



OFFICE OF THE PUBLIC AUDITOR  
Doris Flores Brooks, CPA, CGFM  
Public Auditor

## PROCUREMENT APPEALS

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7 IN THE APPEAL OF,

8 GUAM EDUCATION FINANCING

9 FOUNDATION, INC.,

10 Appellant

} **APPEAL NO: OPA-PA-09-007**

} **DECISION AND ORDER RE  
PURCHASING AGENCY'S MOTION  
FOR CONFIRMATION OF  
SUBSTANTIAL INTEREST**

11  
12 To: **Purchasing Agency:**

13 Department of Public Works, Government of Guam  
14 C/O Benjamin M. Abrams, Esq., Assistant Attorney General  
15 Civil Division, Office of the Attorney General  
16 287 West O'Brian Drive  
Hagåtña, Guam 96910  
Facsimile: (671) 472-2493

17 **Appellant:**

18 Guam Education Financing Foundation, Inc.  
19 Mr. John R. Hand, President  
20 3060 Peachtree Road, Suite 1700  
Hagåtña, Guam 96910  
Facsimile: (404) 504-2790

21 **Interested Party:**

22 International Bridge Corporation  
23 C/O Joyce C.H. Tang, Esq.  
24 Civile & Tang, PLLC  
25 330 Hernan Cortez Ave., Suite 200  
Hagåtña, Guam 96910  
Facsimile: (671) 477-2511

26 **THIS MATTER** came before the Office Public Accountability on October 23, 2009  
27 pursuant to Purchasing Agency's Motion for Confirmation of Substantial Interest. The  
28 Appellant appeared *Pro Se* through the appearances of its board member Mr. Philip J. Flores and

Decision and Order Re Motion for Confirmation of Substantial Interest- 1

1 its secretary Mr. Michael Alvarez. The Purchasing Agency was represented by Assistant  
2 Attorney General Benjamin M. Abrams, Esq. Interested Party International Bridge Corporation  
3 (Hereafter referred to as "IBC") was represented by its Counsel of Record, Joyce C.H. Tang,  
4 Esq. After hearing the arguments of the parties, the Public Auditor hereby issues her Decision  
5 and Order on said Motion for Confirmation of Substantial Interest.  
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### 7 8 **BACKGROUND**

9  
10 On June 9, 2008, John F. Kennedy High School (Hereafter referred to as "JFK") was  
11 closed by a Government of Guam Health and Safety Task Force (Hereafter referred to as "Task  
12 Force"). On November 21, 2008, the Government of Guam's Department of Public Works  
13 (Hereafter referred to as "DPW) issued Request for Proposal for Project No. 700-5-1020-L-TAM  
14 (Construction of the New John F. Kennedy High School - Finance, Demolition, Design, Build,  
15 Maintain, and Leaseback (FDDBML) Part I and Part II (Hereafter referred to as "RFP"). In a  
16 letter dated January 16, 2009 which was signed by DPW Director Lawrence P. Perez on March  
17 4, 2009, DPW selected IBC as the best ranking qualified Offeror for the RFP. On August 13,  
18 2009, the Appellant lodged a protest with DPW. On September 8, 2009 DPW denied the  
19 Appellant's protest. On September 18, 2009, the Appellant filed this appeal. On October 5,  
20 2009, DPW filed its Declaration of Substantial Interest. On October 15, 2009, the Appellant  
21 filed its opposition to DPW's Declaration of Substantial Interest. On October 21, 2009, DPW  
22 filed its reply to the Appellant's Opposition. The Public Auditor heard DPW's Motion for the  
23 Public Auditor to Confirm DPW's Declaration of Substantial Interest on October 23, 2009.  
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1 **FINDINGS OF FACT**

2 Based on the evidence presented by the parties, the Public Auditor makes the following  
3 findings of fact:

4 1. JFK was closed on June 9, 2008 by the Task Force because it was in the poorest  
5 condition of all of the Department of Education’s (Hereafter referred to as “DOE”) schools due  
6 to years of neglect caused by lack of funding to maintain and repair it.<sup>1</sup>  
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8 2. After JFK’s closure, DOE chose to keep the 2,300 JFK students together rather than  
9 transfer them to DOE’s five remaining high schools.<sup>2</sup>  
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11 3. DOE sent the JFK students to GW in split or double sessions with GW’s students for  
12 the 2008-2009 school year.<sup>3</sup>

13 4. The split or double sessions at GW caused the JFK students to: (1) Lose  
14 approximately 30 minutes of instruction time per day; (2) Incur disruptions in their athletic and  
15 physical education programs due to a lack of practice and teaching space, and lack of  
16 transportation to off-campus practice areas.<sup>4</sup>  
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21 <sup>1</sup> Guam Education Policy Board Resolution No. 2009-09 Relative to Re-Building  
22 John F. Kennedy High School, Exhibit D, DPW’s Declaration of Substantial  
23 Interest dated October 5, 2009.

24 <sup>2</sup> Id. Note: The five high schools mentioned in this paragraph include the  
25 new Okudo High School.

26 <sup>3</sup> Id.

27 <sup>4</sup> August 13, 2009 Letter of Substantial Government Interest from Gayle F.  
28 Hendricks, Exhibit C, DPW’s Declaration of Substantial Interest dated October  
5, 2009.

1           5. From April 20-21, 2009, JFK was inspected by the Western Association of Schools  
2 and Colleges (WASC) and received WASC accreditation while JFK students were attending  
3 double sessions at GW. This WASC accreditation will continue for two years. However, JFK is  
4 subject to a WASC revisit during this period.<sup>5</sup>

6           6. WASC recommended that DPW, the JFK High School Task Force, and all  
7 stakeholders need to continue to advocate for the new JFK High School to be completed as soon  
8 as possible and that JFK's teachers need to continue being creative and resourceful to meet  
9 student educational needs while temporarily located at an alternative school site.<sup>6</sup>

10           7. To end the split or double sessions at GW, the Government of Guam, through the  
11 Office of the Governor, issued IFB-GSA-025-09 for the Lease and Maintenance of Interim  
12 Facilities for John F. Kennedy High School and Collateral Equipment which was awarded to  
13 Core Tech International (Hereafter Referred to as "Core-Tech"). A contract was finalized  
14 between the Governor's Office and Core-Tech on June 25, 2009 for the Interim-JFK Campus  
15 located at Tiyan.<sup>7</sup>

16           8. DOE moved 2,300 JFK students from GW to the Interim-JFK Campus for the 2009-  
17 2010 school year.<sup>8</sup>

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21           <sup>5</sup> August 13, 2009 Letter of Substantial Government Interest from Gayle F.  
22 Hendricks, Exhibit C, DPW's Declaration of Substantial Interest dated October  
23 5, 2009.

24           <sup>6</sup> Id.

25           <sup>7</sup> Lease Agreement with Option to Purchase, the Appellant's Exhibit 9 dated  
26 October 16, 2009.

27           <sup>8</sup> Guam Education Policy Board Resolution No. 2009-09, Exhibit D, DPW's  
28 Declaration of Substantial Interest dated October 5, 2009.

1 9. Construction of the new JFK campus must be completed nine months after the  
2 contract is awarded.<sup>9</sup>

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4 10. This appeal was filed on September 18, 2009. The Pre-Conference Hearing in this  
5 matter was held on November 9, 2009, and the Hearing on the Merits of this appeal will be held  
6 on December 7, 2009. Further, the Public Auditor is required to issue her written decision within  
7 30 days of the Hearing on the Merits. 2 G.A.R. Div. 4, Chap. 12, §12110(a). Thus, the total  
8 delay to the project, caused by this appeal, will be approximately three months.  
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## 10 ANALYSIS

### 11 Standard of Review

12  
13 As a preliminary matter, the Public Auditor must determine the appropriate standard of  
14 review to decide the DPW's Motion to Confirm Substantial Interest. DPW and IBC argue that  
15 the OPA's standard of review should be limited to whether the DPW's Declaration of Substantial  
16 Interest has a rational basis and is not arbitrary, and that the Public Auditor should accord  
17 considerable weight to DPW's decision as set forth in the rulings *Pacific Data Systems, Inc., v.*  
18 *Superior Court of Guam*, Civ. No. 90-00029, page 2, (1990 WL 320357) (D.Guam A.D.,  
19 October 24, 1990), and *Pedco Incorporated v. Guam Power Authority and Raymond Camacho*,  
20 CV1536-94, Decision and Order dated December 12, 1994, page 3, line 9 (Superior Court of  
21 Guam). The Public Auditor finds that the ruling in those cases does not apply. The Public  
22 Auditor's statutory authority to confirm a Purchasing Agency's Declaration of Substantial  
23 Interest mandates that the Public Auditor conduct such reviews *de novo*. 5 G.C.A. §5425(g)(3)  
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28 <sup>9</sup> Paragraph 3, August 24, 2009 Letter from Eunice Aflague, Exhibit E, DPW's  
Declaration of Substantial Interest dated October 5, 2009.

1 and §5703. Thus, the Public Auditor shall review DPW's Declaration of Substantial Interest *de*  
2 *novo* to determine whether the Public Auditor should confirm it.

### 3 4 5 **Substantial Interest**

6 DPW moves that the Public Auditor Confirm its Declaration of Substantial Interest. The  
7 threshold issue concerning this matter is whether DPW has standing to make this motion on  
8 appeal. *Guam Imaging Consultants, Inc., and RADS, v. Guam Memorial Hospital Authority and*  
9 *Guam Radiology Consultants, Inc.*, 2004 Guam 15, ¶16-17 (Supreme Court of Guam).

10  
11 Generally, the filing of a protest should halt the procurement until the controversy is resolved. 5  
12 G.C.A. §5425(g) and 2 G.A.R., Div. 4, Chap. 9, §9101(e). However, in order to allow essential  
13 government functions to continue, the Purchasing Agency may proceed with the solicitation or  
14 award of the contract, despite the protest, if the Chief Procurement Officer or the Director of  
15 Public Works, after consultation with and written concurrence of the head of the using or  
16 purchasing agency and the Attorney General or Designated Deputy Attorney General, makes a  
17 written determination that the award of the contract without delay is necessary to protect the  
18 substantial interests of the Government of Guam. 5 G.C.A. §5425(g)(1) and 2 G.A.R., Div. 4,  
19 Chap. 9, §9101(e)(1). Further, if the protest is pending before the Public Auditor, any action  
20 continuing the solicitation or award of the contract is void unless the Public Auditor confirms the  
21 Chief Procurement Officer's or the Director of Public Works' written determination that the  
22 award of the contract without delay is necessary to protect the substantial interests of the  
23 Government of Guam. 5 G.C.A. §5425(g)(3). Here, DPW has made such a written  
24 determination during this appeal before the Public Auditor. Thus, the Public Auditor finds that  
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1 DPW has standing to move the Public Auditor to confirm DPW's Declaration of Substantial  
2 Interest.

3 The Public Auditor must now determine whether the substantial interest claimed by DPW  
4 meets the statutory requirements to justify the award of the contract to the Interested Party IBC  
5 without delay. A determination that the substantial interest is merely involved is not sufficient.  
6 *Carl Corporation v. State Department of Education et.al.*, 946 P.2d 1, 22 (Hawaii, 1997).  
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8 Instead, a substantial interest determination must specifically identify the government interest,  
9 and articulate why it is necessary to protect those interests, and the contract be awarded without  
10 delay. *Id.* at 24. Further, the Purchasing Agency must sufficiently establish necessity to avoid  
11 the automatic stay of actions continuing the solicitation or award of the contract. *Guam Imaging*  
12 *Consultants, Inc., and RADS, v. Guam Memorial Hospital Authority and Guam Radiology*  
13 *Consultants, Inc.*, 2004 Guam 15, ¶16 and ¶41 (Supreme Court of Guam). Here, the Purchasing  
14 Agency is DPW, the Director of Public Works signed the written determination of substantial  
15 interest and the Attorney General of Guam concurred with it. Thus, the Public Auditor finds that  
16 the written determination has the statutorily required approvals.  
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18 The Public Auditor will now review DPW's alleged government interests and determine  
19 whether they sufficiently establish necessity to avoid the automatic stay. DPW identified the  
20 following substantial interests of the Government of Guam: (1) Delay in the re-construction of  
21 JFK; (2) Legal mandates requiring the Government of Guam to provide an adequate public  
22 education; (3) Legal mandates requiring the timely re-construction of JFK; (4) Hardship  
23 caused by double sessions at GW; (5) Disruption of phases of JFK's education program; (6)  
24 Inadequacy of the temporary JFK campus located at Tiyan; (7) Possible increases in financing  
25 costs or the ability to obtain financing for the JFK re-construction; (8) Possible damage to the  
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1 Government of Guam's relationship with investors; (9) Possible price increases in labor and  
2 materials and possible labor shortages. The Public Auditor will now review each of these  
3 reasons *de novo*.  
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6 **This Appeal will cause a Minimal Delay.**

7 DPW and IBC argue that avoiding significant delay completing the JFK re-construction  
8 project justifies avoiding the automatic stay.<sup>10</sup> The Appellant argues that it has taken DPW  
9 seven to eight months to negotiate the contract with IBC and that spending a couple of weeks to  
10 verify the procurement process is worth the delay.<sup>11</sup> As stated above, this appeal will take  
11 approximately three months, and the Public Auditor will not speculate on whether any party in  
12 this matter will appeal her decision to the Superior Court of Guam, or how long such an appeal  
13 will take. This three-month delay, by itself, may not prevent the project from being completed  
14 on time for the 2010-2011 school year. As stated above, the Offeror awarded the contract must  
15 complete the construction of the new JFK within nine months of the contract award. Thus, if the  
16 project is awarded in December 2009, it could be completed by September 2010. Further, as  
17 stated above, if the project is not completed, by the 2010-2011 school year, DOE could continue  
18 to use the interim JFK campus at Tiyan or temporarily transfer the JFK students to DOE's other  
19 high schools until the project is completed. Thus, the Public Auditor finds that the delay caused  
20 by this appeal is minimal and does not sufficiently justify award of the contract without delay.  
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25 <sup>10</sup> Id., and the August 14, 2009 Letter of Substantial Interest of the  
26 Territory from Ramon B. Padua, P.E., Chief Engineer, Exhibit G, DPW's  
27 Declaration of Substantial Interest dated October 5, 2009.

28 <sup>11</sup> Page 3, Appellant's Statement for Hearing dated October 23, 2009.



1                                   **Legal Mandates Requiring the Government of Guam**  
2                                   **to Provide an Adequate Public Education do not justify**  
3                                   **award of the contract without delay.**

4                   DPW and IBC argue that legal mandates requiring the Government of Guam to provide  
5 adequate public education and to establish, maintain, and operate public schools in healthy, safe,  
6 and sanitary learning environments constitute substantial interests that justify award of the  
7 contract without delay.<sup>12</sup> There is a statutory basis for DPW’s argument. The Government of  
8 Guam shall provide an adequate public educational system of Guam, and to that end shall  
9 establish, maintain and operate public schools according to the laws of Guam. The Organic Act  
10 of Guam, 48 U.S.C.. §1421g(b). Further, the term “adequate public education” means, in  
11 relevant part, that public schools provide a healthful, safe, and sanitary learning environment. 1  
12 G.C.A. §715(12)(l). This mandate clearly articulates the government’s interest of maintaining  
13 and operating healthy, safe, and sanitary schools to provide an adequate public education to the  
14 children of Guam. These broad and general mandates justify the closure of JFK and its re-  
15 construction to resolve the longstanding health, safety, and sanitary concerns that plagued JFK  
16 prior to its closure. However, JFK is merely one of several high schools on Guam operated by  
17 DOE, and JFK’s closure on June 9, 2008, has not prevented DOE from continuing to operate the  
18 remaining high schools on Guam, including the interim JFK campus at Tiyan. The closure of  
19 JFK during its re-construction has a minimal effect on the Government of Guam’s ability to  
20 provide an adequate public education. Thus, the Public Auditor finds that the legal mandates  
21 requiring an adequate public education do not sufficiently establish necessity to award the  
22 contract without delay.  
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27 <sup>12</sup> DPW’s Declaration of Substantial Interest dated October 5, 2009, paragraphs  
28 1 and 2, page 2.

1                   **Legal mandates requiring the timely re-construction of JFK do not**  
2                   **justify award of the contract without delay.**

3                   DPW and IBC argue that legal mandates requiring the timely re-construction of JFK  
4 justify award the contract without delay.<sup>13</sup> The Appellant argues that despite these legal  
5 mandates, there was a seven to eight-month delay to negotiate the contract with IBC.<sup>14</sup> There are  
6 legal mandates requiring the re-construction of JFK. The Guam Legislature found that due to a  
7 critical shortage of public school facilities on Guam. Guam needs at least three new public  
8 schools. 5 G.C.A. §58A102. The Guam Legislature also found an immediate need to build a  
9 modern school facility on the existing JFK site, and that the request for proposal for the  
10 replacement of JFK must be issued within 30 days of October 10, 2008, and that the RFP shall  
11 require that occupancy of the new JFK facility take place no later than nine months after  
12 execution of the contract. 5 G.C.A. §58A105. These short timelines resulted in the Governor of  
13 Guam expressing serious concerns. First, the 30 day deadline to issue the RFP put the  
14 government at a great disadvantage and may have exposed the government to a very costly  
15 construction project. Second, the requirement to occupy the JFK facility within nine months  
16 after award might compromise the structural integrity of the new facility causing greater harm  
17 from quick and poor construction.<sup>15</sup> The Public Auditor finds that these are valid concerns and  
18 that the short time-lines to issue the RFP and re-construct JFK made the RFP an unnecessarily  
19 difficult, risky, and possibly more expensive project. Notwithstanding these concerns, DPW  
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24 <sup>13</sup> DPW's Declaration of Substantial Interest dated October 5, 2009, paragraphs  
25 3, 4, and 5, page 2.

26 <sup>14</sup> The Appellant's Statement for Hearing dated October 23, 2009, paragraph 3,  
27 4, and 5, page 2 and 3.

28 <sup>15</sup> October 20, 2008 letter from the Governor of Guam, P.L. 29-114.

1 proceeded with issuing the RFP and selection a best qualified offeror. The Public Auditor finds  
2 that DPW was not timely and caused delays. The RFP was issued 12 days late on November 21,  
3 2008. There was an unexplained delay of one month and 16 days between the date the  
4 evaluation committee selected the best qualified Offeror on January 16, 2009, and the date  
5 DPW's Director signed and approved the selection letter on March 4, 2009.<sup>16</sup> Further, DPW  
6 engaged in a prolonged negotiation period with the best qualified Offeror that lasted five months.  
7 If DPW truly believed that there were substantial interests in complying with the short timelines,  
8 DPW would have issued the RFP on time and would not have engaged in prolonged  
9 negotiations. Thus, the Public Auditor finds that compliance with the legal mandates requiring  
10 timelines for the issuance of the RFP and the completion of the new JFK campus after the  
11 contact is awarded do not sufficiently establish the necessity to award the contract without delay.  
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16 **Hardship caused by Double Sessions at GW during the  
17 Past School Year do not justify award of the contract without delay.**

18 DPW and IBC argue that the hardship endured by students and the educational  
19 community caused by split or double sessions between JFK and GW students at the GW campus  
20 during the 2008-2009 school year justify award of the contract without delay.<sup>17</sup> The Appellant  
21 argues that such hardship has passed because the JFK students have been moved to the interim  
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25 <sup>16</sup> Letter from Lawrence P. Perez dated January 16, 2009 Re Selection of Best  
26 Qualified Offeror, Procurement Record.

27 <sup>17</sup> DPW's Declaration of Substantial Interest dated October 5, 2009, paragraphs  
28 6 and 7, page 3.

1 JFK campus in Tiyan.<sup>18</sup> As stated above, the JFK students did endure hardship while at GW in  
2 the form of: (1) Lost approximately 30 minutes of instruction time per day; (2) Incurred  
3 disruptions in their athletic and physical education programs due to a lack of practice and  
4 teaching space, and lack of transportation to off-campus practice areas. However, despite these  
5 hardships, WASC did accredit JFK for the next two years. Further, the Public Auditor finds that  
6 such hardship was caused, in large part, to DOE's decision to keep the 2,300 JFK students  
7 together instead of transferring them to other DOE high schools to avoid double-sessions at GW.  
8 Also, the Public Auditor finds that any hardship resulting from the double sessions at GW has  
9 passed since JFK students are now attending the interim JFK campus at Tiyan. Thus, the Public  
10 Auditor finds that the hardships resulting from the GW double sessions for the 2008-2009 school  
11 year do not sufficiently establish necessity to award the contract without delay.  
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16 **Any Disruption of JFK's Education Program was caused by**  
17 **DOE and does not justify award of the contract without delay.**

18 DPW and IBC argue that the disruption of all phases of JFK's education program from  
19 August 2008 to the present justifies award of the contract without delay.<sup>19</sup> The evidence in this  
20 matter indicates that JFK is currently accredited, the JFK students are no longer enduring split or  
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25 <sup>18</sup> The Appellant's Response Re DPW's Declaration of Substantial Interest dated  
26 October 5, 2009, paragraph 3, page 4.

27 <sup>19</sup> DPW's Declaration of Substantial Interest dated October 5, 2009, paragraphs  
28 6 and 7, page 3.

1 double sessions, and that said students are attending school at the interim JFK campus in Tiyan.<sup>20</sup>  
2 Further, the only evidence of current disruption to the education program is that the JFK students  
3 do not have adequate Chemistry labs and Physics classrooms at the interim JFK campus in  
4 Tiyan.<sup>21</sup> Thus, the Public Auditor finds that the alleged disruptions to JFK's education program  
5 do not sufficiently establish the necessity to award the contract without delay because not all of  
6 JFK's education program phases were disrupted. Any existing disruption is caused by DOE's  
7 decision to keep the JFK students together rather than transfer them to DOE's other high school  
8 facilities and not due to the delays in the solicitation or award of the contract in this matter.  
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12 **Inadequacy of the Temporary JFK Campus located at Tiyan**  
13 **does not justify award of the contract without delay.**

14 DPW and IBC argue that the inadequacy of the interim JFK campus at Tiyan justifies  
15 award of the contract without delay.<sup>22</sup> The interim JFK campus at Tiyan is DOE's second  
16 attempt to keep the JFK students together after JFK's closure and is an integral part of DOE's  
17 plan to return them to a re-constructed JFK. Due to a finding that the double sessions at GW  
18 were not a conducive learning environment, DOE's plan is to house the JFK students at the  
19 interim JFK campus at Tiyan for the 2009-2010 school year and return them to a re-constructed  
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23 <sup>20</sup> Letter from Gayle F. Hendricks dated August 13, 2009 and Guam Education  
24 Policy Board Resolution Number 2009-09, Exhibits C and D respectively,  
25 attached to DPW's Declaration of Substantial Interest dated October 5, 2009.

26 <sup>21</sup> Testimony of Dana Figirliyong and Testimony of Colette Beausoliel.

27 <sup>22</sup> DPW's Declaration of Substantial Interest dated October 5, 2009, paragraph  
28 8, page 3.

1 JFK for the 2010-2011 school year.<sup>23</sup> However, there are many allegations that the interim JFK  
2 campus at Tiyan is an inadequate facility for a high school.

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4 First, there are allegations that the interim JFK campus at Tiyan is environmentally  
5 unsafe due to Chlordane soil contamination caused by its prior use as a military facility.<sup>24</sup> This  
6 allegation has no merit. The Public Auditor takes judicial notice of the testimony of Mr. Joshua  
7 Tenorio who testified during the hearing on DPW's Motion to Confirm Substantial Interest *In the*  
8 *Appeal Of Guam Community Improvement Foundation, Inc.*, OPA-PA-09-005. In that matter,  
9 which concerns a protest, filed concerning the same RFP in this matter, Mr. Tenorio testified that  
10 he is employed by Core-Tech International, the Government of Guam's Landlord for the Interim  
11 JFK campus at Tiyan. Tenorio testified that the issue of chemical contamination at the Interim  
12 JFK campus in Tiyan has been resolved by encapsulating soil areas surrounding the buildings  
13 prior to the interim JFK campus being opened for the 2009-2010 school year.<sup>25</sup> Second, there  
14 are allegations that the Chemistry labs and Physics classrooms at the interim JFK campus are  
15 inadequate because they are small and the Physics classrooms lack computer equipment and  
16 secure storage spaces.<sup>26</sup> However, the Interim JFK campus at Tiyan does have lab rooms and  
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21 <sup>23</sup> The Guam Education Policy Board Resolution No. 2009-09 dated August 7,  
22 2009, Exhibit D, DPW's Declaration of Substantial Interest dated October 5,  
23 2009.

24 <sup>24</sup> DPW's Declaration of Substantial Interest dated October 5, 2009, paragraph  
25 8, page 3, and the August 13, 2009 Letter of Substantial Government Interest  
26 from Gayle F. Hendricks, Exhibit C, DPW's Declaration of Substantial Interest  
27 dated October 5, 2009.

28 <sup>25</sup> Testimony of Joshua Tenorio in OPA-PA-09-005.

<sup>26</sup> Testimony of Dana Figirliyong and Colette Beausoliel.

1 there is sufficient lab equipment, although much of the equipment must be stored at the old JFK  
2 campus site.<sup>27</sup> Further, although the Physics classrooms are small, there is sufficient equipment  
3 and at least some computers to teach Physics.<sup>28</sup>  
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5 The interim JFK campus at Tiyan has the same number of air-conditioned classrooms and  
6 a cafeteria that will accommodate the same number of students as the re-constructed JFK will  
7 have.<sup>29</sup> If this space is insufficient for the 2,300 students currently assigned to the interim JFK  
8 campus at Tiyan, or, if DOE truly believes they are not receiving an adequate education due to  
9 the condition of the facilities, DOE still has the option of transferring the JFK students so they  
10 can be absorbed into DOE's other high schools. Thus, the Public Auditor finds that there is no  
11 merit to the alleged inadequacies of the interim JFK campus at Tiyan, and that such allegations  
12 do not sufficiently justify award of the contract without delay.  
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16 **There is no merit to DPW's allegations concerning possible**  
17 **increases in financing costs or difficulty in obtaining financing,**  
18 **possible damage to the Government of Guam's relationship with investors,**  
19 **and possible price increases in and shortages of labor and materials.**  
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21 DPW and IBC allege that award of the contract without delay is justifiable because doing  
22 so avoids: (1) Possible increases in financing costs or the ability to obtain financing for the JFK  
23 re-construction;<sup>30</sup> (2) Possible damage to the Government of Guam's relationship with  
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25 <sup>27</sup> Testimony of Dana Figirlyong.

26 <sup>28</sup> Testimony of Colette Beausoliel.

27 <sup>29</sup> Testimony of Joshua Tenorio in OPA-PA-09-005.

28 <sup>30</sup> DPW's Declaration of Substantial Interest dated October 5, 2009, paragraph  
9, page 3.

1 investors;<sup>31</sup> and (3) Possible price increases and shortages in labor and materials prices due to the  
2 upcoming military build-up.<sup>32</sup> As stated above, DPW must sufficiently establish that these  
3 possibilities create sufficient necessity to avoid the automatic stay of actions continuing the  
4 solicitation or award of the contract. *Guam Imaging Consultants, Inc., and RADS, v. Guam*  
5 *Memorial Hospital Authority and Guam Radiology Consultants, Inc.*, 2004 Guam 15, ¶16 and  
6 ¶41 (Supreme Court of Guam). However, the evidence presented by the DPW has failed to  
7 establish such necessity. IBC took a long period of time to obtain financing. Despite being  
8 selected as the best qualified offeror on January 16, 2009 and Director of DPW's approval of the  
9 notice on March 4, 2009, and despite being responsible to obtain financing for the project, IBC  
10 was just about to complete its efforts to obtain financing on August 5, 2009 when it was stopped  
11 by the Appellant's protest.<sup>33</sup> If DPW truly feared that financing costs were rising, it should have  
12 terminated negotiations with IBC and it should have started negotiations with the next most  
13 qualified offeror. In fact, this eight month delay caused by the delayed notice and the  
14 negotiations between DPW and IBC far exceeds the minimal delay caused by this appeal.  
15 Further, DPW failed to show that the short delay caused by the Appellant's protest and this  
16 appeal has actually resulted in higher investment or borrowing costs. Additionally, if IBC is  
17 unable to obtain financing as required after this appeal is resolved, DPW, pursuant to the RFP

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22 <sup>31</sup> DPW's Declaration of Substantial Interest dated October 5, 2009, paragraph  
23 10, page 3.

24 <sup>32</sup> DPW's Declaration of Substantial Interest dated October 5, 2009, paragraph  
25 11, page 3, and August 14, 2009 Letter from Ramon B. Padua and Dionisio M. De  
26 Leon, Exhibit G, DPW's Declaration of Substantial Interest dated October 5,  
27 2009.

28 <sup>33</sup> DPW's Declaration of Substantial Interest dated October 5, 2009.



1 procedures, must terminate its negotiations with IBC and begin negotiations with the next most  
2 qualified Offeror. Thus, Public Auditor finds that any financing cost increases incurred during  
3 the eight months between the date the best qualified offeror was selected, January 16, 2009, and  
4 the date the Appellant lodged its protest, August 13, 2009, do not constitute a substantial interest  
5 that would justify award of the contract without delay.  
6

7         There is insufficient evidence showing possible damage to the Government of Guam's  
8 relationship to its investors. DPW's fears that investors may have a perception of heightened  
9 risks that Government of Guam securities may not be delivered after their sale due to these  
10 protests and that a delay caused by prolonged protest resolution may result in Guam being  
11 viewed in a negative light by potential investors, developers, and future business partners.<sup>34</sup>  
12 DPW and IBC were not able to produce the name of a single potential investor, developer, or  
13 future business partner that holds this view as a result of this matter. The Public Auditor finds  
14 that it is unlikely the three-month delay caused by this appeal will result in any significant  
15 damage to the Government of Guam's relationship with its investors and this allegation does not  
16 sufficiently justify awarding the contract without delay.  
17

18         Concerning the possibility of price increases and shortages of labor and materials, DPW  
19 failed to present proof of any price increases in labor and materials during the one-month period  
20 this appeal was pending at the time this motion was heard or that there would be less labor  
21 available in the three months it would take to resolve this appeal. Thus, the Public Auditor finds  
22 that these mere allegations do not sufficiently justify awarding the contract without delay.  
23  
24  
25  
26  
27

28  

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<sup>34</sup> Id.

1 **CONCLUSION**

2 Based on the foregoing, DPW's Motion to Confirm Substantial Interest is hereby  
3 DENIED. DPW is hereby reminded that it may not proceed further with the solicitation or  
4 award of contract until this appeal is resolved and that any further such action is void pursuant to  
5 5 G.C.A. §5425(g) and 2 G.A.R., Div. 4, Chap. 9, §9101(e).  
6

7 **SO ORDERED** this 16<sup>th</sup> day of November, 2009 by:

8  
9  
10 

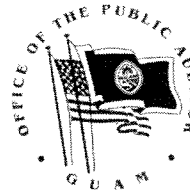
11 

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DORIS FLORES BROOKS, CPA, CGFM  
12 Public Auditor

Suite 401 Pacific News Building  
238 Archbishop Flores St.  
Hagåtña, Guam 96910

Phone: (671) 475-0390  
FAX: (671) 472-7951



OFFICE OF THE PUBLIC AUDITOR

# Fax

**To:** Mr. Benjamin M. Abrams, Assistant AG;  
Mr. John R. Hand, Guam Education  
Financing Foundation, Inc. / Appellant;  
Joyce Tang, Civile and Tang, Interested  
Party (Attorney for IBC)

**From:** Doris Flores Brooks, Public Auditor  
OPA Procurement Appeals

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**Agency:** Office of the Attorney General; Guam  
Education Financing Foundation,  
Inc./Appellant; Civile and Tang

**Pages:** 19 (Including cover)

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**CC:** All Media

**Date:** Monday, November 16, 2009

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**Fax:** 472-2493 / (404) 504-2790 / 477-2511

**Phone:** 475-0390 x 219 (Anne) x 210 (Lou)

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**Re:** OPA-PA-09-007:  
Decision and Order Re Purchasing Agency's Motion for Confirmation of Substantial Interest

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Anne Camacho, x 219, [acamacho@guamopa.org](mailto:acamacho@guamopa.org)

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