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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.

15 and

16 Guam Department of Public Works,

17 Purchasing Agency.
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DOCKET NO. OPA-PA-16-007

DOCKET NO. OPA-PA-16-011

**CORE TECH INTERNATIONAL CORP.'S
HEARING BRIEF**

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I. INTRODUCTION

On June 15, 2015, the Department of Public Works (“DPW”) issued a Request for Proposals for “Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Public Schools (Beginning with Simon Sanchez High School),” Project No. 730-5-1055-L-YIG (the “RFP”). The RFP contemplated a contract to be for a term of five (5) years to include services for thirty-six (36) Guam Department of Education (“GDOE”) facilities as outlined in the Army Corps of Engineering Assessment Report (Attached as A-14 to the RFP). *See*, Ex. 1 Core Tech Hearing Exhibits (“CT Ex.”), RFP, §2.0 at CT-1-0007; CT Ex. 2, *Addendum 6* at CT-2-0007. Priority would be given to Simon Sanchez High School (“SSHS”) and the development of a comprehensive capital improvement plan. *Id.* Three companies submitted proposals: Core Tech, Guam Educational Facilities Foundation, Inc. (“GEFF”), and Pernix Guam LLC (“Pernix”). The Proposal Submission deadline was November 6, 2015. *See*, CT Ex. 2 at CT-2-0001. The Bid Opening date was November 20, 2016. *See*, CT Ex. 2, *Addendum 8* at CT-2-00052.

On December 24, 2015, DPW notified GEFF that its proposal ranked highest of all offerors. *See*, CT Ex. 12, *Negotiating Committee Memorandum* dated May 13, 2016 at CT-12-0001 (“Negotiating Committee Memo”). The members of the Negotiating Committee team were Jon Fernandez (Superintendent of GDOE), Mana Silva Tajeron (GEDA Deputy Director), and Felix C. Benavente (DPW Deputy Director). *Id.* Negotiations with GEFF began on or about February 15, 2016. *Id.*

On May 13, 2016, DPW issued its Notice of Intent to Award the RFP to GEFF. Core Tech received the Notice of Intent to Award on the same day with a cover letter from the Deputy Director, Mr. Felix Benavente. *See*, CT Ex. 11. The May 13th letter received by Core Tech included the following documents: (1) Notice of Intent to Award to GEFF, dated May 13, 2016; (2) Memorandum dated May 13, 2016, from the Negotiating Committee to the Procurement Record file (“Negotiating Committee Memo”); (3) April 22, 2016 letter from GEFF to Mr. John F. Calanayan (DPW); (4) Program of Spaces with the notation “Fanning/Howay Associates, Inc. Confidential”; (5) Simon Sanchez Cost Comparison HS RS Means Cost Budget dated April 21, 2016 for GEDF prepared by Mr. Setiati; and (6) Okkodo Simon Sanchez Cost Comparison. *See*, CT Ex. 11 & 12.

1 DPW did not provide a copy of DPW's and GEFf's IDIQ Contract with the Negotiating Committee
2 Memo. The Negotiating Committee prepared the Negotiating Committee Memo for the procurement
3 file. *See*, CT Ex. 12.

4 In response to the Negotiating Committee Memo, on May 27, 2016, Core Tech filed a protest
5 based on the Notice of Intent to Award and the Negotiating Committee Memo, both of which Core
6 Tech received on May 13, 2016. *See*, CT Ex. 14. DPW denied Core Tech's May 27th Protest on
7 June 8, 2016. *See*, CT Ex. 15. On June 23, 2016, Core Tech appealed the denial of Core Tech's
8 May 27th protest to the Office of Public Accountability ("OPA"). *See*, CT Ex. 17. On July 1, 2016,
9 DPW filed a copy of the Procurement Record for the Appeal and served a copy of the Procurement
10 Record on Core Tech's counsel the same day. *See*, CT Ex. 18.

11 In connection with Core Tech's investigation of facts, on June 14, 2016, Core Tech submitted
12 a request to DPW for documents and information under the Sunshine Reform Act of 1999. *See*, CT
13 Ex. 16. DPW responded to Core Tech's June 14th Sunshine Act requests on July 1, 2016. On July
14 15, 2016, Core Tech filed a protest based on DPW's response to Core Tech's Sunshine Act requests
15 and the Procurement Record filed in the Appeal, both of which were served on Core Tech on July 1,
16 2016. *See*, CT Ex. 20. DPW denied Core Tech's protest on August 3, 2016. *See*, CT Ex. 22. On
17 August 10, 2016, Core Tech appealed the denial of its July 15th protest to the OPA. *See*, *In the*
18 *Appeal of Core Tech International Corp.*, OPA-PA-16-011 (the "Second Appeal"). *See*, CT Ex. 23.
19 The Public Auditor consolidated the First and Second Appeals on August 22, 2016. *See*, *In the*
20 *Appeal of Core Tech International Corp.*, OPA-PA-16-007 and OPA-PA-16-011 (*Order*
21 *Consolidating Cases and Revised Expedited Briefing Schedule*, August 22, 2016).
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24 II. ISSUES IN THE CONSOLIDATED APPEAL

- 25
26 A. WHETHER DPW VIOLATED 2 GAR §3114'S EXPLICIT LIMITATION OF
27 NEGOTIATIONS TO THE ISSUE OF COMPENSATION BY INVITING
28 AND ACCEPTING FOUR NEW PROPOSALS FROM GEFf AFTER DPW
COMPLETED EVALUATION AND RANKING.

- 1 B. WHETHER THE NEGOTIATING COMMITTEE MADE UNAUTHORIZED
2 MODIFICATIONS THE RFP WHEN IT ALLOWED GEFF TO SUBMIT
3 NEW PROPOSALS IN VIOLATION OF PROCUREMENT LAW.
- 4 C. WHETHER DPW THE NEGOTIATING COMMITTEE VIOLATED THE
5 BONDING REQUIREMENTS OF THE RFP IN VIOLATION OF
6 PROCUREMENT LAW.
- 7 D. WHETHER DPW VIOLATED THE RFP BY NEGOTIATING THE
8 INDEFINITE DELIVERY INDEFINITE QUANTITY (“IDIQ”) CONTRACT
9 TO CIRCUMVENT THE \$100M CAP.
- 10 E. WHETHER DPW MAINTAINED A COMPLETE PROCUREMENT
11 RECORD.
- 12 F. WHETHER EDWARD J. (“EJ”) CALVO VIOLATED 5 GCA §5601 *et seq.*
13 OF THE GUAM PROCUREMENT CODE.

14 Based on the arguments to follow, the Public Auditor should find that DPW violated Guam
15 Procurement Law and should (1) cancel the proposed award pursuant to 5 GCA §5451, if the contract
16 has not been awarded, or (2) terminate the contract pursuant to 5 GCA §5452(a), if the contract has
17 been awarded. The OPA should additionally award Core Tech reasonable attorney’s fees and costs
18 of the underlying protests and the consolidated appeals.

19 III. DISCUSSION

20 A. DPW VIOLATED 2 GAR §3114 WHEN IT ALLOWED GEFF TO 21 SUBMIT FOUR NEW PROPOSALS

22 The Negotiating Committee Memo DPW attached to its Notice of Intend to Award states that
23 the Negotiating Committee “engaged in numerous meetings and communications during which GEFF
24 submitted four (4) separate proposals.” *See*, CT Ex. 12 at CT-12-00001. GEFF’s four proposals
25 were new (“New Proposals”) and ranged in price from a high of \$89,332,258 to a low of
26 \$63,796,049. *Id.* The Negotiating Committee Memo also noted significant design differences
27 between the New Proposals, stating that the low offer “compromised the design parameters and needs
28 for Simon Sanchez High School, and was not considered to be the best value for Guam or GDOE.”

1 *Id.* at CT-12-00002. The Negotiating Committee ultimately selected one of the New Proposals, a
2 proposal of \$76,867,335 (“Final Proposal”). *Id.*

3 GEFF submitted the New Proposals after the proposal submission deadline of November 6,
4 2015, and after the Evaluation Team had reviewed and evaluated all proposals, and ranked the
5 offerors based on the proposals submitted. *Id.* at CT-12-00001-2. There is no evidence that DPW
6 notified Core Tech and Pernix, the other bidders on the RFP, that it had solicited new proposals from
7 GEFF, or that it invited Core Tech and Pernix to submit new proposals. GEFF’s New Proposals,
8 including the proposal the Negotiating Committee ultimately selected, materially altered the physical
9 design, structural components and technical components of the proposal GEFF originally submitted
10 in response to the RFP. *Id.* GEFF submitted the New Proposals after the November 6, 2015 deadline.
11 *Id.*

12 DPW violated Guam Procurement Law and the RFP by accepting the New Proposals. *See*, 2
13 GAR §3114. Guam Procurement Regulations do not permit an offeror to submit new proposals after
14 the Procuring Agency completes evaluation of proposals and ranking of offerors. *Id.* Guam
15 Procurement Law only authorizes the Procuring Agency to conduct discussions with offerors to
16 evaluate all proposals *timely* submitted. 2 GAR §3114(i)(1). While §3114(i)(1) authorizes DPW to
17 conduct discussions with offerors to “(A) determine in greater detail such offeror’s qualifications, and
18 (B) explore with the offeror the scope and nature of the required services, the offeror’s proposed
19 method of performance, and the relative utility of alternative methods of approach,” Guam
20 procurement law does not authorize the Procuring Agency to solicit and/or receive new proposals
21 after ranking. 2 GAR §3114(i)(1).

22 Finally, §3114(l) authorizes negotiations between the agency and offeror only with respect to
23 price. *See*, 2 GAR §3114(l):

24 **(l) Negotiation and Award of Contract.**

25
26 (1) **General.** The head of the agency conducting the procurement or a designee
27 of such officer shall negotiate a contract with the best qualified offeror *for the
required services at compensation determined in writing to be fair and
reasonable.*

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

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

3 (B) determining that the offeror will make available the necessary
4 personnel and facilities to perform the services within the required time; and

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

(emphasis supplied).

8 In denying Core Tech’s protest, DPW relied on Section 2.0 of the RFP, which states that
9 “[o]nce a firm is selected, a scope of work and fee estimate will be negotiated to perform the required
10 services for Simon Sanchez High School.” See, CT Ex. 15 at CT-15-00003; CT Ex. 1, RFP, §2.0
11 CT1-00007. The enabling legislation unambiguously requires the RFP to comply with Guam
12 Procurement Law, 5 G.C.A. §58D105, which, in turn, explicitly states that scope of work may be
13 discussed in negotiations to make “certain that the offeror has a clear understanding of the scope of
14 work, specifically, the essential requirements involved in providing the required services,” but does
15 not provide for any other discussions of scope of work. See, 2 GAR §3114(1)(2)(A). Reading the
16 RFP to comply with established procurement law, the RFP’s reference to discussions related to scope
17 of work must refer to *clarification* of the scope of work required. §3114(1)(2)(A) does not allow the
18 procuring agency to change, expand, modify or reduce the scope of work. Guam Procurement Law
19 limits the scope of negotiations to the issue of compensation. See, 2 GAR §3114(1). The Negotiating
20 Committee, in allowing GEF to submit four New Proposals and accepting of the four New
21 Proposals, exceeded its authority and violated §3114(1) of the Procurement Regulations. The OPA
22 should therefore invalidate the purported award to GEF. *Id.*

23 **B. THE NEGOTIATING TEAM DID NOT HAVE AUTHORITY TO**
24 **MODIFY THE RFP OR TO ACCEPT GEF’S NEW PROPOSALS**

25 As noted, the Negotiating Committee accepted four New Proposals from GEF during
26 negotiations and ultimately decided to proceed with one of those New Proposals. The Final Proposal,
27 which DPW attached to the Negotiating Committee Memo, did not comply with the technical
28 requirements of the RFP, in particular, the technical requirements relating to the “Program of

1 Spaces.” *See*, CT Ex. 12, at CT-12-0008-11. The final proposal did not comply with the RFP as
2 follows:

3 1. **Reduction of Classrooms.** The number of classrooms in GEF’s Final Proposal
4 (Program of Spaces) does not meet the requirements of the RFP. For example, GEF’s proposal
5 includes only 18 of the 22 required English classrooms, 14 of the 15 required science classrooms, 14
6 of 16 the required Social Studies classrooms, and 23 of the 34 required classrooms for Fine Arts, PE,
7 Health, World Languages, CFS, ROTC, Chamorro, and Business. GEF’s final proposal also failed
8 to match the requirements for administrative offices set forth in Addendum 6 to the RFP. *See*, CT
9 Ex. 2, Addendum 6 to RFP; CT Ex. 12.

10 2. **Reduction of Auditorium Seating.** The RFP requires a 750-seat Auditorium. *See*,
11 CT Ex. 3 at CT-2-00017. However, GEF’s final proposal proposed a 500 capacity Auditorium. *See*,
12 CT Ex. 12 at CT-12-00002-3 and attached Program of Spaces.

13 These were significant deviations from the requirements of the RFP. Core Tech estimates the
14 value of the reduction in classrooms and in auditorium seating at approximately \$10 million from
15 construction costs (not including any profit or developer fees). GEF’s final proposal was clearly
16 non-responsive to the RFP. The Negotiating Committee’s act of selecting the final proposal despite
17 its non-compliance with the RFP amounts to an improper modification of the RFP after the deadline
18 for submissions closed, after ranking the offerors, and during the negotiations process, for GEF’s
19 exclusive benefit. DPW did not accord Core Tech and Pernix the “fair and equal treatment with
20 respect to any opportunity for discussions and revisions of proposals” Section 4.9.4.3 of the RFP and
21 Guam Procurement Law require. *See* 5 G.C.A. §5001(a)(4). The Negotiating Committee did not
22 have the authority to modify the RFP. By permitting GEF to submit New Proposals and modifying
23 the RFP during contract negotiations to conform to the Final Proposal, DPW not only violated
24 procurement laws, but gave GEF an unfair advantage over all other offerors.

25 By ultimately selecting a proposal that did not comply with the RFP, the Negotiating
26 Committee violated Guam Procurement law and the OPA should cancel the proposed award to
27 GEF.

1 **C. THE OFFEROR MUST BE BONDABLE WITH 100%**
2 **PERFORMANCE AND PAYMENT BOND**

3 The RFP requires all construction task orders to contain contractual obligations which
4 include, among other things, Performance and Payment Bonds. *See*, CT Ex. 1 at CT-1-00019, RFP,
5 §4.1. The *Ma Kahat Act of 2013* provides that the construction contract shall contain contractual
6 obligations typically found in government of Guam construction contracts, including, but not limited
7 to ... performance and payment bonds....” 5 GCA §58D112. The RFP specifically requires that
8 Offerors submit a bid bond for 15% of the 100 million to be financed (*see*, §4.2.1.4, *RFP*) and that
9 the Offeror (Awardee) be bondable:

10
11 4.2.1.5. ***The Offeror [awardee] must be bondable as required by this RFP and***
12 ***by law. A one hundred percent (100%) performance and payment bond must be***
13 ***obtained by Offeror or its prime Contractor.*** The bond must be issued by a
company authorized to do business on Guam, and listed in the U.S. Department of
the Treasury’s Listing of Approved Sureties (Circular 570).

14 *RFP* at 21 (emphasis supplied). According to the Negotiating Committee Memo, the Negotiating
15 Committee and GEFf specifically negotiated “Guam Education Development Partners, Developer’s
16 Subcontractor, is required to provide a Performance Bond.” *See*, CT Ex. 12 at CT-12-0004. While
17 the RFP requires all subcontractors to be bondable, Sections 4.1 and 4.2.1.5 of the RFP (modified by
18 Addendum 6 at page 5 replacing the word “Offeror” with “Awardee”) contain the following
19 requirements:

- 20 (1) The Awardee must be bondable; and
21 (2) A one hundred percent (100%) performance and payment bond must be posted
22 by the Awardee or its prime contractor.

23
24 Neither GEFf nor the Developer’s Subcontractor Guam Education Development Partners
25 (“GEDP”) is providing the bonding the RFP requires. The Preliminary Development and Financing
26 Schedule identifies GEDP as the Master Developer and Project Manager, and Hensel Phelps as
27 Contractor. *See*, CT Ex. 30 at CT-30-00002-4. While Hensel Phelps, a contractor, is bondable, its
28 role in the project is contractor to the GEDP, the development subcontractor, and not the Awardee or

1 Offeror -- GEF. Under the IDIQ Agreement and the agreement reached by the parties, GEF is
2 subcontracting the development obligations, rights and responsibilities to GEDP, including the
3 obligation under the RFP to provide a performance and payment bond. The subcontract of the
4 development obligations, rights and responsibilities by GEF to GEDP does not comply with the
5 express requirement in both the RFP and the enabling legislation. GEF is attempting to circumvent
6 the RFP's requirement for bonding directly through the offeror/awardee or its prime contractor
7 through an illegal subcontract agreement with GEDP. The subcontract of the agreement to GEDP is
8 illegal. To the extent GEF's proposal contemplates bonding through GEDP's construction
9 subcontractor, its proposal is non-responsive to the RFP, and DPW's act of accepting GEF's
10 proposed bonding structure violates the RFP, the enabling legislation, and Guam Procurement Law.
11 For this reason, the OPA should cancel the proposed award to GEF.

12
13 **D. THE IDIQ CONTRACT ENVISIONS GEF CIRCUMVENTION OF
\$100M CAP IN VIOLATION OF RFP**

14 On May 13, 2016, DPW, the Department of Education ("DOE"), and GEF agreed to a final
15 version of the IDIQ Contract. Section 3.1 of the execution version of the IDIQ Contract states
16 as follows:

17
18 **III.**
COMPENSATION AND PAYMENT FOR SERVICES

19 **3.1. Compensation and Payment for Services.** The Government will compensate the
20 Developer for services rendered for Task Orders issued as provided in this Contract based on
21 available funds and not to exceed One Hundred Million and 00/100 Dollars (\$100,000,000.00)
pursuant to Section I (Scope of Contract), unless otherwise directed by the Director of DPW in
writing and permitted by Public Laws 32-120 and 32-121 or any other law. The first and second
Task Orders will be for Simon Sanchez High School and the CCIP.

22
23 *See*, CT Ex. 13 at CT-13-00005. The plain language of Section 3.1 contemplates potential
24 compensation exceeding \$100 million at DPW's direction. Section 4.0 of the RFP, as amended by
25 *Addendum 6*, explicitly restricts the amount of the RFP to \$100 million:

26
27 The scope of work for this RFP includes financing and lease financing for
28 rehabilitation, construction, expansion and renovation (inclusive of
architectural and engineering design) of thirty-six (36) schools **with a total
cost of up to One Hundred Million Dollars (\$100,000,000.00).**

1 See, CT Ex. 2, §4.0, *Addendum 6* at CT-2-0008 (emphasis supplied).

2 Notwithstanding the clear restriction in the RFP limiting compensation to GEF to \$100
3 million, GEF and DPW drafted and agreed to Section 3.1 of the IDIQ Contract, which creates a
4 mechanism by which GEF may circumvent the \$100 million RFP restriction. In its August 23,
5 2016 Agency Report in OPA-PA-16-011, DPW claims that Core Tech's concern that Section 3.1
6 authorizes funds beyond the RFP's \$100 million cap amounts to mere speculation despite the clear
7 language in the IDIQ Contract deviating from the RFP's strict compensation limit, and despite
8 correspondence between GEF, the Negotiating Committee and DPW during the negotiations
9 process in which GEF repeatedly stated its position that compensation was not capped at \$100
10 million. GEF's intention to exceed the 100 Million cap could not be clearer, as the following
11 communications demonstrate:

12 1. *April 13, 2016 letter from Speaker Judy Won Pat.* In a letter dated April 13, 2016,
13 Speaker Won Pat, a sponsor of Public Laws 32-120 and 32-121 (the "Public Laws"), responded to
14 concerns DOE Superintendent Jon Fernandez raised regarding the "borrowing capacity for school
15 renovations." See, CT Ex. 8. The letter states, in part:

16
17 I recall in our January 7, 2016 conversation, you had asked me for
18 some clarity on the laws regarding this. You were specifically interested in
19 increasing the borrowing capacity for school renovations while keeping the
20 same debt service. After some review, my office staff and I found that the
21 law governing the borrowing capacity for school renovations does not
22 specify a limit.

23
24
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 2. *Letter dated April 1, 2016 from GEF to DPW.* In an April 1, 2016 letter from
GEF to DPW, GEF, relying on its counsel's opinion, states the following regarding funding:

From a funding perspective, we have requested Calvo Fisher & Jacob, our
legal counsel, to review the RFP, PL 32-120 and PL 32-121 as they relate to
Guam Procurement law and whether the scope of work for SSHS and the other
thirty-six (36) schools is capped at \$100 million. Their response indicates
that the process fully complies with Guam procurement law and the scope

1 **of work to be negotiated between the Government and GEFF is not**
2 **capped but is limited to the rental payments allocated under the two laws.**

3 *See*, CT Ex. 7 at CT-7-0001-2 (emphasis supplied).

4 GEFF asked its counsel, Calvo Fisher & Jacob (“CFJ”), to opine on the RFP and whether
5 under “Public Laws 32-120 and 32-121 ... the Government and GEFF are able to negotiate the scope
6 of work for the design of Simon Sanchez High School...and whether the total cost for all thirty-six
7 (36) public schools is capped at \$100 million.” *See*, CT Ex. 6. CFJ’s response was:

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

13 *Id.* (emphasis supplied).

14 In denying Core Tech’s July 15th Protest, DPW incorrectly states that the IDIQ Contract
15 specifically provides for a \$100,000,000 cap. It reiterates this position in its August 23, 2016 Agency
16 Report in OPA-PA-16-011, sidestepping the clear qualification in the IDIQ Contract that the amount
17 may exceed the \$100 million RFP cap at DPW’s direction, a substantial deviation from the absolute
18 RFP cap. The IDIQ Contract allows the parties to exceed the \$100 million cap at DPW’s direction so
19 long as the source of government revenues from the Public Laws generates sufficient revenues to
20 cover debt service payments. The source of revenues, as discussed below, is government revenues
21 that are fixed, are not subject to annual appropriation and approval of the Legislature and that exceed
22 \$100 million if fully utilized as DPW and GEFF seem to contemplate in the IDIQ.

23 There are several sources for payment of Simon Sanchez High School Lease. The sum of
24 \$1,707,652 comes from the Territorial Educational Facilities Fund and is funded by real property tax
25 revenues. *See*, 5 GCA §58D109 & 5 GCA §22425 (q)(4). Additionally, 80% of any amount not
26 pledged under (1) to (5) of 5 GCA § 22425(q) will go towards the rental payments due for Simon
27 Sanchez and future schools. *See*, 5 GCA §22425(q)(6). Although the amounts pledged or reserved
28 under §58D109 is limited to \$5,051,977.98 per year during the lease-back period for Simon Sanchez,
Public Law 32-120 also allows the Governor to “pledge or reserve the additional proceeds as a source

1 of payment for municipal lease financing, secured for the purposes stated herein.” See, 5 GCA
2 §58D102.

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

11 DPW’s removal of the RFP cap violates §4.0 of the RFP because it effectively gives GEFf a
12 blank check on the amount it can borrow on the bond market at Guam’s expense. DPW appears to
13 recognize the problematic nature of the compensation provision in the IDIQ Contract, stating in its
14 Agency Report that “if necessary, Section 3.1 could still be modified as the IDIQ contract has not
15 been executed by the Governor nor approved by the Attorney General.” *Agency Report* at 6. DPW’s
16 assurance that it could correct the compensation provision if the OPA orders it to does not make up
17 for the fact that it conspired with GEFf to circumvent the cap in the first place. Moreover, DPW has
18 not actually guaranteed that it *would* modify Section 1.3 if allowed to proceed. The OPA should not
19 reward GEFf’s attempts to raid Government coffers with DPW’s blessing, and it should cancel the
20 award to GEFf.

21 **E. DPW FAILED TO MAINTAIN A COMPLETE PROCUREMENT**
22 **RECORD REQUIRED UNDER GUAM PROCUREMENT LAW.**

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

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

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

1 1. DPW failed to maintain a complete log of all communications as required by §5
2 G.C.A. §5249(a). Instead of maintaining a procurement log book, DPW produced an “RFP
3 Committee for SSSH & 35 DOE Schools” log book (“Log Book”) whose entries begin on December
4 22, 2015, more than 6 months after issuance of the RFP, and end on March 1, 2016, over two months
5 before DPW issued the Notice of Intent to Award. DPW admitted in its denial of the Protest that it
6 did not include communications to or from government employees related to the procurement in a
7 communications log, but argued that it “substantially complied in good faith with this requirement”
8 by providing the communications themselves in the Procurement Record. That is not the law. The
9 law requires the government to keep and provide a log. Like any summary, a log has functions which
10 the source documents themselves cannot achieve. The requirement that a procuring agency maintain
11 a log reinforces government transparency and creates a record so that if source documents are
12 inadvertently lost or damaged, the log would still confirm their existence. In addition, a log allows the
13 reader—whether that reader is a protestor, the Public Auditor, or any member of the public—to
14 review the bigger picture. Most importantly, however, a log includes types of information that source
15 documents cannot provide, such as telephone calls and in-person meetings. DPW’s claim that it can
16 simply re-create the log at a later date ignores the fact that doing so would still exclude these types of
17 non-print communication.

18 Because the Government failed to maintain a log, there is no way of confirming whether the
19 government has provided all communications. There is nothing against which Core Tech or the OPA
20 can check the documents the Government provided. Because there is no log, there is no record of
21 non-print communications such as phone calls or record of documentary evidence that the
22 Government may have lost, damaged, or inadvertently omitted from the record. As it is, DPW
23 initially omitted records from the Procurement Record, and had to supplement the Record on August
24 3, 2016. Because there is no log, the OPA must simply rely on DPW’s representations that its record
25 is complete, a representation it erroneously made before.

26 2. DPW failed to record the negotiations meetings as required by 5 G.C.A. §5249(c).
27 The Negotiating Committee members (Jon Fernandez, Mana Silva Taijeron, and Felix Benavente)
28 and GEFF engaged in numerous negotiation meetings with GEFF. The twelve (12) meetings of

1 which Core Tech is aware based on its review of the documents in the Procurement Record and
2 Sunshine Act responses, occurred on February 15, 2016, February 19, 2016, February 23, 2016,
3 March 2, 2016, March 15, 2016, March 23-25, 2016, April 21, 2016, April 26, 2016, April 27, 2016,
4 and April 28, 2016. DPW has provided no recordings of these meetings in the Procurement Record,
5 and concedes that it did not make any such recordings. DPW has admitted that one of its employees,
6 Reynaldo Junio, made a partial recording of one negotiation meeting on a personal cell phone, and
7 that DPW's attorney informed Mr. Junio that the recording was part of the procurement record, but
8 that DPW failed to preserve the recording, which was lost when Mr. Junio's cell phone sustained
9 water damage on June 4, 2016. *See*, CT Ex. 21. In its Agency Report, DPW now claims that the
10 partial recording Mr. Junio made was in lieu of meeting minutes. However, Section 5249(c) does not
11 require meeting minutes. It requires sound recordings. Sound recordings are necessarily more
12 complete, and more accurate, than meeting minutes.

13 In denying Core Tech's protest on the basis of DPW's failure to maintain a proper
14 procurement record, DPW originally denied that the provisions of §5249(c) applied to the
15 procurement in this matter, insisting that the internal semicolon in the Guam Compiler of Laws'
16 version of §5249(c) evidenced that the Legislature intended that only pre-bid conferences must be
17 recorded.¹

18 In its August 23, 2016 Agency Report, DPW concedes that Section 5249, as originally
19 executed, contains a comma and not a semicolon as the Compiler of Laws' version displays. No
20 existing version of Section 5249, including the Compiler's version, references any further
21 amendments to the law that would account for the punctuation change. However, citing to *Town of*
22 *Pacific v. Seipert*, 79 Mo. 210, 214 (1883), a 133-year old case from Missouri, DPW appears to argue
23 in its Agency Report that the Compiler's incorrect version of the statute, the version with the
24 semicolon, should be *deemed* the law because the Compiler's version has been published for twenty
25

26 ¹ The Compiler's version of §5249 states in relevant part:

27 (c) *sound recordings of all pre-bid conferences; negotiations arising from a request for proposals*
28 *and discussions with vendors concerning small purchase procurement[.]*

1 (20) years. DPW is effectively attempting to substitute the Compiler’s error for the Legislature’s will.
2 This is not the law in Guam. 1 G.C.A. §103 sets forth the relationship between the Guam Code
3 Annotated and other permanent laws. It provides in relevant part:

4
5 § 103. Relationship Between This Code and Other Permanent Laws.

6 (a) The general and permanent laws of Guam shall be:

7 (1) Guam Code Annotated shall be the publication of the permanent
8 codes of Guam and the publications thereof, when certified by the
9 Compiler of Laws, shall be legal evidence of the laws contained
10 therein;

11 ...

12 (3) Public Laws, which may be found in the Office of the
13 Governor, the Office of the Speaker of the Legislature, the Office of
14 Compiler of Laws (commencing with the laws of the 13th Guam
15 Legislature), and any other location declared an official depository by
16 the laws of Guam. Copies contained in the above shall be legal
17 evidence of the laws contained therein.

18 ...

19 (b) If there is shown to be a difference, not permitted by this Code, in
20 contents between the Public Laws described in subsection (3), above, and any
21 of the laws described in subsections (1), (2), (4) and (5) above, the Public Laws
22 shall take precedence.

23 1 G.C.A. §103. Section 103 provides that to the extent there is any discrepancy between the GCA and
24 the Public Laws, the Public Laws take precedence. In fact, if the Compiler deliberately altered the
25 language of §5249, of which there is no evidence, that alteration would not trump Public Law No. 18-
26 44. The Compiler’s error is certainly not the law.

27 DPW’s claim that it relied on the wrong version of the statute and interpreted the clauses of
28 §5249(c) independently is similarly not compelling. The clauses do not make sense independently
and DPW understandably does not offer an interpretation for the supposedly independent clauses of
§5249. DPW’s interpretation of the incorrect Compiler’s version of §5249 would require the
procurement record to include a sound recording of all pre-bid conferences and, separately,
“negotiations arising from a request for proposals and discussions with vendors concerning small

1 purchase procurement” with no stated form, whether written or recorded. Read this way, the law
2 would require that the *negotiation itself* somehow be included in the procurement record. DPW does
3 not explain why it believes the legislature would single out pre-bid conferences to be sound-recorded,
4 but not any of the other items in §5249(c). DPW’s argument is further undermined by the fact that its
5 attorney informed Reynaldo Junio that his recording was part of the procurement record.

6 DPW further claims in its Agency Report that “[t]he procurement record is replete with over
7 3000 pages of documents,” including “drafts of documents, logs, minutes of meetings,
8 communications, evaluation, and a detailed memorialization of negotiations that resulted in the notice
9 of intent to award the contract to GEF.” *Agency Report* at 6. As the Court noted in *Teleguam*
10 *Holdings LLC v. Government of Guam*, Superior Court of Guam Case No. CV0334-13 (August 8,
11 2014), volume is not part of the criteria for determining if the procuring agency has generated a
12 complete procurement record:

13
14 While the Court appreciates the great amount of time and effort that no doubt
15 was required to generate this procurement record, neither time and effort nor
16 size are the criteria for determining whether a procurement record is complete
17 under the Guam Procurement Law. Instead, the statute demands the creation of
18 the procurement record, and the statute also specifies what must be included in
19 it: “Each procurement officer shall maintain a complete record of each
20 procurement. The record shall include the following...” 5 G.C.A. §5249
21 (2005). Under the plain language of the statute, the procurement record is not
22 complete unless it includes the enumerated list of required documents. Nor
23 does the assertion that “there was and is nothing more GSA can give to GTA,”
24 even if true, necessarily mean that the record is complete. There could be many
25 reasons for required documents to not be included in the procurement record. It
26 is not the reason why documents are not included in the procurement record
27 that makes it complete or incomplete, but simply the fact of their inclusion or
28 lack thereof.

23 *Teleguam Holdings, supra* at 14-15. Similarly, no amount of documents can correct the inadequacies
24 of the procurement record in this matter, which, contrary to DPW’s claims in its Agency Report, are
25 fatal to the procurement. DPW claims that the procurement record does contain a communications
26 log, and while the procurement record does not contain sound recordings, DPW prepared notes or
27 minutes of the meetings for the record. DPW is urging the OPA to overlook the fact that the
28 procurement record contains a truncated communications log that accounts for only four (4) of the

1 procurement's eleven (11) months of activity (and whose completeness during those four months is
2 unclear), and the fact that the law does not permit DPW to simply substitute one method of record-
3 keeping (minutes) for another (sound recordings) at its discretion. DPW is attempting to contrast its
4 failure to maintain the procurement record from the Government's failure in *Teleguam Holdings*, but
5 the cases overlap significantly. In *Teleguam Holdings*, the Government failed to preserve materials
6 from four classes of required records: (1) records of date, time, subject matter, and names of
7 participants in meetings, (2) a communications log, (3) several drafts of the Invitation for Bid
8 ("IFB"), and (4) research documents supporting development of the IFB. *Id.* at 10-14. The
9 procurement record in this matter is similarly inadequate, with DPW failing to maintain a proper
10 communications log, and failing to produce *any* sound recordings whatsoever, disregarding its
11 obligation to preserve an entire class of records Section 5249 requires. As in *Teleguam Holdings*, no
12 volume of production in this case will compensate for records that DPW failed to generate at all.
13 Though DPW claims that it simply needs time to organize the procurement record "as the process is
14 stayed pending the protest," no amount of organizational skill will recreate sound recordings DPW
15 did not keep. Nor can it account for non-documentary communications it failed to
16 contemporaneously note in its communications log. These records are lost and unrecoverable, and
17 DPW's failure to maintain them is inexcusable and incurable.

18 Guam law provides a clear remedy for a procuring agency's failure to certify a complete
19 procurement record. "No procurement award shall be made unless the responsible procurement
20 officer certifies in writing under penalty of perjury that he has maintained the record required by
21 §5249 of this Chapter and that it is complete and available for public inspection." 5 G.C.A. §5250
22 (emphasis supplied). As the Superior Court held in *Teleguam Holdings LLC v. Government of*
23 *Guam*, Superior Court of Guam Case No. CV0334-13 (*Decision and Order*, August 18, 2016) "the
24 Procurement record upon which [the Invitation for Bid] and the proposed awards were based is
25 incomplete. A revision of the consequent proposed awards cannot render the preceding procurement
26 record complete and it would remain in violation of the Procurement Law...Therefore, the only
27 remaining remedy available to the Court is to cancel the solicitation and proposed awards". *Id.* at 8.
28 Because DPW failed to record and maintain complete communications log and recordings of

1 negotiations with GEF, the procurement record is incomplete and does not comply with 5 G.C.A.
2 §5249, and the OPA should cancel the proposed award to GEF.

3
4 **F. WHETHER EDWARD J. (“EJ”) CALVO VIOLATED 5 GCA §5601
5 *et seq.* OF THE GUAM PROCUREMENT CODE.**

6 Mr. Calvo was appointed to the board of GEDA on February 2011, and assumed the role of
7 the Chairman of the Board on July 12, 2013. Pursuant to 5 G.C.A. §5030(j), as a “noncompensated
8 individual performing personal services for any governmental body,” Mr. Calvo is by definition an
9 employee of GEDA. Guam Procurement Law prohibits Government employees from attempting to
10 realize personal gain through public employment. See, 5 G.C.A. §5626. Further, non-employees are
11 prohibited from attempting to influence public employees to violate ethical standards.

12 Specifically, §5628 of the Guam Procurement Law states that it is “a breach of ethical
13 standards for any employee to participate directly or indirectly in a procurement when the employee
14 knows that: (1) the employee or any member of the employee’s immediate family has a financial
15 interest pertaining to the procurement; (2) a business or organization in which the employee, or any
16 member of the employee’s immediate family, has a financial interest pertaining to the procurement;
17 or (3) any other person, business or organization with whom the employee or any member of the
18 employee’s immediate family is negotiating or has an arrangement concerning prospective
19 employment is involved in the procurement. 5 G.C.A. §5628. For purpose of this section, Guam
20 Procurement Law defines “Financial Interest” as follows:

- 21 (1) ownership of any interest or involvement in any relationship from which, or
22 as a result of which, a person within the past year has received, or is presently or in the
23 future entitled to receive, more than Two Thousand Five Hundred Dollars (\$2,500) per
24 year, or its equivalent; (2) ownership or such interest in any property or any business
25 as may be specified by the Ethics Commission; or (3) holding a position in a business
26 such as an officer, director, trustee, partner, employee, or the like, or holding any
27 position of management.

28 5 G.C.A. §5601.

Further, 5 G.C.A. §43101 specifically prohibits a member of an elected or appointed board
from acting or participating in discussions on any matters in which he has a financial interest, and
from “influencing any determination made by the board or commission on which the member serves

1 and in which the member either participates personally and substantially through decision, approval,
2 disapproval, recommendation, the rendering of advice, investigation or otherwise, or which is the
3 subject of the member's official responsibility, where the government of Guam is a party or has a
4 direct and substantial interest." 5 G.C.A. §43101.

5 Mr. Calvo's position as Chairman of the GEDA Board did not require his direct or indirect
6 involvement in this RFP -- he could and should have recused himself. In spite of the obvious
7 conflict, the February 25-26th email communications reveal that in February 2015, Mr. Calvo
8 specifically injected himself into the procurement process when he requested to be part of the GEDA
9 "working group" for the drafting of the Request for Proposals for the Project.

10
11 On 2/25/15 3:55 PM, "EJ Calvo" <ejcalvo@tpiguam.com> wrote:

12 Can someone please forward me email sent to DPW presenting GEDA's input on
13 financing for the RFP for Simon Sanchez?

14 EJ

15
16 On Wed, Feb 25, 2015 at 5:12 PM, Christina Garcia <cgarcia@investguam.com> wrote:
17 EJ... We are working on the RFP draft with the AG's office and they have asked that we not
18 release to anyone outside of the working group until it is finalized.

19 Let us know if you want to meet to discuss in more detail.

20 *Si Yu'os Ma'ase,*
21 Tina

22 --

23 Ignoring the Attorney General's instructions and Guam Procurement Law, GEDA included
24 Mr. Calvo in the working group generating the RFP. If, in fact, as the emails state, Mr. Calvo
25 participated in the working group for the RFP, then he directly participated in the procurement
26 because he was involved "through decision, approval, disapproval, recommendation, preparation of
27 any part of a purchase request, influencing the content of any specification or procurement standard,
28 rendering of advice, investigation, auditing or in any other advisory capacity." 5 G.C.A. 5601(d).

1 Mr. Calvo injected himself in the RFP process utilizing his authority and position as
2 Chairman of GEDA—seemingly overriding the instructions of the Attorney General not release the
3 RFP to anyone outside of the working group. Mr. Calvo, and his company PXC, had a financial
4 interest in how the RFP was awarded. Mr. Calvo, who not only is the Chairman of GEDA but also
5 the CEO of Pacific X-Treme Combat LLC, a company with direct interest in Guam Education
6 Development Partners (“GEDP”), has engaged in activity that implicates the ethical standards for
7 employees and non-employees involved in the procurement process.

8
9 **IV. CONCLUSION**

10 Core Tech requests a ruling from the OPA as follows:

- 11 1. A determination that DPW violated the RFP by attempting to circumvent the RFP’s
12 compensation cap;
- 13 2. A determination that DPW failed to maintain a complete procurement record in this
14 case;
- 15 3. If a contract has not yet been awarded, a declaration that the proposed award to GEFF
16 is cancelled pursuant to 5 G.C.A. § 5451(a);
- 17 4. If a contract has been awarded to GEFF, a declaration terminating the contract under 5
18 G.C.A. §5452(a);
- 19 5. A determination that Mr. Calvo violated the Ethical Standards in Guam Procurement
20 Law and appropriate sanctions provided under 5 G.C.A. §§5627 and 5650-5651;
- 21 6. For an award of reasonable attorney’s fees and costs of this protest and appeal; and
- 22 7. For such other relief that the OPA may determine is just and proper.

23 Respectfully submitted this 2nd day of September, 2016.

24 **CIVILLE & TANG PLLC**

25 By: _____

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27 Leslie A. Travis
28 *Attorneys for Appellant*
Core Tech International Corp.