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8 **PROCUREMENT APPEAL**

9 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

10
11 In the Appeal of

12
13 Core Tech International Corp.,

14 Appellant.

15 and

16 Guam Department of Public Works,

17 Purchasing Agency.
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DOCKET NO. OPA-PA-17-001

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

1 Core Tech International Corp. (“Core Tech”) respectfully submits its Remedies Brief
2 addressing each of Core Tech’s claims asserted in the appeal regarding the solicitation for the “Lease
3 Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Public Schools
4 (Beginning with Simon Sanchez High School),” Project No. 730-5-1056-L-YIG.

5 **I. REMEDIES REQUESTED BY CORE TECH**

6 **A. DPW VIOLATED 5.G.C.A CHAPTERS 58D AND 58E BY COMBINING THE**
7 **SOLICITATIONS FOR SSHS AND THE 34 SCHOOLS INTO ONE RFP**

8 On January 25, 2017, the Department of Public Works (“DPW”) issued a Request for
9 Proposals for the Lease Financing for Design, Renovation, Rehabilitation, Construction and
10 Maintenance of Public Schools (Beginning with Simon Sanchez High School), Project No. 730-5-
11 1056-L-YIG (the “RFP”). *See*, Ex. 1 Core Tech Hearing Exhibits (“CT Ex.”), *RFP* § 2.0, at CT7.

12 5 GCA Chapter 58D authorizes DPW to issue a Request for Proposals for the financing,
13 design, renovation or construction of Simon Sanchez High School (“SSHS”), and development of a
14 Comprehensive Capital Improvement Plan (“CCIP”) to provide a roadmap for prioritizing facility
15 improvements for the remaining 34 Guam Department of Education (“GDOE”) schools. 5 GCA
16 Chapter 58E authorizes DPW to issue a Request for Proposals for the financing, design, construction
17 and rehabilitation of public elementary and secondary schools on Guam based on a list of projects
18 identified and prioritized by GDOE utilizing a Program Study and the report generated by the Army
19 Corps of Engineers. *See*, 5 GCA §58E102 & §58E103.¹ Guam law does not allow DPW to combine
20 the RFPs for Chapters 58D and 58E.

21 5 GCA §58E103 sets out conditions precedent prior to the issuance of the RFP for
22 rehabilitation of the remaining schools. It specifically reads:

23
24 _____
25 ¹ There is a discrepancy between the numbering of sections in Chapter 58E in the Compiler of Laws’ version
26 of the statute and Public Law 32-121. The Compiler’s version begins with §58E101. Legislative Findings
27 and Intent, while the Public Law begins with §58E100. Legislative Findings and Intent. Because of this,
28 each statute is one number higher in the Compiler’s version. We have used the Public Law’s numbering
herein to conform with our earlier briefs and the testimony at trial. We have found no substantive
difference between the versions apart from this numbering. No similar discrepancy exists between Chapter
58D and Public Law 32-120.

1 **§ 58E103. Identification of Projects and Procurement.**

2 Under the Superintendent of Education's direction, the education agency *shall*
3 utilize the Program Study, and the report generated by the Department of Interior
4 (DOI)-funded assessment report by the Army Corps of Engineers, to identify and
5 prioritize potential projects to be completed. The list of projects *shall* be included
6 in a Request for Proposals developed by the education agency. Upon receipt of the
7 Program Study, the Superintendent of Education *shall* solicit Requests for
8 Proposals (RFP) through the Department of Public Works, in compliance with the
9 Guam Procurement Law, for the financing, design, construction and
10 rehabilitation of the education facility, according to the needs of the education
11 agency and consistent with this Chapter. The choice of the contractor *shall* be
12 made by a selection committee comprised of the Superintendent of the Department
13 of Education, serving as Chairman, and including the Director of the Department
14 of Public Works or Deputy Director, the Director of the Department of Land
15 Management or Deputy Director, the Administrator of the Guam Environmental
16 Protection Agency or Deputy Administrator, and the Administrator of the Guam
17 Economic Development Authority or Deputy Administrator. The committee *shall*
18 assess the prior performance of the contractor on similar projects, and *shall* be free
19 to disqualify any contractor that *does not* have a successful record of project
20 completion on Guam.

21 **The selection of a contractor *shall* be based upon the proposal that delivers**
22 **the best value for Guam in meeting the objectives of the education agency.**

23 **The RFP *shall* be issued within thirty (30) days after the receipt of the**
24 **Program Study for the design, renovation, rehabilitation, construction or**
25 **maintenance of the education facility.**

26 5 GCA §58E103 (emphasis supplied).

27 On direct examination during the May 8, 2017 hearing, Mr. Felix Benavente, DPW
28 Deputy Director and Chief Procurement Officer for the RFP, testified that he understood the
 Program Study required by Section 58E103 to be synonymous with the CCIP to be developed
 pursuant to Chapter 58D. Assuming, as the Government and Mr. Benavente claim, that the
 CCIP is synonymous with the Program Study required in Section 58E103, the required
 document must be completed before any RFP for maintenance of the 34 remaining schools
 can be issued. *Id.* It is impossible to use an RFP to procure a service that must be completed
 30 days prior to the RFP's issuance. Mr. Ho Eun, CEO of Core Tech, testified that he
 believed the Program Study required by §58E103, as described in the statute, may not have
 sufficient information from which to issue an RFP for the services to be procured for the 34
 remaining schools. He cautioned that lack of details and clarity in procurement means more
 risk and cost for the Government. Nonetheless, the completion of a Program Study is a
 condition required by law before DPW can issue the RFP.

1 Without providing any legal authority, Mr. Benavente testified that he believed he had broad
2 authority under Guam procurement law to proceed with a consolidated RFP for both chapters. Mr.
3 Benavente noted that the previous solicitation for SSHS (which Core Tech protested and successfully
4 appealed to the OPA in 2016) had followed the same strategy. When he was asked to identify which
5 statute(s) gave him the power to combine the two RFP procurements, Mr. Benavente stated that as
6 Chief Procurement Officer, he had the prerogative to join the two RFPs, relying on advice of the
7 Office of the Attorney General. Although he was unable to identify a particular statute granting him
8 this broad authority, counsel for Core Tech asked him whether he was relying on 5 GCA §5113(b),
9 which provides as follows:

10 (b) Power to Adopt Operational Procedures. Consistent with the provisions of this
11 Chapter, the Chief Procurement Officer and the Director of Public Works may adopt
12 operational procedures governing the internal functions of their procurement
operations.

13 5 GCA §5113(b). Mr. Benavente responded affirmatively.

14 Neither Mr. Benavente nor the Government offered any other statutory basis for Mr.
15 Benavente's claim that as the Chief Procurement Officer, he had broad authority to issue a
16 consolidated RFP for Chapters 58D and 58E at any point during the hearing. Section 5113(b)
17 specifically pertains to operational procedures only, and does not empower Mr. Benavente to
18 circumvent Guam Procurement Law, in particular, Section 58E103's express directive that the RFP
19 for procurement of services for the 34 remaining schools *shall be issued* after receipt of the Program
20 Study. Confronted with the express language of 5 GCA §58E103, Mr. Benavente conceded that he
21 did not have the authority to circumvent the statute.

22 Accordingly, the Public Auditor should: (1) find that Chapters 58D and 58E require the
23 issuance of separate RFPs, (2) find that DPW violated Guam law when it combined the two
24 solicitations into one RFP, and (3) require DPW to either cancel the RFP or amend the SSHS RFP to
25 comply with 5 GCA Chapters 58D and 58E. A finding that DPW failed to comply with procurement
26 law, and an order requiring DPW to comply, is necessary to prevent DPW from issuing yet another
27 procurement in violation of the law.
28

1 **B. DPW VIOLATED 5.G.C.A CHAPTER 58E BY SOLICITING MAINTENANCE**
2 **AND INSURANCE SERVICES FOR THE 34 SCHOOLS**

3 In its March 16, 2017 Notice of Appeal, Core Tech outlined numerous consequences of
4 DPW’s decision to unlawfully combine the solicitations for Chapters 58D and 58E. One of the issues
5 Core Tech identified was the unauthorized and unlawful procurement of maintenance and insurance
6 services for the 34 remaining schools. While Chapter 58D mandates the solicitation of insurance and
7 maintenance for SSHS, Chapter 58E does not provide for insurance and maintenance for the 34 other
8 schools. In fact, Chapter 58E contains no provisions authorizing procurement of insurance services,
9 and specifically orders that “all maintenance and repair and exterior grounds keeping and
10 landscaping, and upkeep of the [34 schools]” *shall* be the responsibility of GDOE. 5 GCA §58E109.
11 The Government failed to address this issue at all in its March 31, 2017 Agency Report, which was
12 suspect, as Core Tech pointed out in its May 5, 2017 Hearing Brief. In fact, as Core Tech discussed
13 during the April 20, 2017 hearing in this matter, the Government declined a stipulation to dismiss the
14 instant appeal solely because Core Tech requested language reflecting that insurance and
15 maintenance services for the 34 schools were not authorized by law.

16 On direct examination, Mr. Benavente confirmed that the Government’s attempted inclusion
17 of insurance and maintenance services for the 34 schools in the RFP was not an innocent mistake or
18 an oversight caused by the improper consolidation of the RFPs. Rather, he testified that the
19 Government fully intended to solicit these services under Chapter 58E. The Government argued for
20 the first time during the May 8, 2017 hearing that Chapter 58E actually authorized DPW to solicit
21 such services. When questioned by the Public Auditor as to whether the maintenance services DPW
22 intended to solicit under Chapter 58E include routine, day-to-day maintenance such as janitorial
23 services, Mr. Benavente replied affirmatively, that the RFP includes “all of it.”

24 As noted, solicitation of insurance services for the 34 schools is not authorized in Chapter
25 58E. In fact, as Mr. Benavente confirmed, the only instance in which insurance of any kind is
26 mentioned in Chapter 58E is with regard to contents of the construction contract for rehabilitation
27 work for the 34 schools. Mr. Benavente also confirmed that nothing in Chapter 58E allowed DPW to
28 solicit insurance for 34 schools for 30 years.

1 With regard to the procurement of maintenance services, Mr. Benavente testified that Chapter
2 58E made several references that imply authorization for such procurement. Specifically, he
3 identified the following statutes, in relevant part:

4 **§ 58E101. Definitions.** For purposes of this Chapter and unless otherwise specified,
the following words and phrases are defined to mean:

5 ...

6 (c) Contractor shall mean the authorized entity which shall be the signatory on the
contract and shall be fully responsible for carrying out the design, renovation,
7 rehabilitation, construction, financing, or **maintenance** of the education facility. The
contractor may cooperate with another entity or entities in any manner the contractor
8 deems appropriate to provide for the financing, design, renovation, rehabilitation,
construction or **maintenance** of the public school facilities envisioned by this Act.

9 **§ 58E102. Authorization to Enter into Long-term Leases.** For the purpose of
10 facilitating the financing, design, construction and rehabilitation and **maintenance**
of an education facility encompassed by this Act, the government of Guam or an
11 education agency, as the case may be, is authorized to lease, if required, to the
contractor sufficient government of Guam real property on which to rehabilitate an
12 education facility; provided, such property is in the inventory of the education agency
or the government of Guam. The property may be the site of an existing education
13 facility under the control of an education agency, which existing facility may be
rehabilitated under the provisions of this Act. The education agency is also authorized
14 to lease back from the contractor the property for a period mutually agreed upon
between the education agency and the contractor as may be reasonably necessary to
15 amortize over the lease-back period the costs associated with the design, renovation,
rehabilitation, construction or **maintenance** of the education facility. In no event shall
16 the end of such lease-back period be later than the date thirty (30) years from the
scheduled date of completion of the education facility. The lease-back may be
17 structured as an annually renewable lease with a provision for automatic renewals to
the extent that pledged revenue under § 58E108 is available. The lease-back shall not
18 be construed as a debt under any applicable debt limitation under the Guam Organic
Act or Guam law.

19 **§ 58E103. Identification of Projects and Procurement.** Under the Superintendent of
20 Education's direction, the education agency shall utilize the Program Study, and the
report generated by the Department of Interior (DOI)-funded assessment report by the
21 Army Corps of Engineers, to identify and prioritize potential projects to be completed.
The list of projects shall be included in a Request for Proposals developed by the
22 education agency. Upon receipt of the Program Study, the Superintendent of
Education shall solicit Requests for Proposals (RFP) through the Department of Public
23 Works, in compliance with the Guam Procurement Law, for the financing, design,
construction and rehabilitation of the education facility, according to the needs of the
24 education agency and consistent with this Chapter. The choice of the contractor shall
be made by a selection committee comprised of the Superintendent of the Department
25 of Education, serving as Chairman, and including the Director of the Department of
Public Works or Deputy Director, the Director of the Department of Land
26 Management or Deputy Director, the Administrator of the Guam Environmental
Protection Agency or Deputy Administrator, and the Administrator of the Guam
27 Economic Development Authority or Deputy Administrator. The committee shall
assess the prior performance of the contractor on similar projects, and shall be free to
28 disqualify any contractor that does not have a successful record of project completion
on Guam. The selection of a contractor shall be based upon the proposal that delivers

1 the best value for Guam in meeting the objectives of the education agency. The RFP
2 shall be issued within thirty (30) days after the receipt of the Program Study for the
3 design, renovation, rehabilitation, construction or maintenance of the education
4 facility.

5 5 GCA §§58E101(c), 58E102, and 58E103 (emphasis supplied). Notably, none of these statutes
6 affirmatively authorize the procurement of maintenance services for the 34 schools. In contrast,
7 Chapter 58D provides express authority for the procurement of capital maintenance services for
8 SSHS:

9 **§ 58D111. Maintenance Fund.** The contract or a separate maintenance agreement with
10 the contractor, and the lease-back, **shall provide that all capital maintenance of the**
11 **education facility be performed by the contractor as a separate cost**, the terms of
12 which, and the manner for establishing the amount of payment, shall be determined as
13 a part of the contract; provided, however, that said documents may, at the discretion of
14 the education agency, provide that capital maintenance with respect to equipment
15 (including collateral equipment), onsite utilities, offsite utilities, access roads and other
16 similar improvements need not be performed by the contractor.

17 5 GCA §58D111 (emphasis supplied). However, Chapter 58D specifically states that routine
18 maintenance for SSHS shall be the responsibility of GDOE:

19 **§ 58D110. Utilities and Routine Maintenance and Repair.** **The education agency**
20 **shall be responsible** for the connection and payment of all utilities, including without
21 limitation, power, water, sewer, telephone and cable, and **all routine interior**
22 **maintenance and repair and exterior groundskeeping and landscaping, and**
23 **upkeep of the education facility.**

24 5 GCA §58D110 (emphasis supplied). Under Chapter 58D, DPW is authorized to procure services
25 for capital maintenance of SSHS, but GDOE remains responsible for routine maintenance.

26 Unlike Chapter 58D, Chapter 58E specifically reserves responsibility for capital maintenance
27 to GDOE. 5 GCA §58E104 provides, in relevant part:

28 The contract shall require that the contractor be responsible for all costs, expenses and
fees of any kind or nature, associated with the rehabilitation, design, civil
improvements, on-site and off-site infrastructure, construction, permits, and financing
associated with the completion of an education facility, including the financing of
furniture and equipment for the education facility, as and to the extent provided by the
education agency in the Request for Proposals. . . **The capital maintenance costs**
shall be paid by the education agency.

5 GCA §58E104 (emphasis supplied). Section 58E104 confirms that capital maintenance costs in
particular are reserved to the education agency, and should not be included in the solicitation.

Chapter 58E further provides a statute that at first glance resembles the Section 58D110
restriction against procurement of services for routine maintenance:

1 **§ 58E109.** Utilities, **Maintenance** and Repair. **The education agency shall be**
2 **responsible** for the connection and payment of all utilities, including without
3 limitation, power, water, sewer, telephone, and cable, and **all maintenance and**
4 **repair and exterior groundskeeping and landscaping, and upkeep of the**
5 **education facility.**

6 5 GCA §58E109. However, Section 58E109 is broader in scope than Section 58D110. It provides that
7 GDOE is responsible for *all* maintenance: capital, routine or otherwise.

8 Finally, the definition of the contract itself in §58E101(b) excludes maintenance from the
9 services to be provided in the procurement authorized by Chapter 58E:

10 (b) *Contract* shall mean the design, renovation, rehabilitation, construction, and
11 financing contract entered into by and between the education agency and the
12 contractor chosen by the Guam Economic Development Agency and approved by I
13 Liheslaturan Guåhan.

14 5 GCA §58E101(b).

15 The Government cannot simply ignore the mandate of Sections 58E109, 58E104, and
16 58E101(b). “The language of the statute cannot be read in isolation, and must be examined within its
17 context.” *Aguon v. Gutierrez*, 2002 Guam 14 ¶9 (citing *United States v. Am. Trucking Ass'ns*, 310
18 U.S. 534, 542, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1940) (“To take a few words from their context
19 and with them thus isolated to attempt to determine their meaning, certainly would not contribute
20 greatly to the discovery of the purpose of the draftsmen of a statute....”); *Gutierrez v. Ada*, 528 U.S.
21 250, 255, 120 S.Ct. 740, 744, 145 L.Ed.2d 747 (2000) (“words and people are
22 known by their companions.”)). “A statute’s context includes looking at other provisions of the same
23 statute and other related statutes.” *Aguon, supra* at ¶9.

24 Read as a whole, Chapter 58E clearly does not authorize procurement of insurance and
25 maintenance services for the 34 schools. Because Chapter 58E is silent on the issue of insurance,
26 DPW cannot simply write such authorization into the law at its whim. As the Government has
27 indicated, there are several instances where the term “maintenance” is mentioned in Chapter 58E,
28 with the word appearing exclusively at the end of a list, such as “financing, design, renovation,
 rehabilitation, construction or maintenance.” However, there is nothing in the law that indicates
 legislative intent to breathe broad authority to procure hundreds of millions of dollars’ worth of
 services into this language. To the extent there is confusion regarding the inclusion of the term
 “maintenance” at the end of these lists in three provisions of Chapter 58E, the express reservation of

1 all maintenance responsibilities to GDOE contained in Section 58E109 should resolve any
2 uncertainty that the legislature intended to exclude maintenance services from a Chapter 58E RFP.

3 Further, unlike the general appearance of the term “maintenance” elsewhere in Chapter 58E,
4 Sections 58E109 and 58E104 specifically address the reservation of maintenance responsibility to
5 GDOE. These sections are therefore controlling. “[T]he more specific governs over the more
6 general.” *Abalos v. Cyfred Ltd.*, 2006 Guam 7 (“Because the specific language of the statute ... was
7 enacted later in time, and is absolutely specific, [Defendant’s] argument must fail.”) (citing *Perez v.*
8 *Gutierrez*, 2001 Guam 9 ¶ 19; 20 GCA § 15126 (“Particular expressions qualify those which are
9 general.”)); *see also Camacho v. In re Gumataotao*, 2010 Guam 1 ¶ 19 (observing the principle of
10 statutory construction that “a narrower, more specific provision of a statute takes precedence over a
11 more general provision of the same statute”).

12 The Government’s interpretation of Chapter 58E would render the explicit language of
13 Sections 58E109 and 58E104 superfluous, contrary to established canons of statutory interpretation.
14 “A statute should be construed to give effect to all of its provisions so that no part would be
15 superfluous or insignificant.” *Macris v. Richardson*, 2010 Guam 6 ¶15 (citing *Duncan v.*
16 *Walker*, 533 U.S. 167, 174 (2001) (Refusing to adopt a construction of the statute that would render a
17 word “insignificant, if not wholly superfluous,” the U.S. Supreme Court reiterated its “duty to give
18 effect, if possible, to every clause and word of a statute.”).

19 The Government’s insistence on sneaking maintenance and insurance services into the
20 Chapter 58E procurement is not inconsequential. As Mr. Ho Eun testified during the May 8, 2017
21 hearing, these services would come at immense cost to the Government, tantamount to “financial
22 suicide.” Mr. Ho, who has vast experience as a general contractor, testified that the bonding company
23 for the Chapter 58E solicitation would require insurance for each facility financed, and that insurance
24 and maintenance costs for 34 schools over 30 years could cost the Government over Two Hundred
25 Million dollars (\$200,000,000.00). This would be true even if the maintenance performed on a
26 particular school was minimal, such as fixing a window. If the Legislature wanted to procure over
27 \$200,000,000.00 in maintenance and insurance services, it would have clearly stated so, instead of
28 explicitly stating the exact opposite.

1 Chapter 58E cannot reasonably be read to authorize the procurement of insurance and
2 maintenance services. The OPA should find that the RFP violates Chapter 58E by attempting to
3 procure these services, and order DPW to cancel the RFP or revise the RFP to comply with the law.

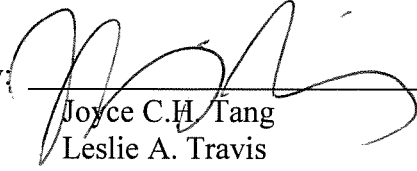
4 **II. CONCLUSION**

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

- 6 1. A determination that DPW violated Guam procurement law by attempting to combine
7 the procurements authorized by 5 GCA Chapters 58D and 58E into one RFP;
- 8 2. A determination that DPW violated Chapter 58E by attempting to procure services for
9 insurance and maintenance of the 34 schools; and
- 10 3. An order to DPW to amend the current RFP to remove the procurement of services
11 mandated under Chapter 58E, or in the alternative, to cancel the current RFP and
12 reissue separate RFPs consistent with the Public Auditor's order, Guam procurement
13 law, and 5 GCA Chapters 58D and 58E.

14
15 Respectfully submitted this 12th day of May, 2017.

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19 Joyce C.H. Tang
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