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8 **PROCUREMENT APPEAL**
9 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

10
11 In the Appeal of

12
13 Core Tech International Corp.,
14 Appellant.

DOCKET NO. OPA-PA-_____

**NOTICE OF APPEAL AND
REQUEST FOR CONSOLIDATION**

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19 **RECEIVED**
20 OFFICE OF PUBLIC ACCOUNTABILITY
21 PROCUREMENT APPEALS

22 DATE: 8/10/16

23 TIME: 3:10 AM PM BY: EMD

24 FILE NO OPA-PA: 16-011

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1 CORE TECH INTERNATIONAL CORP. ("CORE TECH") hereby appeals a decision
2 rendered by the Department of Public Works ("DPW"), an agency of the Government of Guam, on
3 August 3, 2016, denying the July 5, 2016 Bid Protest raised by Core Tech regarding DPW's Request
4 for Proposal for the Lease Financing for Design, Renovation, Rehabilitation, Construction and
5 Maintenance of Public Schools (Beginning with Simon Sanchez High School), Project No. 730-5-
6 1055-L-YIG.

7
8 **I. APPELLANT INFORMATION**

9 Name: Core Tech International Corp.

10 Address: 388 S. Marine Corps Drive, Suite 400
11 Tamuning, Guam 96913

12 For purposes of this appeal, please direct correspondence to Core Tech's counsel, Joyce C.H.
13 Tang, Esq. (jtang@civilletang.com) and Leslie A. Travis (ltravis@civilletang.com), Civile & Tang,
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15 671/477-2511).

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17 **II. APPEAL INFORMATION**

18 A. Purchasing Agency: Department of Public Works

19 B. Contract No: 730-5-1055-L-YIG

20 C. Date of Contract: Notice of Intent to Award to GEFf dated May 13, 2016

21 D. This appeal is made from DPW's August 3, 2016 denial of Core Tech's July 15, 2016
22 protest.

23 E. The names of competing bidders known to appellant are Guam Educational Facilities
24 Foundation, Inc. and Pernix Guam LLC.

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26 **III. RELEVANT PROCEDURAL HISTORY**

27 On June 15, 2015, the Department of Public Works ("DPW") issued a Request for Proposals
28 for the Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of

1 Public Schools (Beginning with Simon Sanchez High School), Project No. 730-5-1055-L-YIG (the
2 “RFP”). The RFP contemplated a contract to be for a term of five (5) years to include services for
3 thirty-six (36) Guam Department of Education (“GDOE”) facilities as outlined in the Army Corps of
4 Engineering Assessment Report (Attached as A-14 to the RFP). *See*, RFP, §2.0 at 7, **Exhibit 1**,
5 *Addendum 6* at 7, **Exhibit 2**. Priority would be given to Simon Sanchez High School (“SSHS”) and
6 the development of a comprehensive capital improvement plan. *Id.* Three companies submitted
7 proposals: Core Tech, Guam Educational Facilities Foundation, Inc. (“GEFF”), and Pernix Guam
8 LLC (“Pernix”). The Bid Submission deadline was November 6, 2015. *See*, *Addendum 6* at 1,
9 **Exhibit 2**. The Bid Opening date was November 20, 2016. *See*, *Addendum 8*, **Exhibit 3**.

10 On December 24, 2015, DPW notified GEFF that its proposal ranked highest of all offerors.
11 *See*, *Negotiating Committee Memorandum* dated May 13, 2016 at 1 (“Negotiating Committee
12 Memo”), **Exhibit 4**. The members of the Negotiating Committee team were Jon Fernandez
13 (Superintendent of GDOE), Mana Silva Tajeron (GEDA Deputy Director), and Felix C. Benavente
14 (DPW Deputy Director). *Id.* Negotiations with GEFF began on or about February 15, 2016. *Id.*

15 On May 13, 2016, DPW issued its Notice of Intent to Award the RFP to GEFF. Core Tech
16 received the Notice of Intent to Award on the same day from the Deputy Director, Mr. Felix
17 Benavente. *See*, Letter dated 5/13/16 to Core Tech with Notice of Intent to Award and Attachments,
18 attached as **Exhibit 5**.

19 Based on information in the Negotiating Committee Memo, on May 27, 2016, Core Tech filed
20 a protest (“May 27th Protest”). DPW denied Core Tech’s May 27th Protest on June 8, 2016. On June
21 23, 2016, Core Tech appealed the denial of Core Tech’s May 27th protest to the Office of Public
22 Accountability. *See*, *In the Appeal of Core Tech International Corp.*, OPA-PA-16-007 (the “First
23 Appeal”). On July 1, 2016, DPW filed a copy of the Procurement Record for the Appeal and served
24 a copy of the Procurement Record on Core Tech’s counsel the same day, attached as **Exhibit 6**.

25 In connection with Core Tech’s investigation of facts, on June 14, 2016, Core Tech submitted
26 a request to DPW for documents and information under the Sunshine Reform Act of 1999. *See*,
27 *6/14/16 Ltr. to Felix Benavente*, **Exhibit 7**. DPW responded to Core Tech’s June 14th Sunshine Act
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1 requests on July 1, 2016. On July 15, 2016, Core Tech filed a protest based on DPW's response to
2 Core Tech's Sunshine Act requests and the Procurement Record filed in the Appeal, both of which
3 were served on Core Tech on July 1, 2016. *See, Core Tech's 7/15/16 Protest, Exhibit 8* ("July 15th
4 Protest"). DPW denied Core Tech's protest on August 3, 2016. *See, DPW's 8/3/16 Denial of Core*
5 *Tech's Protest, Exhibit 9*. In this appeal, Core Tech is appealing the denial of its July 15, 2016
6 protest ("Second Appeal").
7

8 Because the parties, the procurement record, and witnesses are identical, in the interest of
9 judicial economy and expediting the resolution of the pending appeals, Core Tech requests that the
10 Second Appeal be consolidated with the First Appeal.
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12 IV. STATEMENT OF GROUNDS FOR APPEAL

13 A. Core Tech's Appeal Was Timely Filed.

14 Core Tech's protest filed on July 15, 2016 was filed within 14 days of receiving the
15 Procurement Record filed in OPA-PA-16-007 and DPW's response to Core Tech's Sunshine Act
16 requests, both served on Core Tech on July 1, 2016; thus, the protest was timely filed and the 5 GCA
17 §5425(g) automatic stay applies.

18 B. The IDIQ Contract Envisions GEFF Circumvention of the \$100 19 Million Cap In Violation of the RFP.

20 Section 4.0 of the RFP, as amended by *Addendum 6*, explicitly restricts the amount of the
21 RFP to \$100 million:

22 The scope of work for this RFP includes financing and lease financing for
23 rehabilitation, construction, expansion and renovation (inclusive of
24 architectural and engineering design) of thirty-six (36) schools **with a total
cost of up to One Hundred Million Dollars (\$100,000,000.00).**

25 §4.0, Exhibit 2, *Addendum 6* at 3 (emphasis supplied).

26 On May 13, 2016, DPW, the Department of Education ("DOE"), and GEFF agreed to a final
27 version of the IDIQ Contract which included provisions allowing the offeror, GEFF, to circumvent
28

1 the \$100 million contract limitation in the RFP (“IDIQ Contract”). Section 3.1 of the execution
2 version of the IDIQ Contract states as follows:

3
4 **III.**
COMPENSATION AND PAYMENT FOR SERVICES

5 **3.1. Compensation and Payment for Services.** The Government will compensate the
6 Developer for services rendered for Task Orders issued as provided in this Contract based on
7 available funds and not to exceed One Hundred Million and 00/100 Dollars (\$100,000,000.00)
8 pursuant to Section I (Scope of Contract), unless otherwise directed by the Director of DPW in
9 writing and permitted by Public Laws 32-120 and 32-121 or any other law. The first and second
10 Task Orders will be for Simon Sanchez High School and the CCIP.

11 *See, May 13, 2016, Email from T. Keeler with IDIQ Contract, at CT004100, Exhibit 10.* Section 3.1
12 creates an unauthorized exception -- “unless otherwise directed by the Director of DPW in writing
13 and permitted by Public Laws 32-120 and 32-121 or any other law” the 100 million cap does apply –
14 which effectively allows GEFF to circumvent the \$100 million RFP restriction. *Id.*

15 GEFF’s intention to exceed the 100 Million cap is clear:

16 **1. *April 13, 2016 letter from Speaker Judy Won Pat.*** In a letter dated April 13, 2016,
17 Speaker Won Pat, a sponsor of Public Laws 32-120 and 32-121 (the “Public Laws”), responded to
18 concerns raised by Jon Fernandez, the Superintendent of DOE, regarding the “borrowing capacity for
19 school renovations.” *See* 4/13/16 Letter from Speaker Judith T. Won Pat, **Exhibit 11**. The letter
20 states, in part:

21 I recall in our January 7, 2016 conversation, you had asked me for
22 some clarity on the laws regarding this. You were specifically interested in
23 increasing the borrowing capacity for school renovations while keeping the
24 same debt service. **After some review, my office staff and I found that the
law governing the borrowing capacity for school renovations does not
specify a limit.**

25 **The laws [Public Laws 32-120 and 32-121] while identifying a debt
26 service amount [of \$100 million], do not have a cap to its borrowing
27 capacity.** *Id.* (emphasis added).
28

1 2. *Letter dated April 1, 2016 from GEFF to DPW.* In an April 1, 2016 letter from
2 GEFF to DPW, GEFF relying on its counsel’s opinion, states the following regarding funding:

3 From a funding perspective, we have requested Calvo Fisher & Jacob, our
4 legal counsel, to review the RFP, PL 32-120 and PL 32-121 as they relate to
5 Guam Procurement law and whether the scope of work for SSHS and the other
6 thirty-six (36) schools is capped at \$100 million. **Their response indicates
7 that the process fully complies with Guam procurement law and the scope
8 of work to be negotiated between the Government and GEFF is not
9 capped but is limited to the rental payments allocated under the two laws.**

10 *See, 4/1/16 Ltr. from GEFF to DPW, Exhibit 12* (emphasis supplied).

11 GEFF asked its counsel, Calvo Fisher & Jacob (“CFJ”) to opine on the RFP and whether
12 under “Public Laws 32-120 and 32-121 ... the Government and GEFF are able to negotiate the scope
13 of work for the design of Simon Sanchez High School...and whether the total cost for all thirty-six
14 (36) public schools is capped at \$100 million.” *See, CFJ Opinion dated 3/21/16 at 1, Exhibit 13.*
15 CFJ’s response was:

16 Based upon our review of the RFP, Public Laws 32-120 and 32-121,
17 and the Guam Procurement Law and Regulations [footnote omitted],
18 **we believe the parties have the ability to negotiate the scope of
19 work relating to the design of SSHS and that the total cost for all
20 thirty-six public schools is not capped at \$100 million.**

21 *Id.* (emphasis supplied).

22 In denying Core Tech’s July 15th Protest, DPW incorrectly states that the IDIQ Contract
23 specifically provides for a \$100,000,000 cap. DPW ignores a critical fact--that the Compensation
24 provision of the IDIQ Contract is qualified. The IDIQ Contract states at §3.1 that “[t]he Government
25 will compensate the Developer for services rendered for Task Orders issued as provided in this
26 Contract based on available funds and not to exceed One Hundred Million and 00/100 Dollars
27 (\$100,000,000.00)...**unless otherwise directed by the Director of DPW in writing and permitted
28 by Public Laws 32-120 and 32-121 or any other law.**” *See, May 13, 2016, Email from T. Keeler
with IDIQ Contract, at CT004100, Exhibit 10.* (emphasis supplied). The IDIQ Contract allows the
parties to exceed the \$100 million cap so long as the source of government revenues from the Public
Laws generates sufficient revenues to cover debt service payments. The source of revenues, as

1 discussed below, is government revenues that are *fixed, and are not subject to annual appropriation*
2 *and approval of the Legislature.*

3 There are several sources for payment of Simon Sanchez High School Lease. The sum of
4 \$1,707,652 comes from the Territorial Educational Facilities Fund and is funded by real property tax
5 revenues. See, 5 GCA §58D109 & 5 GCA §22425 (q)(4). Additionally, 80% of any amounts not
6 pledged under (1) to (5) of 5 GCA § 22425(q) will go towards the rental payments due for Simon
7 Sanchez and future schools. See, 5 GCA §22425(q)(6). Although the amounts pledged or reserved
8 under §58D109 is limited to \$5,051,977.98 per year during the lease-back period for Simon Sanchez,
9 Public Law 32-120 also allows the Governor to “pledge or reserve the additional proceeds as a source
10 of payment for municipal lease financing, secured for the purposes stated herein.” See, 5 GCA
11 §58D102.

12 The source of lease payments for the other remaining future schools include: (a) funds not
13 already pledged from the Business Privilege Tax of which \$1,882,082 shall fund interest in 2015 and
14 \$2,564,165 shall fund interest annually from 2016 to 2018; (b) \$1,200,000 from real property tax
15 revenues; (c) \$4,800,000 from the maturity of the Business Privilege Tax Bond due in 2019; and (d)
16 any funds not used in (1) to (5) of 5 GCA § 22425(q) to pay for 80% of the remaining balance of
17 lease-back payments for future schools. See 5 GCA §58E108. These open ended funding sources are
18 “continuously appropriated,” and therefore *not subject to annual legislative appropriations or*
19 *legislative oversight and approval.*

20 Removal of the RFP cap violates the §4.0 of the RFP by giving GEFF a contract far more
21 lucrative than the contract permitted by the RFP. Removal of the RFP cap effectively gives GEFF a
22 blank check on the amount it can borrow on the bond market and charge the People of Guam for the
23 next 30 years. The IDIQ Contract as drafted is dangerous, susceptible to exploitation, and most
24 importantly, against public policy and the Legislature’s purpose of safeguarding public funds and
25 limiting the Government’s financial exposure.

26 //

27 //

28

1 **B. DPW Failed to Maintain a Complete Procurement Record Required**
2 **Under Guam Procurement Law.**

3 As the procuring agency for the RFP, DPW has a statutory obligation to maintain an accurate
4 and complete Procurement Record. 5 G.C.A. §5249 provides as follows:

5 Each procurement officer shall maintain a complete record of each
6 procurement. The record shall include the following:

7 (a) the date, time, subject matter and names of participants at any
8 meeting including government employees that is in any way related to a
9 particular procurement;

10 (b) a log of all communications between government employees and
11 any member of the public, potential bidder, vendor or manufacturer which is in
12 any way related to the procurement;

13 (c) **sound recordings of all pre-bid conferences; negotiations arising**
14 **from a request for proposals** and discussions with vendors concerning small
15 purchase procurement;

16 (d) brochures and submittals of potential vendors, manufacturers or
17 contractors, and all drafts, signed and dated by the draftsman, and other papers
18 or materials used in the development of specifications; and

19 (e) the requesting agency's determination of need.

20 5 G.C.A. §5249 (as published by the Compiler of Laws) (emphasis supplied). As discussed below,
21 subsection (c), as originally enacted by P.L. No. 18-44, a version the Legislature passed and has not
22 changed, reads and as follows: "(c) sound recordings of all pre-bid conferences, negotiations arising
23 from a request for proposals and discussions with vendors concerning small purchase procurement."
24 Guam Pub. L. No. 18-44 (Nov. 14, 1986).

25 The Procurement Record DPW maintained for this procurement is missing critical records,
26 audio tapes and the type of information required under 5 GCA §5429 of the Guam Procurement
27 Code. Without the complete communication log, audio tapes, and communications and exchanges
28 documenting the solicitation process, the evaluation, and the negotiation between the negotiation
team members and GEF, the public and the Public Auditor will never know what really transpired
during these meetings and discussions, how decisions were made, and who made them.

1 The following are examples of critical records DPW failed to maintain:

2 1. DPW failed to maintain a complete log of all communications as required by §5
3 G.C.A. §5249(a). Instead of maintaining a procurement log book, DPW produced an “RFP
4 Committee for SSHS & 35 DOE Schools” log book (“Log Book”) whose entries begin on December
5 22, 2015, more than 6 months after issuance of the RFP, and end on March 1, 2016, over two months
6 before the issuance of the Notice of Intent to Award. *See, Log Book, Exhibit 13.* DPW admitted in its
7 denial of the July 15th Protest that communications between government employees related to the
8 procurement were not included in a communications log, but argued that it “substantially complied in
9 good faith with this requirement” by providing the communications themselves in the Procurement
10 Record. *See, Exhibit 9* at 1. This argument should be rejected because the law specifically requires
11 the government to maintain, and provide, a communication log. Like any summary, a log has
12 functions the source documents themselves cannot achieve. The very act of keeping a log reinforces
13 government transparency and confirms the existence of source documents in the event the
14 government inadvertently loses or damages the documents. A log also allows the reader—whether
15 that reader is a protestor, the Public Auditor, or any member of the public—to review the bigger
16 picture. Most importantly, a log includes types of information source documents do not, such as
17 telephone calls and in-person meetings.

18 Crucially, because the government did not keep a log, interested parties such as protestors or
19 the Public Auditor cannot confirm that the government has, as it claims, provided all
20 communications, and cannot cross-reference the documents the government provided against a
21 statutorily mandated record of communications. The government may not have provided all
22 communications, either because they are of a type not reproducible in print—such as phone calls—or
23 because the government lost, damaged, or inadvertently left certain documentary evidence out of the
24 record. Without question, DPW initially left out at least some documents from the Procurement
25 Record in this case, because DPW had to supplement the Record on August 3, 2016, in part to
26 include two draft versions of the IDIQ which it had not previously included in the Record. DPW
27 expects protestors and the Public Auditor to take DPW at its word that the record is now complete,
28 and no further communications exist, unless of course DPW later returns with more documents it had

1 left out of the record. The law requires DPW to create and maintain a log of communications. It
2 failed to do so, resulting in a complete lack of transparency.

3 2. DPW failed to record the negotiations meetings required by 5 G.C.A. §5249(c). The
4 Negotiating Committee members (Jon Fernandez, Mana Silva Taijeron, and Felix Benavente) and
5 GEFf engaged in numerous negotiation meetings with GEFf. The twelve (12) meetings Core Tech
6 is aware of, based on its review of the documents in the Procurement Record and Sunshine Act
7 responses, occurred on February 15, 2016, February 19, 2016, February 23, 2016, March 2, 2016,
8 March 15, 2016, March 23-25, 2016, April 21, 2016, April 26, 2016, April 27, 2016, and April 28,
9 2016. The government did not record these meetings or provide recordings of the meetings in the
10 Procurement Record. Further, DPW has admitted that one of its employees made a partial recording
11 of one negotiation meeting on his personal cell phone, and that the employee was notified that the
12 recording was part of the procurement record, but the recording was not preserved and was lost when
13 the employee's cell phone sustained water damage on June 4, 2016. *See, Declaration of Reynaldo T.*
14 *Junio*, marked and attached as **Exhibit 14**. As a result of this careless recordkeeping and failure to
15 record or preserve negotiations, full audio recordings of what was discussed and decisions made
16 during the negotiations between DPW and GEFf do not exist.

17 In denying Core Tech's protest on the basis of DPW's failure to keep a proper procurement
18 record, DPW chastises Core Tech for its claim that Core Tech purposely eliminated the internal
19 semicolon in §5249(c) requiring the procurement record to include "sound recordings of all pre-bid
20 conferences; negotiations arising from a request for proposals and discussions with vendors
21 concerning small purchase procurement." *See, Exhibit 9* at 2.

22 DPW incorrectly argues that the presence of the semicolon in the statute means that the
23 Legislature intended that only pre-bid conferences must be recorded.¹ Disregarding for the moment
24 that interpreting the clauses of §5249(c) independently would render the clauses nonsensical (DPW

25
26 ¹ DPW's argument that it was not required to record all pre-bid conferences, negotiations and
27 discussions with vendors is inconsistent with the fact that it did require sound recordings to be
28 made a part of the record. Were DPW not required to include such sound recordings in the record,
it is unclear why its attorney advises Mr. Junio that the recording he had made was now part of
the procurement record. **Exhibit 14** at 2.

1 does not itself propose how discussions with vendors concerning small purchase procurements would
2 be made part of the procurement record in the absence of sound recordings, and why it also failed to
3 preserve such records), DPW's reliance on the current version of the statute published by the
4 Compiler of Laws is misplaced. 5 G.C.A. §5249 was derived from Government Code Chapter 12,
5 Section 6964.4, which was added by Public Law No. 18-44, enacted by the Legislature and signed
6 into law by Governor Ricardo J. Bordallo on November 14, 1986. P.L. No. 18-44, which provides, in
7 relevant part, as follows:

8
9 Section 17. A new Section 6964.4 is added to the Government Code to read:

10 “§6964.4. Record of Procurement Actions.

11 Each procurement officer shall maintain a complete record of each
12 procurement. The record shall include the following:

13 ...
14 **(3) sound recording of all pre-bid conferences, negotiations arising from a**
15 **request for proposals and discussions with vendors concerning small**
16 **purchase procurement;**

17 Guam Pub. L. No. 18-44 (Nov. 14, 1986)(emphasis supplied). This original and correct version of
18 the public law also appears in the bound Session Laws for the 18th Guam Legislature. Even the
19 Compiler's version does not reference any further amendments to the law that would account for the
20 punctuation change. Clearly, the semicolon DPW relies on in denying Core Tech's protest was a
21 typographical error in the version the Compiler of Laws published. There is no semi-colon in the
22 original Public Law 18-44 that the Legislature passed. The Legislature clearly did not intend for the
23 clauses of Section 5249 to be interpreted independently, and fully intended to require that sound
24 recordings of negotiations be made part of the procurement record. DPW failed to comply with this
25 provision of the Procurement law.

26 Guam law explicitly provides that **“No procurement award shall be made unless the**
27 **responsible procurement officer certifies in writing under penalty of perjury that he has**
28 **maintained the record required by §5249 of this Chapter and that it is complete and available**
for public inspection.” 5 G.C.A. §5250 (emphasis supplied).

1 Because DPW failed to comply with the requirement of 5 G.C.A. §5249 in connection with its
2 communications and negotiations with GEF, the procurement record is fatally flawed and DPW
3 cannot proceed with an award to GEF.

4 **IV. REQUEST FOR CONSOLIDATION**

5 The OPA is authorized to consolidate appeals for purposes of efficiency and expediency in
6 resolving appeals. 5 G.C.A. § 5701; 2 G.A.R. §§ 12010, 12108-12109. The Second Appeal should
7 be consolidated with the First Appeal because the two appeals arise from protests pertaining to
8 DPW's Request for Proposal for the Lease Financing for Design, Renovation, Rehabilitation,
9 Construction and Maintenance of Public Schools (Beginning with Simon Sanchez High School),
10 Project No. 730-5-1055-L-YIG, the parties, the Procurement Record and witnesses are identical.

11 Consolidating these appeals will provide for efficient and expeditious resolution of the two
12 appeals. For these reasons, the OPA should consolidate the appeals, and all matters pertaining to the
13 appeals should be heard concurrently.

14 **V. RELIEF REQUESTED BY CORE TECH**

15 Core Tech respectfully requests a ruling from the OPA as follows:

- 16 1. If a contract has not yet been awarded, the proposed award to GEF should be
17 cancelled pursuant to 5 GCA § 5451(a).
- 18 2. If a contract has been awarded to GEF, it should be terminated under 5 GCA
19 §5452(a).
- 20 3. DPW should be required to negotiate with the next ranking offeror.
- 21 4. For an award of reasonable attorney's fees and costs of this protest and appeal; and
- 22 5. For such other relief that the OPA may determine is just and proper.
- 23 6. Core Tech requests a hearing on this matter.

24
25 Dated: August 10, 2016

CIVILLE & TANG, PLLC

26 

27 JOYCE C.H. TANG

28 *Attorneys for Appellant Core Tech Int'l Corp.*