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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 09-02-16
TIME: 4:15 AM PM BY: JM
FILE NO OPA-PA: 16-007, 16-011

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**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS**

IN THE APPEAL OF:

CORE TECH INTERNATIONAL CORP.,

Appellant.

CONSOLIDATED APPEAL NOS.:
OPA-PA-16-007
OPA-PA-16-011

**HEARING BRIEF OF INTERESTED
PARTY GUAM EDUCATIONAL
FACILITIES FOUNDATION**

ORIGINAL

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1 **I. ISSUES RELATIVE TO CORE TECH'S FIRST APPEAL (OPA-PA-16-007)**

2 **A. There Is No Merit To Core Tech's Allegation That GEFF Improperly**
3 **Submitted "New Proposals" During The Contract Negotiation Phase.**

4 Citing to the Negotiating Committee's May 13, 2016 Memorandum (the "Negotiating
5 Committee's Memo"), Core Tech's Appeal alleges that DPW violated the law when it allowed
6 GEFF to submit, during contract negotiations, what Core Tech misleadingly characterizes as
7 "new proposals." Nowhere in the Negotiating Committee's memo is the word "new" used to
8 describe the GEFF proposals. Instead, it was Core Tech's counsel who unilaterally inserted
9 "new" before the term "separate proposals" when she quoted in her Appeal a sentence from the
10 Negotiating Committee's Memo. *See* Appeal at 3, lines 19-21 ("the Negotiating Committee
11 Memo released by DPW states that the Negotiating Committee 'engaged in numerous meetings
12 and communications during which GEFF submitted four (4) [new] separate proposals'")
13 (emphasis in original). Core Tech thus tries to make it appear – deceptively – that there were
14 "new" proposals improperly submitted by GEFF, which were intended to supersede GEFF's
15 November 20, 2015 response to the RFP.¹ Core Tech's allegation is without merit.

16 During the first phase of the instant procurement, GEFF was selected as the most qualified
17 offeror in response to the RFP.² Core Tech and Pernix were ranked second and third,
18 respectively. Procurement Record, Tab 12; Declaration of Sean K. Easter (filed 7/22/16)

19 _____
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 (“Easter Decl.”), Exh. 2. The government’s evaluation of the three proposals submitted on
2 November 20, 2015 did *not* consider price or cost as a factor in determining the most qualified
3 offeror. This is consistent with the law. *See In the Appeal of Guam Education Financing*
4 *Foundation, Inc.*, OPA-PA-09-007, Decision at 8-9 (Guam OPA, Jan. 6, 2010) (in the request for
5 proposal method of solicitation, cost is not a factor in determining the best qualified offeror).

6 Moreover, Core Tech itself acknowledged over six (6) months ago – in January 19, 2016 –
7 that cost was *not* going to be an evaluation factor in selecting the most qualified offeror. In its
8 first procurement protest related to the instant RFP (which DPW eventually found meritless and
9 summarily denied, and which denial Core Tech did not appeal), Core Tech’s counsel stated, in
10 pertinent part:

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

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

18 **Answer:** Confirmed.

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

24 After GEFF was selected as the most qualified offeror, GEFF and the government entered
25 the second and final phase of the procurement – contract negotiations. During that phase, the
26 parties negotiated contract details including price and scope of work. Easter Decl., ¶ 7. The so-
27 called “new proposals” that Core Tech accuses GEFF of submitting were actually, in substance,
28

1 alternative cost and pricing estimates for various construction scenarios of the new Simon
2 Sanchez High School. Easter Decl., ¶ 8. The pricing estimates were based on GEFf’s work with
3 the Negotiating Committee during contract negotiations to arrive at the “best value” for the
4 construction of the new high school. *Id.*

5 The RFP had provided an outline list of “General Considerations” for the construction of
6 the new school (see Exhibit A of RFP Addendum No. 6); however, that outline was drafted by the
7 Guam Department of Education (“GDOE”) (*see* Agency Report, Exh. P (Fernandez Decl., ¶ 6),
8 presumably without the benefit of experts on school design and construction, and was not
9 intended to contain inflexible details concerning, for example, the number of classrooms to be
10 constructed at the new school (*id.*). Indeed the purpose of the RFP was to select the most
11 qualified offeror to assist the government in finding the best approach to building a new school, at
12 the best value for the government. Consistent with this approach and intent, GEFf utilized its
13 expertise in school design and construction in working with the Negotiating Committee to
14 develop the best plan for construction of the new school. Easter Decl., ¶ 7.

15 Thus, the government’s negotiations with GEFf – which occurred *after* GEFf was
16 selected as the most qualified offeror – involved both “scope of work” and “price.” Core Tech
17 knew full well since 2015,³ that after the government selected the most qualified offeror, it would
18 then negotiate scope of work and price with the most qualified offeror. The RFP provides for that
19 process in clear and unmistakable terms:

20
21 Once a firm is selected, *a scope of work and fee estimate will be*
22 *negotiated* to perform the required services for Simon Sanchez
High School. “

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

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

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

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(l) Negotiation and Award of Contract.

(1) General. The head of the agency conducting the procurement or a designee 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.

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

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

...

(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(l)(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.

1 **B. There Is No Merit To Core Tech’s Allegation That The Negotiating Team**
2 **Impermissibly Modified The RFP During Contract Negotiations With GEFF.**

3 Core Tech claims that DPW impermissibly modified the RFP by allowing GEFF to
4 submit cost estimates based on modified construction details, which differed from those in
5 Exhibit A of the RFP. As stated above in Section I.A, Exhibit A is entitled “Simon Sanchez
6 High School *Considerations*” (emphasis added). The 11-page document outlines details about
7 what the new high school should contain, such as the number of classrooms, offices, and so forth.
8 It also notes that the new school would accommodate “2,300 students” and “120 classroom
9 teachers.” It was presumably called “Considerations” for a reason, rather than mandatory
10 “Requirements.” That is because the “Considerations” were intended to be flexible guidelines
11 and general parameters, which would provide a basis from which the government and the
12 successful offeror could negotiate the final “scope of work” for the construction project. Agency
13 Report, Exh. P (Fernandez Decl., ¶¶ 6-10).

14 That is exactly what happened. As stated above, the RFP allows for the parties to
15 negotiate the “scope of work” (and price) for the new Simon Sanchez High School. *See* Section
16 2.0 of the RFP, Addendum No. 6 (“*Once a firm is selected, a scope of work and fee estimate will*
17 *be negotiated* to perform the required services for Simon Sanchez High School.”) (emphasis
18 added). And because that process was explained in the RFP, Core Tech at the time of its
19 proposal submission in November 2015 was well aware of it. As mentioned previously, this
20 process is also envisioned by law and accepted by the OPA. *See, e.g.*, 2 GARR Div. 4
21 § 3114(1)(1)-(2) (parties shall engage in negotiation of the contract to make certain that the offeror
22 has a clear understanding of the scope of work and that the negotiated scope meets the needs of
23 the contracting party); *In the Appeal of Guam Education Financing Foundation, Inc.*, OPA-PA-
24 09-007, Decision at 8-9 (Guam OPA, Jan. 6, 2010) (in the request for proposal method of
25 solicitation, cost is not a factor in determining the best qualified offeror).

26 As also stated above, refinements to the “Considerations” set forth in Exhibit A took place
27 with the intent of providing the “best value” for Guam in meeting the objectives of GDOE. *See* 5
28 GCA § 58D105. *See also* Easter Decl., ¶ 9. GEFF’s approach was to work closely with GDOE

1 to design an efficient school. GEFf utilized the professional expertise of its team members to
2 develop an improved design effective at meeting GDOE’s educational needs.

3 An example of how this expertise translated into a “best value” result for the Government
4 during the contract negotiations – rather than an error, as Core Tech alleges – is how GEFf and
5 the Negotiating Committee “right-sized” the number of classrooms and other spaces for the new
6 school. See Agency Report at Exh. K (Neg. Comm. Memo at 2) (“GEFF will design Simon
7 Sanchez High School on the basis of the school considerations as shown in Exhibit A of the RFP
8 *with some changes in features to achieve appropriate right-sizing and correct space*
9 *utilization.*”) (emphasis added); Easter Decl., ¶ 11. Exhibit A originally specified twenty-two
10 (22) English classrooms. However, after taking into account a maximum design capacity of
11 2,300 students and classroom loading of 28-30 students outlined in Exhibit A, GDOE in
12 conjunction with GEFf determined that 22 classrooms were excessive and that even 18
13 classrooms exceeded GDOE’s requirements. As stated in the Negotiating Committee
14 Memorandum:

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

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

22 Such right-sizing extended to modifications to the number of other classrooms and other
23 areas. See Neg. Comm. Memo at 3 (“GDOE advised that it was in the best interests of Guam and
24 the educational system to reduce the number of rooms to only those needed. By eliminating the
25 four (4) English rooms, and adding and reducing the number of other rooms, GDOE was able to
26 best meet its current and future needs.”).

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

An Auditorium with five hundred (500) seats is provided. The cost
to construct the Auditorium is an expensive item and costs over

1 twice per square foot to construct as most other areas. It was
2 decided that the original estimate for seven hundred (700) seats
would result in an under utilized [sic] facility.

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

4 Accordingly, there is no merit to Core Tech’s allegation that the “Considerations” in
5 Exhibit A could not be modified during contract negotiations. The specifications were merely
6 general “Considerations” that were properly refined during the course of contract negotiations
7 between GEF and the government in order to eliminate excesses and to arrive at the best value
8 for the government of Guam.

9 **C. Core’s Tech’s May 27, 2016 Protest Was Untimely Because Core Tech Knew**
10 **Since 2015 That Both Cost And Scope Of Work Would Be Negotiated During**
11 **Contract Negotiations After Selection Of The Most Qualified Offeror.**

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

19 For example, Core Tech’s protest about GEF and’s supposed “new proposals” is actually a
20 disguised complaint that the government entertained GEF and’s cost estimates for the new school
21 during the contract negotiation phase of the RFP. However, as discussed in Section I.A above,
22 Core Tech knew in 2015 that cost would be the subject of contract negotiations after the
23 government’s selection of the most qualified offeror occurred. *See* Section 2.0 of the RFP,
24 Addendum No. 6 (“*Once a firm is selected, a scope of work and fee estimate will be negotiated*
25 *to perform the required services for Simon Sanchez High School.*”) (emphasis added). Core Tech
26 does *not* complain in its May 27 protest about the *dollar amount* of any of the cost proposals
27 submitted by GEF and during cost negotiations, a fact that it could have admittedly only known
28

1 about when it received the Negotiating Committee's May 13, 2016 Memo. Rather, its complaint
2 is that cost proposals were required by the government and were submitted by GEFf during
3 contract negotiations, which is something that Core Tech already knew would occur, at least
4 when the RFP was issued last year in 2015. Core Tech also knew at that time that price
5 discussions would occur during contract negotiations because that is what the law provides. *See* 2
6 GARR Div. 4 § 3114(1)(1)-(2).

7 Likewise, Core Tech's separate allegation that the government impermissibly modified
8 the terms of Exhibit A is really a disguised complaint that the government engaged in
9 negotiations with GEFf concerning the "scope of work," that is, details about the construction of
10 the new Simon Sanchez High School. That ground is similarly based upon the same language of
11 the RFP, which permits the government to negotiate both price and scope of work, after the
12 selection of the most qualified offeror. *See* Section 2.0 of the RFP, Addendum No. 6. For the
13 same reasons discussed above, this ground was known by Core Tech long ago when the RFP
14 issued. Its complaint based on this ground could have been asserted long ago. It was asserted
15 only on May 27, 2016, months after the RFP issued. It is therefore untimely.

16
17 **D. There Is No Merit To Core Tech's Allegation That The Bonding
Requirements Of The RFP Were Impermissibly Modified.**

18 Core Tech's allegation that the RFP's bonding requirements were modified is without
19 merit. In its Appeal, Core Tech admits that the RFP allows the required performance and
20 payment bond to be obtained by the "Awardee or its prime Contractor." Appeal at 7. Indeed, this
21 requirement is provided for by Section 4.2.1.5 of the RFP, which states in pertinent part: "A one
22 hundred percent (100%) performance and payment bond must be obtained by the Awardee *or its*
23 *prime Contractor.*" RFP § 4.2.1.5 (as amended by RFP Addendum No. 6 at p.4 "Section 4.2
24 Amendments") (emphasis added). This is also consistent with section 58D112 of the *Ma Kåhat*
25 Act of 2013 (Guam Pub. L. 32-120) which requires the "developer *or contractor*" to "negotiate
26 and enter into a binding construction contract" for the new Simon Sanchez High School, which
27 would contain provision for items including "performance and payment bonds". 5 GCA
28 § 58D112 (emphasis added).

1 Consistent with the above provisions, the contract negotiated between the government and
2 GEFF requires GEFF *or its prime construction contractor*, Hensel Phelps, to deliver payment and
3 performance bonds to the government. Easter Decl., ¶ 12. Hensel Phelps is one the largest
4 general contractors in the United States. *Id.* GEFF’s November 20, 2015 proposal provides a
5 letter from Travelers Insurance, Hensel Phelps’ surety, that Hensel Phelps’ bonding capacity is
6 approximately \$1 billion – well in excess of the bonding requirements of the RFP. *Id.*
7

8 **E. Core Tech’s Improperly Raised Issues and Flawed Arguments Should Be Disregarded.**

9 **1. Core Tech’s Improperly Raised Issues in its Comments on DPW’s Agency Report (filed 7/22/16) Are Not Properly Before the OPA**

10 **a. Core Tech’s Improper Issue #1: “GEFF Intends to Subcontract Its Contract to Guam Education Development Partners as a Subdeveloper”**

11
12 Core Tech’s entire discussion in Section II.1 of its Comments on DPW’s Agency Report
13 (filed 7/22/16), regarding (a) Guam Education Development Partners (GEDP), (b) the proposed
14 subcontractual arrangement between GEFF and GEDP, and (c) Core Tech’s objections to terms
15 of the proposed IDIQ Contract with GEFF, are **not** properly before the OPA. These issues were
16 never raised in Core Tech’s May 27, 2016 Protest, or in DPW’s June 8, 2016 denial of the Core
17 Tech’s protest. And they were never raised in Core Tech’s Appeal to the OPA filed June 24,
18 2016. Therefore the OPA lacks jurisdiction to consider these issues. *See In the Appeal of Guam*
19 *Community Improvement Foundation, Inc.*, OPA-PA-09-005, Decision at 11-12 (Public Auditor’s
20 jurisdiction is limited to reviewing issues raised in the appellant’s protest and the government’s
21 decision denying the protest); 2 GARR Div. 4 § 12104(b) (“The written Appeal **shall be** in
22 substantially the same format as Appendix A to this Chapter, and **include at a minimum the**
23 **following: (2) ... A concise, logically arranged, and direct statement of the grounds for**
24 **Appeal;...**”) (emphasis added).

25 Notwithstanding the procedural and jurisdictional impropriety of Core Tech’s recitations,
26 the structure Core Tech discusses is a customary financing technique utilized in virtually every
27 project finance transaction. The experience of the parties is attributable to the *principals*
28

1 *involved*, not just the business entity formed specifically for the transaction. That is the reason
2 the RFP asks for identification of the specific principals involved, and not just a corporate charter.
3 Additionally, the structure GEFf will use is the same structure GEFf used in constructing four
4 schools on Guam and for the Okkodo High School expansion.

5 Moreover, Core Tech's complaints about the structure are hypocritical. Core Tech itself
6 planned to use this structure in its unsuccessful proposal to construct JFK High School several
7 years ago, and it is the structure Core Tech used to issue \$100 million of bonds in the state of
8 Arizona to pay for its sale of the Tiyan High School to GDOE.

9
10 **b. Core Tech's Improper Issue #2: "DOE's 4/19/16 Internal
11 Memorandum Confirms the Government Improperly Amended the
12 RFP Design Parameters."**

13 Core Tech's reliance on this purported internal memo from DOE (which it identifies as
14 Exhibit 8) is improper. Core Tech's Exhibit 8 appears to be incomplete; it appears that pages were
15 omitted. Core Tech fails to authenticate this document, and to identify its source. Moreover, this
16 exhibit is not an official government document; its pages are marked "DRAFT", "confidential"
17 and "for internal use only." The document bears no name of its author, and does not indicate it is
18 from DOE or any other source for that matter.

19 Notwithstanding the glaring and multiple defects of this exhibit, the views of its author
20 have no bearing on the official position ultimately adopted and taken by the Negotiating
21 Committee, which include the GDOE Superintendent, Mr. Jon Fernandez, who said:

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

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

26 Moreover, there is no showing that the unidentified author of the memo had the
27 professional qualifications to design a school. In the negotiations, GEFf involved Fanning
28 Howey who has designed over 2,000 schools in the U.S., so the Negotiating Committee wisely
sought to get input from GEFf's experts in developing an efficient, sustainable, and flexible
design for 21st Century education in Guam.

1 c. **Core Tech’s Improper Issue #3:** “With GEF, DOE is Getting
2 32% Smaller School and Paying \$22.9 Million More for SSHS.”

3 Core Tech’s discussion relies on a phantom “Exhibit 10.” This exhibit was not included
4 in the copy served on DPW or GEF. Moreover, Core Tech’s discussion is irrelevant. Cost is
5 not a factor that is taken into consideration in evaluating, at the first stage, who is the most
6 qualified offeror. See *In the Appeal of Guam Education Financing Foundation, Inc.*, OPA-PA-
7 09-007, Decision at 8-9 (Guam OPA, Jan. 6, 2010) (in the request for proposal method of
8 solicitation, cost is not a factor in determining the best qualified offeror).

9 Moreover, this was an RFP process, and not an IFB process. An IFB is meant to select
10 the lowest bidder. By contract, in the RFP method, Guam’s procurement law requires that the
11 Government *first* determine the most *qualified* offeror. After that, the Government negotiates
12 with the most qualified offeror – and only the most qualified offeror – for final contract terms,
13 scope of work, and price which the Government determines to be fair and reasonable. If the
14 Government cannot negotiate a contract with the 1st ranked offeror, then it proceeds to negotiate
15 with the 2nd ranked offeror, and so forth. Core Tech’s price estimate for SSHS (\$63 million)
16 which it discusses in this section of its Comments is merely a price estimate that was provided in
17 its initial proposal to the RFP, submitted November 20, 2015. All of the offerors (including
18 GEF and Pernix) were required to submit the same type of price estimate for SSHS. However,
19 price was **not** one of the evaluation criteria, and did **not** play a role in scoring proposals to
20 determine the most qualified offeror.

21 Comparing Core Tech’s preliminary estimate for Simon Sanchez High School with
22 GEF’s carefully developed plans is an apples-to-oranges comparison. A cheaper school is often
23 not (necessarily) a better school. Cheaper often results in, or brings with it, inferior quality. For
24 example, in prior construction work done for GEF, Core Tech initially chose to use cheap and
25 inferior roofing products at the four schools GEF developed. Because of serious inferior quality
26 problems with this material, GEF filed a latent-defect claim with Zurich, Core Tech’s bonding
27 company. Consequently, Core Tech was forced to pay in excess of \$600,000 to assist in
28 replacement of the roofs – all because of Core Tech’s use of cheap and inferior products. One

1 can assume that Core Tech would – if given the chance – use the same strategy to construct
2 Simon Sanchez High School – Core Tech will use products and materials that are *cheap* and of
3 *inferior* quality. Thus, Core Tech’s claim that it “offered” the Government the *cheapest* price for
4 construction of the new Simon Sanchez High School is really not anything for Core Tech to boast
5 about. Based on Core Tech’s track record, Core Tech’s cheap school building will necessarily
6 consist of *cheap* and *inferior* products and materials. This will be a disservice to the Government
7 of Guam, and to the students, faculty, and staff of Simon Sanchez High School. Moreover,
8 inferior materials and construction will also result in an *unsafe* building for the Simon Sanchez
9 High School students.

10 GEFF’s plan, on the other hand, incorporates numerous *quality* factors while *balancing*
11 *price* at the same time. For example, although utilizing *sustainable design* features, as GEFF
12 intends to do, results in short-term elevated construction costs, long-term annual operating costs
13 are *lowered* considerably. Moreover, although using *high-quality* and *long-lasting* air
14 conditioners and kitchen equipment, as GEFF intends to do, would likewise affect construction
15 costs to a similar certain degree, it will significantly *lower* expensive life cycle and replacement
16 costs in the long run. Finally, there is the Government of Guam’s successful prior experience
17 with GEFF and Hensel Phelps, the prime contractor, who completed their prior jobs on time
18 without increases due to change orders. Core Tech, on the other hand, upon information and
19 belief owes or has owed significant liquidated damages to the Government of Guam for delayed
20 project completions. Moreover, upon information and belief, Core Tech has a reputation for
21 using cheap inferior materials and construction methods in its projects, and also for low-balling
22 their initial cost and then using change orders to significantly increase the costs.

23 In its simplistic arguments which focus on *construction* costs alone, nowhere does Core
24 Tech mention or discuss the cost of *financing* of the project which plays an equal, if not greater,
25 role in determining the total cost of ownership. Total cost of ownership involves multiple factors
26 including initial construction costs, life cycle operating and maintenance costs, and financing
27 costs. As discussed in Section I of GEFF’s Comments on DPW’s Agency Report (filed 7/22/16),
28

1 the financing cost savings under GEFf's plan are alone worth over \$38 million in interest savings
2 over the lifespan of the anticipated lease – savings that will benefit the Government of Guam.
3 GEFf Comments at 1. Such savings can only be realized if this appeal is promptly resolved in
4 favor of DPW and DPW is allowed to execute the IDIQ contract with GEFf. See GEFf
5 Comments at 1; Easter Declaration submitted in support of GEFf Comments, at Exh. 4 (July 21,
6 2016 letter from GEFf investment bankers).

7 Designing a school for 21st century education consists of more than just stringing together
8 classrooms. As an example, based on GEFf's preliminary design, it developed a multi-faceted
9 plan to provide the best value to the government of Guam by providing:

10 Expanded Student Capacity - SShS most recent classroom loading
11 utilizing 30 students per classroom fully accommodates current SShS
12 students, while leaving room for a significant increase in student
13 population in the future.

14 Enhanced Student Engagement and Security – An academic-wing
15 design supports educational neighborhoods for increased student-
16 teacher interaction and provides a flexible arrangement as GDOE's
17 curriculum may change.

18 Better Student Performance – GEFf's incorporates abundant natural
19 light and improved air quality which will lead to improved student
20 attendance and performance.

21 State-of-the-Art Learning Tools – GEFf's intended technology
22 infrastructure in the new SShS is designed to support 21st Century
23 learning.

24 A simplistic square footage/cost comparison, as Core Tech attempted to do in its
25 Comments, is a shallow analysis. Core Tech claims that it will give the Government of Guam a
26 bigger school for less money. However, the challenge of any expert and *reputable* school
27 designer is to design an efficient building without wasted space and that will not cost a lot of
28 money to maintain. Factors such as layout, adjacencies, and building circulation patterns all
contribute to the overall building size. A bigger building is NOT better.

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2. **Core Tech’s Flawed Arguments Asserted in its Comments on DPW’s Agency Report (filed 7/22/16)**

a. **Core Tech’s Flawed Argument #1: “This Procurement is Not a Unique Procurement With Special Procurement Rules – Guam Procurement Laws Apply”**

Core Tech continues to re-hash its old (and now untimely) 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).

All Core Tech is doing is attempting to resurrect old issues that it originally raised its first protest filed January 7, 2016. *See, e.g.*, Core Tech Protest Letter 1/7/2016 at 2 (Exh. H to DPW Agency Report) (“The consideration of ‘best value’ requires the procuring agency to review the cost or price of the offer.”). Back then, Core Tech protested only after it found out that it was not selected as the most qualified offeror. That protest was ultimately denied by DPW as meritless and untimely on January 19, 2016, and Core Tech never appealed the denial to the OPA. *See* 1/19/16 Letter from Felix Benavente to Juno Eun (CEO of Core Tech) (Exh. I to DPW Agency Report). These issues were not raised again by Core Tech in its second protest filed May 27, 2016, nor in DPW’s denial of that protest on June 8, 2016. Therefore, the issues are not properly before the OPA. *See In the Appeal of Guam Community Improvement Foundation, Inc.*, OPA-PA-09-005, Decision at 11-12.

b. **Core Tech’s Flawed Argument #2: “The Design Parameters Are Set Forth in Exhibit A to the RFP (Addendum 6) and Any Deviation from the RFP Design Parameters Is a Violation of the RFP and Guam Procurement Laws.”**

Here, Core Tech again improperly relies upon its defective Exhibit 8, the supposed 4/19/16 DOE “internal memorandum.” Nonetheless, the facts show that Exhibit A was clearly intended to consist of *flexible* “considerations” in the design of the new Simon Sanchez High School. The Superintendent of DOE, Mr. Jon Fernandez, confirmed as much in his declaration:

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

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

5 c. **Core Tech’s Flawed Argument #3:** “2 GAR § 3114 Does Not
6 Permit GEF to Submit Four New Proposals”

7 See GEF Comments on Agency Report (“GEF Comments” filed 7/22/16) at Section II.

8 Moreover, Core Tech’s argument that negotiations between GEF and the Government should
9 not have involved the scope of work is untimely. See GEF Comments at Section IV.

10 d. **Core Tech’s Flawed Argument #4:** “GEF has Not Met the
11 Bonding Requirements Under the RFP and Guam Procurement
12 Laws.”

13 See GEF Comments at Section V. Moreover, as noted in DPW’s Agency Report at 8-9,
14 no bond is due. Section 58D112 of Title 5 GCA directs the Government of Guam and the
15 developer or contractor to enter into a “binding construction contract” which will include
16 contractual provisions for obtaining a payment and performance bond. In order for a bond to be
17 issued there must be binding contracts and plans and specifications. The IDIQ contract with
18 GEF has not been signed. Moreover, plans and specifications will be issued in conjunction with
19 the first Task Order, so any bond would not , and cannot, be due until such plans and
20 specifications are completed.

21 **F. Conclusion.**

22 Core Tech’s appeal filed June 24, 2016, and its May 27, 2016 protest are without merit.
23 Accordingly, the Public Auditor should *deny* Core Tech’s appeal.

24 **II. ISSUES RELATIVE TO CORE TECH’S SECOND APPEAL (OPA-PA-16-011).**

25 **A. The Negotiated IDIQ Contract Is Consistent With The Terms Of The RFP
26 And Authorizing Legislation With Regard To The \$100 Million Cap**

27 Core Tech’s Appeal alleges that DPW, the Guam Department of Education (“GDOE”)
28 and GEF agreed to a final version of the IDIQ contract (specifically § 3.1 of the IDIQ) “which
included provisions allowing the offeror, GEF, to circumvent the \$100 million contract

1 limitation in the RFP.” *See* Appeal at 3, lines 26-27, and 4, lines 1-2. Core Tech’s assertion is
2 without merit and is based on a fundamental misunderstanding of the IDIQ, the RFP and the
3 authorizing laws.

4 The RFP was authorized by Public Law 32-120. *See* RFP Addendum No. 6 Section 2.0
5 (Procurement Record at Tab 4). The RFP provides that scope under the RFP includes financing
6 for various school improvements “with a total cost of up to One Hundred Million Dollars
7 (\$100,000,000.00).” *See id.* at RFP Addendum No. 6 Section 4.0. The RFP also provides,
8 however, that to the extent there is any conflict between the RFP and a public law (such as Public
9 Laws 32-120 and 32-121), the public laws control. *See id.* at RFP Addendum No. 6 Section 2.0.
10 Core Tech was well aware of the controlling status of Public Laws 32-120 and 32-121 since at
11 least September 25, 2015, when Addendum No. 6 was issued.

12 Neither Public Law 32-120 nor Public Law 32-121 mandate a \$100 million cap on the
13 procurement. *See* Public Law 32-120 (Feb. 10, 2014) and 32-121 (Feb. 10, 2014). If the
14 Legislature had intended to include a cap, it could have easily done so as it had done previously in
15 Public Law 31-229, a prior law related to the rehabilitation of Guam’s public schools. *See* 2B
16 Sutherland Statutory Construction § 51:2 (7th ed.) (“Generally, though, courts presume a different
17 intent when a legislature omits words used in a prior statute on a similar subject. More broadly,
18 where a legislature inserts a provision in only one of two statutes that deal with a closely related
19 subject, courts construe the omission as deliberate rather than inadvertent. California, for
20 example, concluded that ‘where a statute, with reference to one subject contains a given
21 provision, the omission of such provision from a similar statute concerning a related subject is
22 significant to show that a different intention existed.’” (Footnotes omitted)). Public Law 31-229
23 authorized lease financings for school improvements and included a limitation that the lease
24 financing authorized by that law “shall not exceed the aggregate amount of One Hundred Million
25 Dollars (\$100,000,000).” *See* Public Law 31-229, section 12 (June 18, 2012). The absence of a
26 cap in Public Laws 32-120 and 32-121 evidences the Legislature’s intent to deliberately omit
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1 such language; and since Public Laws 32-120 and 32-121 supersede the RFP in cases of conflict,
2 the \$100 million limit does not apply to this procurement.

3 Further, as acknowledged by Core Tech (*see* Appeal at 6, lines 3-19), and confirmed by
4 Speaker Won Pat (*see* April 13, 2016 Letter from Speaker Won Pat (Procurement Record at Tab
5 17 and July 15, 2016 Supplemental to Procurement Record at Tab 2)), rather than set a cap, what
6 the Legislature chose to do is identify sources of funding and the amounts available from such
7 sources that can be used for the lease-back payments. For example, Public Law 32-120, section 3
8 (codified at 5 GCA § 22425(q)(4)) provides that \$1,707,652 is continuously appropriated
9 annually to GDOE for the renovation or construction of a new SSHS. Public Law 32-121, also
10 identifies other sources of funding available for the remaining 35 public schools. *See e.g.*, Public
11 Law 32-121 (codified at 5 GCA § 58E107) (rental payments may be secured by a pledge or other
12 reservation of revenues collected by the Government in the amount of \$4.8 million from the
13 maturity of Business Privilege Tax Bond Series 2013C available annually beginning FY2019).⁴
14 Thus, it is clear that the Legislature did not intend to limit the financing capacity for the direly
15 needed school projects authorized by Public Laws 32-120 and 32-121.

16 Even though a cap is not mandated by Public Law 32-120 or Public Law 32-121, the IDIQ
17 contract still includes a cap of \$100 million. Section 3.1 of the IDIQ contract provides with
18 regard to the \$100 million cap as follows:

19
20 **3.1. Compensation and Payment for Services.** The Government will
21 compensate the Developer for services rendered for Task Orders issued as
22 provided in this Contract based on available funds and not to exceed One
23 Hundred Million and 00/100 Dollars (\$100,000,000.00) pursuant to Section I
24 (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.

25 ⁴ Based on GEFf's calculations, the sources and amount of funding identified in Public
26 Laws 32-120 and 32-121 make more than \$100 million available for all the schools (GEFF
27 estimates upwards of \$160 million). *See* March 21, 2016 Letter from Janalynn Cruz Damian
(July 15, 2016 Supplemental to Procurement Record at Tab 1).

1 The above provision is consistent with the RFP as both the contract language and the RFP
2 provide that the authorizing laws control. Core Tech’s claim that Section 3.1 gives GEF “a
3 blank check” skews the plain language of Section 3.1, which requires both the DPW’s Director’s
4 written consent and legislative authorization to exceed \$100 million. Further, Core Tech’s
5 assertion that Section 3.1 is contrary to legislative policy on safeguarding public funds is
6 unsupported since it is the Legislature that declined to impose a cap as it had done previously in
7 Public Law 31-229. *See also* April 13, 2016 Letter from Speaker Won Pat (Procurement Record
8 at Tab 17 and July 15, 2016 Supplemental to Procurement Record at Tab 2).

9 In any event, as correctly pointed out by DPW, the IDIQ contract has yet to be executed
10 by the Governor or approved by the Attorney General. Thus, if it is determined that the RFP and
11 Public Laws 32-120 and 32-121 mandate a \$100 million cap, revising the draft IDIQ contract to
12 strike “unless otherwise directed by the Director of DPW in writing and permitted by Public Laws
13 32-120 and 32-121 or any other law” could be an appropriate remedy under those circumstances.⁵
14 The Procurement Law allows a proposed award to be “revised to comply with the law.” *See* 5
15 GCA § 5451 (“Remedies Prior to an Award. If prior to award it is determined that a solicitation
16 or proposed award of a contract is in violation of law, then the solicitation *or proposed award*
17 shall be: (a) cancelled; or (b) *revised to comply with the law.*”) (emphasis added).
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21 ⁵ In any event, Core Tech’s argument that the IDIQ contract is supposedly “in violation”
22 of the RFP is legally unsustainable. Section V of the IDIQ contract (“Contract Documents
23 Defined”) identifies a list of documents that together “constitute the Contract Documents, all of
24 which are made part hereof; and collectively evidenced and constitute the Contract between the
25 parties hereto, and they are as fully a part of this Contract, as if they were set out verbatim and in
26 full herein:...” IDIQ Contract, § V (August 3, 2016 Supplemental to Procurement Record at Tab
27 1). Included in the list of documents identified in Section V that are part of the Contract are: (1)
28 the “Request for Proposals and all attachments, forms, or exhibits thereto” and (2) “All
Amendments or Addenda to the Request for Proposals.” Therefore the RFP itself and all of its
attachments, amendments, and addenda are “made part” of the IDIQ contract and together with
the other documents identified constitute “the Contract between the parties hereto.” IDIQ
Contract, § V. Section 3.1 cannot therefore be read or interpreted to “violate” the RFP, as Core
Tech contends, because the RFP is part of the IDIQ contract.

1 **B. DPW’s Good Faith Maintenance Of The Current Procurement Record**
2 **Substantially Complies With Applicable Law**

3 Core Tech claims that the procurement record at issue is “fatally flawed.” However, as
4 pointed out by DPW, the 3,000-page procurement record as it currently exists is replete with
5 drafts, communications, minutes of meetings, evaluations, and a detailed memorandum of the
6 negotiations between the Government and GEF. This voluminous procurement record clearly
7 portrays the good faith efforts of the Government in carrying out this procurement and in
8 substantially complying with applicable law. Further, Core Tech has made no showing that the
9 procurement record actually and currently maintained by DPW tarnishes the integrity of the
10 procurement process.

11 Core Tech points to two types of records that are purportedly missing – a log of
12 communications required by 5 GCA § 5249(a) and audio recordings of negotiation meetings
13 required by 5 GCA § 5249(c). However, these items are not fatal to the procurement.

14 With regard to Core Tech’s allegations relating to the lack of a “communications log,” the
15 Procurement Law provides that the procurement record shall include:

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

19 (b) a log of all communications between government employees and any
20 member of the public, potential bidder, vendor or manufacturer which is any way
21 related to the procurement.

22 5 GCA § 5429.

23 The procurement record submitted to the OPA includes minutes of meetings that include
24 the date, time, subject matter, and attendees. *See* attendance sheets and minutes of meetings
25 (Procurement Record at Tabs 6, 8, 12, 17). Thus, DPW has complied with the requirements of
26 subsection (a). Further, a communication log can still be generated prior to certification of the
27 record and award of the IDIQ contract. DPW has stated that it will complete the communication
28 log required by subsection (b) once the stay is lifted and prior to any contract award and that it
has maintained a record of all communications relating to the Procurement. *See* Agency Report
at 6-7. Significantly, the procurement record has yet to be certified by DPW. *See id.* Certification

1 of the record is required before award and as DPW points out in its Agency Report, no award has
2 been made as the procurement is stayed and the AG has yet to approve and the Governor has yet
3 to sign the IDIQ contract. *See id.* Core Tech has not presented any evidence to doubt DPW's
4 assertion that the Government "maintains voluminous pages of communications and documents
5 that have transpired in this procurement." Agency Report at 7. *Cf. Teleguam Holdings LLC v.*
6 *Territory of Guam, et al.*, Superior Court of Guam Civil Case No. 334-13 (Decision & Order
7 Aug. 8, 2014) (finding a materially deficient record where record was declared to be complete but
8 was missing records determined to exist via testimony).

9 Core Tech's complaint regarding DPW's lack of sound recordings of contract negotiations
10 between DPW and GEFf is without merit. Audio recordings of negotiation meetings are not
11 mandatory under a reasonable reading and interpretation of the statute. Core Tech notes that the
12 original text of 5GCA § 5249 as enacted by the legislature (Public Law 18-44), contains an
13 internal separating comma, rather than a semicolon, and reads as follows:

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

16 ...

17 **(c) sound recordings of all pre-bid conferences, negotiations**
18 **arising from a request for proposals and discussions with**
19 **vendors concerning small purchase procurement;....**

20 Core Tech further observes that the published version (as published by the Compiler of
21 Laws), replaces the comma with a semicolon, and reads as follows:

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

25 Although Core Tech calls this a "typographical error" (Appeal at 10) by the Compiler of
26 Laws, this change to a semicolon was more likely a *typographical correction*. Guam law
27 empowers the Compiler of Laws to make adjustments in order to "[c]orrect manifest clerical
28 errors or typographical errors." *See* 1 GCA § 1606(g) ("In preparing the Guam Code Annotated,
the Guam Administrative Rules and Regulations, court reports and other publications of the

1 Office, the Compiler of Laws may: (g) Correct manifest clerical errors or typographical
2 errors.”). It is likely that the Compiler realized that the original comma that the Legislature
3 placed between the words “conferences” and “negotiations” should more appropriately be a
4 semicolon in order to clarify the independent nature of the adjacent clauses. Thus, § 5249 section
5 read in its entirety would only require the procurement “record” to include “sound recordings” for
6 “pre-bid conferences” and *only* “pre-bid conferences.” Indeed this is also consistent with the
7 legislative history of the statute. The original version of the bill as introduced in the 18th Guam
8 Legislature on January 22, 1986 required *only* sound recordings *for pre-bid conferences*:

9
10 § 6964.4. Record of Procurement Actions Taken Pursuant to This
11 Title. The process of procurement shall be **documented** at each
12 step of the process, regardless of the manner of procurement
13 authorized for the particular goods or services to be delivered to the
14 government.

15 **(a) All pre-bid conferences shall be tape recorded and a
16 transcript of the tape recordings shall be made available to any
17 member of the public who requests it within ten (10) days of the
18 pre-bid conference.**

19

20 See Bill No. 743 (LS) (18th Guam Legis., 1st Reg. Sess.) (1/22/1986) at 9 (emphasis added)
21 (attached as **Exh 1** to GEFf Comments on DPW Agency Report (filed 9/2/16)).⁶ There are two
22 additional noteworthy points about the language of Bill No. 743: First, although subsection (a)
23 requires sound recordings for pre-bid conferences, only the “**transcript**” of the recordings is
24 required to be kept and made available to the public. Second, the paragraph antecedent to
25 subsection (a) only requires that the procurement process overall shall be “**documented**” – the
26 meaning of which is self-evident – i.e., the procurement process shall be supported or evidenced
27 by “*writings*.” See Black’s Law Dictionary (6th ed.) at 481 (defining *document* (n) as “An
28 instrument on which is recorded, by means of letters, figures, or marks, the original, official, or

26 ⁶ As retrieved from http://guamlegislature.com/Public_Laws_18th/P.L.%2018-44%20SBill%20No.%20743.pdf on 9/1/2016 (highlights added).

1 legal form of something, which may be evidentially used. In this sense the term ‘document’
2 applies to *writings*;...” (emphasis added); *see also* New Int’l Webster’s Dictionary & Thesaurus
3 of the English Language (2002) at 288 (defining “document” (n) as “1. an original piece of
4 *written or printed matter* conveying authoritative information or evidence” (emphasis added))
5 (*see Exh. 2* to GEF Comments on DPW’s Agency Report, filed 9/2/16).

6 Yet, even if the Compiler chose to keep the comma between “conferences” and
7 “negotiations,” the clauses could be still read independently, contrary to Core Tech’s wishful
8 interpretation:

9 The **record shall include** the following:

10 ...

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

14 Thus, the “procurement record” shall include *first*, “sound recordings of all pre-bid conferences”
15 and *second*, “negotiations arising from a request for proposals and discussions with vendors
16 concerning small purchase procurement.” Under Core Tech’s reading, “sound recordings”
17 would not be limited to pre-bid conferences, but instead would apply to the remaining items in
18 subsection (c). In other words, as Core Tech would have it, procurement officials are required to
19 tape record (1) “all pre-bid conferences,” (2) all “negotiations arising from a request for
20 proposals,” and (3) all “discussions with vendors concerning small purchase procurement.”

21 However, reading the statute in that fashion requires something that is neither in the original text
22 of Public Law 18-44 nor in the text published by the Compiler of Laws – a comma between
23 “proposals” and the word “and” in the second line. Indeed, Core Tech included this non-existent
24 comma, but only in its June 15, 2016 protest letter:

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

28 *See* Core Tech Protest Letter (6/15/2016) at 5. Notably, Core Tech abandoned its newly-found
comma in its subsequent Notice of Appeal with the OPA (*see* Notice of Appeal filed 8/10/2016,

1 at 7 & 10), and instead reverted to the original text of the public law and the text published by the
2 Compiler of Laws – neither of which contains Core Tech’s phantom comma.

3 In light of the above discussion, a more appropriate reading and interpretation of the
4 statute describes two different types of records that an agency must maintain under subsection (c):
5 (1) “sound recordings of all pre-bid conferences”, and (2) “negotiations arising from a request for
6 proposals and discussions with vendors concerning small purchase procurement.” Thus, the
7 plain language does *not require* DPW to maintain sound recordings of contract negotiations
8 arising from an RFP, nor does it require sound recordings of discussions with vendors concerning
9 small purchase procurement. See *Pangelinan v. Gutierrez*, 2000 Guam 11, ¶ 23 (“In cases
10 involving statutory construction, the plain language of a statute must be the starting point.”).
11 Instead, under a plain reading of the statute, the term “sound recordings” would apply only to
12 “pre-bid conferences.”⁷ Consequently, it was neither arbitrary nor capricious for DPW to read §
13 5249(c) in such a way, and such a reading of subsection (c) does not lead to absurd or impractical
14 consequences, untenable distinctions or unreasonable results. See *Carlson v. Guam Tel. Auth.*,
15 2002 Guam 15, ¶ 17 (“Deference is given to the agency interpretation so long as that
16 interpretation neither contravenes clear legislative intent nor frustrates the policy that legislature
17 sought to implement.”); *Guerrero v. Santo Thomas*, 2010 Guam 11, ¶ 39 (“We afford deference
18 to an agency’s interpretation of a statute when the agency has specialized knowledge in the area,
19 but accord the agency interpretation less weight where technical knowledge is not necessary in
20 interpreting a statute.”); 5 GCA § 5113 (“The Director of Public Works shall serve as the central
21 procurement officer of the Territory with respect to construction.”); *Sumitomo Constr., Co. v.*
22 *Gov’t of Guam*, 2001 Guam 23, ¶ 17 (“[N]otwithstanding the deference due the plain-meaning of
23

24 ⁷ Indeed, the plain language requires sound recordings **only** as to “*pre-bid conferences*,”
25 which do *not* apply to the instant **RFP process**. “Pre-bid conferences” occur only in an Invitation
26 for Bid (IFB) process, and *not* an RFP. The Guam Procurement Regulations distinguish between
27 “**pre-bid conferences**” in the IFB process, and “**pre-proposal conferences**” in an RFP process.
28 See 2 GAR Div. 4 § 3109 (g)(4) (explaining “pre-bid conferences” in the IFB process), § 3114 (g)
(explaining “pre-proposal conferences” in the RFP process).

1 statutory language, ... such language need not be followed where the result would lead to absurd
2 or impractical consequences, untenable distinctions, or unreasonable results.” (alteration in
3 original) (internal quotation marks omitted)).

4 Finally, Core Tech has not demonstrated how it is somehow prejudiced by any lack of
5 sound recordings. Nor could Core Tech make such a showing because the negotiations were
6 extensively memorialized in a detailed negotiations memo. *See* May 13, 2016 Memorandum
7 from Negotiating Committee (Procurement Record at Tab 16). This memorandum discusses in
8 detail the negotiations between the Government and GEF. The preparation and inclusion of a
9 negotiation memorandum in the procurement record is consistent with the plain language of
10 subsection (c) and demonstrates DPW’s good faith effort to comply with the requirements of
11 subsection (c).⁸ Moreover, further documentation of negotiation meetings was maintained by the
12 government in the form of written meeting notes, summaries, and minutes.

13
14 **C. Core’s Tech’s July 15, 2016 Protest Relating To The \$100 Million Cap Is
Untimely**

15 Core Tech’s protest ground relating to the purported \$100 million cap is based on the
16 language of the RFP and Public Laws 32-120 and 32-121. And its challenge to the language of
17 section 3.1 is based on the proposed IDIQ Contract between the Government and GEF, a copy
18 of which Core Tech claims to have received only on July 1, 2016. However, Core Tech knew as
19 early as May 13, 2016, that such a contract existed when it received DPW’s Notice of Intent to
20 Award. *See* Notice of Intent to Award at 1 (“The **Contract** is in an amount not exceed one
21 hundred million and 00/100 dollars (\$100,000,000.00). A Task Order has been negotiated for the
22 Reconstruction of Simon Sanchez High School at a price not to exceed seventy six million eight
23 hundred sixty seven thousand and three hundred thirty-five and 00/100 dollars

24
25 ⁸ Good faith and lack of fraud on part of the parties is significant as even illegal contracts
26 can be ratified. *See* 5 GCA § 5452(a) (“Remedies After an Award. (a) If after an award it is
27 determined that a solicitation or award of a contract is in violation of law, then: (1) if the person
28 awarded the contract has not acted fraudulently or in bad faith: (A) the contract may be ratified
and affirmed, provided it is determined that doing so is in the best interests of the Territory...”).

1 (\$76,867,335.00).”) (emphasis added). Upon its review of the Notice on May 13, 2016, Core
2 Tech should have *promptly* requested inspection of such a contract and any other related
3 documents from DPW. Under Guam’s Sunshine Act, any member of the public is allowed to
4 request inspection of a public document. 5 GCA § 10103. Instead of promptly requesting
5 inspection of the IDIQ Contract, Core Tech waited *more than a month* after it received the May
6 13, 2016 Notice of Intent to Award – i.e., until June 14, 2016 – to make a request to DPW under
7 the Sunshine Act. Core Tech was clearly able to make such a request *much earlier* than June 14,
8 2016, and should have done so. Instead, Core Tech unreasonably delayed and waited too long,
9 and didn’t file its protest until July 15, 2016. Core Tech “should have known” of the facts
10 constituting the basis of its protest *prior to* July 1, 2016 (the date when Core Tech claims it
11 actually received the IDIQ Contract). *See* 2 GAR Div. 4 § 9101 (protests shall be in writing and
12 shall be “filed within 14 days after the protestor knows or *should have known* of the facts giving
13 rise thereto..... Protest filed after the 14 day period shall not be considered.”) (emphasis added).

14 Core Tech’s protest was therefore untimely.

15 **D. Conclusion.**

16 Core Tech’s August 10, 2016 Appeal and its July 15, 2016 protest are without merit.
17 Accordingly, the Public Auditor should *deny* Core Tech’s Appeal.

18 **III. IMPROPRIETIES IN CORE TECH’S LIST OF ISSUES FILED AUGUST 30, 2016**

19 GEFF has observed that Core Tech has tendency to misstate the facts and to belatedly
20 raise issues that are not properly before the OPA. These misstatements and improprieties include
21 the following in Core Tech’s List of Issues (filed 8/30/16), to which GEFF objects:

- 22
- 23 A. **Core Tech’s Issue #4 Misstates the Facts.** DPW did not “agree[] to accept the
24 performance and payment bond of Guam Education Development partners.” That
25 is a misstatement. As stated in GEFF’s submissions, the proposed IDIQ between
26 the government and GEFF requires GEFF *or its prime construction contractor*,
27 Hensel Phelps, to deliver payment and performance bonds to the government.
28 GEFF’s November 20, 2015 proposal provides a letter from Travelers Insurance,
Hensel Phelps’ surety, that Hensel Phelps’ bonding capacity is approximately \$1
billion – well in excess of any bonding requirements of the RFP.
- B. **Core Tech’s Issue #5 Misstates the Facts.** There was no “wholesale subcontract
of GEFF’s developer’s obligations under the IDIQ Contract to GEDP... including

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GEFF's obligations to deliver a performance and payment bond." This allegation is factually incorrect.

C. **Core Tech's Issues #8 and #9 Make No Sense.** The negotiated (but unexecuted) IDIQ contract incorporates by reference the RFP and makes it part of the contract. Therefore, there is no way that the terms of the IDIQ could violate the RFP. Moreover, there was never a "contract" on which "the other proposals were based." Core Tech's issues make no sense, and assume wholly non-existent facts.

D. **Core Tech's Issue #11 is Not Properly Before the OPA.** This is the *first* time Core Tech has *ever* raised this issue. It was not raised in either of its protests (either its May 27, 2016 or July 15, 2016 protest). And it was *not* raised in any of its notices of appeal, or any of its previous filings. Therefore, this issue is *not* properly before the OPA, and it should be stricken and disregarded.

In conclusion, both of Core Tech's Appeals should be denied in their entirety.

DATED: September 2, 2016.

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