

1 Ignacio C. Aguigui, Esq.
2 **THE LAW OFFICES OF**
3 **IGNACIO CRUZ AGUIGUI**
4 A Professional Corporation
5 Suite 310, RK Plaza
6 341 S. Marine Corps Drive
7 Tamuning, Guam 96913
8 Telephone (671) 989-9253/987-9914
9 Facsimile (671) 989-9255
10 General Email: admin@aguigui.com

7 **CALVO FISHER & JACOB LLP**
8 259 Martyr Street, Suite 100
9 Hagåtña, Guam 96910
10 Telephone: (671) 646-9355
11 Facsimile: (671) 646-9403

12 *Attorneys for Interested Party*
13 *Guam Educational Facilities Foundation, Inc.*

RECEIVED
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13 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
14 **PROCUREMENT APPEALS**

16 IN THE APPEAL OF:

18 CORE TECH INTERNATIONAL CORP.,

19 Appellant.

16 APPEAL NO.: OPA-PA-16-007

18 **COMMENTS OF INTERESTED PARTY,**
19 **GUAM EDUCATIONAL FACILITIES**
20 **FOUNDATION, ON DPW'S AGENCY**
21 **REPORT**

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ORIGINAL

1 **GUAM EDUCATIONAL FACILITIES FOUNDATION, INC.** (“GEFF”), an
2 interested party and the offeror selected as the most qualified in the instant procurement, concurs
3 with virtually all of the points contained in the Agency Report filed by the Department of Public
4 Works (“DPW”) on July 11, 2016.

5 GEFF provides herein additional comments and observations, in response to both the
6 Agency Report and the Notice of Appeal (“Appeal”) filed by Core Tech International Inc. (“Core
7 Tech”) on June 23, 2016.

8 Core Tech’s instant appeal is without merit. Accordingly, for the reasons stated herein
9 and in DPW’s Agency Report, the Public Auditor should deny Core Tech’s appeal.

10 **I. THIS APPEAL (AND ANY RELATED PROTESTS) SHOULD BE**
11 **EXPEDITIOUSLY RESOLVED SO AS TO ALLOW THE GOVERNMENT**
12 **TO PROCEED WITH THE AWARD TO GEFF**

13 In line with DPW’s July 8, 2016 Motion for Expeditious Disposition on the Merits, GEFF
14 urges the expeditious resolution of this appeal and any related protests so as to allow the
15 government to proceed with its contract with GEFF. *See* Declaration of Sean K. Easter (“Easter
16 Decl.”) submitted concurrently herewith, ¶ 13. As explained in a July 21, 2016 letter from
17 GEFF’s investment bankers, GEFF’s finance plan for the new Simon Sanchez High School
18 project, if allowed to promptly proceed, will result in approximately \$38 *million* of interest cost
19 savings to the government and people of Guam over the anticipated 30-year lease term. *Id.*, ¶ 13,
20 Exh. 4. However, time is of the essence in order for the government to take advantage of
21 available funding and favorable interest rates by August 31, 2016. Accordingly, GEFF urges that
22 the necessary steps be taken to promptly resolve the instant appeal and any related protests so as
23 to allow the government to enter into the contract with GEFF. *Id.*

24 **II. THERE IS NO MERIT TO CORE TECH’S ALLEGATION THAT GEFF**
25 **IMPROPERLY SUBMITTED “NEW PROPOSALS” DURING THE**
26 **CONTRACT NEGOTIATION PHASE**

27 Citing to the Negotiating Committee’s May 13, 2016 Memorandum (the “Negotiating
28 Committee’s Memo”), Core Tech’s Appeal alleges that DPW violated the law when it allowed
GEFF to submit, during contract negotiations, what Core Tech misleadingly characterizes as
“new proposals.” Nowhere in the Negotiating Committee’s memo is the word “new” used to

1 describe the GEFf proposals. Instead, it was Core Tech’s counsel who unilaterally inserted
2 “new” before the term “separate proposals” when she quoted in her Appeal a sentence from the
3 Negotiating Committee’s Memo. See Appeal at 3, lines 19-21 (“the Negotiating Committee
4 Memo released by DPW states that the Negotiating Committee ‘engaged in numerous meetings
5 and communications during which GEFf submitted four (4) [new] separate proposals’”)
6 (emphasis in original). Core Tech thus tries to make it appear – deceptively – that there were
7 “new” proposals improperly submitted by GEFf, which were intended to supersede GEFf’s
8 November 20, 2015 response to the RFP.¹ Core Tech’s allegation is without merit.

9 During the first phase of the instant procurement, GEFf was selected as the most qualified
10 offeror in response to the RFP.² Core Tech and Pernix were ranked second and third,
11 respectively. Procurement Record, Tab 12; Easter Decl., Exh. 2. The government’s evaluation
12 of the three proposals submitted on November 20, 2015 did *not* consider price or cost as a factor
13 in determining the most qualified offeror. This is consistent with the law. See *In the Appeal of*
14 *Guam Education Financing Foundation, Inc.*, OPA-PA-09-007, Decision at 8-9 (Guam OPA,
15 Jan. 6, 2010) (in the request for proposal method of solicitation, cost is not a factor in
16 determining the best qualified offeror).

17 Moreover, Core Tech acknowledged over six (6) months ago – in January 19, 2016 – that
18 cost was not an evaluation factor in selecting the most qualified offeror. In its first procurement

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20 ¹ The proposal submittal date for all offerors was changed from November 6, 2015 to
21 November 20, 2015 by Addendum 8 to the RFP issued November 3, 2015. See Procurement
Record, Tab 4.

22 ² Because this is a pre-award protest, proposals of offerors are not subject to public
23 inspection. See 2 GAR Div. 4, § 3114 (i)(2) (“the agency conducting the procurement shall not
24 disclose any information contained in any proposals until *after* the award of the proposed contract
25 has been made”) (emphasis added). See also *In the Appeal of Guam Community Improvement*
26 *Foundation, Inc.*, OPA-PA-09-005, Decision at 6 (Guam OPA, Nov. 27, 2009) (“there was no
27 award of the contract in this matter so none of the proposals can be made public at this time”).
28 No contract award has been made yet, although GEFf has negotiated the terms of a final contract
with the government. GEFf’s proposal submitted in November 2015 which contains confidential
and proprietary information may be made available for *in camera* inspection by the Public
Auditor should such inspection be deemed necessary in resolving the instant appeal. Easter Decl.,
¶ 5.

1 protest related to the instant RFP (which DPW eventually found meritless and summarily denied,
2 and which denial Core Tech did not appeal), Core Tech’s counsel stated, in pertinent part:

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

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

13 **Answer:** Confirmed.

14 Agency Report, Exh. H at 2 (emphasis added). Accordingly, the proposals submitted by the
15 three offerors were evaluated based on factors *other than* the cost or price of construction of the
16 new Simon Sanchez High School. See Procurement Record, Tab 4 (RFP Addendum No. 7 at 3)
17 (“Evaluation Criteria” scoring table containing 4 evaluation categories: (1) Financing capability,
18 (2) Project Expertise and Experience, (3) Project Approach & Innovation, and (4) Comprehensive
19 Capital Improvement Plan).

20 After GEFf was selected as the most qualified offeror, GEFf and the government entered
21 the second and final phase of the procurement – contract negotiations. During that phase, the
22 parties negotiated contract details including price and scope of work. Easter Decl., ¶ 7. The so-
23 called “new proposals” that Core Tech accuses GEFf of submitting were actually, in substance,
24 alternative cost and pricing estimates for various construction scenarios of the new Simon
25 Sanchez High School. Easter Decl., ¶ 8. The pricing estimates were based on GEFf’s work with
26 the Negotiating Committee during contract negotiations to arrive at the “best value” for the
27 construction of the new high school. *Id.*

28 The RFP had provided an outline list of “General Considerations” for the construction of
the new school (see Exhibit A of RFP Addendum No. 6); however, that outline was drafted by the
Guam Department of Education (“GDOE”) (see Agency Report, Exh. P (Fernandez Decl., ¶ 6),
presumably without the benefit of experts on school design and construction, and was not

1 intended to contain inflexible details concerning, for example, the number of classrooms to be
2 constructed at the new school (*id.*). Indeed the purpose of the RFP was to select the most
3 qualified offeror to assist the government in finding the best approach to building a new school, at
4 the best value for the government. Consistent with this approach and intent, GEFV utilized its
5 expertise in school design and construction in working with the Negotiating Committee to
6 develop the best plan for construction of the new school. Easter Decl., ¶ 7.

7 Thus, the government's negotiations with GEFV – which occurred *after* GEFV was
8 selected as the most qualified offeror – involved both “scope of work” and “price.” Core Tech
9 knew full well since 2015,³ that after the government selected the most qualified offeror, it would
10 then negotiate scope of work and price with the most qualified offeror. The RFP provides for that
11 process in clear and unmistakable terms:

12 Once a firm is selected, ***a scope of work and fee estimate will be***
13 ***negotiated*** to perform the required services for Simon Sanchez
14 High School. “

14 See RFP § 2.0 at ¶ 4, Addendum No. 6 at 2 (amendments to Section 2.0) (emphasis added).

15 Negotiation of the scope of work and price, after selection of the most qualified offeror, is also
16 permitted by the Guam Procurement Rules and Regulations, which provide in pertinent part:

17 (1) Negotiation and Award of Contract.

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

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

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

26 ³ More specifically, Core Tech knew since at least September 23, 2015, when Addendum
27 No. 6 to the RFP was issued.

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(C) agreeing upon *compensation* which is fair and reasonable, taking into account the estimated value of the *required services, and the scope, complexity, and nature of such services.*

2 GAR Div. 4 § 3114(1)(1)-(2) (emphasis added).

Accordingly, GEFf’s submission of four alternative cost estimates was nothing out of the ordinary and was to be expected during contract negotiations. Had Core Tech been selected as the most qualified offeror – which it was not – the Negotiating Committee would have undoubtedly required it to submit similar cost estimates and would have worked with it to refine the scope of work for building the new school. However, judging from its instant Appeal, if Core Tech had its way, all of the “Considerations” in Exhibit A would be mandatory, requiring that every single item in that document be incorporated in construction of the new school. In GEFf’s view, that approach would have resulted in an undesirable outcome – a grossly oversized school that would cost a considerably larger amount to operate and maintain. See Easter Decl., ¶ 10. Fortunately, GEFf’s intent was to help the government achieve the “best value” for Guam and GDOE, thus resulting in an efficiently-designed and well-conceptualized school. This required modifications to the general “Considerations” contained in Exhibit A, which was consistent with GDOE’s intent and objective. Easter Decl., ¶ 9.

III. THERE IS NO MERIT TO CORE TECH’S ALLEGATION THAT THE NEGOTIATING TEAM IMPERMISSIBLY MODIFIED THE RFP DURING CONTRACT NEGOTIATIONS WITH GEFf

Core Tech claims that DPW impermissibly modified the RFP by allowing GEFf to submit cost estimates based on modified construction details, which differed from those in Exhibit A of the RFP. As stated above in Section I, Exhibit A is entitled “Simon Sanchez High School *Considerations*” (emphasis added). The 11-page document outlines details about what the new high school should contain, such as the number of classrooms, offices, and so forth. It also notes that the new school would accommodate “2,300 students” and “120 classroom teachers.” It was presumably called “Considerations” for a reason, rather than mandatory “Requirements.” That is because the “Considerations” were intended to be flexible guidelines

1 and general parameters, which would provide a basis from which the government and the
2 successful offeror could negotiate the final “scope of work” for the construction project. Agency
3 Report, Exh. P (Fernandez Decl., ¶¶ 6-10).

4 That is exactly what happened. As stated above, the RFP allows for the parties to
5 negotiate the “scope of work” (and price) for the new Simon Sanchez High School. *See* Section
6 2.0 of the RFP, Addendum No. 6 (“**Once a firm is selected, a scope of work and fee estimate will**
7 **be negotiated** to perform the required services for Simon Sanchez High School.”) (emphasis
8 added). And because that process was explained in the RFP, Core Tech at the time of its
9 proposal submission in November 2015 was well aware of it. As mentioned previously, this
10 process is also envisioned by law and accepted by the OPA. *See, e.g.*, 2 GARR Div. 4
11 § 3114(l)(1)-(2) (parties shall engage in negotiation of the contract to make certain that the offeror
12 has a clear understanding of the scope of work and that the negotiated scope meets the needs of
13 the contracting party); *In the Appeal of Guam Education Financing Foundation, Inc.*, OPA-PA-
14 09-007, Decision at 8-9 (Guam OPA, Jan. 6, 2010) (in the request for proposal method of
15 solicitation, cost is not a factor in determining the best qualified offeror).

16 As also stated above, refinements to the “Considerations” set forth in Exhibit A took place
17 with the intent of providing the “best value” for Guam in meeting the objectives of GDOE. *See* 5
18 GCA § 58D105. *See also* Easter Decl., ¶ 9. GEFf’s approach was to work closely with GDOE
19 to design an efficient school. GEFf utilized the professional expertise of its team members to
20 develop an improved design effective at meeting GDOE’s educational needs.

21 An example of how this expertise translated into a “best value” result for the Government
22 during the contract negotiations – rather than an error, as Core Tech alleges – is how GEFf and
23 the Negotiating Committee “right-sized” the number of classrooms and other spaces for the new
24 school. *See* Agency Report at Exh. K (Neg. Comm. Memo at 2) (“GEFF will design Simon
25 Sanchez High School on the basis of the school considerations as shown in Exhibit A of the RFP
26 **with some changes in features to achieve appropriate right-sizing and correct space**
27 **utilization.**”) (emphasis added); Easter Decl., ¶ 11. Exhibit A originally specified twenty-two
28 (22) English classrooms. However, after taking into account a maximum design capacity of

1 2,300 students and classroom loading of 28-30 students outlined in Exhibit A, GDOE in
2 conjunction with GEFf determined that 22 classrooms were excessive and that even 18
3 classrooms exceeded GDOE's requirements. As stated in the Negotiating Committee
4 Memorandum:

5 The final negotiated scope of work contains relatively minor
6 deviations from GDOE's Simon Sanchez High School
7 Considerations set forth in the RFP. For example, twenty-two (22)
8 English rooms were listed in the RFP however GDOE reevaluated
 its current and projected requirements and determined that eighteen
 (18) [rooms] more than met its requirements.

9 *See* Agency Report at Exh. K (Neg. Comm. Memo at 3). *See also* Easter Decl., ¶ 11.

10 Such right-sizing extended to modifications to the number of other classrooms and other
11 areas. *See* Neg. Comm. Memo at 3 ("GDOE advised that it was in the best interests of Guam and
12 the educational system to reduce the number of rooms to only those needed. By eliminating the
13 four (4) English rooms, and adding and reducing the number of other rooms, GDOE was able to
14 best meet its current and future needs.").

15 Also, the Auditorium – which Core Tech complains about in its protest – was right-sized
16 to accommodate 500, rather than 700, seats. As the Negotiating Committee aptly observed:

17 An Auditorium with five hundred (500) seats is provided. The cost
18 to construct the Auditorium is an expensive item and costs over
19 twice per square foot to construct as most other areas. It was
20 decided that the original estimate for seven hundred (700) seats
 would result in an under utilized facility.

21 *Neg. Comm. Memo at 2-3; Agency Report, Exh. P (Fernandez Decl. ¶ 10).*

22 Accordingly, there is no merit to Core Tech's allegation that the "Considerations" in
23 Exhibit A could not be modified during contract negotiations. The specifications were merely
24 general "Considerations" that were properly refined during the course of contract negotiations
25 between GEFf and the government in order to eliminate excesses and to arrive at the best value
26 for the government of Guam.

1 **IV. CORE'S TECH'S MAY 27, 2016 PROTEST WAS UNTIMELY BECAUSE**
2 **CORE TECH KNEW SINCE 2015 THAT BOTH COST AND SCOPE OF**
3 **WORK WOULD BE NEGOTIATED DURING CONTRACT**
4 **NEGOTIATIONS AFTER SELECTION OF THE MOST QUALIFIED**
5 **OFFEROR**

6 The fundamental grounds for Core Tech's instant protest – i.e., that price and scope of
7 work were impermissibly negotiated and addressed during contract negotiations – are based on
8 the language of the RFP. Core Tech's protest is therefore untimely because it knew about such
9 grounds long ago, upon the issuance of the RFP (and its addenda) in 2015. The instant protest –
10 its second one – was filed on May 27, 2016 – way beyond the 14-day protest period. *See* 2 GAR
11 Div. 4 § 9101 (protests shall be in writing and shall be “filed within 14 days after the protestor
12 knows or should have known of the facts giving rise thereto... Protests filed after the 14 day
13 period shall not be considered.”).

14 For example, Core Tech's protest about GEF's supposed “new proposals” is actually a
15 disguised complaint that the government entertained GEF's cost estimates for the new school
16 during the contract negotiation phase of the RFP. However, as discussed in Section I above, Core
17 Tech knew in 2015 that cost would be the subject of contract negotiations after the government's
18 selection of the most qualified offeror occurred. *See* Section 2.0 of the RFP, Addendum No. 6
19 (“*Once a firm is selected, a scope of work and fee estimate will be negotiated* to perform the
20 required services for Simon Sanchez High School.”) (emphasis added). Core Tech does *not*
21 complain in its May 27 protest about the *dollar amount* of any of the cost proposals submitted by
22 GEF during cost negotiations, a fact that it could have admittedly only known about when it
23 received the Negotiating Committee's May 13, 2016 Memo. Rather, its complaint is that cost
24 proposals were required by the government and were submitted by GEF during contract
25 negotiations, which is something that Core Tech already knew would occur, at least when the
26 RFP was issued last year in 2015. Core Tech also knew at that time that price discussions would
27 occur during contract negotiations because that is what the law provides. *See* 2 GARR Div. 4 §
28 3114(l)(1)-(2).

 Likewise, Core Tech's separate allegation that the government impermissibly modified
the terms of Exhibit A is really a disguised complaint that the government engaged in

1 negotiations with GEFF concerning the “scope of work,” that is, details about the construction of
2 the new Simon Sanchez High School. That ground is similarly based upon the same language of
3 the RFP, which permits the government to negotiate both price and scope of work, after the
4 selection of the most qualified offeror. *See* Section 2.0 of the RFP, Addendum No. 6. For the
5 same reasons discussed above, this ground was known by Core Tech long ago when the RFP
6 issued. Its complaint based on this ground could have been asserted long ago. It was asserted
7 only on May 27, 2016, months after the RFP issued. It is therefore untimely.

8 **V. THERE IS NO MERIT TO CORE TECH’S ALLEGATION THAT THE**
9 **BONDING REQUIREMENTS OF THE RFP WERE IMPERMISSIBLY**
10 **MODIFIED**

11 Core Tech’s allegation that the RFP’s bonding requirements were modified is without
12 merit. In its Appeal, Core Tech admits that the RFP allows the required performance and
13 payment bond to be obtained by the “Awardee or its prime Contractor.” Appeal at 7. Indeed, this
14 requirement is provided for by Section 4.2.1.5 of the RFP, which states in pertinent part: “A one
15 hundred percent (100%) performance and payment bond must be obtained by the Awardee *or its*
16 *prime Contractor.*” RFP § 4.2.1.5 (as amended by RFP Addendum No. 6 at p.4 “Section 4.2
17 Amendments”) (emphasis added). This is also consistent with section 58D112 of the *Ma Kāhat*
18 Act of 2013 (Guam Pub. L. 32-120) which requires the “developer *or contractor*” to “negotiate
19 and enter into a binding construction contract” for the new Simon Sanchez High School, which
20 would contain provision for items including “performance and payment bonds”. 5 GCA
21 § 58D112 (emphasis added).

22 Consistent with the above provisions, the contract negotiated between the government and
23 GEFF requires GEFF *or its prime construction contractor*, Hensel Phelps, to deliver payment and
24 performance bonds to the government. Easter Decl., ¶ 12. Hensel Phelps is one the largest
25 general contractors in the United Sates. *Id.* GEFF’s November 20, 2015 proposal provides a
26 letter from Travelers Insurance, Hensel Phelps’ surety, that Hensel Phelps’ bonding capacity is
27 approximately \$1 billion – well in excess of the bonding requirements of the RFP. *Id.*
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VI. CONCLUSION

Core Tech's appeal and protest are without merit. Accordingly, for the reasons stated herein and in DPW's Agency Report, GEF respectfully requests that the Public Auditor expeditiously *deny* Core Tech's appeal.

Dated: July 22, 2016.

**THE LAW OFFICES OF
IGNACIO CRUZ AGUIGUI**

By: 
IGNACIO C. AGUIGUI, ESQ.

Suite 310, RK Plaza
341 S. Marine Corps Drive
Tamuning, Guam 96913
Telephone (671) 989-9253/987-9914
Facsimile (671) 989-9255

CALVO FISHER & JACOB LLP
259 Martyr Street, Suite 100
Hagåtña, Guam 96910
Telephone: (671) 646-9355
Facsimile: (671) 646-9403

Attorneys for Guam Educational Facilities Foundation, Inc.