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**THE OFFICE OF PUBLIC ACCOUNTABILITY
 HAGÁTÑA, GUAM**

In the Appeal of:

Core Tech International Corp.,

Appellant,

and

**GUAM DEPARTMENT OF
 PUBLIC WORKS,**

Purchasing Agency.

) DOCKET NO. OPA-PA-16-007
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) **DEPARTMENT OF PUBLIC WORKS**
) **REBUTTAL TO CORE TECH**
) **INTERNATIONAL, INC.'S COMMENTS**
) **ON THE AGENCY REPORT**
)
)

- I. **The Department of Public Works (“DPS”) hereby submits its rebuttal to Core Tech International, Corp., (“Core Tech”) response to DPW’s Agency Report that was filed on July 11, 2016.**
- II. **Core Tech International, Inc.’s Statement of Relevant Facts are not properly before the Public Auditor in this Appeal and Therefore are Outside her Jurisdiction.**

This is an appeal from Core Tech International, Inc.'s ("Core Tech") protest filed on May 27, 2016. Core Tech attempts to present new issues to the Public Auditor in its comments on DPW's Agency Report that were not raised in its May 27, 2016 Protest.

Core Tech's entire discussion in Section II. of its Comments, regarding (a) the proposed subcontractual arrangement between GEF and GEDP, (b) DOE's 4/19/16 internal memorandum amending the RFP and (c) GEF's proposal of a smaller SSHS that costs more than Core Tech's

proposal, are not properly before the OPA. These issues were never raised in Core Tech's May 27, 2016 Protest, or in DPW's June 8, 2016 denial of the Core Tech's protest.

If an issue on appeal was not raised in Core Tech's protest filed on May 27, 2016 with the Department of Public Works or DPW's decision denying the protest, then the issue is not properly before the Public Auditor because it is appearing for the first time on appeal and there is no decision from DPW concerning such issue for the Public Auditor to review. See *In the Matter of Infratech International LLC OPA-PA-11-019*. The Public Auditor's jurisdiction is limited to reviewing DPW's decision of June 8, 2016 denying Core Tech's May 27, 2016 Protest. See *In the Matter of Appeal Z4 Corporation OPA-PA-09-012* (finding arguments made for the first time on appeal are not within the Public Auditor's jurisdiction to hear because they were not properly before her) and *See In the Appeal of Guam Community Improvement Foundation, Inc.*, OPA-PA-09-005, Decision at 11-12 (Public Auditor's jurisdiction is limited to reviewing issues raised in the appellant's protest and the government's decision denying the protest).

Although not properly before the OPA, the government wishes to briefly address some of Core Tech's alleged relevant facts.

a. DOE's 4/19/16 Internal Memorandum Documents that GEF's Submissions were part of the Negotiation Process.

Core Tech incorrectly alleges that GDOE's April 19, 2016 Memorandum documents that the Government improperly amended the RFP design parameters. First, as noted in the title to Exhibit A it was intended to provide *considerations, not requirements*. As GDOE Superintendent Mr. Jon Fernandez stated:

Exhibit A to the RFP was prepared by GDOE. *As the title states it was intended to provide considerations, and not requirements*, for the construction of Simon Sanchez High School."

Declaration of Jon Fernandez (7/11/2016) (Exh. P to Agency Report) (emphasis added).

Further, GDOE's memorandum documents that the negotiating process was properly followed by the Negotiating Team. The memorandum served to notify GDOE's Superintendent, and later the Negotiating Team, of concerns with constructing an inexpensive or cheap Simon Sanchez HS. GDOE and the Negotiating Team relied on the April 19, 2016 Memorandum in electing to continue negotiations as the "low offer while obviously less expensive unreasonably compromised the design parameters and needs for Simon Sanchez High School." **Exhibit B** Negotiating Committee's May 13, 2016 Memorandum.

b. Core Tech's Cost Analysis is Irrelevant to the Appeal.

Core Tech's pricing and bid proposal are immaterial to this Appeal and warrant little discussion. This discussion relies on a supposed "Exhibit 10." However, this exhibit was not included in the copy served on DPW. Moreover, this discussion is irrelevant. Cost is not a factor

that is taken into consideration in evaluating, at the first stage, who is the most qualified offeror. *See In the Appeal of Guam Education Financing Foundation, Inc.*, OPA-PA-09-007, Decision at 8-9 (Guam OPA, Jan. 6, 2010) (in the request for proposal method of solicitation, cost is not a factor in determining the best qualified offeror).

In addition, this was an RFP process, and not an IFB process which is meant to select the lowest bidder. In the RFP method authorized by the Act, the Selection Committee was required to *first* determine the most qualified offeror. *See*, Public Law 32-120, the *MA KAHAT ACT OF 2013* passed into law on February 10, 2013. *See*, P.L. 32-121, attached as **Exhibit A**, at 8. On December 22, 2015, DPW notified GEF, Core Tech and Pernix that GEF had been selected as the No. 1 offeror (i.e., Selected Contractor). *See*, **Exhibits E 1-3**.

After that, the Act directed the Negotiating Team to negotiate with the most qualified offeror – and only the most qualified offeror – for final contract terms, scope of work, and price which the Government determines to be fair and reasonable. The Negotiating Committee commenced negotiations with GEF. The negotiations were successful and on May 13, 2016 DPW issued a Notice of Intent to Award to GEF.

In closing, Core Tech makes these arguments for the first time on this appeal. DPW has not issued a decision on these issues for the OPA to review. Therefore the OPA lacks jurisdiction to consider these issues.

III. ARGUMENTS

A. The Act, RFP and Addendum No. 6 Authorize Target One Time Legislation for a Single Uniquely Important Project.

Core Tech continues to re-hash old arguments that the Government was required to take price into consideration in determining the most qualified offeror because the governing statutes require a “best value” determination. *See, e.g.*, Core Tech Comments at 9 (“How can ‘best value’ be determined when there is no comparison of the deliverables? The ‘*best value*’ method is commonly understood to involve a consideration of technical and *price* factors to determine the offer of the greatest value to the government.”) (emphasis added).

The Act, RFP and Addendum No. 6 specifically authorized the Negotiating Committee to negotiate both the scope of work and fee estimate with the most qualified offeror. Pricing was not included in the selection of the contractor as the objective was to select the most qualified contractor. GEF was selected as it is the most qualified contractor. The RFP clearly provides that following selection of the best qualified offeror the parties will negotiate scope and price. Addendum #6 Section 2.0 Intent provides “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.” (emphasis added) *See*, **Exhibit F**.

The cases and federal regulations cited by Core Tech as supporting its argument as to what constitutes "best value" either support the government's position or are factually distinguishable from the current procurement's governing legislation. *Rochester City Lines, Co. v. City of Rochester*, 868 N.W. 2d 655 (Minn. 2015) involved a protester who alleged bias by the government officials tasked with awarding the contract. In rejecting protester's claim the court stated:

"RCL's arguments call into question the city's discretion as to what constitutes "best value" for the city. Therefore we review the requirements of the RFP for abuse of discretion, and conclude that RCL has failed to present evidence sufficient for a reasonable fact-finder to conclude that the city abused its discretion in determining what business and financial requirements were necessary to provide best value to the city." *Id* at 460

In Rochester, as with the present Appeal, Appellant provided no evidence of bias by the Negotiating Team, only unsubstantiated allegations.

Further, while Core Tech correctly cites the law in *Firstline Transportation Security, Inc. v. United States*, 100 Fed. Cl. 359 (Fed. Cl. 2011), such is deceptively misleading. The cite is misleading because the cases the governing legislation, similar to the Federal Acquisition Rules, mandated that it negotiate with more than one offerer. In *Firstline* the government negotiated with seven (7) offerers. **Id.**

In the present procurement however the Negotiating Team was directed to negotiate with one offerer, and only one offerer. In passing the Act the Guam legislature created new statutory provisions *See, Exhibit A*, §§ 58D101 – 58D113 and **Exhibit B**, §§58E100 – 58E-110. The clear and unequivocal intent of the legislation was to establish procedures governing the procurement for a targeted project; that being the construction of Simon Sanchez HS and the development of a comprehensive development plan to prioritize and facilitate the repairs at GDOE schools (collectively "Guam's School Project"). In creating unique and targeted procurement procedures it is clear that the Legislature intended such to supercede Guam's normal Procurement laws on Guam's School Project and Guam's School Project only.

According to the United States Court of Appeals, for the Federal Circuit:

Effective contracting demands broad discretion. *Burroughs Corp. v. United States*, 223 Ct. Cl. 53, 617 F.2d 590, 598 (1980); *Sperry Flight Sys. Div. v. United States*, 548 F.2d 915, 921, 212 Ct. Cl. 329 (1977). Accordingly, agencies "are entrusted with a good deal of discretion in determining which bid is the most advantageous to the Government." *Tidewater Management Servs.*, 573 F.2d at 73, 216 Ct. Cl. 69.

Contracting officers “are entitled to exercise discretion upon a broad range of issues confronting them in the procurement process.” Impresa Construzioni Geom. Domencio Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001) (internal quotation marks omitted). Accordingly, procurement decisions are subject to a “highly deferential rational basis review.” CHE Consulting, Inc. v. United States, 552 F.3d 1351, 1354 (Fed. Cir. 2008) (internal quotation marks omitted). Under that standard, we sustain an agency action ‘evincing rational reasoning and consideration of relevant factors.’” (quoting CHE Consulting, Inc. v. United States, 552 F.3d at 1354 (quoting Advanced Data Concepts, Inc. v. United States, 216 F.3d at 1058)))

Moreover, in a negotiated procurement, contracting officers generally may be afforded greater decision making discretion, in comparison to their role in sealed bid procurements. See Glenn Def. Marine (ASIA), PTE Ltd. v. United States, 720 F.3d at 907 (“The protestor’s burden is greater in negotiated procurement, as here, than in other types of bid protests because “the contracting officer is entrusted with a relatively high degree of discretion.””); Am. Tel. & Tel. co. v. United States, 307 F.3d 1374, 1379 (Fed. Cir. 2002) (“Moreover, in a negotiated procurement, as in this case, this court has held that the regulations entrust the contracting officer with especially great discretion, extending even to his applicator of procurement regulations.”), reh’g en banc denied (Fed. Cir.), cert. denied, 540 U.S. 937 (2003).

The United States Court of Appeals for the Federal Circuit also has explained that procurement officials have a greater degree of discretion when it comes to best-value determinations, as compared to a procurement based on price alone. See Galen Med. Assocs., Inc. v. United States, 369 f.3d at 1330 (noting that because “the contract was to be awarded based on ‘best value,’ the contracting officer had even greater discretion than if the contract were to have been awarded on the basis of cost alone”); E.W. Bliss Co. v. United States, 77 F.3d at 449 (“Procurement officials have substantial discretion to determine which proposal represents the best value for the government.”); AM Gen., LLC v. United States, 77 F.3dat 449 (“Procurement officials have substantial discretion to determine which proposal represents the best value for the government.”) AM Gen., LLC v. United States, 115 Fed. Cl. 653, 697 (2014).

In closing, Core Tech’s Appeal cites general procurement law that is in direct conflict with the targeted procurement provisions contained in the Act that established procurement procedures for the Guam School Project. The Act granted the Negotiating Committee broad powers to select the “proposal that delivers the best value for Guam in meeting the objectiv3es of the education agency.” **Exhibit A**, at 8. The Negotiating Committee complied with this obligation when it awarded a best value contract to GEFF.

B. The Negotiating Committee was Authorized to Negotiate Both the “Scope of Work” and “Fee Estimate” for Simon Sanchez High School.

Addendum #6 Section 2.0 Intent provides “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.” (emphasis added) See, **Exhibit F**.

Core Tech misrepresents the facts. First, as noted earlier in this response RFP Exhibit A was clearly intended to consist of *flexible* “considerations” in the design of the new Simon Sanchez HS. See, Exhibit A to the RFP and GDOE Superintendent Jon Fernandez’s Declaration. The Negotiating Committee was entrusted with board discretion in negotiating a contract with GEF, the selected contractor. It is entitled to substantial discretion in determining in negotiating a proposal decides represents the best value for the government.

C. GEF’s Submissions were part of the Negotiation Process.

GEF’s submissions were consistent with the exchange of information and ideas, on site field inspections of both Okkodo and Simon Sanchez High Schools, meetings with Simon Sanchez HS’s principal and teachers, etc. that were involved in the parties negotiations. The responses, which were simply refinements to its proposal, were consistent with discussions on the “scope of work” and “fee estimate” authorized by the Act.

D. No Bond is Required at this time.

An OPA Appeal is not the proper venue for a party to allege concerns with the particulars of a Government of Guam contract. Further, no bond is required at this time. Section 58D112 of Title 5 GCA directs the Government of Guam and the developer or contractor to enter into a “binding construction contract” which will include contractual provisions for obtaining a payment and performance bond. In order for a bond to be issued there must be binding contracts and plans and specifications. The contract with GEF has not been signed. Moreover, plans and specifications will be issued in conjunction with the first Task Order, so any bond would not be due until such plans and specifications are completed.

The government requests the relief stated in its Agency Report.

Submitted this 29th day of July, 2016.

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By: _____

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