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**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEAL**

In the Appeal of

Core Tech International, Inc.,

Appellant.

DOCKET NO. OPA-PA-16-007

**CORE TECH INTERNATIONAL,
INC.'S COMMENTS REGARDING
THE GOVERNMENT OF GUAM'S
AGENCY REPORT**

I. INTRODUCTION

Core Tech International, Inc. ("Core Tech") filed three protests with the Department of Public Works ("DPW") regarding the procurement for of 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) (the "RFP"). This is an appeal from Core Tech's second protest, filed on May 27, 2016 ("Protest 2"). See, **Exhibit 1**, *Protest 2* (without attachments). DPW denied the Protest 2 on June 8, 2016. See, **Exhibit 2**, *6/8/16 Ltr. F. Benavente to H. Eun*. Core Tech timely appealed DPW's denial of Protest 2 on June 23, 2016.

See, *Notice of Appeal* filed 6/23/16. DPW filed its *Agency Report* on July 11, 2016. See, *Agency Report* filed 7/11/16. Core Tech submits its comments to the *Agency Report*.

II. STATEMENT OF RELEVANT FACTS

On May 13, 2016, Core Tech received the *Notice of Intent to Award* with five attachments, stating that the Government of Guam was awarding the contract to Guam Educational Financing Foundation (“GEFF”), subject to the execution of a contract. See, **Ex. 3**, *Notice of Intent to Award with Attachments 1-5* at 1. The *Notice of Intent to Award* was provided to Core Tech and, presumably, the other offeror, Pernix Guam LLC, on the same day.

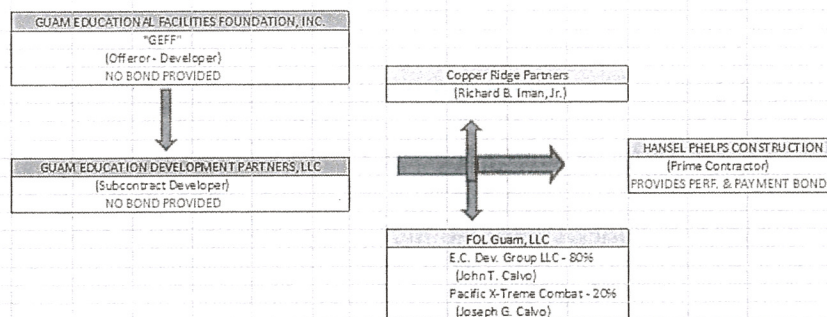
DPW made an initial filing of its *Procurement Record* on July 1, , 2016. See, 7/1/16, *DPW Procurement Record*. DPW supplemented the *Procurement Record* on July 15, 2016. See, 7/15/16, *Supplement to Procurement Record*. Based on the information provided to Core Tech from the *Procurement Record* and *Sunshine Act* responses, Core Tech confirmed facts supporting its *Protest 2*, and discovered new and troubling information:

1. **GEFF Intends To Subcontract its Contract to Guam Education Development Partners as a Sub-Developer.**

GEFF, an Offeror, submitted its proposal as a developer and not a contractor. It was based on GEFF and its team’s experience, qualifications, and the proposal, the evaluation team made a determination that GEFF’s proposal met the RFP requirements. GEFF was ranked highest, and proceeded to the negotiation phase with the Negotiation Committee. Section 4.2.1 of the RFP states that if “the Offeror is a Developer[,] it is the responsibility of the Developer to hire a Contractor based on the minimum experiences and qualifications required by the RFP.” See, §4.2.1, RFP.

Under the provisions of the IDIQ Contract that was negotiated by the parties, the Government agreed to allow GEF to subcontract its contract to Guam Education Development Partners, LLC (“GEDP”). GEDP is not a contractor, rather, it is a developer and its role will be a “Master Developer and Project Manager”. See, **Ex. 4, Preliminary Development and Financing Schedule**. As shown in the Preliminary Development and Financing Schedule, the role of GEF, the offeror and supposed developer, will be limited to Lessee under the Ground Lease during the construction period, and Lessor in the Lease Back Agreement after the bond is issued. *Id.* at GEDA244-248. Meanwhile, GEDP¹ will act as the “Master Developer and Project Manager,” pursuant to a subcontract agreement with GEF. See, **Ex. 6, Execution Version – IDIQ Contract** at CT4110.

We know nothing about GEDP. It was not the offeror and would not have qualified under the requirements of the RFP. GEDP was registered as a domestic company on August 14, 2015, and is owned by Copper Ridge Partners and FOL Guam, LLC. See, **Ex. 5** at 5. The owners of FOL Guam, LLC are EC Development Group LLC (80%) and Pacific X-Treme Combat, LLC (20%). See, **Ex. 7, FOL Guam, LLC Articles of Organization**, at 5. A diagram of the relationship of the GEF team is as shown below:



¹ The reference to Guam Development Partners, the “Master Developer and Project Manager” in **Exhibit 5**, appears to be a typographical error. The correct name should be “Guam Education Development Partners, LLC.” See, Articles of Incorporation for GEDP

The IDIQ Contract confirms that GEDP would take over the IDIQ contract, as it specifically states that the “Government hereby approves Developer’s [GEFF] subcontract with Guam Education Development Partners, who shall provide a bond through the prime general contractor [Hansel Phelps] as provided in Article XII.” See, Ex. 6 at 13. The RFP does not allow the assignment of the Contract to another party. In this case, GEFF will assign its contract to GEDP, and GEDP will replace GEFF.

GEDP is not a contractor and having been formed only twelve months ago, it does not have the resources and experience required to get a performance and payment bond. Because neither GEFF, the offeror, nor GEDP, the “subcontract” Master Developer, can obtain the necessary performance and payment bonds, they are seeking the Government’s consent to substitute Hansel Phelp’s bond and to modify the requirements of the RFP to allow GEDP’s contractor, Hansel Phelps, to provide the bond. As discussed below, this is improper and violates the RFP and Guam Procurement Laws.

2. DOE’s 4/19/16 Internal Memorandum Confirms the Government Improperly Amended the RFP Design Parameters.

DOE is a procuring agency and was involved in every aspect of the RFP, from drafting the RFP, the solicitation process, selection and ranking of the Offerors, evaluations of the proposals and the intent to award. In an April 19, 2016 Internal Memorandum prepared by the Department of Education (“DOE”), a procuring agency and a party to the IDIQ Contract, DOE expressed grave concerns about the ongoing negotiation meetings (*see, Ex. 8, DOE Internal Memorandum* dated 4/19/16). Excerpts from the 4/19/16 Internal Memorandum follow:

- a. “The primary focus of this negotiation is to obtain best value as indicated in PL 32-120 and 32-121. Because of this we are losing focus on the intent of the RFP by reducing square footage to lower cost to meet the ‘best value’ criteria. Essentially, to obtain best value, the requirements and parameters set forth in the RFP

shall remain and the cost reduction shall be on profit, overhead, direct and indirect cost and design.” *Id.* at CT1080.

b. “GEFF must work harder to reduce cost without compromising the design parameters describe[d] in the RFP.” DOE recommended that the Negotiating Committee “negotiate proposal submission of \$73,218,078.00 as all-inclusive of Contribution to the Arts, A&E, FFE (Collateral Equipment), Construction Management, Owner Contingency, Owner Overhead, and Owner Profit as described in the February 29, 2016 letter to DPW with the caveat of adhering to the parameters established in Exhibit A of the RFP and the RFP in its entirety including offsite improvements.” (emphasis added). *Id.* Exhibit A to the RFP was amended by Addendum 6. *See, Ex. 9, Exhibit A – SSHS Design Parameters (Addendum 6).*

c. “The RFP is very clear of what is being requested for the construction of Simon Sanchez High School. All design parameters were specifically provided in Exhibit of the RFP such as 2,300 anticipated maximum student population, classroom capacity, classroom quantity of 121, Classroom capacity of 28-30, cafeteria capacity... auditorium capacity of 750.... The design parameters described in the RFP is intended to establish a standard level for all potential offerors.” (emphasis added). *Id.*

d. In a letter dated March 16, 2016 from DPW to GEFF, GEFF was asked to provide a detailed cost breakdown to construction SSHS with a budget of \$60 million. DOE concluded that “[i]f the intent of the \$60M request is to obtain best value, it is not, it’s compromising by reducing the RFP parameters to meet the \$60M request. The request is essentially authorizing deviation from the RFP design parameters which constitutes cardinal change in order to meet the budget. Best value is not achieved with this approach.” (emphasis added). *Id.*

e. GEFF’s response to DPW’s March 16, 2016 request was to “reduce the overall square footage by 85,084 sf (from 278,850 to 193,766) with a cost of \$63,796,049.” *Id.* at CT1081. “The adjusted proposal did not meet the required needs of school operations. As of April 5, 2016, GEFF provided a revision to incorporate and meet the requirements expressed by SSHS principal in the April 2, 2016 meeting. This resulted in a revised total square footage [reduction to] ... 244,816 [s.f.]” *Id.*

f. The 4/19/16 Memorandum summarized in a chart the negotiation between GEFF and the Government, detailing the price, area readuciton, and removal of “soft costs” which were included in the initial GEFF RFP of \$16.1 million. DOE later discovered that GEFF also excluded from its proposal the cost for a secondary road described in the Exhibit A – Design Parameters, with an additional cost of \$425,000. *Id.* at CT1082.

The table below illustrates the efforts in negotiations. The negotiations show a trend of square footage reductions with an upward costs.

History		Simon Sanchez Proposal	Costs not included	Simon Sanchez Total	Proposed SSHS SF	Cost per SF
RFP		\$73,218,078.00	\$16,104,180.00	\$89,322,258.00	278,850	\$320.32
3/3/2016	*	\$77,688,554.00	0	\$77,688,554.00	237,000	\$327.80
3/21/2016	*	\$63,796,049.00	0	\$63,796,049.00	193,766	\$329.24
4/1/2016	*	\$74,974,000.00	0	\$74,974,000.00	234,739	\$319.39
4/5/2016	*	\$78,164,364.47	0	\$78,164,364.47	244,816	\$319.28

* SF cost is calculated by the cost of SSHS divided by Square Footage (Cost÷SF).

g. With respect to the issue of class room requirement of 121 class rooms based on 30 students per class room, GEFF argued that the area can be reduced because SSHS only had to accommodate 2,300 students, and with 121 class rooms based on 30 students per room, SSHS will have excess capacity. *Id.* DOE's response was completely appropriate – that is, the “driving factor of facility size, specifically classrooms should primarily [be] based on the curricular and quantity of teachers. Determining the size of the school primarily on population will be difficult to achieve. Again, not all class rooms will have 30 students. This will result in class room shortage and forced sharing.” *Id.*

h. The conclusion reached by DOE at that time was that “**the attempt of good faith negotiation with GEFF is consequently compromising the SSHS requirements set forth in the RFP and school operational requirements. The negotiations continuously result in the change of scope by reduction of square footage to lower cost to meet the ‘best value’.... This results in changes to the parameters stated within the RFP and is a disadvantage to the other offerors who proposed offers based on the parameters of the RFP.**” (emphasis added). *Id.* at CT1803.

i. The 4/19/16 Memorandum included a chart breaking out the proposals based on cost and area. *Id.*

The evaluation committee ranked the offerors in the following successions and proposed costs;

- No. 1 GEFF
- No. 2 CTI
- No. 3 Purnix

	Simon Sanchez Proposal	Costs not included	Simon Sanchez Total	CCIP	RFP Total	Proposed SSHA SF
GEFF	\$ 73,218,078.00 *	\$ 16,104,180.00	\$ 89,322,258.00	\$ 400,000.00	\$ 89,722,258.00	278,850
CTI	\$ 61,598,362.00 **	\$ 1,684,867.00	\$ 63,283,229.00	\$ 536,279.00	\$ 63,819,508.00	Not indicated
Purnex	\$ 82,400,000.00 ***				\$ 82,400,000.00	Not indicated

- * additional project costs not included or identified in proposal submission.
- ** equipment not included but offered as optional.
- *** Purnex cost proposal was in a separate sealed envelope which was not opened by the evaluation committee. The CCIP and other costs associated with their proposal is not known.

GEFF Vs. CTI	\$ 25,902,750.00	Difference
GEFF Vs. Purnex	\$ 7,322,258.00	Difference

3. With GEFF, DOE is Getting 32% Smaller School and Paying \$22.9 Million More For SSHA.

The final terms agreed to between GEFF and the Negotiation Committee for SSHA was for \$76,767,335. *See, Notice of Intent to Award*, at 3. The proposed new SSHA would be 244,816 s.f., of which 177,403 s.f. is net building area (classrooms, etc.), and 67,437 s.f. is circulation or common area. *Id.* at 12. Core Tech’s proposal was for a school with a net area of 233,540 s.f. at a total cost of \$63,819,508. *See, Ex. 10, CTI SSHA Net Area Breakdown.* Core Tech’s proposed school was 32% larger in area, and costs \$12.9 million less. The Government cannot be getting better value for a 32% smaller school (a \$10 million value) and \$12.9 million more. The Government is paying \$22.9 million more for a smaller school, which does not meet the *Design Parameters* and the needs of the students of SSHA.

III. ARGUMENTS

A. This Procurement is Not an Unique Procurement With Special Procurement Rules -- Guam Procurement Laws Apply.

In the first part of its “Statement Answering Allegations of Appeal,” *See, Agency Report* at 4-6, DPW launches into an exegesis of the uniqueness of this procurement and “[a]lternate procurement procedures allowing of design-build and similar projects . . . [as] widely accepted as a viable project delivery method for public works projects in the United States.” *Id.* at 4. DPW argues that “the Act is replete with special and unique provisions that substantially differ from Guam’s general procurement law,” and that it “makes a single reference to Guam’s general procurement law, and even that was incorporated into the Act.” *Id.* at 4. In support of this proposition the DPW notes that “§58D105 states that the government of Guam or GDOE ‘shall solicit Requests for Proposals (RFP) through the Department of Public Works.’” *Id.* (emphasis in Agency Report). The sentence does not end there, and in fact expressly requires compliance with Guam procurement law. Section 58D105 directs, in relevant part, that “government of Guam or an education agency shall solicit Requests for Proposals (RFP) through the Department of Public Works, in compliance with Guam procurement law. . . .” 5 GCA § 58D105. This might constitute a “single reference,” as DPW notes, but this “single reference” unambiguously establishes that the procurement in question is subject to Guam Procurement Law.

DPW goes to great lengths to establish that the *Ma Kahat Act* has its own requirements which are distinct from those contained in Guam Procurement Law. *See, Agency Report* at 5-6. However, the unique provisions of the *Ma Kahat Act* do not invalidate the requirements of Guam Procurement Law. The procurement must follow both the requirements of the *Ma Kahat Act*, and the requirements of Guam Procurement Law.

DPW refers to “alternate procurement procedures allowing design-build and similar projects” that, it states, are accepted as a viable project delivery method for public works projects in the United States. *See, Agency Report* at 4. However, the “alternate” design-build method

already exists in Guam law, which does permit the type of procurement suggested by DPW without any comparisons of actual deliverables. The Guam Administrative Rules describe a design-build or turnkey method of procurement as follows:

The territory prepares a set of performance specifications including functional criteria, any life-cycle cost considerations, and other evaluation factors. The territory shall also specify the degree of detail necessary in a design proposal. The contractor is selected on the basis of its design proposal, proposed price, and other stated evaluation criteria. It may be appropriate to use a multi-step process to lessen the number of firms submitting final design proposals to reduce administrative burden and to keep preparation costs down.

2 G.A.R. § 5102(7)(a).

The unconstrained procurement DPW envisions for the lease back projects would allow the government's contract requirements to be changed or reduced in consultation with just one offeror, with no competition, no comparison, and no basis on which to determine which of the offerors offer the "best value" to the government. "Best value" is another express requirement of the statutes governing this procurement. Title 5 GCA § 58D105 expressly declares that "[t]he selection of a contractor shall be based upon the proposal that delivers the best value for Guam in meeting the objectives of the education agency." *See also* 5 GCA § 58E104 ("The selection of a contractor *shall* be based upon the proposal that delivers the best value for Guam in meeting the objectives of the education agency.") (Emphasis in statute). SSHS Design Parameters and the needs of the school are clearly set forth in Exhibit A (Addendum 6 to the RFP). *See, Ex. 9, Exhibit A- Design Parameters*. How can "best value" be determined when there is no comparison of the deliverables? The "best value" method is commonly understood to involve a consideration of technical and price factors to determine the offer of the greatest value to the government. *See, e.g., Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 658

(Minn. 2015) (“Best-value bidding, as described by the FTA, is a procedure by which the award of a government contract depends on ‘which proposal represents the ‘best value’ [based] on an analysis of the tradeoff of qualitative technical factors and price or cost factors.’ *U.S. Dep’t of Transp., Third-Party Contracting Guidance*, FTA Circular 4220.1F, VI-10 (Nov. 1, 2008, rev. Mar. 18, 2013) (hereinafter “FTA Guidance”). There must always be a comparison of the deliverables. As described by the Federal Circuit in *Firstline Transportation Security, Inc. v. United States*, 100 Fed. Cl. 359 (Fed. Cl. 2011):

The FAR notes that “[t]he objective of source selection is to select the proposal that represents the best value.” 48 C.F.R. § 15.302. In determining which proposal represents the best value, the government must compare the relative costs and benefits of the competing proposals, including both price and non-price factors, in a best-value tradeoff analysis:

This process permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal. The perceived benefits of the higher priced proposal shall merit the additional cost, and the rationale for tradeoffs must be documented in the file in accordance with 15.406.

Id. § 15.101-1(c). The FAR sets forth specific requirements for a best-value tradeoff analysis, see *id.* § 15.101-1, and sets forth a different set of requirements for a lowest-price technically acceptable procurement, see *id.* § 15.101-2.

Id. at 374.

DPW’s comparison of its view of this procurement as basically unfettered by any procurement law regulations or principles to “alternate” methods such as “design-build” fails given the open-ended discretion it claims it had to change the published project requirements while negotiating with just one offeror. Its view of “best value” as allowing it to select an offeror and then, in discussions with one offeror, change the project requirements that all offerors relied on in submitting their offers, finds no support in “best value” procurement. One cannot

determine “best value” without some comparison of what the offerors or bidders will deliver. Here, DPW’s allowing GEFf to deliver less than the RFP requirements and the standards set by Exhibit A – Design Parameters, while other offerors would have delivered the required structures, at, by the way, a lower price, reflected a material change in the RFP requirements.

DPW argues that it was merely negotiating scope of the contract with GEFf. However, the *Ma Kahat* Act must be read in conjunction with Guam Procurement Law, which clearly limits negotiations on scope of work:

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;

(B) determining that the offeror will make available the necessary personnel and facilities to perform the services within the required time; and

(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 §3114(l)(2). Any negotiations were limited to ensuring that GEFf “has a clear understanding of the scope of work.” *Id.* Nothing in the statute permits DPW to change the *Design Parameters* and scope of work provided for in the RFP.

B. The Design Parameters Are Set Forth In Exhibit A to the RFP (Addendum 6) and Any Deviation From The RFP Design Parameters Is a Violation of the RFP and Guam Procurement Laws.

DOE, the procuring government agency, clearly states that that the “design parameters described in the RFP is intended to establish a standard level for all potential offerors....”

See, Ex. 8, 4/19/16 DOE Memorandum at CT1080. “The RFP is very clear of what is being requested for the construction of Simon Sanchez High School. All design parameters were

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specifically provided in Exhibit of the RFP such as 2,300 anticipated maximum student population, classroom capacity, classroom quantity of 121, Classroom capacity of 28-30, cafeteria capacity... auditorium capacity of 750.... and any “deviation from the RFP design parameters ... constitutes cardinal change in order to meet the budget.” (emphasis added).

Id.

The number of classrooms in GEF’s final proposal 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 classrooms, 14 of the required Social Studies classrooms, and 23 of the 34 required classrooms for Fine Arts, PE, Health, World Languages, CFS, ROTC, Chamorro, and Business. The final proposal also failed to match the requirements for administrative offices set forth in Design Parameters in Exhibit A (Addendum 6 to the RFP). *See, Ex. 9, Exhibit A to Addendum 6 to RFP; Ex. 8, 4/19/16 DOE Memorandum at 3; Ex. 3, Notice of Intent to Award (5/13/Memo) at 0002-003 & (Program of Spaces) at 009-0012.*

DPW has argued that these Design Parameters requirements are flexible because the chart attached as Exhibit A to Addendum 6 was entitled “SIMON SANCHEZ HIGH SCHOOL CONSIDERATIONS.” The chart provided in Amendment 6 was clearly meant to be a mandatory standard, not a mere guideline or wish list as DPW is suggesting. DPW’s answers to Requests for Information confirm that the Design Parameters in Exhibit A to Addendum 6 of the RFP are requirements for bidders to follow in submitting their proposals:

22. What is the required student capacity for regular classrooms

Answer: Maximum of 30.

Does this student capacity apply to all of the classrooms, or does the capacity vary?

Answer: Classroom capacity will vary by instructional area. For example; maximum capacity for regular classrooms are 30 while SPED/ESL class capacity is 20. Reference Amendment 6 for the new addition of Exhibit A for more details.

There is a footnote designating regular classrooms in the RFP document's Classroom breakdown (p. 46), does this apply to the 34 classrooms for Fine Arts, PE, Health, etc.?

Answer: The footnote represents Health, World Language, and Chamorro as Regular Classrooms. Reference Amendment 6 for the new addition of Exhibit A for more details.

23. How many of the Science classrooms need to be Laboratories?

Answer: 15 classrooms all equipped with sinks and storage, 3 of the classrooms have adjoining prep rooms, 4 of the classrooms need to be classrooms with laboratories; and 2 stand-alone laboratories. Reference Amendment 6 for the new addition of Exhibit A for more details.

What are the requirements for science prep rooms?

Answer: Supports for electrical outlets, storage cabinets, hazardous materials storage, ventilation, emergency chemical wash, appropriate ventilation. Reference Amendment 6 for the new addition of Exhibit A for more details.

24. Are the Gymnasium and Auditorium included as part of the total number of classrooms, and how many classrooms are these large spaces considered?

Answer: Reference Amendment 6 for the new addition of Exhibit A for more details.

Are these required to be separate facilities?

Answer: Yes, they are separate facilities.

25. What is the required student capacity and other requirements for the ESL and SPED classrooms?

Answer: ESUSPED 20 student capacity. BLS require a classroom adjoined with a living-home style type of classroom. Each SPED/ESL need to have a restroom facility that is ADA accessible. Reference Amendment 6 for the new addition of Exhibit A for more details.

See, **Ex. 9, Exhibit A - Addendum 6 Design Parameters** at pp. 32-33. For more examples, see Addendum 6, pp. 34-35. DPW's response to its offerors' questions is telling. If DPW did not want the requirements in Exhibit A - Design Parameters to be binding, it would not have referred offerors to Exhibit A - Design Parameters when they asked about requirements. When a requirement wasn't binding, DPW made that clear in its answer. For example, see DPW's reply to Pernix's Question 27 in Addendum 6, which references an "ideal" instead of a hard number:

27. What is the required seating capacity of the Gymnasium?

Answer: Ideal overall seating including floor area for assemblies would be 2,300.
See Addendum 6, page 34.

Nor is there any logic to DPW's argument that it could change anything it wanted in the RFP because the *Ma Kahat* Act authorizes DPW to negotiate scope. First of all, negotiations as to scope are limited by Guam procurement law to ensuring that the offeror "has a clear understanding of the scope of work." 2 GAR §3114(1)(2). Second, even if DPW were permitted to negotiate scope beyond the bounds of §3114(1)(2)—an argument which Core Tech rejects—that would only authorize negotiations as to elements of the scope of work not already determined by the RFP. If RFP requirements were up for negotiations, the entire RFP process would be rendered meaningless.

C. 2 GAR §3114 Does Not Permit GEF to Submit Four New Proposals.

DPW's interpretation of its authority under the enabling legislation is contrary to established procurement law in Guam. 2 GAR §3114(1) authorizes negotiations between the agency and offeror only with respect to price. See, 2 GAR §3114(1). The section provides, in relevant part:

(1) 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;

(B) determining that the offeror will make available the necessary personnel and facilities to perform the services within the required time; and

(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.** (emphasis added).

2 GAR §3114(1) (emphasis added).

As noted in the Notice of Appeal, GEF was allowed to submit four new proposals for the RFP *after* the proposal submittal deadline of November 6, 2015 and *after* review and evaluation of all proposals by the Evaluation Team, which among other things, review and ranked the offerors based on the proposals submitted. There were significant design differences between the four proposals, ranging from proposals with compromised design parameters to a “bells and whistles” design. The Negotiating Committee ultimately selected one of the new proposals, for \$76,867,335.

By allowing GEF to submit four new proposals after the proposal submittal deadline had passed, DPW violated Guam Procurement Law. Guam Procurement Regulations do not permit an offeror to submit new proposals after evaluation and ranking is completed. *Id.* 2 GAR §3114(i)(1) allows for discussions with offerors in order to evaluate all proposals timely submitted. 2 GAR §3114(i)(1). While DPW is authorized to engage in discussions with offerors to “(A) determine in greater detail such offeror’s qualifications, and (B) explore with the

offeror the scope and nature of the required services, the offeror's proposed method of performance, and the relative utility of alternative methods of approach," nothing in the procurement law permits the agency to solicit and/or receive new proposals after ranking.

DPW seems to rely in part on the fact that, despite the lack of an express directive in the enabling legislation, the RFP and Exhibit A – Design Parameters (Addendum 6) do provide for negotiations of scope of work in addition to price. While the RFP and Exhibit A – Design Parameters indicate DPW's intent to negotiate scope of work with the top-ranking offeror, neither trumps established procurement regulations, which limit negotiations between GEF and DPW to the issue of compensation. *See*, 2 GAR §3114(l). It is indisputable the Negotiating Committee exceeded its authority under the Act and violated §3114(l) of the Procurement Regulations.

D. GEF Has Not Met the Bonding Requirements Under the RFP and Guam Procurement Laws.

The governing legislation, 5 GCA §58D contains two requirements regarding bonding. They are found in 5 GCA §58D106 and §58D112.

Section 58D112 directs that:

Prior to undertaking the work of renovating or constructing a new Simon Sanchez High School, the Guam Economic Development Authority, the Department of Public Works, the Guam Department of Education, and the developer or contractor shall negotiate and enter into a binding construction contract to renovate or construct a new Simon Sanchez High School in accordance with the Guam Building Code (21 GCA Ch. 67), and any other applicable requirements. The construction contract shall contain contractual obligations typically found in government of Guam construction contracts, including, but not limited to:

- (a) warranties;
- (b) liquidated damages;
- (c) performance and payment bonds;
- (d) indemnity;
- (e) insurance;

5 GCA §58D112. (emphasis added).

Guam Procurement Law contains the specific requirement that when a construction contract is entered into with the Government, the contractor must comply with the Performance and Payment Bond requirements contained in §5304 of Guam Procurement Law. 5 GCA §5304 of the Guam Procurement Law requires for all construction contracts, in this case the IDIQ Contract between the Government of Guam and GEF, that performance and payment bonds for 100% of the contract price be delivered to the Territory:

§5304. Contract Performance and Payment Bonds.

(a) When Required; Amounts. When a construction contract is awarded in excess of Twenty-Five Thousand Dollars (\$25,000), the following bonds or security shall be delivered to the Territory and shall become binding on the parties upon the execution of the contract:

(1) a performance bond satisfactory to the Territory, executed by a surety company authorized to do business in this Territory or otherwise secured in a manner satisfactory to the Territory, in an amount equal to one hundred percent (100%) of the price specified in the contract; and

(2) a payment bond satisfactory to the Territory, executed by a surety company authorized to do business in this Territory or otherwise secured in a manner satisfactory to the Territory, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond shall be in an amount equal to one hundred percent (100%) of the price specified in the contract.

5 GCA §5304. (emphasis added).

This means that when GEF (the Offeror and Awardee) enters into the IDIQ Construction Contract with the Government, GEF or its prime contractor, Hansel Phelps, must deliver to the Government, with the Government as the obligee: (1) a performance bond in an amount equal to 100% of the price specific in the IDIQ construction contract; and (2) delivery a

payment bond in an amount equal to 100% of the price specific in the contract. The performance and payment bond “shall become binding on the parties upon the execution of the contract.” (emphasis added). In an email dated May 18, 2016 from GEF’s counsel, Jannalyn Damian, copying Eduardo “Champ” Calvo, to Tom Keeler, DPW’s counsel, confirmed that the provisions of §5304 apply to this IDIQ Construction Contract. See, Ex. 6, 5/18/16 email from J. Damian at CT4096. An excerpt of the 5/18/16 email from Ms. Damian is shown below:

From: Janalynn Cruz Damian [jdamian@calvofisher.com]
Sent: Wednesday, May 18, 2016 11:25 AM
To: Tom Keeler; Shannon Taitano; Eleanor Borja
Cc: Eduardo A. Calvo; Jamie Peightal
Subject: RE: RFP No. 730-5-1055-L-YIG- Lease Financing for Design, Renovation Rehabilitation, Construction ... Simon Sanchez First

Tom,

Thanks again for taking the time this morning to meet with us to go over the final issues on the IDIQ contract. As we discussed, attached is the final version of the contract. We've fixed some typos and made some formatting changes; the only substantive change was to Section XII to revise the threshold for the bonds from \$100,000 to \$25,000 to comply with Guam law.

We are arranging for Phil Flores to sign this version on behalf of GEF. I will have the original delivered to you today.

Let me know if you have any questions.

Thanks,
Jan

Janalynn Cruz Damian

In Protest 2, Core Tech asserted that GEF was not bondable and did not comply with the RFP and Guam Procurement Law. See, Ex. 1, Protest 2 at 5-6. The RFP requires that all construction task orders shall contain contractual obligations which include, among other things, Performance and Payment Bonds. See, RFP, §4.1. A requirement of proposals submitted is that the Offeror must submit a bid bond for 15% of the bid amount, and the Offeror must be bondable:

4.2.1.5. **The Offeror [awardee] must be bondable as required by this RFP and by law. A one hundred percent (100%) performance**

and payment bond must be obtained by Offeror or its prime 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).

The *Ma Kahat Act of 2013* provides that the construction contract *shall* contain contractual obligations typically found in government of Guam construction contracts, including, but *not* limited to ... performance and payment bonds....” 5 GCA §58D112.

As discussed in Section II.1 above, the IDIQ Contract that was negotiated by the parties, the Government agreed to allow GEFf to subcontract its contract to GEDP. *See, Ex. 6, Execution Version – IDIQ Contract* at CT4110. DPW did not produce a copy of GEFf's subcontract agreement with GEDP in the Procurement Record. Presumably, DPW agreed to this subcontract provision without reviewing the GEFf-GEDP subcontract agreement.

Under this subcontract arrangement, GEDP will take over GEFf's responsibilities as the “Master Developer and Project Manager.” *See, Ex. 4, Preliminary Development and Financing Schedule.* GEDP's responsibilities include, but, are not limited to: (1) meeting and negotiating IDIQ Agreement and Lease terms with DPW; (2) work on USDA Loan Application and Bond Financing Documents; (3) review SSHS Draft Lease; (4) execute lease agreement; (5) submit USDA Application; (6) manage all financing document responsibilities; and (7) negotiate and sign construction contract with Hansel Phelps. *Id.* The role of GEFf, the offeror has been replaced and usurped by GEDP. GEFf's role was really limited to being the Lessee under the Ground Lease during the construction period, and Lessor in the Lease Back Agreement after the

would not have qualified as a bidder, and would not have been able to obtain a bond. The subcontract arrangement allows GEDP to get the contract without meeting all of the requirements of the RFP, including the requirement that the Offeror or its contractor provide a performance and payment bond.

The second requirement in 5 GCA §58D106 requires only that the “[IDIQ] contract will also require that all major subcontracts be covered by a performance bond.” Section 58D106, in relevant part, provides:

The contract shall require that the contractor will work with GDOE to develop the comprehensive capital improvement plan in connection with the design of a renovated or construction of a new Simon Sanchez High School. Further, the contractor shall be responsible for all costs, expenses and fees of any kind or nature, associated with the design, civil improvements, on-site and off-site infrastructure, construction, permits, and financing associated with the completion of an education facility, including the financing of furniture and equipment for the education facility, as, and to the extent, provided by the education agency in the Request for Proposals. **The contract will also require that all major subcontracts be covered by a performance bond.**... (emphasis added)

5 GCA §58D106.

The subcontract agreement contemplated here is not a subcontract where the developer is subcontracting its contract to a sub-developer. Rather, it is a subcontract for construction work. Hansel Phelps is the contractor to the sub-developer GEDP not GEFF. As discussed above, DPW cannot allow GEFF to subcontract to a sub-developer, GEDP, an entity that not only does not meet the RFP requirements, but cannot deliver the bonds required in the RFP and Guam Procurement Law.

Submitted this 22nd day of July, 2016.

CIVILLE & TANG, PLLC

By: _____

JOYCE C. TANG

Attorneys for Appellant

Core Tech International, Inc.

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Schools (Beginning w

Tech's second protest,

attachments). DPW

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