGUMENT IS MOOT**

13 In its *List of Issues*, DPW states that there is only one issue remaining in this appeal, whether
14 Core Tech's issues concerning the second procurement is either moot or not ripe with regards to the
15 current RFP. *Purchasing Agency [Admissions of Fact] List of Issues* at 1. The issue raised by DPW is
16 moot. In her *Decision and Order re: Purchasing Agency's Motion to Dismiss*, the Public Auditor
17 denied DPW's *Motion to Dismiss* the Appeal on grounds of mootness:

18 The Public Auditor finds that the Purchasing Agency's concessions do not eliminate
19 all the issues in this appeal. In fact, the Purchasing Agency states that its agreement
20 addresses all of CTI's issues on appeal with the exception of the Appellant's claim
21 that GDOE is required to complete a Program Study prior to the issuance of a second
22 RFP for maintenance of Guam's remaining public schools. *Id.* In fact, the Purchasing
23 Agency disputes this and contents that the CCIP was intended in lieu of the Program
24 Study. *Id.* the Purchasing Agency goes on to argue that this issue is moot. *Id.*
25 However, as stated above, to be moot, all issues must be resolved. As there is at least
26 this issue for the Public Auditor to resolve, the Public Auditor finds that this matter is
27 not moot and the Purchasing Agency's Motion to Dismiss must be DENIED.

28 *In the Appeal of Core Tech International Corp.* OPA-PA-17-001 (*Decision and Order Re:
Purchasing Agency's Motion to Dismiss*, May 4, 2017) at 3 ("5/4/2017 D&O"). The 5/4/2017 D&O
conclusively resolves the issue of mootness DPW raised in its *List of Issues*. Accordingly, the issue of
mootness issue is moot.

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IV. CONCLUSION

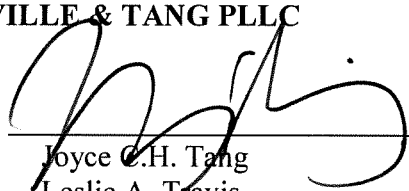
Core Tech requests a ruling from the OPA as follows:

1. A determination that DPW violated Guam Procurement Law by attempting to combine the procurements under Chapter 58D and Chapter 58E into one RFP;
2. A determination that DPW violated Chapter 58E by attempting to procure services for insurance and maintenance of the 34 schools; and
3. An order to DPW to amend the current RFP to remove the procurement of services mandated under Chapter 58E, or in the alternative, to cancel the current RFP and reissue separate RFPs consistent with the Public Auditor's order, Guam procurement law, and 5 GCA Chapters 58D and 58E.

Respectfully submitted this 5th day of May, 2017.

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