

1 cost proposals provided by GEFf during its negotiations with the RFP Negotiation Committee,
2 to include its April 22, 2016 proposal for \$76,867,335 that became the basis for the IDIQ Contract,
3 did not violate the considerations listed in Exhibit A of the RFP; (4) The chairman of GEDA's
4 Board of Directors, E.J. CALVO had a financial interest, as defined by 5 G.C.A. §5601, in the
5 RFP. As the chairman of GEDA's Board of Directors, E.J. CALVO must comply with the
6 mandates of 5 G.C.A. §5626, §5628(a), and §43101 by recusing himself from any direct or
7 indirect participation in the RFP's solicitation process; (5) DPW violated paragraphs 4.2.1.5,
8 2.2.2, and 3.3 of the RFP by allowing GEFf's primary construction contractor to provide the
9 100% payment and performance bonds required by the RFP and the IDIQ Contract in Section XII
10 of the IDIQ Contract; (6) DPW violated the RFP's \$100,000,000 limit imposed by paragraph 4.0
11 of the RFP by allowing GEFf to exceed this limit at the direction of DPW's Director in Section
12 3.1 of the IDIQ Contract; (7) DPW violated 5 G.C.A. §5249(b) and 2 G.A.R., Div. 4, Chap. 3,
13 §3129(2) by not having a communications log in the procurement record; and (8) DPW also
14 violated 5 G.C.A. §5249(c) and 2 G.A.R., Div. 4, Chap. 3, §3129(3) by not having sound
15 recordings of the negotiations in its procurement record. Accordingly, CTI's appeal in OPA-PA-
16 16-007 and OPA-PA-16-011 are hereby GRANTED in part, and DENIED in part.

17 18 19 **II. FINDINGS OF FACT**

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21 The Public Auditor in reaching this Decision has considered and incorporates herein the
22 procurement record and all documents submitted by the parties, except for those excluded by the
23 Hearing Officer at the hearing for the Appellant's Appeal, and all arguments made during the
24 hearings which were held on September 7, 8, 15, 16, 19, 22, and 23, 2016, and on October 3, 4,
25 5, and 7, 2016. Based on the aforementioned record in this matter, the Public Auditor makes the
26 following findings of fact:
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- 1 1. On or about June 15, 2015, DPW issued the RFP.¹
2 2. The RFP solicited for a contractor to perform, in relevant part, the following:

3 a. Provide financing, design, renovation, and construction, and to provide
4 collateral equipment, maintenance, and insurance as mandated by P.L. 32-120 and P.L. 32-121
5 for a total of 36 DEPARTMENT OF EDUCATION, GOVERNMENT OF GUAM (Hereafter
6 Referred to as “GDOE”) schools with Simon Sanchez High School (Hereafter Referred to as
7 “SSHS”) as a priority, as well as develop a Comprehensive Capital Improvement Plan.²

8 b. It was DPW’s intent that an indefinite delivery, indefinite quantity contract
9 (Hereafter Referred to as “IDIQ Contract”) for the financing, design, renovation, and construction
10 services of GDOE facilities will be awarded to the most responsive and responsible proposer
11 whose proposal meets the needs of DPW to the best degree as set forth in the RFP.³

12 c. The period of performance to complete SSHS is 730 calendar days commencing
13 from the date of award of the negotiated task order; the period of performance for the IDIQ
14 Contract for the financing, design, renovation, and construction services is for a five-year period
15 commencing from the date of award; and the period of performance for each of the remaining 35
16 GDOE school facilities will be negotiated and awarded on a task order basis per school facility
17 based on a priority list and the needs of GDOE after the Comprehensive Capital Improvement
18 Plan is completed; and that completion of the Comprehensive Capital Improvement Plan is 365
19 calendar days commencing from the date of the negotiated task order.⁴

20 d. That the contractor awarded the RFP contract will be the Prime Contractor who
21 shall be responsible, in total, for all work of any subcontractors.⁵

22 e. The scope of work had a total cost of up to \$100,000,000.⁶

24 ¹ Advertisement in the Pacific Daily News dated June 15, 2015, TAB 1, Exhibit A, Procurement Record filed on July
25 1, 2016 in OPA-PA-16-007.
26 ² Section 2 Project Overview and Instructions, Paragraph 2.0 Intent, RFP, TAB 2, Exhibit B, Id. as amended by
27 Addendums 6 and 7, TAB 4, Exhibit D, Id.
28 ³ Section 2 Project Overview and Instructions, Paragraph 2.0, Intent, RFP, TAB 2, Exhibit B, Id. as amended by
Addendums 6 and 7, TAB 4, Exhibit D, Id.
⁴ Section 2, Paragraph 2.1.1 Simon Sanchez and IDIQ Design/ Construction/ Renovation/Demolition/CIP, RFP, TAB
2, Exhibit B, Id. as amended by Addendum No. 7, TAB 4, Exhibit D, Id.
⁵ Section 3, Paragraph 3.3 Prime Contractor/Subcontractors Partnership, RFP, TAB 2, Exhibit B, Id.
⁶ Section 4-A, Paragraph 4.0 Overview, RFP, TAB 2, Exhibit B, Id. as amended by Addendum No. 7, TAB 4, Exhibit
D, Id.

1 f. In negotiation of subsequent task orders, the Awardee's pricing and costs shall
2 be based on RS Means Facilities Construction Cost Data. The pricing and costs for each task order
3 when submitted to the government by the Awardee shall be based on the most recent information,
4 city costs indexes, location factors, unit prices, coefficient percentage factors and other factors or
5 data as contained in the RS Means Facilities Construction Cost Data, and the Awardee must
6 identify the coefficient attributed to each ordering period for Task Order Coefficients.⁷

7 3. The RFP required the Offerors to:

8 a. Submit their proposals in writing, and to provide DPW one original, seven paper copies,
9 and three CD copies of their proposals.⁸

10 b. Not to submit multiple or alternate proposals and that such proposals would not
11 be accepted.⁹

12 c. Communicate only with DPW's JOHN F. CALANAYAN, and not to
13 communicate with any other DPW staff or other Government of Guam officials regarding the
14 RFP procurement, except at the direction of the procurement officer in charge of the RFP
15 solicitation, who in this case was DPW Deputy Director FELIX BENAVENTE.¹⁰

16 d. Include project approach and cost estimates for SSHS and the development of
17 the Comprehensive Capital Improvement Plan with their Proposal for the remaining 35 schools
18 will be issued as task orders based on the results of the Comprehensive Capital Improvement Plan
19 in which the cost estimates will be requested.¹¹

20 e. Prepare a cost estimate and project approach to provide capital maintenance and
21 insurance for SSHS. Capital maintenance shall include the capital structure, which includes civil,
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24 ⁷ Section 4-A, Paragraph 4.1 Task Orders, RFP, TAB 2, Exhibit B, Id. as amended by Addendum No. 7, TAB 4,
25 Exhibit D, Id.

26 ⁸ Section 2, Paragraph 2.4.1 General, RFP, TAB 2, Exhibit B, Id. as amended by Addendum No. 7, TAB 4, Exhibit
27 D, Id.

28 ⁹ Section 2, Paragraph 2.4.7 Multiple or Alternate Proposals, TAB 2, Exhibit B, Id. as amended by Addendum No.
7, TAB 4, Exhibit D, Id.

¹⁰ Section 3, Paragraph 3.2 Single Point of Contact, RFP, TAB 2, Exhibit B, Id. as amended by Addendum No. 7,
TAB 4, Exhibit D, Id. and Testimony of FELIX BENAVENTE on September 7, 2016 (Part B; 00:07:34-00:07:38
and 00:07:58-00:08:35).

¹¹ Section 4-A, Paragraph 4.0.1, RFP, TAB 2, Exhibit B, Id. as amended by Addendum No. 7, TAB 4, Exhibit D, Id.

1 structural, mechanical, and electrical, and the all-inclusive routine interior and exterior
2 maintenance, but excludes collateral equipment.¹²

3 f. Include a separate project approach and cost estimate for design, construction,
4 renovation, and demolition in whole or in part of SSSH to be in compliance with the latest Federal
5 and Local Building Code Standards, and construction of additional new facilities such as
6 cafeteria, auditorium, sports facilities, gymnasium, track and field, etc., and to provide furniture,
7 equipment, maintenance, and insurance as mandated under P.L. 32-121.¹³

8 g. Include conceptual plans showing the civil and architectural layout for SSSH
9 based on SSSH requirements, and all off-site development such as proposed access roads and any
10 modifications to existing roadways or pedestrian facilities, utilities, landscaping, etc.¹⁴

11 h. Be bondable as required by the RFP and include a Bid Bond of not less than
12 15% of the \$100,000,000 to be financed. Said Bid Bond shall be enclosed in the sealed bid
13 envelope. In addition, a 100% performance and payment bond must be obtained by the Awardee
14 or its Prime Contractor.¹⁵

15 i. Work with the GUAM ECONOMIC DEVELOPMENT AUTHORITY,
16 GOVERNMENT OF GUAM (Hereafter Referred to as "GEDA") to provide approximately
17 \$100,000,000 financing for the design (including architectural and engineering), renovation or
18 construction of all 36 school facilities, and to provide furniture and equipment.¹⁶j. Prospective
19 Offerors were initially required to submit their proposals no later than August 28, 2015 at 4:00
20 p.m.¹⁷

21 4. After receiving the proposals, the RFP required the following:

22 a. A selection committee comprised of the GDOE Superintendent who would
23 serve as the Chairman, the DPW Director or Deputy Director, the Director or Deputy Director of
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25 ¹² Section 4-A, Paragraph 4.0.2, RFP, TAB 2, Exhibit B, Id. as amended by Addendum No. 7, TAB 4, Exhibit D, Id.

26 ¹³ Section 4-A, Paragraph 4.0.3, RFP, TAB 2, Exhibit B, Id. as amended by Addendum No. 7, TAB 4, Exhibit D, Id.

27 ¹⁴ Section 4-A, Paragraph 4.0.3.1, RFP, TAB 2, Exhibit B, Id. as amended by Addendum No. 7, TAB 4, Exhibit D,
28 Id.

¹⁵ Section 4-A, Paragraphs 4.2.1.4 and 4.2.1.5, RFP, TAB 2, Exhibit B, Id. as amended by Addendum No. 7, TAB 4,
Exhibit D, Id.

¹⁶ Section 4-A, Paragraph 4.2.1.7 and Section 6, Paragraph 4.d, RFP, TAB 2, Exhibit B, Id.

¹⁷ Section 1, Schedule of Events, RFP, TAB 2, Exhibit B, Id.

1 the DEPARTMENT OF LAND MANAGEMENT, (Hereafter Referred to as “DLM”), the
2 Administrator or Deputy Administrator of the GUAM ENVIRONMENTAL PROTECTION
3 AGENCY, (Hereafter Referred to as “GEPA”), and the GEDA Administrator or Deputy
4 Administrator would be convened to review and evaluate the proposals. The selection committee
5 would then choose the firm to be awarded the contract, based on the criteria stated in the RFP.¹⁸

6 b. The committee will first review each proposal for compliance with the minimum
7 qualifications and mandatory requirements of the RFP. Failure to comply with any requirements
8 shall disqualify a proposal.¹⁹

9 c. All proposals will initially be classified as either “responsive” or “non-
10 responsive.” Proposals may be found non-responsive any time during the evaluation process or
11 contract negotiation, if any of the required information is not provided or the proposal is not
12 within the plans and specifications described and required by the RFP. If a proposal is found to
13 be non-responsive, it will not be considered further.²⁰

14 d. The committee would then evaluate and rate the proposals according to the
15 following criteria: (1) Competency, which included the responsiveness of the proposal to perform
16 the scope; such other information that may be required or useful in the faithful performance of
17 the contract; project approach; and the ability, capacity, and skill of the Offeror;²¹ (2) Construction
18 Experience; (3) Financing Capability; and (4) The Offeror’s project approach and cost for the
19 development of a Comprehensive Capital Improvement Plan.²² The Financing Capability and
20 Project Expertise and Experience criteria each allowed a maximum score of 30 points, Project
21 Approach and Project Innovation each allowed a maximum score of 10 points, and
22 Comprehensive Capital Improvement Plan allowed a maximum score of 20 points.²³ e.

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25 ¹⁸ Section 2, Paragraph 2.5.1 Selection Committee, RFP, TAB 2, Exhibit B, Id. and Section 5, Paragraph 5.0
Evaluation, RFP, TAB 2, Exhibit B, Id. as amended by Addendum 6, TAB 4, Exhibit D, Id.

26 ¹⁹ Section 5, Paragraph 5.1, Criteria, RFP, TAB 2, Exhibit B, Id. as amended by Addendum No. 7, TAB 4, Exhibit
D, Id.

27 ²⁰ Section 3, Paragraph 3.7 Classification of Proposals as Responsive or Non-Responsive.

28 ²¹ NOTE: Section 5.1.3 erroneously uses the term “fateful” when the correct term should be “faithful.”

²² Section 2, Paragraph 2.5.3, RFP, TAB 2, Exhibit B, Id. and Section 5 Evaluation Criteria, RFP, TAB 2, Exhibit B,
Id. as amended by Addendum No. 7, TAB 4, Exhibit D, Id.

²³ Section 5.3, Evaluation, Rating, and Selection, RFP, TAB 2, Exhibit B, Id. as amended by Addendum No. 7, TAB
4, Exhibit D, Id.

1 Selection and award will be based on the information contained in the Offeror's proposal and
2 information or materials presented by Offerors outside the formal response or subsequent
3 discussion/negotiation will not be considered, will have no bearing on any award, and may result
4 in the Offeror being disqualified from further consideration.²⁴

5 f. Once a firm is selected, a scope of work and fee estimate will be negotiated to
6 perform the required services for SSHS. A task order will then be developed and executed for the
7 remaining schools based on the priority list and needs of GDOE after completion of the
8 Comprehensive Capital Improvement Plan.²⁵

9 g. A leaseback agreement may be prepared once negotiations with the successful
10 Offeror have concluded on a task order basis.²⁶

11 5. GEF and CTI received copies of the RFP on June 15, 2015.²⁷

12 6. Between, August 6, 2015 to September 18, 2015, DPW issued RFP Addendum Nos. 1
13 through 5, which in relevant part amended the date of the issuance of Answers to Written
14 Questions from August 7, 2015 to September 25, 2015.²⁸

15 7. On September 25, 2015, DPW issued RFP Addendum No. 6, which, in relevant part,
16 extended the deadline for the Offerors to submit their proposals from August 28, 2015 to
17 November 6, 2015, amended several sections of the RFP, and provided a second period for
18 potential Offerors to submit Requests for Information.²⁹

19 8. On October 9, 2015, DPW issued RFP Addendum No. 7, which, in relevant part,
20 amended several sections of the RFP, and provided responses to the second round of Requests for
21 Information.³⁰

24 ²⁴ Section 3, Paragraph 3.9 Completeness of Proposals, RFP, TAB 2, Exhibit B, Id.

25 ²⁵ Section 2, Paragraph 2.0 Intent, RFP, TAB 2, Exhibit B, Id. as amended by Addendum No. 7, TAB 4, Exhibit D,
26 Id.

26 ²⁶ Section 4-A, Paragraph 4.3, Offeror's Responsibilities, RFP, TAB 2, Exhibit B, Id. as renumbered from Paragraph
27 4.4 to 4.3 by Addendum No. 7, TAB 4, Exhibit D, Id.

27 ²⁷ Bid Register, TAB 3, Exhibit C, Id.

28 ²⁸ Addendum No. 1 dated August 6, 2015, Addendum No. 2 dated August 13, 2015, Addendum No. 3 dated August
29 27, 2015, Addendum No. 4 dated September 10, 2015, and Addendum No. 5 dated September 18, 2015, TAB 4,
30 Exhibit D, Id.

²⁹ Addendum No. 6 dated September 25, 2015, TAB 4, Exhibit D, Id.

³⁰ Addendum No. 7 dated October 9, 2015, TAB 4, Exhibit D, Id.

1 9. On November 3, 2015, DPW issued RFP Addendum No. 8, which, in relevant part,
2 extended the RFP submission date from November 6, 2015 to November 20, 2015 at 4:00 p.m.³¹

3 10. On November 19, 2015, DPW issued RFP Addendum No. 9, which, in relevant part,
4 extended the RFP submission date from November 20, 2015 to November 23, 2015 at 4:00 p.m.³²

5 11. On November 23, 2015, DPW received proposals from GEF, CTI, and PERNIX
6 GUAM, LLC (Hereafter Referred to as "PERNIX").³³

7 12. On December 2, 2015 the RFP Evaluation Committee was convened and had its first
8 meetings to review the Offerors' proposals on December 9, 2015 and December 10, 2015.³⁴

9 13. On December 11, 2015, the RFP Evaluation Committee met and heard presentations
10 by representatives of PERNIX and CTI.³⁵ On December 12, 2015, the RFP Evaluation Committee
11 met and heard a presentation by a representative from GEF.³⁶

12 14. On December 21, 2015, the RFP Evaluation Committee met and evaluated the
13 proposals submitted by the three Offerors. The committee ranked GEF first with 463 points, CTI
14 second with 434 points, and PERNIX third with 400 points.³⁷

15 15. On December 22, 2015, DPW informed GEF, CTI, and PERNIX that their proposals
16 ranked number 1, 2, and 3, respectively. Additionally, DPW advised GEF that it would be
17 engaging in contract negotiations, and DPW advised CTI and PERNIX that although they would
18 not be engaging in contract negotiations, DPW would be retaining their proposals because the
19 initial evaluation may not exclude them from further consideration.³⁸

20 16. On December 30, 2015, DPW informed GEF that the first contract negotiation
21 meeting was scheduled for January 8, 2016.³⁹

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24 ³¹ Addendum No. 8 dated November 3, 2015, TAB 4, Exhibit D, Id. NOTE: This Addendum uses the term "bid
opening" in error, when it was referring to "RFP submission."

25 ³² Addendum No. 9 dated November 19, 2015, TAB 4, Exhibit D, Id.

26 ³³ Call Register dated November 23, 2015, TAB 11, Exhibit K, Id.

27 ³⁴ Memorandum by JON J.P. FERNANDEZ dated December 2, 2015, TAB 15, Exhibit O, Id.

28 ³⁵ Attendance Sheet dated December 11, 2015, TAB 12, Exhibit L, Id.

³⁶ Attendance Sheet dated December 12, 2015, TAB 12, Exhibit L, Id.

³⁷ Attendance Sheet dated December 21, 2015 and Summary Evaluation Form dated December 21, 2015, TAB 12,
Exhibit L, Id.

³⁸ DPW letters to GEF, CTI, and PERNIX dated December 22, 2015, TAB 14, Exhibit N, Id.

³⁹ DPW letter to GEF dated December 30, 2015, TAB 15, Exhibit O, Id.

1 17. On January 7, 2016, CTI filed a protest concerning the procurement method DPW
2 used for the RFP. Specifically, CTI alleged that DPW violated 5 G.C.A., Chapter 58D's
3 requirement that DPW select the proposal that delivers the best value for Guam in meeting
4 GDOE's objectives by failing to consider the costs and the development fees of the proposals
5 submitted in response to the RFP.⁴⁰

6 18. On January 19, 2016, DPW denied CTI's January 7, 2016 protest on the sole ground
7 that it was untimely because CTI had notice of the proposal evaluation criteria on June 15, 2015
8 and it failed to file its protest until January 7, 2016, which exceeded the 14 day period to file a
9 protest required 2 G.A.R., Div. 4, Chap. 9, §9101. Additionally, DPW advised CTI that the
10 ranking letter only allows the government to engage in negotiations with the highest ranked
11 Offeror and that if these negotiations fail, CTI would be next in line to negotiate a contract with
12 the government.⁴¹

13 19. On February 15, 2016, the RFP Negotiation Committee met with GEFf's
14 representatives to begin their contract negotiations.⁴²

15 20. On February 17, 2016, GEFf requested that DPW allow GEFf representatives to
16 contact various officials from the OFFICE OF THE ATTORNEY GENERAL, (Hereafter
17 Referred to as "AG's Office"), GEDA, GDOE, and DPW for the purpose of obtaining additional
18 information concerning legal issues, project financing issues, overall project description, SSSS
19 programming, scope, financing, time schedules, and overall project issues.⁴³

20 21. On February 19, 2016, the RFP Negotiation Committee held a coordination meeting,
21 outside of the presence of GEFf representatives, to discuss their February 15, 2016 meeting with
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25 ⁴⁰ Pages 1 through 4, CTI's Protest dated January 7, 2016, Exhibit H, Agency Report filed on July 11, 2016 in OPA-
26 PA-16-007. NOTE: This Protest was not located in the Procurement Record filed on July 1, 2016 in OPA-PA-16-
007.

27 ⁴¹ DPW's January 19, 2016 Protest Decision, TAB 20, Exhibit T, Procurement Record filed on July 1, 2016 in OPA-
PA-16-007.

28 ⁴² DPW Attendance Sheet dated February 15, 2016, Page PR GEFf 000608, Exhibit y, GEFf's Exhibit List filed on
August 26, 2016.

⁴³ GEFf Letter to DPW dated February 17, 2016, page PR GEFf 00593, Exhibit z, Id.

1 GEFF, GEFF's February 17, 2016 request to speak with various government officials, and their
2 next step in the negotiation process.⁴⁴

3 22. On February 23, 2016, the RFP Negotiation Committee met with GEFF
4 representatives.⁴⁵

5 23. On February 24, 2016, GEFF provided additional information to the RFP Negotiation
6 Committee which explained that GEFF's \$73,218,078 proposed cost to construct SSHS was
7 based on a construction cost of \$262.56 per square foot, for a new building with 278,850 square
8 feet, inclusive of a \$2,250,885 contractors fee, but exclusive of architectural and engineering
9 expenses; furniture, fixture, and equipment costs; and contribution to the arts costs.⁴⁶

10 24. On February 25, 2016, DPW requested that GEFF provide it with its total costs for the
11 construction of SSHS.⁴⁷

12 25. On February 29, 2016, GEFF responded by disclosing that its costs for the contribution
13 to the arts was \$732,180; its architectural and engineering fees were \$4,400,000; its furniture,
14 fixtures, and equipment costs were \$2,500,000; its construction management and monitoring
15 costs were \$840,000; its owner contingency costs, to cover unforeseen cost increases or
16 estimation values, was \$3,661,000; its owner overhead costs were \$310,000; and its owner profit
17 costs were \$3,661,000; for a total cost of \$89,332,258 to construct the new SSHS.⁴⁸

18 26. On March 2, 2016 the RFP Negotiation Committee conducted a conference call with
19 GEFF's representative wherein the committee requested that GEFF provide it with a cost
20 comparison between GEFF's proposed SSHS costs and the costs to construct Okkodo High
21 School.⁴⁹

24 ⁴⁴ DPW Attendance Sheet dated February 19, 2016 and RFP Negotiation Team Agenda dated February 19, 2016,
pages PR GEFF 000601 and PR GEFF 000602, Exhibit aa, Id.

25 ⁴⁵ GEFF Letter to DPW dated February 24, 2016, page PR GEFF 000597, Exhibit bb, Id.

26 ⁴⁶ GEFF Letter to DPW dated February 24, 2016, pages PR GEFF 000597 through PR GEFF 000600, Exhibit bb, Id.

27 ⁴⁷ GEFF Letter to DPW dated February 24, 2016, page PR GEFF 000597, Id. and GEFF Letter to DPW dated
February 29, 2016, pages PR GEFF 000584 and PR GEFF 000585, Exhibit dd, Id.

28 ⁴⁸ GEFF Letter to DPW dated February 29, 2016, pages PR GEFF 000584 and PR GEFF 000585, Exhibit dd, Id.
NOTE: The GEFF letter indicated the total cost would be \$89,332,258, but it should be \$89,322,285 per our
calculation.

⁴⁹ Email from JON FERNANDEZ to ARLEEN U. PIERCE dated March 1, 2016, page GDOE 0562, Exhibit ee, and
GEFF Letter to DPW dated March 3, 2016, page GDOE 0572, Exhibit ff, Id.

1 27. On March 3, 2016 GEFF responded by showing, using RS Means Indices to convert
2 the 2007, 2008, and 2013 dollars spent to construct Okkodo High School into present costs, and
3 that if Okkodo High School were built today, it would cost \$68,466,041, or \$330.29 per square
4 foot for a 207,291 square foot building, and that GEFF's \$89,332,258 preliminary cost for SSHS,
5 or \$320.35 per square foot for a 278,860 square foot building. This would result in the SSHS
6 square footage cost to be \$9.94 cheaper than the square footage cost to construct Okkodo High
7 School adjusted to present dollars.⁵⁰

8 28. On March 15, 2016, the RFP Negotiation Committee held a coordination meeting
9 outside of the presence of GEFF's representatives and discussed GEFF's \$73 Million and \$89
10 Million proposals, the cost breakdown for the construction of SSHS, GEFF's Comparative
11 Analysis with Okkodo High School, and the best value for the project. During its deliberations,
12 the committee was concerned that the RFP required a cost estimate that included costs for the
13 design, construction, insurance, maintenance, and collateral equipment and that GEFF's cost
14 estimate did not include these costs until GEFF's February 29, 2016 letter disclosed them,
15 resulting in a \$16,114,180 increase to GEFF's cost proposal. The committee also requested that
16 GEFF provide it with a detailed cost breakdown of constructing SSHS with a budget of
17 \$60,000,000 by March 22, 2016.⁵¹

18 29. On March 21, 2016, GEFF responded by providing the RFP Negotiation Committee
19 with a proposed construction cost for SSHS of \$63,796,049, but with a reduction in square footage
20 from 278,860 square feet to 193,766 square feet, and increase in students per classroom from 25
21 to 30, the replacement of the auditorium with a combined cafeteria and stage, the elimination of
22 computer rooms, the elimination of lighting and bleachers for the tennis courts and soccer field,
23 and downsizing workrooms and offices.⁵²

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27 ⁵⁰ GEFF Letter to DPW dated March 3, 2016, page GDOE 0572, Exhibit ff, Id.

28 ⁵¹ DPW Attendance Sheet and Agenda dated March 15, 2016, pages PR GEFF 000518 to PR GEFF 000520, Exhibit
gg, Id. and DPW's Letter to GEFF dated March 16, 2016, pages PR GEFF 000529 to 000530, Exhibit hh, Id.

⁵² GEFF Letter to DPW dated March 21, 2016, pages PR GEFF 000574 to PR GEFF 000581, Exhibit ii, Id.

1 30. On March 23, 2016, the RFP Negotiation Committee met with GEFf representatives
2 and discussed the cost breakdown and the best value.⁵³

3 31. On March 24, 2016, the RFP Negotiation Committee met with GEFf representatives
4 and discussed the differences between the GEFf’s original proposal and its revised \$63,796,049.
5 GEFf representatives were to meet with GDOE on March 25, 2016 to conduct an item by item
6 review of the revised proposal and the committee agreed to meet again on March 28, 2016.⁵⁴

7 32. The afternoon of March 24, 2016, GDOE re-considered its classroom usage and
8 quantities by decreasing the total number of classrooms for SSHS to 116.⁵⁵

9 33. On March 25, 2016, GDOE representatives met with GEFf representatives and they
10 discussed SSHS’s school program to determine the daily schedule and class census per room to
11 determine if they could reduce the room count to reduce project costs. GDOE also informed GEFf
12 to include the cost of a gated access road at SSHS’s southern boundary which would function as
13 a one-way out in the morning and afternoon for buses, and to size the kitchen to feed breakfast
14 and lunch meals to SSHS, F.B.L.G. Middle School, D.L. Perez Elementary School, Machananao
15 Elementary School, and Upi Elementary School. GEFf agreed to meet with GDOE’s
16 Superintendent at Okkodo High School to review its design, and to meet with SSHS’s principal
17 and assistants on March 28, 2016 to review their potential program revisions.⁵⁶

18 34. On March 28, 2016, GEFf representatives met with GDOE representatives and SSHS
19 representatives and discussed SSHS’s design standards and to take a tour of Okkodo High
20 School.⁵⁷

21 35. On March 29, 2016, GEFf representatives met with GDOE and DPW representatives
22 and discussed how they could develop a scope of work to ensure that the new SSHS would be
23 functional and have the best value. They also discussed auditorium options, determined that the
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25 ⁵³ DPW Attendance Sheet and Meeting Agenda dated March 23, 2016, pages PR GEFf 000498 to PR GEFf 000499,
26 Exhibit jj, Id.

27 ⁵⁴ SETIADI ARCHITECTS LLC Meeting Attendance Sign-In and Pre-Design Meeting Notes dated March 24, 2016,
28 pages PR GEFf 000496 to PR GEFf 000497, Exhibit kk, Id.

⁵⁵ Email from RANDY ROMERO to JON FERNANDEZ dated March 25, 2016, pages GDOE 0838 to GDOE 0839,
Exhibit kk, Id.

⁵⁶ Meeting Notes dated March 25, 2016, pages PR GEFf 000494 to PR GEFf 000495, Exhibit ll, Id.

⁵⁷ DPW Attendance Sheet dated March 28, 2016, page PR GEFf 000491, and Email from SEAN EASTER to JOHN
CALANAYAN dated March 29, 2016, page PR GEFf 000484, Exhibit mm, Id.

1 basic room size would be increased from 750 square feet to 850 square feet to accommodate a
2 maximum capacity of 28 students per room, determined that the existing auto shop must be
3 demolished and a new auto shop constructed, and that there would be an access driveway for
4 buses at the campus' south side.⁵⁸

5 36. Also on that day, GDOE provided GEFf with its classroom loading assignments for
6 SShS for 116 classrooms.⁵⁹

7 37. On March 30, 2016, the RFP Evaluation Committee met with GEFf representatives
8 and SShS representatives and conducted walk-thru tours of SShS and Tiyan High School.⁶⁰

9 38. On April 1, 2016, GEFf provided DPW a revised cost proposal for the construction
10 of SShS in the amount of \$74,947,000 to construct a 234,739 square foot school; a normal student
11 capacity of 2,330 and a maximum student capacity of 2,742; 103 classrooms with 812 square feet
12 per classroom; a 300-seat auditorium with stage and lighting equipment; dedicated classrooms
13 and teaching stations for GCC programs; a kitchen sized and equipped to serve over 5,000 meals;
14 a gymnasium with a full basketball court with bleacher seating for 1,800 people; and lighted
15 football, track, soccer, baseball, and tennis facilities.⁶¹

16 39. On April 4, 2016, representatives from DPW, GEFf, GDOE, and SShS met and the
17 SShS representatives submitted several requested revisions to GEFf's April 1, 2016 proposal
18 which GEFf roughly estimated would add an additional \$5,200,713 to GEFf's \$74,947,000 April
19 1, 2016 proposal.⁶²

20 40. On April 8, 2016, GEFf presented DPW with a proposed pre-development schedule
21 that would culminate in the signing of an IDIQ contract by April 28, 2016.⁶³

24 ⁵⁸ Minutes of Meeting dated March 29, 2016, page PR GEFf 000487, Exhibit nn, Id.

25 ⁵⁹ Email from RANDY ROMERO to SEAN EASTER dated March 29, 2016, pages PR GEFf 000488 to PR GEFf
26 000489, Exhibit oo, Id.

27 ⁶⁰ DPW Attendance Sheets dated March 30, 2016, pages PR GEFf 000521 to PR GEFf 000522, Exhibit pp, Id. and
28 Meeting Notes dated March 30, 2016, page PR GEFf 000484, Exhibit pp, Id.

⁶¹ GEFf Letter to DPW dated April 1, 2016, pages GDOE 0909 to GDOE 0915, Exhibit rr, Id.

⁶² Email from SEAN EASTER to JOHN CALANAYAN and RANDY ROMERO dated April 4, 2016, pages PR
28 GEFf 000567 and PR GEFf 000492 to PR GEFf 000493, Exhibit ss, Id.

⁶³ Email from SEAN EASTER to JOHN CALANAYAN dated April 8, 2016, pages GDOE 0950 and GDOE 0951,
Exhibit tt, Id.

1 41. On April 20, 2016, GEFF representative SEAN EASTER met with GDOE
2 Superintendent JON FERNANDEZ. The Superintendent inquired if GEFf had been working with
3 GEDA to answer GEFf's questions concerning financing the RFP projects and GEFf responded
4 that they had not because they were waiting for approval from the committee before doing so.⁶⁴

5 42. On April 21, 2016, as a result of its meeting with GDOE's Superintendent, GEFf
6 submitted a request to DPW that it be allowed to contact GEDA directly and no later than April
7 25, 2016, to confirm the revenue sources available and to review the Plan of Finance presented
8 in GEFf's proposal.⁶⁵

9 43. On April 21, 2016, GEFf representatives met with GDOE representatives and they
10 determined that the desired design loading of the new SShS classrooms would be 30 students;
11 that the standard classroom size would be 812 square feet inclusive of built-in storage; that the
12 new SShS would have a 500 seat auditorium; that GEFf's current proposal met GDOE's
13 requirement that SShS's kitchen be capable of serving four additional schools with a combined
14 enrollment exceeding 5,000 students; that the use of wireless internet would eliminate the need
15 for computer labs; that the football field would have no locker and shower rooms; that the baseball
16 dug outs would be constructed using chain link fence; that the fence around the ball fields and
17 track would match those at Okkodo High School; that the new SShS would have a gated, 2,500
18 linear foot road for morning and afternoon bus traffic; and that GEDA would have to be the group
19 to review and confirm compliance with the RFP's project financing requirements.⁶⁶ The
20 agreement concerning the classrooms resulted in a reduction of the 121 classroom stated in the
21 RFP to 114 classrooms.⁶⁷

22 44. On April 22, 2016 GEFf representatives met with GEDA representatives and most of
23 their discussions centered on the language in the RFP restricting expenditures for the construction
24 of the new SShS and the capital improvements to GDOE's 35 other schools to \$100,000,000.

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27 ⁶⁴ Email from JON FERNANDEZ to RFP Negotiation Committee dated April 21, 2016, page GDOE 0958, Exhibit
uu, Id.

⁶⁵ GEFf Letter to DPW dated April 21, 2016, page GDOE 1006, Exhibit uu, Id.

28 ⁶⁶ Email from SEAN EASTER to RANDY ROMERO, *et.al.*, dated April 26, 2016, page GDOE 0352, Exhibit vv,
Id. and Meeting Notes dated April 21, 2016, pages GDOE 0353 to GDOE 0354, Exhibit vv, Id.

⁶⁷ GEFf Comparison Sheet dated April 21, 2016, page GDOE 0357, Exhibit vv, Id.

1 GEDA explained to GEFf that its position was that although the public laws authorizing the RFP
2 did not set an expenditure cap on the projects, the RFP's language concerning the \$100,000,000
3 was a self-imposed limitation on spending by the government and was a fiscal policy decision.
4 GEDA further explained that if, for example, SSHS cost \$75,000,000, then the remaining
5 \$25,000,000 could be allocated to the capital improvement projects for GDOE's 35 other schools,
6 and that funding sources that do not increase the Government of Guam's debt, such as federal
7 grants, are excluded from the \$100,000,000 limitation.⁶⁸

8 45. On April 22, 2016, GEFf submitted its revised cost proposal to DPW, which proposed
9 a total project cost to construct the new SSHS of \$76,867,335. This proposal would give the new
10 SSHS a total of 244,816 square feet at a cost of \$313.98 per square foot, a maximum capacity of
11 2,922 students, a 500 seat auditorium, and a kitchen sized to serve four additional schools with a
12 combined student population of 5,000 students.⁶⁹

13 46. On April 26, 2016, the RFP Negotiation Committee met outside of the presence of
14 GEFf representatives and discussed costs, deliverables, timelines, and the determination of best
15 value in accordance with P.L. 32-120 and P.L. 32-121.⁷⁰

16 47. On April 27, 2016, the RFP Negotiation Committee held a coordination meeting with
17 GEFf representatives.⁷¹

18 48. On April 29, 2016, the RFP Negotiation Committee met with GEFf representatives
19 and discussed GEFf's scope of work, award review and processing, IDIQ Contract Documents
20 and award, and the notice to proceed.⁷²

21 49. On May 13, 2016 the RFP Negotiation Committee decided to award the RFP Contract
22 to GEFf and approved GEFf's proposed \$76,867,335 to construct the new SSHS.⁷³

24 ⁶⁸ Email from JANALYNN CRUZ DAMIAN to TOM KEELER, *et.al.*, dated April 22, 2016, page CT001242,
25 Exhibit ww, Id.

⁶⁹ GEFf Letter to DPW dated April 22, 2016, pages PR GEFf 000475 to PR GEFf 000482, Exhibit xx, Id.

26 ⁷⁰ DPW Attendance Sheet and Meeting Agenda dated April 26, 2016, pages PR GEFf 000548 to PR GEFf 000549,
27 Exhibit yy, Id.

⁷¹ DPW Attendance Sheet dated April 27, 2016, page PR GEFf 000538, Exhibit zz, Id.

28 ⁷² DPE Attendance Sheet and Meeting Agenda dated April 29, 2016, pages PR GEFf 000536 to PR GEFf 000537,
Exhibit aaa, Id.

⁷³ DPW Memorandum dated May 13, 2016, TAB 16, Exhibit P, Procurement Record filed on July 1, 2016 in OPA-
PA-16-007.

1 50. Also on that day, DPW issued a Notice of Intent to Award the RFP Contract to GEF
2 for an amount not to exceed \$100,000,000 and that a task order had been negotiated for the
3 construction of SSHS for the amount of \$76,867,335.⁷⁴

4 51. By May 26, 2016, DPW, GDOE, and GEF had signed the IDIQ Contract and only
5 the signatures of Guam's Attorney General and the Governor were required to finalize the
6 contract.⁷⁵

7 52. On May 27, 2016, 14 days after DPW issued its Notice of Intent to Award, CTI filed
8 a protest alleging that: (1) DPW violated 2 G.A.R., Div. 4, Chap. 3, §3114 by allowing GEF to
9 submit four new proposals; (2) DPW was not allowed to modify the RFP after selection of the
10 Best Qualified Offeror; (3) The Offeror must be Bondable and a 100% Performance and Payment
11 Bond must be obtained by the Offeror or its Prime Contractor; and (4) The involvement of FOL
12 Guam, LLC and E.C. Development is a Conflict or a Potential Conflict of Interest which had to
13 be disclosed.⁷⁶

14 53. On June 8, 2016, DPW denied CTI's May 27, 2016 protest because: (1) GEF's four
15 proposals were part of the negotiation process; (2) The RFP Negotiation Committee was not
16 limited to accepting GEF's original proposal and had the authority to negotiate the scope of
17 work with GEF; (3) No bond is due at this time; and (4) CTI's conflict or potential conflict
18 claims are mere speculation and unsubstantiated.⁷⁷

19 54. On June 23, 2016, 15 days after DPW denied its May 27, 2016 protest, CTI filed its
20 appeal in OPA-PA-16-007.⁷⁸

21 55. On July 15, 2016, CTI filed a protest alleging that: (1) The IDIQ Contract circumvents
22 the RFP's \$100,000,000 limit; and (2) DPW failed to maintain a Complete Procurement Record
23 as required by Guam Procurement Law.⁷⁹

26 ⁷⁴ Notice of Intent to Award dated May 13, 2016, TAB 16, Exhibit P, Id.

27 ⁷⁵ IDIQ Contract, page 17, DPW's Supplement to the Procurement Record filed in OPA-PA-16-007 and OPA-PA-
16-011 on September 8, 2016.

28 ⁷⁶ CTI Protest dated May 27, 2016, Exhibit 6, Notice of Appeal filed on June 23, 2016 in OPA-PA-16-007.

⁷⁷ DPW Protest Decision dated June 8, 2016, Exhibit 7, Id.

⁷⁸ Notice of Appeal filed on June 23, 2016 in OPA-PA-16-007.

⁷⁹ CTI Protest dated July 15, 2016, Exhibit 8, Notice of Appeal filed on August 10, 2016 in OPA-PA-16-011.

1 actual Offeror who may be aggrieved in connection with the method of source selection,
2 solicitation, or award of a contract, may protest to the Director of Public Works, for solicitations
3 involving construction such as the RFP at issue here, and the protest shall be submitted in writing
4 within 14 days after such aggrieved person knows or should know of the facts giving rise thereto,
5 and protests filed after the 14 day period shall not be considered. 5 G.C.A. §5425(a) and 2 G.A.R.,
6 Div. 4, Chap. 9, §9101(c)(1). DPW believes that CTI's May 27, 2016 protest was timely in two
7 ways. First, DPW concedes that the protest was timely.⁸⁴ Second, as stated above, untimeliness
8 was not one of the grounds cited in DPW's Decision denying CTI's May 27, 2016 protest.
9 However, DPW's position on the protest's timeliness is not decisive on this issue because no prior
10 determination shall be final or conclusive on the Public Auditor. 5 G.C.A. §5703. Further, if the
11 protest was not timely, then the appeal is not properly before the Public Auditor and must be
12 dismissed. 5 G.C.A. §5703. Therefore, the Public Auditor must review GEF's arguments
13 regarding the timeliness of CTI's May 27, 2016 protest to ensure that this matter is properly before
14 her.

15 GEF believes that since 2015, CTI knew that cost would be the subject of contract
16 negotiations after DPW selected the most qualified offeror because the RFP states that once a
17 firm is selected, a scope of work and fee estimate will be negotiated.⁸⁵ However, this is not
18 supported by the plain language of CTI's May 27, 2016 protest. CTI's main allegations
19 concerning the proposals is that there was a price difference of approximately \$25.6 million
20 between its highest proposal of \$89,332,258 and its lowest proposal of \$63,796,049, that each of
21 these proposals had significant design differences, and that these proposals were submitted after
22 the November 6, 2015 deadline to submit the proposals, and after the review and evaluation of
23 the proposals that resulted in the ranking of the Offerors.⁸⁶ Hence, the Public Auditor finds that
24 these arguments are not limited to the language of the RFP and are based on information that CTI
25 could not have obtained, i.e., the various proposals and the methodology used by the RFP
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28 ⁸⁴ Page 7, Agency Report filed on July 11, 2016 in OPA-PA-16-007.

⁸⁵ Line 14, page 8, GEF's Comments on DPW's Agency Report filed on July 22, 2016 in OPA-PA-16-007.

⁸⁶ Page 3, CTI Protest dated May 27, 2016, Exhibit 6, Notice of Appeal filed on June 23, 2016.

1 Negotiation Committee to obtain them, until after DPW issued its Notice of Intent to Award and
2 its Memorandum explaining its award on May 13, 2016.

3 GEFF also believes that since 2015, CTI knew that DPW could alter the considerations
4 for the construction of the new SSSH because the language of the RFP allows it.⁸⁷ This belief is
5 also unfounded based on a review of the plain language of CTI's May 27, 2016 protest. CTI
6 alleges that DPW modified the RFP by allowing GEFF to amend its original proposal and submit
7 additional proposals that substantially departed from the RFP's considerations for the
8 construction of the new SSSH as follows: (1) GEFF's final proposal offered fewer classrooms
9 for English, Science, Social Studies, Fine Arts, PE, Health, World Languages, CFS, ROTC,
10 Chamorro, and Business than what was sought by the RFP; and (2) The RFP sought a 750-seat
11 auditorium, while GEFF's original proposal offered a 700-seat auditorium, and GEFF's final
12 proposal offered a 500-seat auditorium. The Public Auditor finds that these arguments are not
13 limited to the language of the RFP and are based on information that CTI could not have obtained,
14 i.e., the classroom and auditorium seating offered by GEFF's proposals, until after DPW issued
15 its Notice of Intent to Award and its Memorandum explaining its award on May 13, 2016.

16 Hence, CTI did not know of the grounds for its protest until DPW issued its Notice of
17 Intent to Award on May 13, 2016. CTI filed its May 27, 2016 protest 14-days after May 13, 2016.
18 This complies with the 14-day protest period required by 5 G.C.A. §5425(a) and 2 G.A.R., Div.
19 4, Chap. 9, §9101(c)(1). Accordingly, the Public Auditor holds that CTI's May 27, 2016 Protest
20 was timely.

21 The Public Auditor will now review, as a preliminary matter, whether there is any merit
22 to GEFF's allegation that one of CTI's July 15, 2016 protest allegations was untimely.

23
24 **B. CTI's July 15, 2016 Protest Allegation was Timely.**

25 GEFF alleges that CTI's July 15, 2016 protest allegation that the IDIQ Contract
26 circumvents the RFP's \$100,000,000 limit is untimely.⁸⁸ As stated above, to be timely a protest
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⁸⁷ Line 27, page 8, GEFF's Comments on DPW's Agency Report filed on July 22, 2016 in OPA-PA-16-007.

⁸⁸ Line 5, page 10, GEFF's Comments on DPW's Agency Report filed on September 2, 2016.

1 must be filed within 14 days after an aggrieved Offeror knows or should know of the facts giving
2 rise thereto. 5 G.C.A. §5425(a) and 2 G.A.R., Div. 4, Chap. 9, §9101(c)(1). Also, as stated above,
3 if the protest was untimely, the appeal based on the protest must be dismissed because it is not
4 properly before the Public Auditor. 5 G.C.A. §5703. Here, DPW concedes that CTI's July 15,
5 2016 Protest was timely.⁸⁹ However, as stated above, that determination is neither final nor
6 conclusive on the Public Auditor. 5 G.C.A. §5703. Specifically, GEF's untimeliness allegation
7 is based on its belief that after receiving DPW's May 13, 2016 Notice of Intent to Award, CTI
8 knew that DPW would be issuing to GEF a \$100,000,000 contract on May 13, 2016 and this
9 should have prompted CTI into requesting a copy of the contract on that date.⁹⁰ However, this
10 allegation is borne out of Section 3.1 of the IDIQ Contract, which states that the government will
11 compensate GEF for services rendered for Task Orders issued as provided in the contract based
12 on available funds not to exceed \$100,000,000 unless otherwise directed in writing and permitted
13 by law.⁹¹ Further, CTI states that it did not receive a copy of the IDIQ Contract until DPW
14 provided it to CTI on July 1, 2016.⁹² CTI filed its protest on July 15, 2016 which is within the
15 14-day protest period required by 5 G.C.A. §5425(a) and 2 G.A.R., Div. 4, Chap. 9, §9101(c)(1).
16 Accordingly, the Public Auditor holds that CTI's July 15, 2016 protest allegation that the IDIQ
17 Contract circumvents the RFP's \$100,000,000 limit is timely.

18 The Public Auditor must review, as a preliminary matter, whether CTI's September 29,
19 2016 Request for Determination that GEF's proposal was non-responsive has any merit.

20
21 **C. DPW Failed to Thoroughly Review Each Proposal for Responsiveness.**

22 CTI requests that the OPA review GEF's original proposal, submitted to OPA under
23 seal, for the purpose of determining whether it was responsive to the RFP with regard to its
24 identity and experience.⁹³ At the heart of this request is CTI's belief that GEF claims to be an
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27 ⁸⁹ Page 4, Agency Report filed on August 23, 2016 in OPA-PA-16-011.

⁹⁰ Line 8, page 10, GEF's Comments on DPW's Agency Report filed on August 23, 2016.

⁹¹ Page 3, CTI Protest dated July 15, 2016, Exhibit 8, Notice of Appeal filed on August 10, 2016 in OPA-PA-16-011.

⁹² Page 2, Id.

⁹³ Lines 10 to 16, page 2, Request for Determination that GEF's Proposal was Non-Responsive filed on September 29, 2016.

1 entity known as GUAM EDUCATION FINANCING FOUNDATION (GEFF's name, as stated
2 above, is GUAM EDUCATIONAL FACILITIES FOUNDATION, INC.), and, in CTI's view,
3 this affects the responsiveness of GEFF's original proposal and every one of GEFF's subsequent
4 proposals to include the GEFF proposal ultimately selected by the RFP Negotiation Committee.⁹⁴
5 Specifically, according to CTI, if GEFF submitted information that concerns GUAM
6 EDUCATION FINANCING FOUNDATION's experience as GEFF's experience, this alone
7 would render GEFF's proposal non-responsive.⁹⁵ However, CTI's request raises a larger
8 question, which is, did the RFP Evaluation Committee do its job in determining whether or not
9 the proposals were responsive? Ostensibly, DPW claims it did and asserts, in one of its
10 justifications for denying CTI's May 27, 2016 protest, that "GEFF was the highest ranked
11 Offeror" and that "The selection of GEFF was proper and is not subject to challenge."⁹⁶ The
12 Public Auditor will review this part of DPW's Protest Decision *de novo*. 5 G.C.A. §5425(e) and
13 2 G.A.R., Div. 4, Chap. 12, §12201.

14 The RFP Evaluation Committee's first job was supposed to review each proposal DPW
15 received in response to the RFP to ensure that the proposals complied with the RFP's
16 requirements. Paragraph 3.7 of the RFP required the Evaluation Committee to review the
17 proposals and initially classify all proposals as either "responsive" or "non-responsive."⁹⁷ The
18 failure of an Offeror to comply with any RFP requirements should have resulted in the RFP
19 Evaluation Committee deeming the proposal non-responsive, and the proposal should not be
20 considered further. The members of the RFP Evaluation Committee included representatives
21 FELIX C. BENAVENTE, for DPW, JON FERNANDEZ, for GDOE, MANA SILVA
22 TAIJERON, for GEDA, MICHAEL BORJA, for DLM, and ERIC PALACIOS, for GEPA.⁹⁸

25 ⁹⁴ Lines 15 to 18, page 9, Id.

26 ⁹⁵ Lines 14 to 17, page 10, Id.

27 ⁹⁶ Page 1, DPW's Protest Decision dated June 8, 2016, Exhibit 7, Notice of Appeal filed on June 23, 2016 in OPA-
28 PA-16-007.

⁹⁷ Section 3, Paragraph 3.7 Classification of Proposals as Responsive or Non-Responsive, RFP, TAB 2, Exhibit B,
Procurement Record filed on July 1, 2016 in OPA-PA-16-007 and Section 5, Paragraph 5.1, Criteria, RFP, TAB 2,
Exhibit B, Id. as amended by Addendum No. 7, TAB 4, Exhibit D, Id.

⁹⁸ Summary Evaluation Form, TAB 12, Exhibit L, Id., and Testimony of FELIX C. BENAVENTE on September 7,
2016 (Part B; 01:30:00-01:31:18).

1 FELIX C. BENAVENTE testified that at the RFP Evaluation Committee’s first meeting consisted
2 of informing its members what was going on, and the next meetings concerned the presentations
3 by the Offerors.⁹⁹ JON FERNANDEZ testified that when they opened the proposal packets they
4 initially reviewed the proposals for “overall responsiveness” and they deemed them responsive.¹⁰⁰
5 MANA SILVA TAIJERON testified that they determined that the proposals were responsive.¹⁰¹
6 The Evaluation Committee went through the proposals to determine that everything was included
7 and it took them about 30 minutes.¹⁰² Based on these testimonies, the RFP Evaluation
8 Committee’s review of the proposals to determine whether they were responsive was cursory at
9 best, and the record in this matter indicates the committee did not adequately compare the
10 proposals with all of the RFP’s requirements.

11 Specifically, as stated above, the RFP Evaluation Committee selected GEFf as the most
12 qualified Offeror on December 21, 2015. However, just over two months later, on February 24,
13 2016, the RFP Negotiation Committee discovered that GEFf’s \$73,218,078 proposed cost to
14 construct SSSH, which was part of GEFf’s proposal, did not include architectural and
15 engineering expenses; furniture, fixture, and equipment costs; and costs for contribution to the
16 arts.¹⁰³ As stated above, the RFP specifically required that the Offerors include, in relevant part,
17 their cost estimates for design, construction, and to provide furniture, maintenance, and
18 insurance.¹⁰⁴ Hence, the Public Auditor finds that the RFP Evaluation and Negotiation
19 Committees failed to properly evaluate the proposals, to include but not limited to GEFf’s
20 proposal, to determine whether they are responsive by meeting all of the RFP’s requirements. The
21 RFP Evaluation Committee’s cursory review of the proposals to determine whether they were
22 responsive may have also missed the issue of whether GEFf met all the experience and
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24 ⁹⁹ Testimony of FELIX C. BENAVENTE on September 7, 2016 (Part B; 01:33:14-01:34:12).

25 ¹⁰⁰ Testimony of JON FERNANDEZ on September 19, 2016 (Part B; 00:04:04-00:04:20) and on September 22, 2016
(Part A; 00:26:36-00:27:00).

26 ¹⁰¹ Testimony of MANA SILVA TAIJERON on September 22, 2016 (Part A; 2:39:00-02:40:19).

27 ¹⁰² Testimony of JON FERNANDEZ on September 19, 2016 (Part B; 00:05:57-00:06:04) and Testimony of MANA
SILVA TAIJERON on September 22, 2016 (Part A; 02:39:36-02:39:50).

28 ¹⁰³ GEFf Letter to DPW dated February 24, 2016, pages PR GEFf 000597 to PR GEFf 000600, Exhibit bb, GEFf’s
Exhibit List filed on August 26, 2016.

¹⁰⁴ Section 4-A, Paragraph 4.0.3, RFP, TAB 2, Exhibit B, Procurement Record filed on July 1, 2016 in OPA-PA-16-
007 as amended by Addendum No. 7, TAB 4, Exhibit D, Id.

1 qualifications standards required by the RFP. DPW argues that an offeror's project expertise and
2 the experience of the offeror's key personnel and team is one of the evaluation criteria which must
3 be scored by RFP Evaluation Committee, and that GEF and GUAM EDUCATION
4 FINANCING FOUNDATION share the same experience because their key personnel are the
5 same.¹⁰⁵ Albeit, project expertise and experience was one of the RFP's scored evaluation criteria,
6 the RFP also required the Contractor to have at least five years of actual and direct experience in
7 construction of a minimum of \$5,000,000 for schools or other facilities or structures.¹⁰⁶ Yet,
8 RICHARD INMAN, GEF's President, testified that GEF was formed in "2015 prior to the
9 submission of our proposal."¹⁰⁷ Hence, GEF, being less than a year old in December 2015, could
10 not have met these requirements by itself. GEF's key personnel and its team members may have
11 met this requirement; however, it does not appear that this was reviewed by the RFP's Evaluation
12 Committee. Had the RFP Evaluation Committee properly reviewed all of the proposals, to
13 include GEF's to ensure they met all the RFP's requirements, including the five-year experience
14 requirement discussed here, the Public Auditor would be more confident of DPW's assertion in
15 its June 8, 2016 Protest Decision that the selection of GEF was proper. However, this level of
16 confidence is lacking and must be restored before DPW can proceed with its award, and the
17 question now becomes what actions must be taken to do so.

18 CTI requests that the Public Auditor review GEF's proposal *in camera* to determine
19 whether GEF's proposal is responsive to the RFP's sections concerning the mandatory
20 experience requirements.¹⁰⁸ GEF argues that its proposal was responsive because it properly
21 identified itself in its proposal, the RFP permits GEF's business model, and GEF's individual
22 team members and key personnel met or exceed the experience required by the RFP.¹⁰⁹ However,
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25 ¹⁰⁵ Page 4, DPW's Opposition to Appellant's Request for Determination that GEF's Proposal was Non-Responsive
filed on October 14, 2016.

26 ¹⁰⁶ Paragraph 5.2.2, RFP, TAB 2, Exhibit B, Procurement Record filed on July 1, 2016 in OPA-PA-16-007 as
amended by Addendum No. 7 dated October 29, 2015, TAB 4, Exhibit D, Id.

27 ¹⁰⁷ Testimony of RICHARD INMAN on September 16, 2016 (Part A; 00:08:15-00:08:38).

28 ¹⁰⁸ Line 18, page 11, Request for Determination that GEF's Proposal was Non-Responsive filed on September 29,
2016.

¹⁰⁹ Line 5, page 7 to line 3, page 10, GEF's Opposition to CTI's Request for Determination that GEF's Proposal
was Non-Responsive filed on October 14, 2016.

1 DPW correctly points out that, as the Purchasing Agency, it should be the entity to determine
2 whether the proposals submitted in response to the RFP are responsive. As stated above, the RFP
3 specifically requires the RFP Evaluation Committee to make this determination. Accordingly, the
4 Public Auditor holds that DPW must comply with the RFP's procedural requirements by re-
5 convening the Evaluation Committee to thoroughly and properly review the proposals by
6 comparing their contents to the RFP requirements. These requirements include, but are not limited
7 to the RFP's various cost estimate requirements and experience requirements mentioned herein.
8 Further, as required by the RFP, if the RFP Evaluation Committee finds that any of the proposals,
9 to include but not limited to GEF's proposal, is non-responsive, such proposal must not be
10 considered any further.¹¹⁰

11 DPW and GEF's arguments that the issue of whether GEF's proposal was responsive
12 is not properly before the Public Auditor have no merit.¹¹¹ The Public Auditor's jurisdiction is
13 limited to reviewing issues raised in an Appellant's protest and the Purchasing Agency's decision
14 denying the protest. *In the Appeal of Guam Community Improvement Foundation, Inc.*, OPA-PA-
15 09-005, Decision, line 18, page 11. Here, as stated above, in its June 8, 2016 decision denying
16 CTI's May 27, 2016 protest, DPW expressly asserted that its selection of GEF as the highest
17 ranked contractor was "proper" and that "GEF was selected for a variety of reasons including
18 the fact that its team is comprised of award winning national firms with specialized expertise and
19 experience in constructing schools."¹¹² Further, CTI argues that it is not a frivolous request to
20 require that a winning proposal be responsive to the RFP.¹¹³ Accordingly, the Public Auditor
21 holds that she may review the issue of whether DPW properly selected GEF as the highest
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25 ¹¹⁰ Section 3, Paragraph 3.7 Classification of Proposals as Responsive or Non-Responsive, RFP, TAB 2, Exhibit B,
26 Procurement Record filed on July 1, 2016 in OPA-PA-16-007 and Section 5, Paragraph 5.1, Criteria, RFP, TAB 2,
27 Exhibit B, Id. as amended by Addendum No. 7, TAB 4, Exhibit D, TAB 4, Id.

27 ¹¹¹ Page 2, DPW's Opposition to CTI's Request for Determination that GEF's Proposal was Non-Responsive, and
28 line 11, page 1, GEF's Opposition to CTI's Request for Determination that GEF's Proposal was Non-Responsive,
both filed on October 14, 2016.

¹¹² Page 1, DPW Protest Decision dated June 8, 2016, Exhibit 7, Notice of Appeal filed on June 23, 2016 in OPA-
PA-16-007.

¹¹³ Line 25, page 6, Notice of Appeal filed on June 23, 2016 in OPA-PA-16-007.

1 ranked proposer, which includes the ancillary issue of whether GEFf's proposal was responsive
2 to the RFP, because it is properly before her.

3 CTI's request for the OPA to unseal GEFf's proposal or portions of its proposal submitted
4 in response to the RFP is untimely.¹¹⁴ The Public Auditor shall, upon written request, make
5 available to any Interested Party or member of the public information submitted that bears on the
6 substance of the appeal except where information is proprietary, confidential, or otherwise
7 permitted or required to be withheld by law or regulation. 2 G.A.R., Div. 4, Chap. 12, §12106.
8 Here, there is a regulation requiring that GEFf's proposal be withheld. The agency conducting
9 the procurement shall not disclose any information contained in any proposals until after award
10 of the proposed contract is made and only the proposal of the Offeror awarded the contract shall
11 be opened to public inspection except as otherwise provided in the contract. 2 G.A.R., Div. 4,
12 Chap. 3, §3114(i)(2). Here, no award has been made as the RFP has not been fully executed.
13 Therefore, the Public Auditor finds that it must withhold GEFf's proposal submitted in response
14 to the RFP because it is not available for public inspection at this time since the award of the RFP
15 contract is not yet complete.¹¹⁵

16 The Public Auditor will now review, as a preliminary matter, whether DPW's Reply to
17 CTI's Remedies Brief filed on October 21, 2016 should be considered.

18
19 **D. DPW's Reply to CTI's Remedies Brief is Moot.**

20 On October 21, 2016, DPW filed a reply to CTI's Remedies Brief. Here, on October 7,
21 2016, during the hearing in this matter, the Hearing Officer authorized the Parties to file their
22 Remedies Briefs no later than 5:00 p.m. on October 14, 2016 and no oppositions or replies to
23 these brief were authorized.¹¹⁶ Yet, on October 21, 2016, DPW filed a reply to CTI's Remedies

26 ¹¹⁴ Lines 20 to 21, page 11, CTI's Request for Determination that GEFf's Proposal was Non-Responsive filed on
27 September 29, 2016.

28 ¹¹⁵ Page 4, DPW Agency Report filed on July 11, 2016 in OPA-PA-16-007 and DPW Supplement to Procurement
Record filed on September 8, 2016.

¹¹⁶ Statements of Hearing Officer ANTHONY R. CAMACHO, ESQ., on October 7, 2016, (Part B; 00:01:35-
00:02:40).

1 Brief. However, DPW withdrew its Reply Brief on October 26, 2016. Therefore, the Public
2 Auditor finds this issue moot.

3 The Public Auditor will now review the merits of CTI's appeal starting with the issue of
4 whether DPW violated Guam procurement law by allowing GEF to submit four proposals during
5 the RFP's negotiation phase.

7 **E. GEF's Cost Proposals did Not Violate Guam Procurement Law or Regulations.**

8 CTI alleges that DPW violated 2 G.A.R., Div. 4, Chap. 3, §3114 in two ways. First, CTI
9 argues that DPW violated 2 G.A.R., Div. 4, Chap. 3, §3114(i)(1) by soliciting for and accepting
10 GEF's four proposals after it had ranked the proposals and selected the best qualified Offeror.¹¹⁷
11 The head of the agency conducting the procurement or a designee of such officer shall evaluate
12 all proposals submitted and may conduct discussions with any Offeror, and the purpose of such
13 discussions shall be to: (1) Determine in greater detail such officer's qualifications; and (2)
14 Explore with the Offeror the scope and nature of the required services, the Offeror's proposed
15 method of performance, and the relative utility of alternative methods of approach. 2 G.A.R., Div.
16 4, Chap. 3, §3114(i)(1). The Public Auditor finds that this regulation does not apply to the four
17 proposals that were submitted by GEF because it only pertains to discussions that DPW
18 conducted prior to its ranking of the Offerors and each of GEF's proposals at issue here were
19 submitted after it had selected GEF as the most qualified Offeror. The selection of the most
20 qualified Offeror occurs after the conclusion of the validation of the qualifications, evaluation,
21 and the discussions permitted in 2 G.A.R., Div. 4, Chap. 3, §3114(i). 2 G.A.R., Div. 4, Chap. 3,
22 §3114(j). Here, as stated above, the RFP Evaluation Committee selected GEF as the most
23 qualified Offeror on December 21, 2015 and notified all offerors on December 22, 2015.¹¹⁸
24 Further, as stated above, GEF submitted its \$89,332,258 proposal on February 29, 2016.¹¹⁹ It
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26

27 ¹¹⁷ Line 12, Page 4, CTI's Hearing Brief filed on September 2, 2016.

28 ¹¹⁸ DPW Letters to GEF, CTI, and PERNIX dated December 22, 2015, TAB 14, Exhibit N, Procurement Record
filed on July 1, 2016 in OPA-PA-16-007.

¹¹⁹ GEF Letter to DPW dated February 29, 2016, pages PR GEF 000584 to PR GEF 000585, Exhibit dd, GEF's
Exhibit List filed on August 26, 2016.

1 submitted its \$63,796,049 proposal on March 21, 2016.¹²⁰ It submitted its \$74,947,000 proposal
2 on April 1, 2016.¹²¹ It submitted its final \$76,867,335 proposal on April 22, 2016.¹²² Hence, each
3 of GEFf's proposals at issue here were submitted after DPW selected GEFf as the most qualified
4 Offeror on December 22, 2015. Nevertheless, as stated above, during the evaluation period and
5 prior to the selection of GEFf as the most qualified Offeror, the RFP Evaluation Committee met
6 with a GEFf representative on December 12, 2015 and heard a presentation concerning GEFf's
7 proposal.¹²³ Even if any of the information that was presented in any of the GEFf's subsequent
8 proposals was discussed at this presentation, it would be permitted by 2 G.A.R., Div. 4, Chap. 3,
9 §3114(i). Ostensibly, a plain reading of this regulation indicates that it permits the Purchasing
10 Agency to discuss with any of the Offerors the scope and nature of the required services, and
11 alternative methods of approach. Hence, if DPW and GEFf discussed any of the information in
12 GEFf's subsequent proposals at GEFf's December 12, 2015 presentation, such discussions are
13 authorized by 2 G.A.R., Div. 4, Chap. 3, §3114(i).

14 CTI's next argument is that the four GEFf proposals at issue here were not permissible
15 during the negotiation stage because DPW could only negotiate price.¹²⁴ However, a plain reading
16 of Guam Procurement Regulations does not support this argument. Contract negotiations shall be
17 directed toward: (1) Making certain that the Offeror has a clear understanding of the scope of
18 work, specifically, the essential requirements involved in providing the required services; (2)
19 Determining that the Offeror will make available the necessary personnel and facilities to perform
20 the services within the required time; and (3) Agreeing upon compensation which is fair and
21 reasonable, taking into account the estimated value of the required services, and the scope,
22 complexity, and nature of such services. 2 G.A.R., Div. 4, Chap. 3, §3114(1)(2). Hence, the RFP
23 Negotiation Team was authorized by this regulation to negotiate not only the price, but the
24 estimated value of required services, and the scope, complexity, and the nature of the services
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27 ¹²⁰ GEFf Letter to DPW dated March 21, 2016, pages PR GEFf 000574 to PR GEFf 000581, Exhibit ii, Id.

¹²¹ GEFf Letter to DPW dated April 1, 2016, pages GDOE 0909 to GDOE 0915, Exhibit rr, Id.

28 ¹²² GEFf Letter to DPW dated April 22, 2016, pages PR GEFf 000475 to PR GEFf 000482, Exhibit xx, Id.

¹²³ Attendance Sheet dated December 12, 2015, TAB 12, Exhibit L, Id.

¹²⁴ Line 22, page 4, CTI's Hearing Brief filed on September 2, 2016.

1 required by the RFP and the record in this matter indicates that they did so. As stated above, each
2 of the four proposals at issue here were requested by the RFP Negotiation Committee and
3 concerned negotiated adjustments to the scope, complexity, and the nature of the services, which
4 all had an effect on the price of constructing the new SSHS. As stated above, these negotiations
5 resulted in the high proposal of \$89,332,258, the low proposal \$63,796,049, and the two proposals
6 in between these which included the final agreed upon \$76,867,335 proposal that was accepted
7 as the basis of the IDIQ Contract. The negotiation of these four proposals was a necessary part of
8 the solicitation process because DPW can only award the RFP contract after it concludes its
9 negotiations with the most qualified Offeror by agreeing on compensation which results in the
10 best value for the government. which is fair and reasonable and the contract requirements. 5
11 G.C.A. §5216(e) and 2 G.A.R., Div. 4, Chap. 3, §3114(l)(3). Accordingly, the Public Auditor
12 finds that there is no merit to CTI's allegation that 2 G.A.R., Div. 4, Chap. 3, §3114(l) limited the
13 negotiations between the RFP Negotiation Committee and GEFf to price alone.

14 Finally, the Public Auditor finds no merit in CTI's allegations that DPW accepted GEFf's
15 four proposals after the November 23, 2015 deadline for the Offerors to submit their proposals in
16 response to the RFP.¹²⁵ At the core of this argument is CTI's belief that GEFf's four proposals at
17 issue here are the equivalent of the proposals that the Offerors submitted in response to the RFP.
18 They are not. As stated above, the RFP required the Offerors to submit a project approach and
19 cost estimates for SSHS as part of their proposals. This document required by RFP and, as stated
20 above, GEFf submitted one and its original cost estimate for the construction of SSHS which was
21 \$73,218,078.¹²⁶ However, as stated above, during the negotiations, GEFf clarified that this cost
22 estimate excluded certain costs and that when GEFf included these costs at the request of the
23 RFP Negotiation Committee, the result was GEFf's February 29, 2016 proposal for \$89,332,258.
24 As stated above, this proposal and the remaining three proposals at issue here were all products
25

27 ¹²⁵ Line 1, page 4, Id. NOTE: CTI's Hearing Brief erroneously references the earlier November 6, 2015 Deadline
28 which was extended to November 20, 2015 by RFP Addendum No. 8, which was then extended to November 23,
2015, the actual date the proposals were received by DPW, by RFP Addendum No. 9.

¹²⁶ GEFf Letter to DPW dated February 24, 2016, page PR GEFf 000597, Exhibit bb, GEFf's Exhibit List filed on
August 26, 2016.

1 of the negotiations between the RFP Negotiation Committee and GEF. Hence, GEF's four
2 proposals submitted during the negotiation phase are not the same as the proposals required on
3 the November 23, 2015 deadline.

4 Accordingly, based on the foregoing, the Public Auditor holds that there is no merit to
5 CTI's allegations that GEF's February 29, 2016 proposal for \$89,332,258, its March 21, 2016
6 proposal for \$63,796,049, its April 1, 2016 proposal for \$74,947,000, and its April 22, 2016
7 proposal for \$76,867,335 violated 2 G.A.R. §3114.

8
9 **F. The RFP Negotiation Committee Could Accept GEF's Cost Proposals**

10 CTI argues that DPW could not accept any of GEF's four proposals because none of
11 them complied with the RFP's requirements for the new SSHS.¹²⁷ This argument relies on CTI's
12 belief that the RFP does not allow any modification of the considerations for the construction of
13 SSHS listed in Exhibit A of the RFP. This exhibit lists approximately nine pages of considerations
14 for the construction of the new SSHS.¹²⁸ CTI prepared its proposal believing that these
15 considerations were the minimum requirements for the construction of SSHS and that they were
16 neither optional nor could an Offeror amend them.¹²⁹ However, the considerations were more of
17 a wish list prepared by SSHS's principal and staff without any professional assistance, and the
18 RFP allowed the Offerors to negotiate the final scope of work for the construction of SSHS.¹³⁰
19 This is supported by the language of the RFP, which, as stated above, clearly says that once a firm
20 is selected, a scope of work and fee estimate will be negotiated to perform the required services.¹³¹
21 Further, as stated above, the RFP Negotiation Team had the regulatory authority to negotiate the
22 estimated value of required services, and the scope, complexity, and the nature of the services

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25 ¹²⁷ Line 23, page 5, CTI's Hearing Brief filed on September 2, 2016.

26 ¹²⁸ RFP Exhibit A, RFP Addendum No. 7, TAB 4, Exhibit D, Procurement File filed on July 1, 2016 in OPA-PA-16-007.

27 ¹²⁹ Testimony of MICHAEL MAKIO on September 22, 2016 (Part A; 00:09:06-00:12:30).

28 ¹³⁰ Testimony of ELIZABTH GAYLE on October 5, 2016, (Part A; 00:08:40-00:09:30 and 00:11:10-00:13:28) and October 4, 2016 (Part B; 00:33:08-00:33:50), Testimony of JON FERNANDEZ on September 19, 2016 (Part B; 00:09:17-00:10:54) and September 22, 2016 (Part A; 00:09:06-00:11:16), Testimony of MANA SILVA TAIJERON on September 22, 2016 (Part A; 02:58:36-02:58:53).

¹³¹ Section 2, Paragraph 2.0 Intent, RFP, TAB 2, Exhibit B, Procurement Record filed on July 1, 2016 in OPA-PA-16-007 as amended by Addendum No. 7, TAB 4, Exhibit D, Id.

1 required by the RFP. 2 G.A.R., Div. 4, Chap. 3, §3114(1)(2). Hence, the Public Auditor holds that
2 the cost proposals provided by GEFf during its negotiations with the RFP Negotiation
3 Committee, to include its April 22, 2016 proposal for \$76,867,335 that became the basis for the
4 IDIQ Contract, did not violate the considerations listed in Exhibit A of the RFP.

5
6 **G. The RFP Requires GEFf to Provide the 100% Performance and Payment Bonds**

7 CTI argues that neither GEFf nor its subcontractor, GUAM EDUCATION
8 DEVELOPMENT PARTNERS (Hereafter Referred to as “GEDP”) is providing the bonding that
9 the RFP requires.¹³² As stated above, the RFP required that the Awardee be bondable as required
10 by the RFP and a 100% performance and payment bond must be obtained by the Awardee or its
11 Prime Contractor.¹³³ This language is almost mirrored in the IDIQ Contract which states “The
12 Developer [GEFF] or its Prime Construction Contractor must deliver to the Government for each
13 Task Order an executed performance bond and an executed payment bond in such form as is
14 acceptable to the Government in an amount equal to one hundred percent (100%) of the
15 construction cost for Task Orders exceeding Twenty-Five Thousand Dollars & 00/100
16 (\$25,000.00).”¹³⁴ The Public Auditor finds that there is a conflict between the language of the
17 RFP and the language of the IDIQ Contract because the RFP requires that the Awardee or its
18 Prime Contractor must obtain the performance and payment bonds and the IDIQ Contract allows
19 the Awardee or its Prime Construction Contractor to do so. Albeit, the IDIQ’s Contract
20 Documents include the RFP and its addendums, there is no language stating which governs in the
21 event of a conflict like this.¹³⁵ The RFP’s language should govern because the deadline for DPW
22 to amend the RFP passed when DPW opened the proposals on November 23, 2015.¹³⁶ Hence,
23 DPW is prohibited from making any further amendments to the RFP’s language after this date
24

25 _____
¹³² Line 24, page 7, CTI’s Hearing Brief filed on September 2, 2016.

26 ¹³³ Section 4-A, Paragraph 4.2.1.5, RFP, Procurement Record filed on July 1, 2016 in OPA-PA-16-007 as amended by
Addendum No. 7, TAB 4, Exhibit D, Id.

27 ¹³⁴ Section XII, Performance and Payment Bonds, IDIQ Contract, DPW’s Supplemental Procurement Record filed
on September 8, 2016.

28 ¹³⁵ Section V, Contract Documents, Id.

¹³⁶ Section 2, Paragraph 2.2.2. Amendments, RFP, TAB 2, Exhibit B, Procurement File filed on July 1, 2016 in OPA-
PA-16-007.

1 including any attempt to use the language of the IDIQ Contract to amend the language used in the
2 RFP. Ostensibly, only GEF, as the Awardee, or GEF's Prime Contractor can provide the
3 performance and payment bonds required by the RFP and the IDIQ Contract.

4 However, additional language in the RFP states that only the Offeror awarded the contract
5 can serve as the "Prime Contractor."¹³⁷ This paragraph also states that the Prime Contractor is
6 totally responsible for all the work of its Subcontractors, and their acts and omissions.¹³⁸ This
7 paragraph goes to state that subcontractors should be capable of submitting performance bonds
8 and to comply with 5 GCA §58D106, but this appears to be referring to performance bonds
9 between the Prime Contractor and the Subcontractor, because nothing contained in the RFP or
10 the IDIQ Contract shall create any contractual relationship between DPW and the
11 subcontractors.¹³⁹ Further, this paragraph is silent on the 100% payment bond required by the
12 RFP and the IDIQ Contract. Accordingly, the Public Auditor finds that GEF, as the Awardee
13 and as the Prime Contractor, must provide the 100% performance and payment bonds required
14 by the RFP and the IDIQ Contract.

15 DPW incorrectly stated, in its May 13, 2016 Memorandum, that GEDP would provide the
16 100% performance and payment bonds. In that memorandum, DPW identified GEDP as GEF's
17 "subcontractor," and identified GEDP as the entity that would have to provide the performance
18 bond.¹⁴⁰ GEDP is part of GEF's team to provide the services required by the IDIQ Contract.¹⁴¹
19 GEDP will serve as GEF's developer for the services required by the IDIQ Contract.¹⁴²
20 However, as stated above, only GEF can provide the performance and payment bonds and GEDP
21 is prohibited from doing so because it is neither the Offeror who was awarded the IDIQ Contract
22 nor is it the Prime Contractor.

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26 ¹³⁷ Section 3, Paragraph 3.3 Prime Contractor/Subcontractors Partnership, RFP, TAB 2, Exhibit B, Id.

27 ¹³⁸ Id.

28 ¹³⁹ Id.

¹⁴⁰ Page 4, DPW Memorandum dated May 13, 2016, TAB 16, Exhibit P, Procurement Record filed on July 1, 2016 in OPA-PA-16-007.

¹⁴¹ Testimony of RICHARD INMAN on September 16, 2016 (Part A; 00:18:08-00:18:17).

¹⁴² Id at (Part A; 00:24:04-00:24:12).

1 GEFF's argument that HENSEL PHELPS, GEFF's Prime Construction Contractor can
2 provide the 100% performance and payment bonds required by the RFP and the IDIQ Contract is
3 equally incorrect.¹⁴³ GEFF correctly points out that one of the laws that set the RFP solicitation
4 process in motion, the *Ma Kāhat* Act of 2013 as codified in P.L. 32-120 (Effective February 10,
5 2014), states that the construction contract for the new SSHS entered into between the Developer
6 or Contractor and GEDA, DPW, and GDOE must contain contractual safeguards including
7 performance and payment bonds.¹⁴⁴ 5 G.C.A. §58D112(c). This section is inapplicable to the
8 IDIQ Contract, which is a separate contract from the construction contract for the new SSHS. In
9 fact, that construction contract has yet to be drafted. Further, if it was DPW's' intent to allow the
10 performance and payment bonds to be provided by the RFP Awardee's Prime Construction
11 Contractors, Developer, or Subcontractor, that intent is not expressed in the RFP. As stated above,
12 the RFP requires that the Offeror awarded the contract or its Prime Contractor to provide the
13 bonds, and also states that only such offeror can serve as the "Prime Contractor." Hence, as shown
14 above, the language contained in the IDIQ Contract allowing the "prime construction contractor"
15 to submit the bonds is improper because it conflicts with the language in the RFP. Thus, HENSEL
16 PHELPS cannot provide the 100% performance and payment bonds required by the RFP and
17 IDIQ Contract because it is not the Offeror who was awarded the IDIQ Contract nor is it the
18 "Prime Contractor," as that term is defined by the RFP.

19 CTI requests that the Public Auditor cancel DPW's award of the IDIQ Contract to GEFF
20 because of GEFF's failure to comply with the RFP's bonding requirements.¹⁴⁵ However, this
21 would be a drastic remedy because time remains for DPW to correct this oversight as the IDIQ
22 Contract is not yet finalized, and DPW has not required a performance or payment bond at this
23 time.¹⁴⁶ Accordingly, the Public Auditor holds that paragraphs 4.2.1.5, 2.2.2, and 3.3 of the RFP
24 requires GEFF to provide the 100% payment and performance bonds required by the RFP and the
25 IDIQ Contract. Additionally, the Public Auditor holds that DPW must amend Section XII of the
26

27 ¹⁴³ Line 1, page 9, GEFF's Hearing Brief filed on September 2, 2016.

28 ¹⁴⁴ Line 24, page 8, Id.

¹⁴⁵ Line 11, page 8, CTI's Hearing Brief filed on September 2, 2016.

¹⁴⁶ Pages 8 to 9, Agency Report filed on July 11, 2016 in OPA-PA-16-007.

1 IDIQ Contract by replacing the term “prime construction contractor” with the term “Prime
2 Contractor” to ensure that the IDIQ Contract’s language mirrors the RFP’s language.

3
4 **H. GEDA’s Chairman has a Conflict of Interest**

5 CTI alleges that GEDA’s Chairman, EDWARD J. CALVO (Hereafter referred to as “E.J.
6 CALVO”) should have recused himself from participating in the drafting of the RFP. Generally,
7 government employees are prohibited from attempting to realize personnel gain through public
8 employment. 5 G.C.A. §5626. Further, it’s a breach of ethical standards for any employee to
9 participate directly or indirectly in a procurement when the employee knows that: (1) The
10 employee or any of the member of the employee’s immediate family has a financial interest
11 pertaining to the procurement; (2) A business or organization in which the employee, or any
12 member of the employee’s immediate family, has a financial interest pertaining to the
13 procurement; or (3) Any other person, business, or organization with whom the employee or any
14 member of the employee’s immediate family is negotiating or has an arrangement concerning
15 perspective employment is involved in the procurement. 5 G.C.A. §5628(a). The term “financial
16 interest” as used in that statute, means: (1) Ownership of any interest or involvement in any
17 relationship from which, or as a result of which, a person within the past year has received, or in
18 the future entitled to receive more than \$2,500 per year, or its equivalent; (2) Ownership or such
19 interest in any property or any business as may be specified by the Ethic’s Commission; or (3)
20 Holding a position in a business such as officer, director, trustee, partner, employee, or the like,
21 or holding any position in management. 5 G.C.A. §5601(e). Further, members of an elected or
22 appointed board are prohibited from acting or participating in discussions on any matters in which
23 he or she is a principal or has a financial interest, and from influencing any determination made
24 by the board or commission on which the member serves and in which the member either
25 participates personally and substantially through decision, approval, disapproval,
26 recommendation, the rendering of advice, investigation or otherwise, or which is the subject of
27 the member’s official responsibility, where the Government of Guam is a party or has a direct
28 substantial interest. 5 G.C.A. §43101. E.J. CALVO was appointed as a GEDA Board member in

1 2010 and has been serving as the Chairman for the past couple years. He served as the GEDA
2 Chairman throughout the RFP's development and its solicitation.¹⁴⁷ His only involvement with
3 the RFP was to request a draft of the RFP and to receive updates on the status of the RFP during
4 the pre-solicitation period in which the RFP was being developed for the purpose of understanding
5 GEDA's role in the RFP, and to be informed of GEDA's activities involving the RFP.¹⁴⁸

6 As GEDA's Chairman, E.J. CALVO would have had the duty to recuse himself from any
7 GEDA discussion, or any GEDA decision that concerned any of his personal financial interests.
8 Here, CTI established that while serving as GEDA's Chairman, E.J. CALVO was also serving as
9 the Chief Executive Officer (Hereafter referred to as "CEO") of PACIFIC X-TREME COMBAT,
10 LLC (Hereafter referred to as "PXC").¹⁴⁹ CTI alleged that E.J. CALVO had a financial interest
11 because PXC had a direct interest in GEDP, which, as stated above, is GEF's developer for the
12 RFP projects.¹⁵⁰ The evidence in this matter indicates that GEDP is a Guam limited liability
13 corporation that is 60% owned by COPPER RIDGE, a Georgia Limited Liability Company
14 owned by RICHARD INMAN and JAMES WILSON, and 40% owned by FOL GUAM, LLC,
15 which is owned by E.C. DEVELOPMENT GROUP, LLC and PXC.¹⁵¹ This would give E.J.
16 CALVO a financial interest in the procurement because he is an officer of PXC, which would
17 stand to gain financially by virtue of its partial ownership of FOL GUAM, LLC and that entity's
18 partial ownership of GEDP. Additionally, it appears that E.J. CALVO has a second financial
19 interest because his father, JOHN T. CALVO has an interest in E.C. DEVELOPMENT GROUP,
20 LLC because he signed FOL GUAM, LLC's Articles of Organization as the authorized
21

23 ¹⁴⁷ Testimony of E.J. CALVO on September 22, 2016 (Part A; 01:11:00-01:12:58).

24 ¹⁴⁸ Id., at (01:30:48-01:39:25) and Testimony of MANA SILVA TAIJERON on September 22, 2016 (Part A;
02:11:40-02:14:58).

25 ¹⁴⁹ Testimony of E.J. CALVO on September 22, 2016 (Part A; 01:09:10-01:09:24).

26 ¹⁵⁰ Line 3, page 20, CTI's Hearing Brief filed on September 2, 2016.

27 ¹⁵¹ Guam Educational Development Partners, LLC's Articles of Organization, Exhibit5, and FOL GUAM, LLC's
28 Articles of Organization, Exhibit 3, CTI's Exhibit List filed on August 30, 2016 and Testimony of RICHARD
INMAN on September 16, 2016, (Part A; 00:24:27-00:24:58 and 00:30:10-00:30:40). NOTE: Exhibits 3 and 5 were
not entered into evidence during the Hearing, however, the Public Auditor takes Judicial Notice of these documents,
pursuant to 2 G.A.R., Div. 4, Chap. 12, §12108(h) and Rule 201(b)(2) Guam Rules of Evidence, because they were
filed with the Department of Revenue and Taxation, Government of Guam, and are capable of accurate and ready
determination by resort to sources whose accuracy cannot reasonably be questioned.

1 representative of E.C. DEVELOPMENT GROUP, LLC.¹⁵² Hence, as JOHN T. CALVO has a
2 financial interest in E.C. DEVELOPMENT GROUP, LLC, which has an interest in FOL GUAM
3 LLC., which has an interest in GEDP, his son, E.J. CALVO has a conflict of interest concerning
4 any discussion or decision made by GEDA's board or management concerning the RFP.

5 Due to E.J. CALVO's limited involvement in this RFP, the Public Auditor holds that he
6 did not participate directly in the RFP solicitation. However, the Public Auditor does find that he
7 came very close to indirect participation by his request for a draft of the RFP and by his attempts
8 to be informed of the RFP's solicitation progress from GEDA's management. As the chairman
9 of GEDA's Board of Directors, E.J. CALVO must comply with the mandates of 5 G.C.A. §5626,
10 §5628(a), and §43101 by recusing himself from any direct or indirect participation in the RFP's
11 solicitation process.

12
13 **I. The IDIQ Contract must Include the RFP's \$100,000,000 Limit**

14 CTI alleges that Section 3.1 of the IDIQ Contract allows DPW to exceed the RFP's
15 \$100,000,000 limit at DPW's discretion.¹⁵³ As stated above, the paragraph 4.0 of the RFP's scope
16 of work had a limit of \$100,000,000.¹⁵⁴ However, Section 3.1 of the IDIQ Contract states that:
17 "The Government will compensate the Developer [GEFF] for services rendered for Task Order
18 issued as provided in this Contract based on available funds and not to exceed One Hundred
19 Million Dollars and 00/100 (\$100,000,000.00)..., unless otherwise directed by the Director of
20 DPW in writing and permitted by Public Laws 32-120 and 32-121 or any other law.¹⁵⁵ The Public
21 Auditor finds that a plain reading of this contract clause allows the Government of Guam and
22 GEFF to exceed the RFP's \$100,000,000 cost limitation should DPW's Director authorize
23 additional funds in excess of that amount. As stated above, DPW is not allowed to amend the
24

25
26 ¹⁵² Page 5, FOL GUAM, LLC'S Articles of Organization, Exhibit 3, CTI's Exhibit List filed on August 30, 2016.
NOTE: The Public Auditor takes Judicial Notice of the fact that JOHN T. CALVO is the father of E.J. CALVO
pursuant to 2 G.A.R., Div. 4, Chap. 12, §12108(h) and Rule 201(b)(1) because this is a generally known fact.

27 ¹⁵³ Line 23, page 8, CTI's Hearing Brief filed on September 2, 2016.

28 ¹⁵⁴ Section 4-A, Paragraph 4.0 Overview, RFP, TAB 2, Exhibit B, Procurement Record filed on July 1, 2016 in OPA-
PA-16-007 as amended by Addendum No. 7, TAB 4, Exhibit D, Id.

¹⁵⁵ Section 3.1, Compensation and Payment for Services, IDIQ Contract, DPW's Supplemental to Procurement
Record filed on September 8, 2016.

1 RFP's language by using the IDIQ Contract and the RFP's language and the IDIQ Contract
2 language should mirror each other. As stated above, the IDIQ Contract has not been finalized,
3 and the Public Auditor holds that DPW must enforce the RFP's \$100,000,000 limit by deleting
4 the phrase "unless otherwise directed by the Director of DPW in writing and permitted by Public
5 Laws 32-120 and 32-121 or any other law," from Section 3.1 of the IDIQ Contract.

6 The Public Auditor is not persuaded by GEF's argument that the RFP does not have a
7 \$100,000,000 limitation because such limitation is not set forth in P.L. 32-120 and P.L. 32-121.¹⁵⁶
8 This argument relies on language in the RFP stating that if there is a conflict between the
9 representations made in the RFP and a public law, the public law controls.¹⁵⁷ GEF is correct
10 that neither P.L. 32-120 nor P.L. 32-121 specifically impose a \$100,000,000 cost on the RFP.
11 Despite this, the RFP's \$100,000,000 limitation does not conflict with or contradict any of the
12 provisions of the P.L. 32-120 and P.L. 32-121. As stated above, the RFP limits expenditures for
13 the construction of the new SSSS and the capital improvements to GDOE's 35 other schools to
14 \$100,000,000 and this is a self-imposed limitation on spending by the government.¹⁵⁸ This fiscal
15 policy decision actually does not conflict with or contradict P.L. 32-120 and P.L. 32-121 because
16 the RFP will still fulfill those laws' requirements concerning the construction of a new SSSS and
17 the repair and renovation of the remaining 35 schools.

18 19 **J. The Procurement Record is Incomplete**

20 CTI alleges that DPW's procurement record for the RFP is incomplete because it does not
21 have a communications log or sound recordings of the meetings.¹⁵⁹ After an exhaustive review of
22 the procurement record, the Public Auditor finds that the RFP's procurement leaves much to be
23 desired and much needs to be done to bring it into compliance with Guam's Procurement Laws
24 and Regulations. DPW must maintain a complete record of the RFP. 5 G.C.A. §5249 and 2

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26 ¹⁵⁶ Line 13, page 16, GEF's Hearing Brief filed on September 2, 2016.

27 ¹⁵⁷ Section 2, Paragraph 2.0 Intent, RFP, TAB 2, Exhibit B, Procurement Record filed on July 1, 2016 in OPA-PA-
16-007 as amended by Addendum No. 7, TAB 4, Exhibit D, Id.

28 ¹⁵⁸ Page 4, DPW Hearing Brief filed on September 2, 2016 and Testimony of MANA SILVA TAIJERON on
September 23, 2016 (00:28:00-00:28:44).

¹⁵⁹ Line 28, page 17, CTI's Hearing Brief filed on September 2, 2016.

1 G.A.R., Div. 4, Chap. 3, §3129. A complete procurement record requires a log of all
2 communications between government employees and any member of the public, potential bidder,
3 vendor, or manufacturer which is in any way related to the procurement. 5 G.C.A. §5249(b) and
4 2 G.A.R., Div. 4, Chap. 3, §3129(2). This log is important because it increases the level of
5 governmental transparency by summarizing and recording both the “hard document”
6 correspondence, and the quieter, low profile (non-digital or non-print) types of communication
7 such as telephone calls and in person meetings between the Purchasing Agency and the public,
8 bidders, Offerors, potential vendors, and manufacturers.¹⁶⁰ A well-kept log allows the public to
9 quickly and conveniently understand what occurred between the purchasing and public in a
10 procurement solicitation. This type of “big picture” understanding is very important because it
11 promotes three underlying policies of Guam’s Procurement Laws and Regulations, which are to
12 provide for increased public confidence in the procedures followed in public procurement, to
13 provide safeguards for the maintenance of a procurement system of quality and integrity, and to
14 require public access to all aspects of procurement. 5 G.C.A. §5001(b)(3), (7), and (8), and 2
15 G.A.R., Div. 4, Chap. 1, §1102(2), (6), and (7). Hence, the Public Auditor finds that the log of
16 communications required by 5 G.C.A. §5249(b) and 2 G.A.R., Div. 4, Chap. 3, §3129(2) is not
17 only necessary to have a complete procurement record, but also a very important part of the record
18 for the reasons cited above.

19 Despite the requirement for the log and its great importance, DPW admits it did not
20 maintain a log, but claims that it compiled all communications to or from government employees
21 related to the RFP’s procurement in the 4,000 plus pages of the procurement record.¹⁶¹ The Public
22 Auditor reviewed the RFP’s procurement record, and finds that it contains TAB 17, Exhibit Q,
23 which has the wordy title of “Any and All Communications from or to Anyone Concerning Any
24 Part of the IFB or RFP”; TAB 21, Exhibit U and TAB 22, Exhibit V, which are both titled “Guam
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26
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28 ¹⁶⁰ Line 12, page 13, Id.

¹⁶¹ DPW Protest Decision dated August 3, 2016, Exhibit 9, Notice of Appeal filed on August 10, 2016 in OPA-PA-16-011.

1 Department of Public Works Internal Emails and Documents.”¹⁶² These three tabs are extremely
2 voluminous because they contain copies of emails, meeting attendance sheets, letters, meeting
3 minutes, and other documents. The RFP’s procurement record also contains TAB 18, Exhibit R,
4 which is titled “Any Determination Required by Law as may Fit the Circumstances”; TAB 19,
5 Exhibit S, which is titled “Contract Including All Draft Versions”; and TAB 20, Exhibit T, which
6 is titled “Bid Protests, if any, and Responses thereto.”¹⁶³ These three tabs contain a copy of the
7 RFP with its addendums, copies of earlier drafts of the RFP with corrections, draft DPW
8 correspondence concerning the RFP, and a copy of CTI’s May 27, 2016 protest. These six tabs
9 have, easily, approximately 2,000 or more pages, of documents. Further, these tabs are difficult
10 to go through because DPW simply put these documents into these tabs without organizing them
11 by date, subject matter, or document type. Based on this review, the Public Auditor finds DPW’s
12 admission is credible because TAB 17, Exhibit Q through TAB 22, Exhibit V of the Procurement
13 Record is not a log, but simply a collection of various documents compiled during the RFP’s pre-
14 solicitation and solicitation periods.

15 The Public Auditor will now review whether DPW’s claim that all communications
16 between Government of Guam employees and the public are in the procurement record.

17 The Public Auditor finds that this claim places a great strain on DPW’s credibility. JOHN
18 CALANAYAN, DPW Engineer Supervisor, was responsible for maintaining the RFP’s
19 procurement record.¹⁶⁴ He testified that he did not maintain a communications log, but has since
20 been instructed to do so.¹⁶⁵ Further, he testified that he was not aware that GDOE was maintaining
21 records concerning the RFP procurement.¹⁶⁶ This testimony strongly indicates that DPW merely
22 submitted the documents it had in its possession, which probably do not include communications
23 between GDOE and the public or any of the Offerors that GDOE has maintained. This is
24 supported by DPW’s assertion that it has not finalized the procurement record and it intends to
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26 ¹⁶² TAB 17, Exhibit Q; TAB 21, Exhibit U; and TAB 22, Exhibit V, Procurement Record filed on July 1, 2016 in
27 OPA-PA-16-007.

¹⁶³ TAB 18, Exhibit R; TAB 19, Exhibit S; and TAB 20, Exhibit T, Id.

28 ¹⁶⁴ Testimony of JOHN CALANAYAN on September 23, 2016 (02:10:46-02:11:04).

¹⁶⁵ Id., at (02:11:20-02:12:50).

¹⁶⁶ Id., at (02:13:30-02:13:53).

1 complete the record, to include the communications log, once the stay caused by CTI's protests
2 and this appeal is lifted.¹⁶⁷ Accordingly, the Public Auditor finds that the communications records
3 compiled by DPW are incomplete. The Public Auditor will now review CTI's allegation that the
4 procurement record is incomplete because DPW did not make sound recordings of all the
5 meetings concerning the RFP.

6 A complete procurement record requires sound recordings of all pre-bid conferences,
7 negotiations arising from a request for proposal, and discussions with vendors concerning small
8 purchase procurement. 5 G.C.A. §5249(c) and 2 G.A.R., Div. 4, Chap. 3, §3129(3). Here, GEF
9 invites the Public Auditor to give effect to the semi-colon and interpret this statute and regulation
10 to only require sound recordings of all pre-bid conferences.¹⁶⁸ However, the Public Auditor
11 declines this invitation for two reasons. First, the semi-colon is a typographic error. The original
12 text of 5 G.C.A. §5249(c), as it appears in P.L. 18-44 (Effective on November 6, 1986), reads, in
13 relevant part: "sound recordings of all pre-bid conferences, negotiations arising from a request
14 for proposals and discussions with vendors concerning small purchase procurement." Section 17,
15 P.L. 18-44. There is no semi-colon after the word "conferences," instead there is a comma which
16 is used to separate items in a series. That is, the sound recordings are required for not only the
17 pre-bid conferences, but also the negotiations and the discussions described in the statute.
18 However, if the semi-colon is given its effect, punctuating between main clauses without a
19 coordinating conjunction, then the sound recordings will only be required of the pre-bid
20 conferences. Here, as evidenced above, the semi-colon was added by the Compiler of Laws when
21 codifying the text of the public law because it was not part of the public law's original text. The
22 Public Auditor is not persuaded by GEF's argument that the added semi-colon is a valid
23 typographic correction to the text of the statute because doing so nullifies the remaining statutory
24 language and this constitutes the second reason the Public Auditor will not give effect to the semi-
25 colon. In cases involving statutory construction, the plain language of the statute must be the
26 starting point. *Aguon v. Gutierrez*, 2002 Guam 14, ¶6 (Supreme Court of Guam). In looking at

28 ¹⁶⁷ Page 3, DPW's Rebuttal to CTI's Comments on the Agency Report filed on September 6, 2016.

¹⁶⁸ Line 3, page 23, GEF's Hearing Brief filed on September 2, 2016.

1 the statute's language the trier of fact's task is to determine whether or not the statutory language
2 is plain and unambiguous, and this is determined by reference to the language itself, the specific
3 context the language is used, and the broader context of the statute as a whole. *Id.* Here, using the
4 original comma, the context of the language used and the broader context of the statute's plain
5 language is clear. That is, the sound recordings are required for the pre-bid conferences, the
6 negotiations, and the discussions described in the statute as items in a series punctuated by a
7 comma. However, if GEF's preferred interpretation were used, the broader context of the statute
8 falls apart because the statute would only require sound recordings of the pre-bid conferences,
9 and it would mention: "negotiations arising from a request for proposals and discussions with
10 vendors concerning small purchase procurement," without explaining what was required from
11 those events for the purposes of record keeping. Therefore, the Public Auditor holds that the plain
12 language of 5 G.C.A. §5249(c) and 2 G.A.R., Div. 4, Chap. 3, §3129(3) requires the Purchasing
13 Agency to have, as part of the procurement record, sound recordings of all pre-bid conferences,
14 negotiations arising from a request for proposal, and discussions with vendors concerning small
15 purchase procurement.

16 Here, it is very clear that sound recordings are not available for any of the evaluation or
17 negotiation meetings conducted by DPW for the RFP solicitation. Although DPW made tape
18 recording of the meetings of the RFP Evaluation Committee, these recordings are of such poor
19 quality that they cannot be transcribed or used due to high background noise and the low volume
20 of the participant's voices.¹⁶⁹ Further, no official sound recordings were made of any of the
21 Negotiation Committee meetings, however, these meetings were summarized in DPW's
22 Memorandum dated May 13, 2016 which is described above.¹⁷⁰ Accordingly, the Public Auditor
23 finds that the procurement record in this matter is incomplete because it does not have the sound
24 recordings of the RFP's negotiations required by 5 G.C.A. §5249(c) and 2 G.A.R., Div. 4, Chap.
25 3, §3129(3).

28 ¹⁶⁹ Declaration of THOMAS P. KEELER, ESQ., filed on November 14, 2016.

¹⁷⁰ Page 3, DPW's Rebuttal to CTI's Comments to the Agency Report filed on September 6, 2016.

1 The Public Auditor is not persuaded by DPW and GEFf's arguments that DPW has
2 substantially complied with the requirements for the sound recordings of the negotiations by
3 providing its May 13, 2016 negotiation memorandum.¹⁷¹ As stated above, to have a complete
4 procurement, sound recordings of the negotiations must be included in the procurement record.
5 5 G.C.A. §5249(c) and 2 G.A.R., Div. 4, Chap. 3, §3129(3). Therefore, DPW's memorandum is
6 not a substitute for the required sound recordings and the procurement record remains incomplete
7 without it.

8 Based on the foregoing, the Public Auditor holds that the procurement record in this matter
9 is incomplete because it does not contain the communications log required by 5 G.C.A. §5249(b)
10 and 2 G.A.R., Div. 4, Chap. 3, §3129(2), and because it does not contain sound recordings of the
11 negotiations required by 5 G.C.A. §5249(c) and 2 G.A.R., Div. 4, Chap. 3, §3129(3).

12
13 **K. DPW May Cancel or Revise the Solicitation or the Proposed Award**

14 CTI argues that the Public Auditor must set aside DPW's selection of GEFf as the most
15 qualified Offeror and its proposed award of the IDIQ Contract to GEFf, and cancel the
16 solicitation.¹⁷² If prior to an award it is determined that a solicitation or proposed award of a
17 contract is in violation of law, then the solicitation or proposed award shall be cancelled, or
18 revised to comply with the law. 5 G.C.A. §5451 and 2 G.A.R., Div. 4, Chap. 9, §9105(a).
19 Here, there is no award of the contract, only the intent to award described above. Further, as
20 shown above, DPW has violated Guam's Procurement Laws and Regulations, as well as the RFP.
21 As stated above, the RFP Negotiation Committee violated paragraph 3.7 of the RFP by failing to
22 properly evaluate the proposals to determine if they are responsive. DPW violated paragraphs
23 4.2.1.5, 2.2.2, and 3.3 of the RFP by allowing GEFf's primary construction contractor to provide
24 the 100% payment and performance bonds required by the RFP and the IDIQ Contract in Section
25 XII of the IDIQ Contract. DPW violated the RFP's \$100,000,000 limit imposed by paragraph 4.0

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28 ¹⁷¹ Id., and Line 4, page 24, GEFf's Hearing Brief filed on September 2, 2016.

¹⁷² Line 12, page 2, line 1, page 3, line 14, page 3, line 16, page 4, line 23, page 5, line 23, page 6, line 11, page 7,
and line 24, page 7, CTI's Remedies Brief filed on October 14, 2016.

1 of the RFP by allowing GEF to exceed this limit at the direction of DPW's Director in Section
2 3.1 of the IDIQ Contract. DPW violated 5 G.C.A. §5249(b) and 2 G.A.R., Div. 4, Chap. 3,
3 §3129(2) by not having a communications log in the procurement record. Finally, DPW also
4 violated 5 G.C.A. §5249(c) and 2 G.A.R., Div. 4, Chap. 3, §3129(3) by not having sound
5 recordings of the negotiations in its procurement record. However, DPW has two options to
6 resolve these shortcomings.

7 First, DPW may cancel the solicitation and start over. Although this will cause the greatest
8 amount of delay, it would resolve all the deficiencies. Doing so would give DPW the opportunity
9 to revise the RFP's language prior to its re-issuance. Specifically, DPW could amend RFP
10 paragraphs 4.2.1.5, 2.2.2, and 3.3, if it prefers to allow the Prime Construction Contractor of the
11 Offeror awarded the contract to provide the 100% performance and payment bonds required by
12 the RFP. DPW could also ensure that after it receives the proposals, the RFP Evaluation
13 Committee thoroughly reviews them to ensure they are responsive. DPW absolutely must ensure
14 that it keeps the communications log required by 5 G.C.A. §5249(b) and 2 G.A.R., Div. 4, Chap.
15 3, §3129(2) and that it makes sound recordings of its negotiations as required by 5 G.C.A.
16 §5249(c) and 2 G.A.R., Div. 4, Chap. 3, §3129(3). Finally, DPW must certify the procurement
17 record as required by 5 G.C.A. §5250 and 2 G.A.R., Div. 4, Chap. 3, §3130 prior to DPW's
18 director signing the IDIQ Contract.

19 Second, if DPW decides not to cancel the solicitation in its entirety, it must cancel its
20 proposed award to GEF and its selection of GEF as the most qualified offeror. DPW could then
21 thoroughly evaluate all the proposals to ensure they are responsive and begin negotiations with
22 the Offeror it selects as the most qualified Offeror, even if this offeror is GEF, so that DPW can
23 remedy its error of not recording the negotiations. DPW could then ensure that it keeps the
24 communications log and that it makes clear and understandable sound recordings of any future
25 negotiations. Although this is likely the shorter of the two options, DPW would have to revise:
26 (1) Section 3.1 of the IDIQ Contract so that it does not violate the RFP's \$100,000,000 limit on
27 the scope of work and (2) Section XII of the IDIQ Contract to ensure that only the Offeror
28 awarded the contract is required to provide the payment and performance bonds. Finally, DPW

1 must certify the procurement record as required by 5 G.C.A. §5250 and 2 G.A.R., Div. 4, Chap.
2 3, §3130 and prior to DPW's Director or Deputy Director signing the IDIQ Contract.

3 This is the crossroad where DPW stands, DPW must carefully choose which of these paths
4 it takes.

5 Given that this procurement has a price tag of \$100,000,000 and that the Government of
6 Guam infrequently administers a single procurement of this magnitude, these deficiencies cast a
7 shadow for the people of Guam as to the transparency and openness of the procurement process.
8 Accordingly, DPW is admonished for not exercising due diligence in this procurement.

11 IV. CONCLUSION

12 Based on the foregoing the Public Auditor hereby determines the following:

- 13 1. CTI's May 27, 2016 Protest was timely.
- 14 2. CTI's July 15, 2016 Protest was timely.
- 15 3. The RFP Negotiation Committee violated paragraph 3.7 of the RFP by failing to
16 properly evaluate the proposals, to include but not limited to GEF's proposal, to determine
17 whether they are responsive by meeting all of the RFP's requirements.
- 18 4. DPW's Reply to CTI's Remedies Brief filed on October 21, 2016 is hereby stricken
19 from the record because it is moot.
- 20 5. There is no merit to CTI's allegations that GEF's February 29, 2016 proposal for
21 \$89,332,258, its March 21, 2016 proposal for \$63,796,049, its April 1, 2016 proposal for
22 \$74,947,000, and its April 22, 2016 proposal for \$76,867,335 violated 2 G.A.R. §3114.
- 23 6. The cost proposals provided by GEF during its negotiations with the RFP Negotiation
24 Committee, to include its April 22, 2016 proposal for \$76,867,335 that became the basis for the
25 IDIQ Contract, did not violate the considerations listed in Exhibit A of the RFP.
- 26 7. The chairman of GEDA's Board of Directors, E.J. CALVO had a financial interest, as
27 defined by 5 G.C.A. §5601, in the RFP. As the chairman of GEDA's Board of Directors, E.J.

1 CALVO must comply with the mandates of 5 G.C.A. §5626, §5628(a), and §43101 by recusing
2 himself from any direct or indirect participation in the RFP’s solicitation process.

3 8. Should DPW decide not to cancel the RFP, DPW must enforce the RFP’s \$100,000,000
4 limit by deleting the phrase “unless otherwise directed by the Director of DPW in writing and
5 permitted by Public Laws 32-120 and 32-121 or any other law.”

6 9. DPW violated paragraphs 4.2.1.5, 2.2.2, and 3.3 of the RFP by allowing GEF’s
7 primary construction contractor to provide the 100% payment and performance bonds required
8 by the RFP and the IDIQ Contract in Section XII of the IDIQ Contract.

9 10. The procurement record in this matter is incomplete because it does not contain the
10 communications log required by 5 G.C.A. §5249(b) and 2 G.A.R., Div. 4, Chap. 3, §3129(2), and
11 because it does not contain sound recordings of the negotiations required by 5 G.C.A. §5249(c)
12 and 2 G.A.R., Div. 4, Chap. 3, §3129(3).

13 11. CTI’s appeal in OPA-PA-16-007 is hereby DENIED in part and GRANTED in part.

14 12. CTI’s appeal in OPA-PA-16-011 is hereby DENIED in part and GRANTED in part.

15 13. The Public Auditor finds that CTI is entitled to its reasonable costs incurred in
16 connection with the solicitation, including its bid preparation costs, and its May 27, 2016 and July
17 15, 2016 protests, excluding attorney’s fees, pursuant to 5 G.C.A. §5425(h), because CTI was
18 ranked as the second most qualified Offeror and there was a reasonable likelihood that it may
19 have been awarded the IDIQ Contract but for DPW’s violation of the RFP and its violations of 5
20 G.C.A. §5249(b) and (c) and 2 G.A.R., Div. 4, Chap. 3, §3129(2) and (3).

1 This is a Final Administrative Decision. The Parties are hereby informed of their right to
2 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
3 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative
4 Decision. 5 G.C.A. §5481(a).

5 A copy of this Decision shall be provided to the parties and their respective attorneys, in
6 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website
7 www.opaguam.org.

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9 **DATED** this 22nd day of November, 2016.

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12 _____
13 DORIS FLORES BROOKS, CPA, CGFM
14 PUBLIC AUDITOR
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