

II. APPEAL INFORMATION

- A. Purchasing Agency: Department of Public Works, Government of Guam
- B. Project No: 730-5-1055-L-YIG
- C. Date of Request for Proposals (“RFP”): June 15, 2015
- D. This appeal is made by Core Tech International Corp. (“Core Tech”) from the Department of Public Works decision to deny Core Tech’s May 27, 2016 protest.
- E. The names of the competing bidders are Guam Educational Facilities Foundation, Inc. (“GEFF”) and Pernix Guam LLC (“Pernix”).

III. RELEVANT BACKGROUND

DPW SOLICITS A REQUEST FOR PROPOSALS PROJECT NO. 730-5-1055-L-YIG (LEASE FINANCING FOR DESIGN, RENOVATION, REHABILITATION, CONSTRUCTION AND MAINTENANCE FOR PUBLIC SCHOOLS (BEGINNING WITH SIMON SANCHEZ HIGH SCHOOL))

Public Law 32-120, the *MA KAHAT ACT* OF 2013 passed into law on February 10, 2013. *See*, P.L. 32-121, attached as **Exhibit A**. Among other items the Act added a new chapter 58D to Title 5, Guam Code Annotated, relative to the renovation or construction of a new Simon Sanchez High School and related financing. Public Law 32-121, also known as the *MA KAHAT ACT* OF 2013 (the “Act”), added a new Chapter 58E to the Guam Procurement Law. *See*, P.L. 32-120, attached as **Exhibit B**. The Act authorized the government to issue a Request for Proposals for the renovation or construction of Simon Sanchez High School (“Simon Sanchez HS”) and the development of a comprehensive capital improvement plan for prioritizing capital improvements to all Guam Department of Education (“GDOE”) schools. *See*, **Exhibit A** at 1.

On June 15, 2015, the Department of Public Works (“DPW”) issued a Request for Proposals Project No. 730-5-1055-L-YIG Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance for Public Schools (Beginning with Simon Sanchez High School) (the “RFP”). *See*, **Exhibit C**. The RFP, as authorized by the Act, contemplated a contract to be for a term of five (5) years to include services for thirty-six (36) GDOE. *See*, DPW RFP No. No. 730-5-1055-L-YIG, §2.0 at 7, attached as **Exhibit C**, and Addendum 6, attached as **Exhibit D**, at 2.

Priority would be given to Simon Sanchez HS and the development of a comprehensive capital improvement plan. *Id.*

The RFP was to be awarded in two (2) phases. *See, Exhibit A*, at 7 and *Exhibit B*, at 6. Each phase had a different committee. Phase 1 provided for a selection committee (the “Selection Committee”) comprised of the Superintendent of the Department of Education (“DOE”) DPW’s Director or Deputy Director, the Director or Deputy Director of the Department of Land Management and the Administrator or Deputy Administrator of the Guam Environmental Protection Agency and the Administrator or Deputy Administrator of the Guam Economic Development Authority (“GEDA”). The Selection Committee was responsible for selecting a contractor (“Selected Contractor”) which “*shall* be based upon the proposal that delivers the best value for Guam in meeting the objectives of the education agency. (emphasis in the original) *Exhibit A*, at 8.

The second phase of the RFP provided for a negotiating committee (the “Negotiating Committee”) to negotiate with the Selected Contractor. *Exhibit B*, at 7. The Negotiating Committee was smaller than the Selection Committee and was comprised of three (3) representatives, the Superintendent of the Department of Education (“DOE”) DPW’s Deputy Director and the Deputy Administrator of the Guam Economic Development Authority (“GEDA”). *Id.*

Prior to submission of sealed proposals, prospective bidders had an opportunity to submit questions regarding the RFP. DPW issued amendments I to VI---- in response to these questions to clarify the RFP. Procurement Record, Tab “ 5 ”.

The bid submission date was November 6, 2015. *See, Exhibit E*. Three (3) companies, namely Core Tech International Corp. (“Core Tech”), Pernix Guam LLC (“Pernix”) and Guam Educational Facilities Foundation, Inc. (“GEFF”), submitted proposals in response to the RFP. A copy of GEFF’s Proposal is attached as *Exhibit F*.

On November 20, 2015 the sealed proposals of three (3) companies GEFF, Core Tech and Pernix were opened in the presence of company representatives.

On December 22, 2015, DPW notified GEFF, Core Tech and Pernix that GEFF had been selected as the No. 1 offeror (i.e., Selected Contractor). *See, Exhibits G 1-3*.

Negotiations with GEFF/Selected Contractor were delayed owing to a January 7, 2016 protest filed by Core Tech. *See, Exhibit H.* On January 19, 2016 DPW rejected Core Tech's protest. *See, Exhibit I.* Core Tech apparently decided not to take further action on its protest.

On or about February 15, 2016 the Negotiating Team commenced negotiations with GEFF. *See, DPW & Negotiation Team Meeting Agenda attached as Exhibit J.*

During the period of February 15, 2016 through the date of DPW's issuance of the Notice of Intent to Award Contract GEFF and the Negotiating Committee engaged in extensive negotiations primarily related to the reconstruction of Simon Sanchez HS. *See, Exhibit K.*

On May 13, 2016 DPW issued a Notice of Intent to Award to GEFF. *See, Exhibit L.*

Core Tech filed its second protest on the RFP on May 27, 2016. *See, Core Tech Protest, attached as Exhibit M.* DPW denied Core Tech's protest on June 8, 2016. *See, DPW's Denial of Protest, attached as Exhibit N.*

A contract has been drafted and partially executed. It has not been formally submitted to the Attorney General's office for approval. Nor has the Governor of Guam signed the contract.

IV. STATEMENT ANSWERING ALLEGATIONS OF APPEAL

In the interpretation of laws, the legislative will is the all-important or controlling factor. *See, 73 Am. Jur. §145.* In the Act the Guam legislature enacted alternate procurement authority limited to a single project. *See, Exhibit A, §§ 58D101 – 58D113 and Exhibit B, §§58E100 – 58E-110.* The clear and unequivocal intent of the legislation was to alternate procurement procedures for a special project of utmost importance to Guam and its residents; that being the construction of Simon Sanchez HS and the development of a comprehensive development plan to prioritize and facilitate the repairs and maintenance of GDOE remaining schools. *Id.*

As discussed herein the Act is replete with special and unique provisions that substantially differ from Guam's general procurement law. Further, the Act makes a single reference to Guam's general procurement law, and even that was incorporated into the Act. § 58D105 states that the government of Guam or GDOE "*shall* solicit Requests for Proposals (RFP) through the Department of Public Works". *See, Exhibit A, at 7.*

Alternate procurement procedures allowing for design-build and similar projects are now widely accepted as a viable project delivery method for public works projects in the United States. *See, California's Design-Build Transit Law (codified in Pub. Cont. Code § 20209.5 et seq.)*

(authorizes transit operators to enter into design-build for transit projects and make the selection determination using either a best value or low bid process); *See also*, California Government Code Section 5956 (contemplates using a competitive negotiation process that allows an agency to select a contractor for negotiations based on either a best value determination (with qualifications and competence as the primary selection criteria, but also taking price and other factors into account) or using a qualifications-based selection process (in which case the price could either be negotiated before or after contract award). The requirements in these and other jurisdictions statutes may differ from the Act however they demonstrate that alternate procurement procedures are being used on public works projects throughout the states.

Under the Guam Procurement Law construction project contracts are typically fully designed with approved plans and specifications and contracts are awarded after competitive bidding. *See*, 5 GCA Chapter 5. This is not the case in the current procurement. Plans and specifications do not exist and won't for a number of months. The Act established alternate procurement procedures designed to identify and negotiate with a single contractor to construct Simon Sanchez HS and to develop a comprehensive plan to repair and maintain GDOE schools. The Acts procurement procedures substantially differ from those contained in the Guam Procurement Law. For example:

- The Act mandated that DPW issue the RFP within thirty (30) days of enactment of legislation. **Exhibit A**, at 7, 8.
- The government or GDOE is authorized to enter into long term leases. *See*, **Exhibit A**, at 6 and *See*, **Exhibit B**, at 5.
- In the Act the Guam Legislature clearly intended to create specific procurement procedures for a specific project, that being the construction or renovation of Simon Sanchez HS and preparation of a comprehensive plan to repair and maintain GDOE remaining schools. *See*, **Exhibit A**, at 6.
- Pricing *was not* considered in Phase 1 of the procurement. Instead the Selection Committee selection "*shall* be based upon the proposal that delivers the best value for

Guam in meeting the objectives of the education agency. (emphasis in the original) *See, Exhibit A*, at 8.

- The Act authorized the Negotiating Committee to address pricing in Phase 2 of the procurement. *See, Exhibit B*, at 8, lines 1 to 9.

It is clear in reviewing the Act that the Guam Legislature authorized alternate procurement procedures to select the single most qualified contractor. Pricing was not included in the selection of the contractor as the objective was to select the most qualified contractor. GEFF was selected as it is the most qualified contractor. *See, Exhibit G*, 1; *Exhibit O*, 2 and *Exhibit P*, 7. The RFP clearly provides that following selection of the best qualified offeror the parties will negotiate scope and price. Addendum #6 Section 2.0 Intent provides “Once a firm is selected, a *scope of work and fee estimate will be negotiated* to perform the required services for Simon Sanchez High School.” (emphasis added) *See, Exhibit D*, at 2.

Once Core Tech’s first protest was resolved, the Negotiating Committee commenced negotiations with GEFF. *See, Exhibit J*. Negotiations started on or about February 15, 2016 and continued until May 13, 2016 when it issued its Negotiating Team Memorandum. *See, Exhibit L*. During these three (3) months GEFF and GDOE and the Negotiating Committee exchanged information and ideas, conducted on site field inspections of both Okkodo and Simon Sanchez High Schools, met with Simon Sanchez HS’s principal and teachers. *Id.* In addition, as part of its educational process on construction costs the Negotiating Committee requested at various times that GEFF inform it what GDOE and Guam would receive at a conservative (i.e., low) price and what it would cost to construct Simon Sanchez HS with all the “bells and whistles”. *See, Exhibit O*, at 5 and *Exhibit P*, at 5. GEFF responded by submitting the “four (4) proposals” complained of, which in fact were simply refinements to its proposal in response to new GDOE details. As the special legislation did not set forth how negotiations were to be performed the Negotiating Committee could conduct them in a good faith manner. This is what it did in negotiating the scope of work and fee estimate as directed to do so in the Act.

At all times the Negotiating Team acted in good faith in handling the procurement in accordance with what they thought to be required under the Act and RFP.

A. Core Tech's Appeal was Timely Filed.

DPW acknowledges that Core Tech's appeal is timely.

B. DPW and the Negotiating Committee Conducted Negotiations with GEFF Concerning the Scope of Work and Fee Estimate as Authorized by the Act and RFP

As already discussed, the Act, RFP and Addendum No. 6 specifically authorized the Negotiating Committee to negotiate both the scope of work and fee estimate with the most qualified offeror. GEFF's team is comprised of specialists in the planning, design and construction of middle and high schools and is the most qualified contractor. *See, Exhibit O*, at 2. It is unreasonable to expect, as Core Tech alleges, that as GDOE provided additional information and clarified its needs and requirements for Simon Sanchez HS that GEFF's original proposal would not undergo modification.

Core Tech incorrectly sites 2 GAR §3114 as controlling negotiations. *See, Core Tech Appeal*, p. 3 at 17. Among other claims it asserts that 2 GAR §3114(1) limits "negotiations between the agency and offeror only with respect to price." (emphasis in Core Tech's Appeal) *See, Core Tech Appeal*, p. 4, at 13. This argument is not credible. The Act, RFP and Addendum No. 6, which govern the special procurement, specifically states that following selection of the Selected Contractor/GEFF the parties are authorized to negotiate the scope of work and price with the Selected Contractor. Addendum #6 Section 2.0.

C. DPW and the Negotiating Committee Negotiated in Good Faith with the Selected Contractor, as Authorized in the Act; the Negotiating Team did not Modify the RFP

The Act, RFP and Addendum No. 6 authorized DPW and the Negotiating Committee to negotiate the scope of work and fee estimate with the Selected Contractor. Exhibit A to the RFP is improperly characterized by Core Tech as "technical requirements". *Core Tech Appeal*, p. 5, Section C. Exhibit A is actually entitled "SIMON SANCHEZ HIGH SCHOOL CONSIDERATIONS". *See, Exhibit A of Exhibit C*. The Act specifically directed the government to negotiate the scope of work and price with the Selected Contractor. To argue such wasn't allowed, as Core Tech does, doesn't make sense.

1. The Negotiating Committee, at the request of GDOE, made minor adjustments to Simon Sanchez HS number of rooms and other items contained in its RFP Exhibit A Considerations. *See, Exhibit K and Exhibit O*, at 4. These modifications were contemplated by the Act and RFP. The functionality of Simon Sanchez HS rooms remains the same and the construction cost savings can be used for other items. **Exhibit P**, at 8.
2. GDOE was responsible for providing the number for the remaining schools, listed in the RFP. Inclusive of Simon Sanchez HS the RFP listed this number to be thirty-six (36) schools. This number is incorrect and was corrected during negotiations with GEF. *See, Exhibit P*, at 9. This administrative error is not a proper basis for the Appeal.
3. Core Tech addresses the cost savings resulting from the reduction of auditorium seating. Core Tech Appeal, p. at C(3). Indeed this was a factor in GDOE's analysis of the Auditorium's projected usage and benefit to the school and community. *See, Exhibit K and Exhibit P*, at 9. It is important to remember however that pricing was not a factor in selecting a contractor for the Project. Instead the intent of the Act and RFP was to select the most qualified contractor to negotiate with. The Act and its special procurement procedures are not looking to construct an inexpensive or lower quality school. Instead the alternate procurement procedures direct the Negotiating Committee and GDOE to negotiate with the highest qualified contractor to construct a solid modern Simon Sanchez HS that if properly maintained will benefit Guam and its residents for decades to come.

D. No Bond is Required at this Time.

There are no plans and specifications yet for the construction of a new Simon Sanchez HS. As noted, there also isn't a construction contract and won't be for a number of months. Accordingly, there is no bond required at this time. This is consistent with the Act and RFP. §58D112 Contractual Safeguards reads as follows:

"Prior to undertaking the work of renovating or constructing a new Simon Sanchez High School, the Guam Economic Development Authority, the Department of Public Works, the Guam Department of Education, and the developer or contractor

shall negotiate and enter into a binding construction contract to renovate or construct ... The construction contract *shall* contain contractual obligations typically found in construction contracts, including, but *not* limited to”:

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- (c) performance and payment bonds;
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Performance and payment bonds will be required at the time that plans and specifications are in place and DPW and GEFf sign a construction contract.

CONCLUSION

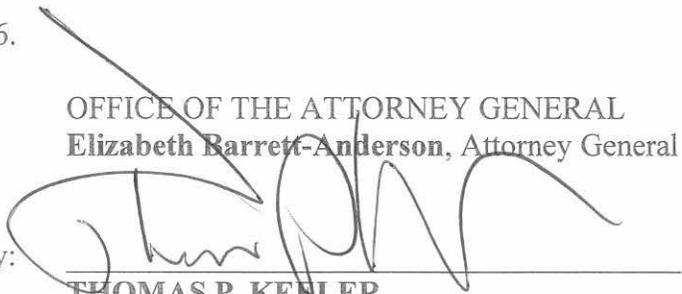
DPW and the government of Guam have express authority under the Act to use an alternate ____ method of procurement to first identify the most qualified contractor and, once identified, to negotiate with them. The express authority given was for a single project of paramount interest to Guam and its residents. The Negotiating Committee acted in good faith in conducting negotiations as provided under the Act. Its decision is entitled to substantial deference.

DPW requests that the appeal of Core Tech be dismissed and that the Public Auditor award all legal and equitable remedies that the department may be entitled to as a result.

Dated this 11th day of July, 2016.

OFFICE OF THE ATTORNEY GENERAL
Elizabeth Barrett-Anderson, Attorney General

By:



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4. Exhibit D Addendum 6 – Project No. 730-5-1055-L-YIG
5. Exhibit E Bid Submission Date was November 6, 2015, Addendum 7
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13. Exhibit M Core Tech Protest – Regarding Request for Proposal for Project – May 27, 2016
14. Exhibit N DPW's Denial of Protest – Response to Protect of Intent to Award Contract for Project 730-5-1055-L-YIG dated June 8, 2016
15. Exhibit O Declaration of Deputy Director Felix Benevente
16. Exhibit P Declaration - Jon Fernandez