



OFFICE OF PUBLIC ACCOUNTABILITY  
Doris Flores Brooks, CPA, CGFM  
Public Auditor

December 15, 2017

Honorable Thomas C. Ada  
Senator 34<sup>th</sup> Guam Legislature and  
Chairperson, Committee on Environment, Land, Agriculture and  
Procurement Reform  
Guam Congress Building  
Hagatna, Guam 96910

Re: Bill 121-34: An Act to Amend and to Add a New Section relative to Requiring the Payment of Liquidated Damages and Payment of a Fine of \$10,000....

Hafa Adai Senator Ada and Committee Members:

Thank you for the invitation to provide testimony on Bill No. 121-34 introduced by Senator Michael San Nicolas. We believe the bill will add another layer of bureaucracy that in the end may prolong the procurement process, rather than expedite it and put a chilling effect on future procurement protests and appeals.

We are all weary and frustrated by the extensive delays that have occurred regarding the desperately needed rebuild of Simon Sanchez High School. However, Bill 121 is not the panacea to the delays.

Core Tech International Corp.'s (Core Tech) previous appeals on the rebuild of Simon Sanchez high school were not frivolous. Core Tech's two appeals in 2016, OPA-PA-16-007 and OPA-PA-16-011 were both resolved in 152 days (from the initial filing in June 2016 to the consolidated decision in November 2016). These appeals were denied in part and granted in part, and Core Tech was awarded reasonable costs incurred in connection with the solicitation. The decision for the third appeal, OPA-PA-17-001, issued in June 2017, was resolved in 86 days. The decision on Core Tech's third appeal was again denied in part and granted in part, but with no costs awarded to Core Tech.

A procurement of this magnitude, possibly in excess of \$100 million, will naturally invite competition. It is competition that will give our government the best value and price. For the non-winning bidder to protest the award to the procuring agency and to appeal to OPA is a sign of healthy competition.

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From our history of appeals starting in 2006, there have been 149 appeals filed or an average of 14 per year. Of these appeals, 65 appeals were dismissed and 83 decisions were rendered. From these decisions, 30 decisions were in favor of the appellants, 34 in favor of the Government, and 19 were split. Based on these statistics, it is apparent that the appellant and the Government have a reasonable chance of succeeding. The decisions have not considerably favored the appellant or the Government.

The fundamental premise of government procurement is to ensure the integrity of the procurement process, to ensure a level playing field for all vendors, and to ensure that vendors who choose to bid have the opportunity to bid and are not shut out prematurely.

We should be pleased that there are vendors still willing to comb through extensive documents and propose viable bids and seek whatever advantage is lawfully available.

What we saw from the Core Tech appeals was the lack of knowledge and understanding of the procurement process. During the hearings and the questioning of DPW's Chief Procurement Officer, he often referred to his staff as knowledgeable of the procurement process, while he himself could not directly answer the questions. Although we all rely heavily on staff, in the end, the Chief Procurement Officer is ultimately responsible and not staff. As I have often publicly stated, you cannot legislate good management.

With the override of Bill 58 now P.L. 34-19 in June 2017, that law changed the rules of engagement from a Request for Proposals (RFP) to an Invitation for Bids (IFB). That too added to the delay.

To impose a fine of \$10,000 on the Director who in good faith attempted to issue a viable procurement solicitation, is chilling and Draconian. No Director who has done his level best would want that sword of Damocles hanging over his neck.

Liquidated damages in contract law is specifically defined. Black's Law Dictionary 8th edition, explains the term as follows:

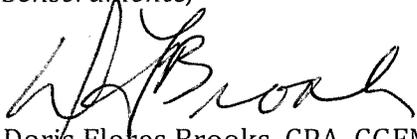
An amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches. If the parties to a contract have properly agreed on liquidated damages, the sum fixed, is the measure of damages for a breach, whether it exceeds or falls short of the actual damages.

How the Public Auditor would assess such liquidated damages is not defined in Bill 121. In addition, assessing liquidated damages because of appeals will discourage viable protests and appeals.

For both liquidated damages and fines assessed by the Public Auditor to be appealed to the Attorney General (AG) is also not acceptable. The AG is the Government's attorney in many of these procurement matters. Therefore, appealing to the AG would allow the AG to judge a matter decided by the Public Auditor that involved the AG. Such liquidated damages and fines, if they were to remain in the bill, should be appealed to the Superior Court and not to the AG.

While I share the frustrations of the extensive delays arising from the rebuild of Simon Sanchez, Bill 121 will not resolve the delays. More due diligence, advice, consultation, and review are but some of the requirements needed to make the IFB for Simon Sanchez viable.

*Senseramente,*

A handwritten signature in black ink, appearing to read 'Doris Brooks', written in a cursive style.

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