



## ARGUMENT

### **A. Audio Recordings Contain Confidential Proposal and Proprietary Information**

Public Laws 32-120 and 32-121 established an evaluation committee to review and evaluate proposals submitted in response to this Request for Proposals ("RFP"). The proposals submitted contain confidential, trade secrets and other proprietary information not subject to disclosure. *See* 2 GAR 3114(f)(1)(G). The administrative hearing officer must first determine if the materials sought to be protected are, in fact, trade secrets and proprietary information, before permitting Core Tech International Corp. ("Core Tech") access to the tapes. *See Sci. Games, Inc. v. Dittler Bros.*, 586 So. 2d 1128, 1131 (Fla. Dist. Ct. App. 1991). Furthermore, Core Tech must demonstrate a reasonable necessity to obtain the information. *See Sci. Games, Inc. v. Dittler Bros.*, 586 So. 2d 1128, 1131 (Fla. Dist. Ct. App. 1991) (finding that materials as to which trade secrets privilege was asserted were not necessary to proper resolution of protest and, thus request for disclosure was denied).

Moreover, the proposals from offerors who were not awarded the contract shall not be opened to public inspection. *See* 2 GAR § 3114(h). Discussions by the evaluation committee during evaluation meetings pertaining to these proposals and their confidential information are therefore precluded from disclosure.

### **B. The Evaluation Committee Meeting Tapes are Immaterial to these Proceedings**

The Evaluation Committee meeting tapes are not necessary to proper resolution of this protest. The evaluation and ranking of the proposals are not part of the appeal filed by Core Tech. Furthermore, the time to protest the evaluation and ranking of proposals has expired. Core Tech was notified on December 22, 2016 that it was ranked No. 2 by the Evaluation

Committee. *See, Exhibit A.* Core Tech elected to not protest the evaluation and ranking of the proposals at the time. *See, Exhibit B.* Therefore any protest of the evaluation and ranking of proposals would be time barred. It is indisputable that Guam Education Facilities Foundation ("GEFF") is the highest ranked offeror.

**C. Title 5 G.C.A. § 5249 Does Not Require Audio Recordings of Evaluation Meetings**

Audio recordings of evaluation meetings are not required to be part of the procurement record. DPW acknowledges that because the tapes relate to the procurement, it is part of the record and therefore submitted under seal to the Public Auditor to review. However, as previously discussed, the tapes are not available for disclosure due to the confidential material reviewed and discussed in evaluation of the proposals. Furthermore, 5 G.C.A. § 5251 makes the procurement record requirements in 5 G.C.A. § 5249 public records. Since audio recordings of evaluation committee meetings are not required to be in the procurement record under 5 G.C.A. § 5249, they are not deemed public records.

**D. Memorandum of Evaluation**

Title 2 GAR 3114(m) requires a memorandum of evaluation. The memorandum sets forth how the evaluation factors stated in the RFP were applied to determine the best qualified offeror and be available for public inspection. *Id.* Furthermore, the evaluation sheets by the individual evaluation committee members are disclosed in the procurement record. Since the law only requires a memorandum of the evaluation and the evaluation sheets are in the record, the Evaluation Committee meeting tapes need not be disclosed.

**E. Policy in Favor of Nondisclosure of Evaluation Committee Meeting Tapes**

Finally, legislative policy supports nondisclosure of the audio recordings of the Evaluation Committee meetings. Title 5 G.C.A. § 5252 states the rules for procurement record shall be to protect the integrity of the bidding process, protect the confidentiality of trade secrets and provide for transcription of sound recordings. The nondisclosure of discussions of the proposals would protect the integrity of the bidding process by not disclosing the other proposals and by protecting confidential information contained in all the proposals. The process is currently at pre-award stage, any confidential information disclosed would unduly prejudice the offerors in this procurement. The appropriate record would be the transcription of these recordings thereby redacting confidential or legally protected information.

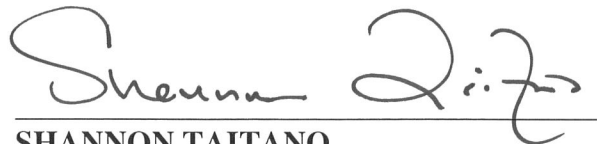
**CONCLUSION**

DPW respectfully requests the Evaluation Committee meeting tapes filed under seal on September 7, 2016 remain sealed and not be disclosed due to the confidential information contained in them.

Dated this 8<sup>th</sup> day of September, 2016.

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

By:



**SHANNON TAITANO**  
Assistant Attorney General

# EXHIBIT A

The Honorable  
EDDIE BAZA CALVO  
Governor

The Honorable  
RAY TENORIO  
Lt. Governor

DOW Q1-3



GLENN LEON GUERRERO  
Director

FELIX C. BENAVENTE  
Deputy Director

December 22, 2015

**Guam Educational Facilities Foundation, Inc.**  
118 Biridan Pulattat  
Dededo, Guam 96929

Attn: Sean K. Easter  
Vice President

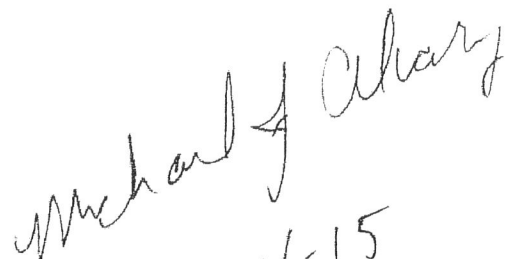
**Subject: Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Public Schools (Beginning with Simon Sanchez High School) Project No. 730-5-1055-L-YIG**

Dear Mr. Easter

The Simon Sanchez-RFP selection/evaluation committee has completed their evaluation of the proposals submitted in response to the advertised RFP. We are pleased to inform you that, **Guam Educational Facilities Foundation, Inc.**, has been selected as the No. 1 ranking offeror. Your proposal has been determined to meet the needs of the Government of Guam to the best degree. Therefore, as the No. 1 ranking offeror, your corporation will be participating further in the Request For Proposal process, Contract Negotiations.

Thank you very much for the impressive RFP submittal. The time and effort your company and staff expended is sincerely appreciated.

  
GLENN LEON GUERRERO  
Director

  
12-24-15  
G.E.F.F.

*The Honorable*  
**EDDIE BAZA CALVO**  
*Governor*

*The Honorable*  
**RAY TENORIO**  
*Lt. Governor*



**GLENN LEON GUERRERO**  
*Director*  
**FELIX C. BENAVENTE**  
*Deputy Director*

December 22, 2015

**Core Tech International Corp.**  
388 South Marine Corps Dr. Suite 400  
Tamuning, Guam 96913

Attn: Conchita Bathan  
Chief Executive Officer

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

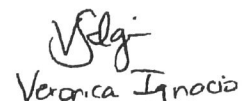
Dear Ms. Bathan

Thank you very much for your participation with your firm's Request For Proposal submittal. The time and effort your company and staff expended is sincerely appreciated.

Upon the completion of the evaluation of the submittal, we wish to inform you of the ranking of your firm as No. 2, by the selection/evaluation committee. Although your Proposal will not be subject for contract negotiations at this time, please be advised that DPW wishes to retain your proposal as the initial evaluation may not exclude your proposal from further consideration.

Department of Public Works appreciates your interest with our Capital Improvement Projects and looks forward to your participation and future opportunities to work with your firm.

  
GLENN LEON GUERRERO  
Director

  
Veronica Ignacio  
12/24/15

*The Honorable*  
**EDDIE BAZA CALVO**  
*Governor*

*The Honorable*  
**RAY TENORIO**  
*Lt. Governor*



**GLENN LEON GUERRERO**

*Director*

**FELIX C. BENAVENTE**

*Deputy Director*

December 22, 2015

**PERNIX GUAM, LLC**  
P.O.Box 23068  
Barrigada, Guam 96921

Attn: Louis C. DeMaria  
Vice President

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

Dear Mr. DeMaria

Thank you very much for your participation with your firm's Request For Proposal submittal. The time and effort your company and staff expended is sincerely appreciated.

Upon the completion of the evaluation of the submittal, we wish to inform you of the ranking of your firm as No. 3, by the selection/evaluation committee. Although your Proposal will not be subject for contract negotiations at this time, please be advised that DPW wishes to retain your proposal as the initial evaluation may not exclude your proposal from further consideration.

Department of Public Works appreciates your interest with our Capital Improvement Projects and looks forward to your participation and future opportunities to work with your firm.

  
**GLENN LEON GUERRERO**  
Director





# EXHIBIT B

DPW R

## CIVILLE & TANG, PLLC

www.civilletang.com

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

January 7, 2016

### VIA HAND DELIVERY

4:15 PM. 08

Mr. Glenn Leon Guerrero  
Director  
GUAM DEPARTMENT OF PUBLIC WORKS  
542 North Marine Corp Drive  
Tamuning, Guam 96913

Re: **PROTEST OF RFP FOR PROJECT NO. 730-5-1055-L-YIG**

Dear Mr. Leon Guerrero:

Core Tech International Corp. ("Core Tech") hereby gives notice that it protests the method of procurement in the Request for Proposal process for the Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance for Public Schools (Beginning with Simon Sanchez High School), Project No. 730-5-1055-L-YIG (the "RFP"). A copy of the RFP is marked and attached hereto as **Exhibit 1**. This protest is made pursuant to 2 GAR Div. 4 §9101. Core Tech received the notice of ranking letter from Department of Public Works ("DPW") on December 24, 2015.

The Department of Public Works was authorized to solicit Requests for Proposals by the *Ma Kåhat* Act of 2013, Public Law 32-120, which enacted 5 GCA Chapter 58D. Pursuant to the *Ma Kåhat* Act of 2013, DPW was required to issue an RFP in compliance with the *Ma Kåhat* Act of 2013 and Guam procurement law. DPW was required to base its selection on "the proposal that delivers the *best value* for Guam in meeting the objectives of the education agency (emphasis added)." See 5 GCA §58D105.

Despite the requirement to consider value, DPW excluded the cost of construction and/or development fees from the Evaluation Criteria in its Request for Proposal. See Section 5.3 of the RFP. DPW further admitted that it would not consider cost in its answers to Core Tech's Requests for Information. Specifically, in *Addendum 6*, Core Tech asked whether there would be an amendment to include the cost as part of proposal evaluation. DPW responded: "No, cost will have no evaluation factor." See *Addendum 6* marked and attached hereto as **Exhibit 2**.

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Likewise, in *Addendum 7* to the RFP, DPW confirmed that it would not consider the cost estimate for Simon Sanchez High School as an evaluation criterion. See **Addendum 7** marked and attached hereto as **Exhibit 3**. The question and answer regarding cost appear as Question 6 on page 5 of *Addendum 7* and are as follows:

In your response to question on Section 4.0.1, it was stated that “cost will have not evaluation factor” please confirm that government will not evaluate the cost estimate for Simon Sanchez HS even if it is still required to be submitted in our proposal.

**Answer:** Confirmed.

In *Addendum 7* at page 3, Section 5.3, “Evaluation, Rating and Selection”, the evaluation form setting forth the evaluation criteria was amended, and did not provide for any evaluation based on estimated costs for Simon Sanchez High School.

The Legislature directed that the selection of a proposal be based on the “best value” incorporating a procurement method -- the “best value” method -- which requires the 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”); see also *Sayer v. Minn. Dep’t of Transp.*, 790 N.W.2d 151, 156 (Minn.2010) (recognizing that the ‘best-value process differs from the lowest responsible bid process in that it allows public agencies to consider factors other than cost when awarding contracts’).”).

The consideration of “best value” requires the procuring agency to review the cost or price of the offer. Under federal regulations, the cost or price must be considered in a “best value” procurement in conducting the “trade off” between price and qualitative technical factors.

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.

*Firstline Transportation Security, Inc. v. United States*, 100 Fed. Cl. 359, 374 (Fed. Cl. 2011).

The term “best value” is also articulated in the Guam Procurement Regulations pertaining to the selection of contracts. Title 2 GAR § 3119(c)(1) directs that:

**The objective when selecting a contract type is to obtain the best value in needed supplies, services, or construction in the time required and at the lowest cost or price to the territory. In order to achieve this objective, the Procurement Officer, before choosing a contract type, should review those elements of the procurement which directly affect the cost, time, risk, and profit incentives bearing on the performance.** (emphasis added).

Among the factors to be considered in selecting any type of contract are:

- (A) the type and complexity of the supply, service, or construction item being procured;
- (B) the difficulty of estimating performance costs such as the inability of the territory to develop definitive specifications, to identify the risks to the contractor inherent in the nature of the work to be performed, or otherwise to establish clearly the requirements of the contract;
- (C) the administrative costs to both parties;
- (D) the degree to which the territory must provide technical coordination during the performance of the contract;
- (E) the effect of the choice of the type of contract on the amount of competition to be expected;

(F) the stability of material of commodity market prices or wage levels;

(G) the urgency of the requirement; and

(H) the length of contract performance.

2 GAR § 3119(c)(1).

Based on the foregoing, DPW was required by Guam law to make a determination of "best value" which requires consideration of cost. Without considering cost as a factor in the evaluation, it would be impossible to assess which proposal provides the Government with "best value." A determination of "best value" without trading off cost and other technical factors would open the door to awards of contracts without considering the prices offered by other offerors in conjunction with other criteria. It would allow awards based purely on technical criteria without taking into consideration the cost to the government. 5 GCA §58D105 and Guam Procurement Law did not authorize a cost blind evaluation methodology.

Because DPW failed to consider the cost of construction and/or development fees as one of the factors in evaluating the proposals, it violated Guam Procurement Law and the mandate in 5 GCA §58D105 that the evaluation be based on the "best value" to the Government. Any award based on this flawed evaluation criteria would be invalid and the RFP should be revised to comply with Guam law and resolicited.

Core Tech International Corp. can be reached at the following address:

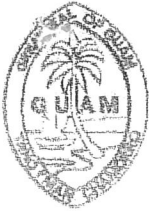
**Core Tech International Corp.**  
388 South Marine Corps Dr. Suite 400  
Tamuning, GU 96913

Please do not hesitate to contact me at 671-472-8868 if you have further questions or comments.

Sincerely,

Joyce C.H. Tang





The Honorable  
**EDDIE BAZA CALVO**  
 Governor

The Honorable  
**RAY TENORIO**  
 Lt. Governor

DPW L



**GLENN LEON GUERRERO**  
 Director  
**FELIX C. BENAVENTE**  
 Deputy Director

January 19, 2016

Juno Eun  
 CEO/President  
 Core Tech International Corp.  
 388 South Marine Corps Drive, Suite 400  
 Tamuning, Guam 96931

**Re: Response to Protest of Request For Proposal (RFP) for Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance for Public Schools (Beginning with Simon Sanchez High School) Project No. 730-5-1055-L-YIG ("RFP")**

Hafa Adai Mr. Eun:

This serves to respond to Core Tech International Corp.'s ("CTI") January 7, 2016 letter protesting the above referenced RFP pursuant to 2 GAR Div. 4 §9101. To rectify the alleged violation, Protestor claims that any award would be invalid and that the government should revise the RFP and resolicit the project. For the reasons stated herein Department of Public Works (DPW) Contracting Officer (i.e., in this case DPW Deputy Director Felix C. Benavente) has determined that Protestor's written protest is not timely and is therefore rejected.

The RFP was issued on June 15, 2015 and a Pre-Proposal Conference & Simon Sanchez High School Site Inspection was held on July 6, 2015. . See RFP § 1. In addition, CTI had until July 24, 2015 in which to submit written questions concerning the criteria to be used, which were confirmed with Addendum No. 7 on October 9, 2015. Despite being on actual notice of the criteria to be used in the procurement for a period of nearly four (4) months CTI failed to file a protest. As 2 GAR Div. 4 §9101, cited by CTI as the basis for its protest, provides that protests shall be in writing and "*filed within 14 days after the protestor knows or should have known of the facts giving rise thereto. A protest ... Protests filed after the 14 day period shall not be considered.*" Emphasis added. CTI not only failed to file its protest within the mandatory fourteen (14) day period *but only did so until after notice that it was not the highest ranked contractor* bringing into consideration both a lack of good faith and disregard for the integrity of Guam's procurement law. Further RFP § 6.1(b) required CTI to submit a written statement specifying the "*extent of agreement with all terms, conditions, and provisions included in the RFP including attachments.*" See also, RFP § 3.7. Owing to CTI's failure to protest the criteria within fourteen (14) days of knowing the valuation criteria, particularly in light of its apparent affirmative decision to postpone any protest until *after notification that it wasn't the first ranked proposer*, it is my determination that the protest is not timely and is rejected.

Page 2 of 2  
Mr. Juno Eun  
Core Tech International Corp.



Although the protest is rejected as not timely it is appropriate to note that the department considers the RFP valid. RFP § 2 directed contractors to read Guam Public Laws 32-120 and 32-121 and other laws and specifically provides that "*in the event of conflict between representations made in this RFP and a public law, the public law controls.*" Thus it was incumbent upon CTI to prepare its proposal as required by the RFP, which requires a wide variety of information for evaluating submissions, including RS Means pricing metrics to ensure competitive costs and value, and PL 32-120 and 32-121. In addition, the first phase of the procurement ranked the proposers in order of qualifications and the negotiating committee, which is tasked with negotiating the contract terms and conditions, has yet to convene owing to CTI's untimely protest. The department looks forward to the selection committee being allowed to perform its task in negotiating the best contract for Guam and its residents and, most importantly, its high school students.

We note further that the ranking letter only allows for the government to engage in negotiations with the highest ranked offeror. There is no guarantee that the negotiations will result in an award of contract and thus CTI has not been damaged. Further, if negotiations fail, your company is the next in line to be given the opportunity to negotiate a contract.

DPW also wants to notify you of its concerns with CTI's legal counsel having written the Guam legislature while the protest was under consideration. The department considers this to be in blatant disregard of RFP § 3.2 (Single Point of Contact) and clearly intended to improperly influence the Contracting Officer's decision. This serves to place CTI and its counsel on notice that the next time either one of them improperly contacts a government official during the procurement process that DPW will consider such an ethical breach and take the appropriate action, which depending on the facts may include disqualifying CTI or Civile & Tang's then client from the procurement under consideration.

In closing, it is my determination that CTI's protest was not timely filed and is therefore rejected.

This further serves to inform you of the right to administrative and judicial review of this decision.

Deputy Director/Acting Chief Procurement Officer



**FELIX C. BENAVENTE**

cc: Elizabeth Barrett-Anderson, Esq. Guam Attorney General