Office of the Attorney General
Elizabeth Barrett-Anderson
Attorney General of Guam
Solicitor Division
590 S. Marine Corps Dr.
Tamuning, Guam 96913 • USA
(671) 475-3324 • (671) 472-2493 (Fax)
www.guamag.org
Attorneys for the Government of Guam

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 08-23-16
TIME: 11:05 ☑AM ☐PM BY: JM
FILE NO OPA-PA: 16-011

THE OFFICE OF PUBLIC ACCOUNTABILITY
HAGATNA, GUAM

IN THE APPEAL OF: **CORE TECH INTERNATIONAL CORP.,** Appellant. and **GUAM DEPARTMENT OF PUBLIC WORKS,** Purchasing Agency.	**DOCKET NO. OPA-PA-16-011** **DEPARTMENT OF PUBLIC WORKS AGENCY REPORT**

I. APPELLEE INFORMATION

Name: Department of Public Works

Address: 542 N. Marine Corps Drive
Tamuning, Guam 96913

For purposes of this appeal, please direct correspondence to DPW's counsel, Thomas P. Keeler and Shannon Taitano, tkeeler@guamag.org and staitano@guamag.org, Guam

ORIGINAL

Attorney General's Office, 590 S. Marine Corps Drive, Suite 706, ITC Building • Tamuning, Guam 96913. Tel. 475-3324; Fax: 472-2493

II. APPEAL INFORMATION

A. Purchasing Agency: Department of Public Works, Government of Guam

B. Project No.: 730-5-1055-L-YIG

C. Date of Request for Proposals ("RFP"): June 15, 2015

D. This appeal is made by Core Tech International Corp. ("Core Tech") from the Department of Public Works decision to deny Core Tech's July 15, 2016 protest.

E. The names of the competing bidders are Guam Educational Facilities Foundation, Inc. ("GEFF") and Pernix Guam LLC ("Pernix")

III. RELEVANT BACKGROUND

DPW SOLICITS A REQUEST FOR PROPOSALS 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)

Public Law 32-120, the *MA KAHAT ACT* of 2013 passed into law on February 1, 2014. *See* P.L. 32-120, Procurement Record, **Tab "18"**. Among other items the Act added a new chapter 58D to Title 5, Guam Code Annotated, relative to the renovation or construction of a new Simon Sanchez High School and related financing and the development of a comprehensive capital improvement plan for prioritizing capital improvements to all Guam Department of Education ("GDOE") schools. *See*, Procurement Record, **Tab "18"**. Public Law 32-121 added a new Chapter 58E to the Guam Procurement Law. *See*, Public Law 32-121, Procurement Record, **Tab "18"**. The law authorized the government to issue a Request for Proposals for the renovation, rehabilitation, construction or maintenance of GDOE schools.

On June 15, 2015, the Department of Public Works ("DPW") issued a Request for Proposals 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"). *See*,

Procurement Record, **Tab "2"**. The RFP, as authorized by the Act, contemplated a contract to be for a term of five (5) years to include services for thirty-six (36) GDOE. *See*, DPW RFP No. 730-5-1055-L-YIG, §2.0 at 7, Procurement Record, **Tab "2"**, and Addendum 6, Procurement Record, **Tab "4"**, at 2. Priority would be given to Simon Sanchez HS and the development of a comprehensive capital improvement plan. *Id.*

The RFP was to be awarded in two (2) phases. *See*, Public Laws 32-120 and 32-121, Procurement Record, **Tab "18"**. Each phase had a different committee. Phase 1 provided for a selection committee (the "Selection Committee") comprised of the Superintendent of the Department of Education ("DOE") DPW's Director or Deputy Director, the Director or Deputy Director of the Department of Land Management and the Administrator or Deputy Administrator of the Guam Environmental Protection Agency and the Administrator or Deputy Administrator of the Guam Economic Development Authority ("GEDA"). The Selection Committee was responsible for selecting a contractor ("Selected Contractor") which *shall* be based upon the proposal that delivers the best value for Guam in meeting the objectives of the education agency. (emphasis in the original) *See*, Public Law 32-120 at 8 and Public Law 32-121at 7, Procurement Record, **Tab "18"**.

The second phase of the RFP provided for a negotiating committee (the "Negotiating Committee") to negotiate with the Selected Contractor. *See*, Public Law 32-120 at 7 and Public Law 32-121 at 8, Procurement Record, **Tab "18"**. The Negotiating Committee was smaller than the Selection Committee and was comprised of three (3) representatives: the Superintendent of the Department of Education, ("DOE") DPW's Deputy Director, and the Deputy Administrator of the Guam Economic Development Authority ("GEDA"). *Id.*

Prior to submission of sealed proposals, prospective bidders had an opportunity to submit questions regarding the RFP. DPW issued amendments I to IV in response to these questions to clarify the RFP. *See*, Procurement Record, **Tab "9"**.

The bid submission date was November 6, 2015. *See*, Procurement Record, **Tab "4"**. Three (3) companies, namely Core Tech International Corp. ("Core Tech"), Pernix Guam LLC ("Pernix") and Guam Educational Facilities Foundation, Inc. ("GEFF"), submitted proposals in response to the RFP. The Selection Committee evaluated the proposals. *See*, Procurement Record, **Tab "12" and Tab "13"**. On December 22, 2015, DPW notified GEFF, Core Tech and Pernix that GEFF had been selected as the No. 1 offeror (i.e., Selected Contractor). *See*, Procurement Record, **Tab "14"**.

Negotiations with GEFF/Selected Contractor were delayed owing to a January 7, 2016 protest filed by Core Tech. *See*, **Exhibit A**. On January 19, 2016, DPW rejected Core Tech's protest. *See*, **Exhibit B**. Core Tech apparently decided not to take further action on its protest as it did not appeal the decision with the OPA.

On or about February 15, 2016 the Negotiating Team commenced negotiations with GEFF. *See*, DPW & Negotiation Team Meeting Agenda attached as **Exhibit C.** During the period of February 15, 2016 through the date of DPW's issuance of the Notice of Intent to Award Contract, GEFF and the Negotiating Committee engaged in extensive negotiations primarily related to the reconstruction of Simon Sanchez HS. *See*, Procurement Record, **Tab "16"**. On May 13, 2016, DPW issued a Notice of Intent to Award to GEFF. *See*, Procurement Record, **Tab "16"**.

Core Tech filed its second protest on the RFP on May 27, 2016. *See*, Core Tech Protest, attached as **Exhibit D**. DPW denied Core Tech's protest on June 8, 2016. *See*, DPW's Denial of Protest, attached as **Exhibit E**. Core Tech appealed DPW's denial of their protest with the Office of Public Accountability on June 23, 2016. *See*, Notice of Appeal, *In the Appeal of Core Tech International Corp.*, Docket No. OPA-PA-16-007.

Core Tech filed a third protest on July 15, 2016. *See*, Core Tech Protest, **Exhibit F**. DPW denied Core Tech's protest on August 3, 2016. *See*, DPW's Denial of Protest, **Exhibit G**. Core Tech appealed DPW's denial of their protest with the Office of Public Accountability on August 10, 2016. *See*, Notice of Appeal, *In the Appeal of Core Tech International Corp.*, Docket No. OPA-PA-16-011.

An indefinite delivery indefinite quantity ("IDIQ") contract has been drafted and partially executed. It has not been formally submitted to the Attorney General's office for approval. Nor has the Governor of Guam signed the contract.

IV. STATEMENT ANSWERING ALLEGATIONS OF APPEAL

A. Core Tech's Appeal Was Timely Filed

DPW acknowledges that Core Tech's appeal is timely.

B. The IDIQ Contract is Consistent with the RFP

Core Tech contends that the IDIQ Contract, as currently written, creates an unauthorized exception by inserting "unless otherwise directed by the Director of DPW in writing and permitted by Public Laws 32-120 and 32-121 or any other law" in Section 3.1.

> Section 3.1. Compensation and Payment for Services. The Government will compensate the Developer for services rendered for Task Orders issued as provided in this Contract based on available funds and not to exceed One Hundred Million and 00/100 Dollars ($100,000,000.00) pursuant to Section I (Scope of Contract), unless otherwise directed by the Director of DPW in writing and permitted by Public Laws 32-120 and 32-121 or any other law. The first and second Task Orders will be for Simon Sanchez High School and the CCIP.

Contrary to Core Tech's assertion, Section 3.1 of the IDIQ Contract is consistent with the RFP as it incorporates Sections 4.0 and 4.4 of the RFP.

> Section 4.0 provides:
>
> The scope of work for this RFP includes financing and lease financing for rehabilitation, construction, expansion and renovation (inclusive of architectural and engineering design) of thirty-six (36) schools with a total cost of up to One Hundred Million Dollars ($100,000,000.00).
>
> *See,* RFP 4.0 at 18
>
> Section 4.4 provides:
>
> Should there be inconsistencies between the requirements of this RFP and the stated Public Laws, the requirements of law shall prevail.
>
> *See,* RFP 4.4 at 23.

Core Tech was on notice that Public Laws 32-120 and 32-121 supersede any inconsistencies in the RFP. Section 3.1 is not intended to circumvent the RFP or issue a blank check to GEFF, as suggested by Core Tech, but rather to provide flexibility in order to meet the requirements of the authorizing laws.

Core Tech only speculates that Section 3.1 authorizes additional funds but additional funds have not been authorized as Section 4.0 of the RFP and Section 3.1 of the IDIQ Contract cap the scope of work's cost at $100,000,000.00. Section 3.1, consistent with the RFP, simply incorporates by reference Public Laws 32-120 and 32-121 as the prevailing authority to ensure compliance with the laws.

Section 3.1 does not circumvent the RFP. However, if necessary, Section 3.1 could still be modified as the IDIQ contract has not been executed by the Governor nor approved by the Attorney General. Therefore, Section 3.1, as currently written, is not fatal to the procurement process.

C. DPW Maintains the Procurement Record as Required Under Guam Procurement Law

The procurement record is replete with over 3000 pages of documents. The record includes drafts of documents, logs, minutes of meetings, communications, evaluations, and a detailed memorialization of negotiations that resulted in the notice of intent to award the contract to GEFF. The record shows what transpired during meetings and discussions, how decisions were made, and who made them.

The Procurement Record is not fatally flawed as and is not missing critical records nor is a materially incomplete record. *See, Teleguam Holdings LLC v. GovGuam and PDS*, Superior Court of Guam, Civil Case No. 0334-13, Decision and Order, August 8, 2016 and August 18, 2016 (ordering the cancelation of the procurement as the procurement record was materially incomplete under the terms of 5 GCA § 5249(b), (d), and (e)). In the *Teleguam Holdings* case, the record did not include numerous documents of IFB drafts and materials in the development of the specifications, emails, meeting records, log, and communications, nor did GSA request these documents from individuals involved in the procurement process. In this instance, the Government has in good faith substantially complied with the Procurement Law in maintaining a demonstrative procurement record.

1. DPW has yet to organize the procurement record as the process is stayed pending the protest.

Core Tech contends that DPW failed to maintain a log of all communications as required in 5 GCA 5249(b). Ordinarily, the procurement record is organized right before the contract is submitted to the Attorney General for review. AG Procurement Form 1, attached as **Exhibit H**, is submitted with the contract and procurement record. At that time, the procurement officer certifies

that he or she has "caused to be prepared and now maintain a full and complete record of the procurement as required by law". Because this process is stayed pending the protest determination, DPW has yet to enter all the communications in the log, *See*, **Exhibit I,** and organize the procurement record. As Core Tech noted in its appeal, the log is a summary of the source documents and can be completed with the source documents maintained by the Government. Furthermore, DPW is required to supplement the Procurement Record as required after the initial filing with the OPA. *See,* Order After Hearing and Notice of Motion Hearing, *In the Appeal of, Core Tech International Corp*, Appeal No. OPA-PA-16-007, July 12, 2016. The Government has substantially complied with the law and maintains voluminous pages of communications and documents that have transpired in this procurement as set forth herein.

2. DPW relied on the published 5 GCA 5249(c) for guidance in memorializing the negotiations rather than recording the negotiation meetings

DPW acted according to the Guam Compiler of Law's published version of 5 GCA 5249(c). *See Town of Pacific v. Seipert*, 9 Mo. 210, 214 (1883) (held that, under the facts in the case, the law as published would be deemed the law, instead of the enrolled act on file) *citing Pease v. Peck*, 59 US 595 (1855). Although the original law contains a comma, the version published for 20 years in the Guam Code Annotated and currently on the Guam Compiler of Laws website contains a semi-colon between "sound recordings" and "negotiations". Because a semicolon indicates that the clauses are independent, DPW acted accordingly and no recordings were made of the negotiation meetings except that one instance when Reynaldo T. Junio, an engineer with DPW and assisting in the procurement, recorded a portion of one of the negotiating meetings on his cell phone[1]. *See Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, 558 (Ariz. Ct. App. 2008) (determining that a semicolon is used to separate independent clauses of a sentences) *citing Webster's Third New International Dictionary* 2063 (1971).

In its place, a memorialization of the negotiations was documented and is in the Procurement Record. A memorandum detailing the evaluation factors applied and the elements of the negotiations determining the award of the contract to GEFF, which were consistent with the

---

[1] The recording was intended to maintain meeting minutes and Mr. Junio intended to save the recording at a later date. The cell phone was severely damaged by water and was not able to access the records on it. *See*, Purchasing Agency Supplemental to Procurement Record, Tab 3, Declaration of Reynaldo T. Junio dated August 1, 2016.

RFP and Guam Procurement Law was prepared and placed in the procurement record. As such, the lack of sound recordings of negotiating meetings is not fatal to the procurement.

Core Tech contends that the record is fatally flawed because the record does not contain a communications log and sound recordings of the negotiation meetings. The Procurement Record contains a communications log and a record of communications to enter into the log. While the Procurement Record does not contain sound recordings of the negotiation meetings DPW has documented the negotiation meetings for the Record. The Procurement Record contains the requisite documents that clearly demonstrate good faith compliance with the Guam Procurement Act and Public Laws 32-120 and 32-121.

CONCLUSION

As DPW acted in good faith in the procurement process, its decision is entitled to substantial deference. DPW requests that the appeal of Core Tech be dismissed and that the Public Auditor award all legal and equitable remedies that the department may be entitled to as a result.

Dated this 23rd day of August, 2016.

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

By: ______________________________
SHANNON J. TAITANO
Assistant Attorney General

TAB 1

EXHIBIT A

January 7, 2016 Protest of RFP for Project No. 730-1055-L-YIG

CIVILLE & TANG, PLLC

www.civilletang.com

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

January 7, 2016

VIA HAND DELIVERY

4:15 p.m. CS

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**.

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

TAB 2

EXHIBIT B

January 19, 2016 – DPW Rejected Core Tech's Protest

The Honorable
EDDIE BAZA CALVO
Governor

The Honorable
RAY TENORIO
Lt. Governor

public works
DIPATTAMENTON CHE'CHO' PUPBLEKO
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.

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,andPL 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 Civille& 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

FELIX C. BENAVENTE

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

TAB 3

EXHIBIT C

DPW & Negotiation Team

Meeting Agenda

RFP Projection #730-5-1055-L-YIG

DPW & Negotiation Team
Meeting Agenda
RFP Projection #730-5-1055-L-YIG

1:00 p.m., Monday, February 15, 2016
ASD Conference Room

1. Call to Order
2. Introduction – DPW, DOE, GEDA & GEFF
3. GEFF
   a) Overview
   b) Roles of All Members
4. Cost Overview
5. Deliverables & Timelines
6. Future Meetings & Contacts During this Review
7. Open Discussion
8. Adjournment

TAB 4

EXHIBIT D

May 27, 2016 – Protest Regarding Request for Proposals for Project No. 730-5-1055-L-YIG

ORIGINAL

CIVILLE & TANG, PLLC

www.civilletang.com

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

May 27, 2016

VIA HAND DELIVERY

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

Re: **PROTEST REGARDING REQUEST FOR PROPOSALS FOR 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)**

Protest of Intent to Award Contract for Project No. 73-10055-L-YIG to Guam Educational Facilities Foundation, Inc.

Dear Mr. Leon Guerrero:

We represent Core Tech International Corp. ("Core Tech"). Core Tech hereby gives notice that it protests the Intent to Award the Contract 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 to Guam Educational Facilities Foundation, Inc. This protest is made pursuant to 5 G.C.A. § 5425 and 2 GAR Div. 4, §9101.

Identification of the Protestor and Its Attorney:

The name and address of the protestor is:
Core Tech International Corp.
388 S. Marine Corps Drive, Suite 400
Tamuning, Guam 96913

The protestor is represented by the law firm of Civille & Tang, PLLC and all communications regarding this protest should be sent to:

Joyce C.H. Tang,
Civille & Tang, PLLC
330 Hernan Cortez Avenue, Suite 200
Hagåtña, Guam 96910

The procurement that is the subject of this protest is Guam Department of Public Works, 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").

I. Statement of the Protest and the Reasons for the Protest:

The Department of Public Works ("DPW") 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 "solicit Requests For Proposals (RFP) through the Department of Public Works, in compliance with the Guam Procurement Law. . . ." 5 G.C.A. 58D105, as enacted by Public Law 32-120, § 2.

On June 15, 2015, the Guam Department of Public Works issued the RFP for Project No. 730-5-1055-L-YIG. A copy of the RFP is marked and attached to this Protest as **Exhibit 1**. Core Tech and two others, including, Guam Educational Facilities Foundation, Inc. ("GEFF") submitted proposals in response to the RFP.

By letter dated May 13, 2016, Mr. Felix C. Benavente, Deputy Director of the Department of Public Works, provided Core Tech with a Notice of Intent to Award under the RFP stating that "[t]he Government of Guam announces its intent to award the above referenced RFP for the Lease Financing For Design, Renovation, Rehabilitation, Construction and Maintenance for Public Schools (Beginning with Simon Sanchez High School) to: Guam Educational Facilities Foundation, Inc." It was further stated that "this Notice of Award is subject to execution of a written contract. . . . [and that [o]fferors not listed above will not be awarded a contract pursuant to RFP No. 730-5-1055-L-YIG." A copy of the Notice of Intent is attached to this Protest as **Exhibit 2.**

The RFP's Negotiating Committee's May 13, 2016 Memorandum memorializing the steps taken in selecting Guam Educational Facilities Foundation, Inc. ("Memorandum") was attached to the Notice of Award. A copy of the Memorandum is attached to this Protest. *See*, **Exhibit 3**. The Memorandum refers to The Notice and Memorandum reveal that GEFF was allowed to modify its proposal in violation of Guam procurement law and the RFP. The Memorandum states that a copy of GEFF's proposal is attached to the Memorandum. *Id.* at 2. Core Tech did not receive a copy of GEFF's proposal submitted in response to the RFP. However, Core Tech did receive a copy of a letter dated April 22, 2016, consisting of eight (8) pages from GEFF to Mr. John F. Calanayan, a DOE Engineer Supervisor.

2. DPW Violated 2 GAR §3114 When It Allowed GEFF to Submit Four New Proposals.

According to the Memorandum, on December 24, 2015, the review committee selected GEFF as the most qualified firm and notified GEFF that as the top ranked contractor "it would be participating further in the RFP's process of Contract Negotiations." *Memorandum* at 1. The Memorandum states that negotiations commenced on or about February 15, 2016, with the Negotiation Committee, who were Jon Fernandez, Mana Silva Taijeron, and Felix Benavente. The Negotiation Committee "engaged in numerous meetings and communications during which GEFF submitted four (4) [***new***] separate proposals (emphasis added)." *Id.* The price difference of GEFF's four new proposals ("New Proposals") was approximately $25.6 million, ranging from a high of $89,332,258 to a low of $63,796,049.00. *Id.* at 1-2. The Memorandum further demonstrates that there were significant design differences between the four proposals, noting that the low offer "compromised the design parameters and needs for Simon Sanchez High School, and was not considered to be a best value for Guam or GDOE." *Id.* at 2.

The Memorandum stated that one of GEFF's four new proposals was attached and proposed an amount not to exceed $76,867,335. *Id.* at 2. Based on the statement in the Memorandum that the New Proposals were submitted by GEFF after meetings with the Negotiation Committee commenced and during negotiations, the New Proposals were submitted ***after*** the proposal submittal deadline of November 6, 2015, and ***after*** review and evaluation of all proposals by the evaluation time resulting in the ranking of offerors. Core Tech was not asked or given an opportunity to submit additional proposals, and does not believe other offerors were asked to do so. Because the $76,867,335 proposal referred to in the Memorandum, as well as the other three proposals, were not the original proposal submitted in response to the RFP but were, rather, proposals made during the post-ranking negotiations, allowing GEFF to submit New Proposals was a violation Guam Procurement Law and the RFP.

Section 3114(i)(1) of the Guam Procurement Regulations allow the procuring agency to engage in pre-selection (evaluation) 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." 2 GAR § 3114(i)(1). Nothing in the Procurement Law allows DPW to permit any offeror to submit new proposals after the proposal submittal deadline. While §3114(i)(3) permits modification of a proposal, the modification must be done prior to the conclusion of the pre-selection evaluation discussions. *See,* 2 GAR § 3114(i)(3).

After a best qualified offeror is selected, negotiations can be had, **<u>but only with respect to price</u>**. Title 2 GAR § 3114(i)(l) specifically provides, in relevant part, as follows:

(i) **Negotiation and Award of Contract.**

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

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

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

(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).

Since the submission of the $76,867,335 proposal and the other three new proposals occurred following the selection of the best qualified offeror, it was not permitted under §3114(i)(1), and should have been rejected. The New Proposals should not have been considered. Critically, the New Proposals could not have modified the original proposal, as they were New Proposals. Even if the New Proposals did modify GEFF's original proposal, which Core Tech believes they did not, they would be unauthorized modifications of the proposal submitted for evaluation. Title 2 GAR §3114. The Memorandum clearly states that the four proposals were not modifications but separate new proposals, and in permitting GEFF to submit four new separate proposals after selection, DPW violated Guam Procurement Law and made an unauthorized modification to the RFP. In allowing GEFF to submit New Proposals and making an unauthorized modification to the RFP, DPW also unfairly prejudiced the other offerors.

3. DPW Was Not Allowed To Modify the RFP After Selection Of The Best Qualified Offeror and Should Not Have Allowed GEFF to Submit New Proposals.

In addition to allowing GEFF to submit New Proposals, DPW modified the RFP after selection of the best qualified offeror, when it modified the RFP and allowed GEFF to materially

modify its proposal by submitting new non-responsive proposals as follows:

1. The number of classrooms in GEFF's final proposal does not meet the requirements of the RFP. For example, GEFF'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 *Addendum 6* to the RFP. *See Addendum 6* to RFP, **Exhibit 4**; *Memorandum* at 3; Program of Spaces attached to Memorandum.

2. The RFP and the *Ma Kåhat Act of 2013* required a proposal and contract inclusive of thirty-six (36) schools. GEFF's final proposal includes only 35. *See Memorandum* at 4.

DPW allowed GEFF to modify its original proposal, and in this case, submit four new proposals after its original proposal was reviewed and was ranked by the evaluation committee as the best qualified offeror. The RFP requires an Auditorium for a 750 seat capacity. *See, Addendum 6* at 12. GEFF's original proposal included a 700-seat auditorium, the final proposal from GEFF provided a 500-seat auditorium. In permitting these modifications post-ranking and without notifying and giving other offerors the same opportunity to modify and submit new proposals, DPW violated the Guam Procurement Regulations, and gave GEFF with an unfair advantage over other offerors. GEFF was selected and permitted to submit proposal after proposal until it landed on something that satisfied DPW, an opportunity that was not afforded the other offerors. These modifications and submission of New Proposals were completely outside the scope of negotiation authorized by Title 2 GAR § 3114(l).

4. **The Offeror Must be Bondable And A 100% Performance and Payment Bond Must be Obtained by Offeror Or Its Prime Contractor.**

The RFP states that all construction task orders shall contain contractual obligations which include, among other things, Performance and Payment Bonds. *See*, RFP, §4.1. 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. 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).

RFP at 21 (emphasis added). The Memorandum states on page 4 that one of the issues negotiated relates to "Guam Education Development Partners, Developer's Subcontractor, is required to provide a Performance Bond." While the RFP requires all subcontractors to be bondable, Sections 4.1 and 4.2.1.5 of the RFP as modified by Addendum 6 at 5 (replacing the word "Offeror" with "Awardee") contain a contractual requirement that the Awardee must be bondable and that either the *Awardee* or its *Prime Contractor* must provide a 100% performance and payment bond. If the Negotiation Committee modified the bonding requirements of the RFP in any manner, such modification would be a post-ranking modification and is not allowed under the RFP or the Guam Procurement Law.

At this time, Core Tech is not aware of GEFF's contractor's ability to procure bonding for this project. Section 5.2 of the RFP requires the contractor to submit evidence of "Financial Resources". *See*, RFP §5.2(l) at 38. To meet this requirement, the contractor must provide a "financial resources report ... dated not more than six (6) months prior to bid opening... prepared by a certified accountant" evidencing the contractor's "Bonding Capability." If the Negotiation Team agreed to modify the RFP bonding requirements and allowed GEFF's or its contractor to submit a performance bond through its subcontractor because GEFF or the contractor did not or were unable for any reason to obtain the performance and/or payment bond, then it would not have been able to the Bonding requirements under §5.2(l). GEFF's proposal was non-responsive and should have been rejected.

5. **The Involvement of FOL Guam, LLC and E.C. Development Is a Conflict or a Potential Conflict Which Had to be Disclosed.**

The Memorandum states at page 4 that Guam Education Development Partners ("GEDP") is the Developer's Subcontractor, and is involved in this RFP. Based on the Articles of Organization of GEDP, the company is owned by two members, namely Cooper Ridge Partners (60% interest) and FOL Guam, LLC (40% interest). FOL Guam, LLC is a Guam limited liability company managed by EC Development Group, LLC, and owned by E.C. Development Group, LLC (80% interest) and Pacific X-Treme Combat, LLC (20% interest). Eduardo ("Champ") Calvo and the Calvo family have direct or indirect interest in this RFP. Section 6.5 of the RFP states that the Proposal "shall ... indicate any current or historical engagement or relationships with any public or private party that could potentially create a conflict of interest with GEDA, the Government of Guam, DPW, DoE, or any of the government's agencies or instrumentalities." *See*, RFP at 43. If any contracts, including but not limited to insurance contracts, developer or profit sharing agreements, and supply or service contracts, involve FOL Guam, LLC, Eduardo "Champ" Calvo, and Eddie Calvo, the Governor of Guam (if he holds a direct or indirect interest in any of the Calvo businesses), then such relationships are either conflicts or a potential conflicts which were required be disclosed.

Given the violations of Guam Procurement Law, if the contract has not yet been awarded, the proposed award to GEFF should be cancelled. *See* 5 GCA § 5451(a). If the contract has been awarded to GEFF, it should be terminated under 5 GCA § 5452(a).

Core Tech expressly reserves the right to supplement this protest as additional facts are discovered. Please do not hesitate to contact me at 671-472-8868 if you have further questions or comments.

Sincerely,

Joyce C.H. Tang

Attachments – Exhibits 1 - 4

TAB 5

EXHIBIT E

June 8, 2016 – DPW's Denial of Protest

The Honorable
EDDIE BAZA CALVO
Governor

The Honorable
RAY S. TENORIO
Lieutenant Governor

COPY

public works
DIPATTAMENTON CHE'CHO' PUPBLEKO
GLENN LEON GUERRERO
Director
FELIX C. BENAVENTE
Deputy Director

June 8, 2016

Core Tech
RECEIVED 6/8/16 4:15 pm
Proc file

Mr. Ho Sang Eun
Core Tech International Corp.
388 South Marine Corps. Drive, Suite 400
Tamuning, Guam 96931

Re: 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")

Response to Protest of Intent to Award Contract for Project No. 730-5-1055-L-YIG to Guam Educational Facilities Foundation, Inc.

Mr. Eun,

This serves to respond to Core Tech International Corp.'s ("Core Tech") May 27, 2016 letter protesting the above referenced Intent to Award Contract for Project No. 730-5-1055-L-YIG to Guam Educational Facilities Foundation, Inc. ("GEFF"). To rectify the alleged violation, Protestor claims that any award of contract would be invalid and that the government should revise the RFP and resolicit the project. For the reasons stated herein DPW's Contracting Officer (i.e., in this case DPW Deputy Director Felix C. Benavente) has determined that Protestor's written protest is without merit and is therefore denied.

GEFF was the highest ranked contractor. The selection of GEFF was proper and is not subject to challenge. GEFF was selected for a variety of reasons including the fact that its team is comprised of award winning national firms with specialized expertise and experience in constructing schools. The selection committee, pursuant to 5 G.C.A. § 58E103, determined that GEFF "delivered the best value for Guam in meeting the objectives of the education agency". Price was not included in the evaluation criteria. See RFP § 5.3. See also, government's response to Core Tech's question number 5 in Addendum No. 6.

The second phase of the procurement provided for the Negotiating Committee, comprised of the Guam Department of Education's ("GDOE") Superintendent, Jon Fernandez, the Guam Economic Development Authority's ("GEDA") Deputy Director, Mana Silva Taijeron, and the aforementioned DPW's Deputy Director Felix C. Benavente, to enter negotiations with the highest ranked contractor. The intent of the enabling legislation is clear and unequivocal. Section 2.0 (INTENT) states in pertinent part as follows:

"Once a firm is selected, a scope of work and fee estimate will be negotiated to

The Honorable
EDDIE BAZA CALVO
Governor

The Honorable
RAY S. TENORIO
Lieutenant Governor

public works
DIPATTAMENTON CHE'CHO' PUPBLEKO
GLENN LEON GUERRERO
Director
FELIX C. BENAVENTE
Deputy Director
TN16-1036

June 8, 2016

Mr. Ho Sang Eun
Core Tech International Corp.
388 South Marine Corps. Drive, Suite 400
Tamuning, Guam 96931

Re: 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")

Response to Protest of Intent to Award Contract for Project No. 730-5-1055-L-YIG to Guam Educational Facilities Foundation, Inc.

Mr. Eun,

This serves to respond to Core Tech International Corp.'s ("Core Tech") May 27, 2016 letter protesting the above referenced Intent to Award Contract for Project No. 730-5-1055-L-YIG to Guam Educational Facilities Foundation, Inc. ("GEFF"). To rectify the alleged violation, Protestor claims that any award of contract would be invalid and that the government should revise the RFP and resolicit the project. For the reasons stated herein DPW's Contracting Officer (i.e., in this case DPW Deputy Director Felix C. Benavente) has determined that Protestor's written protest is without merit and is therefore denied.

GEFF was the highest ranked contractor. The selection of GEFF was proper and is not subject to challenge. GEFF was selected for a variety of reasons including the fact that its team is comprised of award winning national firms with specialized expertise and experience in constructing schools. The selection committee, pursuant to 5 G.C.A. § 58E103, determined that GEFF "delivered the best value for Guam in meeting the objectives of the education agency". Price was not included in the evaluation criteria. See RFP § 5.3. See also, government's response to Core Tech's question number 5 in Addendum No. 6.

The second phase of the procurement provided for the Negotiating Committee, comprised of the Guam Department of Education's ("GDOE") Superintendent, Jon Fernandez, the Guam Economic Development Authority's ("GEDA") Deputy Director, Mana Silva Taijeron, and the aforementioned DPW's Deputy Director Felix C. Benavente, to enter negotiations with the highest ranked contractor. The intent of the enabling legislation is clear and unequivocal. Section 2.0 (INTENT) states in pertinent part as follows:

"Once a firm is selected, a scope of work and fee estimate will be negotiated to

perform the required services for Simon Sanchez High School."

The Guam Legislature authorized the Negotiation Committee to negotiate a "scope of work" and "fee estimate" for Simon Sanchez High School with the highest ranking contractor. See, RFP Section 2. See also, Addendum No. 6. As PL 32-120 and PL 32-121 provided special procedures for this particular procurement Core Tech's protest claiming that DPW violated 2 GAR § 3114 and the Procurement Code is without merit. The governing legislation specifically authorized the Negotiating Committee to negotiate with highest ranked contractor, GEFF. Further, as noted above, the negotiations were to encompass both the scope of work and fee estimate. The four (4) GEFF submittals were a direct result of discussions with, and requests by, the Negotiating Committee. The Negotiating Committee, in evaluating what was the best value for Guam and the GDOE, explored any number of items with respect to the scope of work and cost for constructing Simon Sanchez High School. The proposals were a mechanism the Negotiating Committee utilized to educate itself on construction costs. For example, GEFF's low proposal was in response to the Negotiating Committee's interest in seeing what could be constructed for a "set cost". Similarly, GEFF was also requested to show what the cost would be if Simon Sanchez High School were constructed with all the "bells and whistles". There was no expectation that the low set cost proposal or bells and whistles proposal would meet the needs of the GDOE. The committee nonetheless, as part of the negotiation process, asked for the proposals as part of the negotiation process in order to assist it in obtaining the best value for GDOE and Guam.

DPW and the Negotiating Committee considers GEFF's submittals to be part of the parties' negotiations, which were specifically authorized by the Legislature. DPW, the Negotiating Committee and a number of supporting staff members are all able to testify concerning the negotiations, if needed.

Along the same line Core Tech objects that it was not asked or given an opportunity to submit additional proposals, etc., and that such violated Guam Procurement Law and the RFP. Again, this is not correct. A review of PL 32-120 and PL 32-121 make it clear that the Negotiating Committee was directed to select a single contractor to negotiate with. 5 G.C.A. § 58D105 states in pertinent part: "The choice of a contractor *shall* be made by a selection committee". Emphasis in the original. The section states further on: "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 the original. Once GEFF was selected that was the only contractor the Negotiating Committee was directed to negotiate with. There are numerous other sections that could be sited however suffice it to say that the RFP clearly contemplated that the Negotiating Committee would negotiate with only one contractor.

Core Tech also asserts that Notice of Intent to Award Contract should be cancelled because the RFP and *Ma Kahat Act of 2013* required a proposal and contract inclusive of thirty-six (36) schools and GEFF's proposal only includes thirty-five (35). Similar to some of Core Tech's other objections DPW questions if this objection is made in good faith or is intended to interfere with or delay the procurement process. DPW considers this to be a frivolous complaint. In any event, while GEFF and the Negotiating Committee could have recited the number of schools listed in the RFP the fact is GDOE notified the other committee members and GEFF that

the correct number of schools was thirty-five (35). This complaint is not a valid basis for a protest.

As noted in the governing legislation (and noted above) the Negotiating Committee was specifically authorized to negotiate the scope of work. To claim that the committee was limited to GEFF's original proposal is nonsensical. Exhibit A of the RFP is entitled "SIMON SANCHEZ HIGH SCHOOL CONSIDERATIONS". It was not entitled requirements as both the governing legislation and the RFP contemplated that the scope of work was subject to negotiation.

Following GEFF's selection the parties conducted more detailed discussions, walk through of both Okkodo High School and Simon Sanchez High School (with Principal Carla Dulay Masnayon) and other work. GEFF also interviewed teachers at Simon Sanchez High School. Based on the additional information and GDOE's desire to receive the best value it slightly revised the scope of work. For example, GDOE decided that it was more desirable to have co-sharing of science labs with two (2) classrooms to establish a cohesive learning experience between classes. This resulted in a cost saving by reducing the number of classrooms by one while adding four (4) new science labs. Similarly, the seating capacity of the auditorium (an expensive item) was based on GDOE balancing its size, the cost of construction and the projected use. These types of minor adjustments were proper, provided GDOE and Guam the best value and were fully within the contemplation of the governing legislation and RFP.

Core Tech's fourth objection concerns bonds. No bond is due at this time. 5 G.C.A. § 58D112 clearly states that the bonds are due at the time GDOE and contractor "enter into a binding construction contract to renovate or construct a new Simon Sanchez High School in accordance with the Guam Building Code (21 G.C.A. Ch. 67), and any other applicable requirements." See also, § 58E105 and Answer No. 4 to Core Tech's questions in Addendum No. 6. DPW also does not believe Core Tech's objection to a contractual provision to be grounds for a protest of the RFP. No construction contract has been signed at this time. Accordingly, Core Tech's objection is moot and without merit.

Protests should be based on facts and not speculation. Core Tech's final objection presents an unsubstantiated speculation of possible conflicts of interest. This objection is unsubstantiated by fact and is without merit.

In closing, the Negotiating Committee decision to award GEFF the IDIQ contract is in full compliance with P.L. 32-120 and PL 32-121. What Core Tech alleges to be modifications of the RFP were in fact a direct result of the parties' negotiations, nothing more and nothing less. Negotiations as to the scope of services and proposed cost were specifically authorized by law. The governing legislation directed the government to negotiate with the contractor that delivered the best value for Guam in meeting the objectives of the educational agency. This is what the Negotiating Committee did in awarding the Notice of Intent to Award Contract to GEFF. It is my determination that Core Tech's protest is denied.