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December 5, 2017

VIA HAND DELIVERY

The Honorable Benjamin J.F. Cruz
Speaker
The 34th Guam Legislature
33rd Guam Legislature
155 Hesler Place
Hagåtña, Guam 96932

Senator Frank B. Aguon, Jr.
Chairperson
Committee on Guam-U.S. Military Buildup, Infrastructure,
and Transportation
The 34th Guam Legislature
33rd Guam Legislature
155 Hesler Place
Hagåtña, Guam 96932

Re: Bill No.204-34 (COR) – Frank B. Aguon, Jr.
An act to amend §§ 58D105(a) and 59D112, and add a new §58D105(e), all of Chapter 58D, Title 5, Guam Code Annotated, relative to designating the Guam Department of Education as the Procuring entity for purposes of any solicitation respecting the Construction and/or Renovation of Simon Sanchez High School under a longterm lease-back.

Dear Speaker Cruz and Senator Aguon:

Thank you for the opportunity to provide comments on Bill No. 204-34 (the “Bill”). This letter serves as written testimony on behalf of Core Tech International Corp. (“Core Tech”) with regard to Bill No. 204-34.

Bill No. 204-34, proposed by Senator Frank Aguon is an effort to move forward the procurement of Simon Sanchez High School (“SSHS”). The Bill seeks to amend the *Ma Kahat Act*, 5 G.C.A. § 58D, and change the procurement agency for SSHS to the Department of Education (“DOE”) instead of the Department of Public Works (“DPW”). DOE will not only be in charge of the procurement, but it will also be granted the authority to bypass a pending protest and proceed with an award if it finds that such an “award of the contract without delay is necessary to protect substantial interests of the Territory.” Bill No. 204-34, Section 4(e)(1). This written determination

must be made after consultation with the AG and the AG also must supply a written concurrence with the substantial interest determination. *Id.*

I. SUMMARY

While Core Tech supports the 34th Guam Legislature's efforts to complete the procurement of SSHS, and applaud Senator Aguon's effort to move the procurement forward, if Bill No. 204-34 is passed into law, it will cause more delays and give rise to more protests and litigation.

Bill No. 204-34 is problematic for several reasons. The issues are summarized below and discussed in greater detail in Section II of this letter.

Issue 1: Section 4(e)(1) of the Bill eviscerates the procedures by which a protestor may challenge and appeal the determination of substantial interests. Furthermore, it allows an agency to make final unreviewable, unappealable, substantial interest determinations simply by obtaining the concurrence of the Attorney General, whose wrongful actions (those working under the Attorney General) may be the basis for the protests. To allow circumvention of independent review of the Public Auditor and the Judges of the Superior Court not only undermines the integrity of the procurement process, but denies bidders or protestors their fundamental due process rights.

Issue 2: Bill 204-34 can be challenged on two separate constitutional grounds.

First, fundamental fairness principles of procedural due process require that fair notice and a hearing when a governmental body takes away a constitutionally recognized right. Under Guam procurement law, a bidder has a statutory right to a two-day notice and hearing under 5 GCA §5424(g)(2) when the Chief Procurement Officer and Director of Public Works makes a written determination that an award of a contract is necessary to protect the substantial interests of the Territory under 5 GCA §5424(g)(1). Bill 204-34 does away with the §5424(g)(2) notice requirement to bidders, and in effect, a bidder's right to a hearing. The Courts have recognized a bidder's property right in procurements. This Bill, if passed in its current version, gives rise to a constitutional challenge because the deletion of a bidder's notice and hearing rights is an infringement of a bidders' property rights.

Secondly, Courts have applied the Separation of Powers doctrine in the context of procurements. Here, the Department of Education ("DOE"), a government agency, is empowered and authorized to interpret what "substantial interests" means under Guam procurement law without judicial review. DOE would be interpreting the very statute under which it is exercising powers to short-cut procurement rules (e.g., after an award without further delay after a determination of substantial interests), to determine whether DOE's actions were proper. In doing so, it is engaging in a judicial function which is the province of the judiciary. Bill 204-34 delegates and empowers a government agency to review its own decision or determination of substantial interest, and precludes review of that determination. This is a clear violation of the Separation of Powers doctrine because it infringes upon the powers of the judicial branch.

A successful constitutional challenge in federal court on either ground would result in the law being struck, and cause further delay to the reconstruction of the SSHS.

II. DISCUSSION

ISSUE 1:

The current Guam procurement law allows the Chief Procurement Officer or the Director of Public Works to make a written determination of substantial interests if it consults with the purchasing agency and the AG. 5 G.C.A. § 5425(g)(1). Both the agency and the AG must give their written concurrence that awarding the contract without delay is necessary to protect the substantial interests of the Territory. *Id.* Moreover, at least two (2) days' notice must be given to the protestor absent any declaration of emergency by the Governor. *Id.* at (2). The Public Auditor also must "confirm" such a determination if a protest is pending. If no protest is pending, the award may proceed under a substantial interest determination if no protest is filed within the two (2) day notice period. *Id.* at (3). The two days' notice gives notice to protestor of the written determination.

Additionally, the current law provides for an appeal process to challenge the substantial interest determination. 2 G.A.R. § 12115. A protestor may appeal a substantial interest determination to the Public Auditor, and the Public Auditor is tasked with either "confirm[ing] or reject[ing] the determination." *Id.* at (a), (b). This process applies to protests under 5 G.C.A. § 5425(g), and the Public Auditor's confirmation or rejection may be appealed to the Superior Court of Guam pursuant to 5 G.C.A. § 5707. The Legislature, in passing the current law, wisely recognized that review by an independent, elected Public Auditor, was essential to protect the integrity of the procurement process, and to protect the interest of the Territory.

Section 4 of Bill No. 204-34 includes a provision that eviscerates a protestor's right to appeal, and the jurisdiction of the Public Auditor and Superior Court in one fell swoop:

(e) Notwithstanding any other provision of law, rule or regulation, in the event of a timely protest under 5 GCA § 5425(a) or under 5 GCA § 5480(a), the Guam Department of Education *shall not* proceed further with the solicitation or with the award of the contract prior to final resolution of such protest, and any such further action is void, unless:

(1) The Department of Education, after consultation with and the written concurrence of the Attorney General or designated Deputy Attorney General, makes a written determination that the award of the contract without delay is necessary to protect [the] substantial interests of the Territory.
(emphasis supplied).

Section 4(e)(1) creates a loophole where a Government agency, which is frequently

represented by the office of the Attorney General, can circumvent the protections of review by the Public Auditor and the Judges of the Superior Court of Guam, by having the Attorney General, whose attorneys in many cases are intimately involved with the solicitation and award, issue a determination that is not subject to independent review. The standards for what “is necessary to protect the substantial interests of the Territory” are not addressed in the legislation, and clearly invite situations in which the Attorney General does no more than rubberstamp an agency’s desire to avoid independent review of its decisions. Bill 204-34 eviscerates a key function of the Public Auditor and the Judges of the Superior Court of Guam.

By removing the requirement that an agency has to give two (2) days’ notice to the protestor, the due process right of the protestor are also eviscerated. Bill 204-34 should be rejected because it allows an agency to make substantial interests determinations, with the concurrence of the Attorney General, final, unreviewable, and unappealable. The roles of the Public Auditor and the Judges of the Superior Court are vital in insuring the integrity of the procurement process and protection of the best interests of the Territory. The best interest of the Territory is not served by Bill 204-34.

ISSUE 2:

A. Procedural Due Process Requires Fair Notice and a Hearing. Bill No. 204-34 Violates a Bidder’s Procedural Due Process Rights Because it Eviscerates the Notice and Hearing Procedures Available Under Current Procurement Law.

Courts have recognized that bidders have a protected property interest in the award of a procurement contract requiring that the award be given to the lowest responsible bidder and no discretion is left to the agency to reject all bids. *Pataula Elec. Membership Corp. v. Whitworth*, 951 F.2d 1238, 1242-43 (11th Cir. 1992). At a minimum, procedural due process requires fair notice and opportunity to be heard. *See City of Los Angeles v. David*, 538 U.S. 715 (2003). The Legislature may not dispense with these minimum requirements when a constitutionally or statutorily recognized due process right is at stake. *Carroll v. Johnson*, 565 S.W.2d 10 (Ark. 1978). If notice and a hearing are provided, courts weigh the current processes under a balancing test. *See Wilkinson v. Austin*, 545 U.S. 209 (2005).

The balance of interests involves a three-part inquiry: (1) private party’s interest that is affected by the official action; (2) the risk of erroneous deprivation of such interest through procedures used and probable value if any additional or substitute procedural safeguards; and (3) the government’s interest. *Id.* The third component focuses on administrative efficiency and fiscal concerns. *Id.*

Under the enabling act for SHSS procurement, the government has no discretion in the awarding of the contract and must award it to the lowest responsible bidder. *See* 5 G.C.A. § 58D105. Specifically, the *Ma Kahat Act of 2013*, SHSS’s enabling legislation, states “The award of the contract *shall* be based upon a responsive offer submitted by a responsible offeror that is responsive to the solicitation and offers the *lowest annual leaseback rate* to the government of Guam for a fixed

thirty (30) year term.” *Id.* (emphasis added). Because the procuring agency is not given any discretion, a bidder has a cognizable and protected property interest in its bid.

Where there is a constitutionally recognized property interest, a bidder must be afforded fair notice and a hearing if its rights will be terminated. By doing away with the notice requirements, a right every bidder is entitled to under 5 GCA §5424(g)(2), the Bill strips away a bidder’s rights to fair notice and hearing for its property rights. Although a bidder’s property rights are protected by notice and hearing through the normal channels of a procurement protest and appeal, once a substantial interest determination is made by DOE and the AG, the right to protest or a pending protest would cease to exist, leaving a bidder without notice or the ability to protect its property rights. In other words, a substantial interest determination results in an unconstitutional deprivation of a bidder’s property rights because it eradicates any safeguards; for example, notice and hearing intended to protect the due process rights of bidders in SHSS.¹

B. Guam Procurement Law Does Not Define Substantial Interests. A Substantial Interests Determination by DOE will be an Interpretation of its Own Statute, Giving Rise to A Violation of the Separation of Powers Doctrine.

The Organic Act of Guam created a government consisting of “three branches, executive, legislative, and judicial....” 48 U.S.C. § 1421(a). The Supreme Court of Guam has held that through this provision in the Organic Act, Guam recognizes the doctrine of separation of powers. *Villagomez-Palisson v. Superior Court*, 2004 Guam 13, ¶ 14; *see also Hamlet v. Charfauros*, 1999 Guam 18, ¶ 9 (“By its very language, therefore, the Organic Act requires application of the constitutional doctrine of separation of powers to government of Guam functions”).

The separation of powers doctrine is meant to “preclude a commingling of...essentially different powers of government in the same hands and thereby prevent a situation where one department would be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments.” *AlohaCare v. Department of Human Services*, 276 P.3d 645, 654 (Haw. 2012). The Guam Legislature is imbued with legislative power extending to all rightful subjects not inconsistent with the Organic Act and the laws of the United States applicable to Guam. 48 U.S.C. § 1423(a). Likewise, the Judiciary of Guam is granted the authority to interpret and apply the laws to actual controversies. *Villagomez*, 2004 Guam 13 at ¶ 15 (citing *Gleason v. Samaritan Home and Church Mut. Ins. Co.*, 926 P.2d 1349, 1359-60 (Kan. 1996)).

Because the judiciary branch has the authority to interpret laws, government agencies engaging in the judicial function of interpreting statutes must submit their interpretations of statutes

¹ Once again, the Bill removes the current legal protections in place for bidders regarding a substantial interests determination. 5 G.C.A. § 5425(g)(2) provides for two (2) days’ notice, 2 G.A.R. § 12115 allows for the Public Auditor to review a substantial interests determination, and 5 G.C.A. § 5707 permits an appeal to the Superior Court. Bill 204-34 contains no such notice or fair hearing provisions.

enacted by the Legislature to judicial review.² See *AlohaCare*, 276 P.3d at 655. A separation of powers issue arises when the “legislature vests administrative agencies with judicial power but precludes judicial review of the agency’s decisions.” *Id.* Without judicial review, the agency is left to decide the legality of its own determinations in violation of the separation of powers doctrine. *Id.*; see also *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (“If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances.”).

Guam procurement law does not define “substantial interests.” See 5 G.C.A. §§ 5030, 5425, 58D *et seq.* The Office of Public Accountability (OPA) has declared that a substantial interest determination involves more than a statement “that a substantial interest is merely involved.” *In the Appeal of Guam Community Improvement Foundation, Inc.*, No. OPA-PA-09-005, p. 7 (citing *Carl Corporation v. State Department of Education, et. al.*, 946 P.2d 1, 22 (Hawaii, 1997)). The determination “must specifically identify the government interest and articulate why it is necessary to protect those interests and award the contract without delay.” *Id.* Finally, the agency must sufficiently establish necessity to warrant an automatic stay of protests. *Id.* (citing *Guam Imaging Consultants, Inc. v. Guam Memorial Hospital Authority*, 2004 Guam 15, ¶ 16 and 41). The presence of alternatives to proceeding to an award in spite of a protest negates a finding of necessity, and any delay that is substantially the fault of the agency will preclude a finding of substantial interests.³ See *id.* at p. 8.

Bill 204-34 does not require DOE to adhere to the Public Auditor’s interpretations and allows the agency to interpret the statute as it sees fit, DOE, would therefore, be engaging in a function normally reserved for the judicial branch of government.⁴ In other words, if Bill No. 204-34 is enacted, the Legislature would have granted DOE the ability to interpret the definition of “substantial interests” in the context of SHSS without any oversight as to the propriety or legality of that determination.

Just as disturbing is the fact nowhere in Bill 204-34 is there a provision which allows for any form or possibility of judicial review of DOE’s and the AG’s determination of substantial interests.⁵

² Executive agencies are free to interpret their own statutes, and courts are required to give considerable deference to an agency’s interpretation of its own statute. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). However, these interpretations are always subject to judicial review, thereby avoiding the separation of powers challenge that is the subject of this memorandum. *Id.*

³ An agency’s substantial interests determination and these interpretations of the Public Auditor are subject to review by the judiciary, thereby avoiding an issue with separation of powers.

⁴ DOE need not adhere to any interpretations of the Public Auditor because its determination will not be subject to any review. It, therefore, can interpret “substantial interests” in any matter it sees fit.

⁵ This is in stark contrast to current procurement law. Under current law, a substantial interests determination may be appealed to the Public Auditor and subsequently to the Superior Court as a final decision of the Public Auditor.

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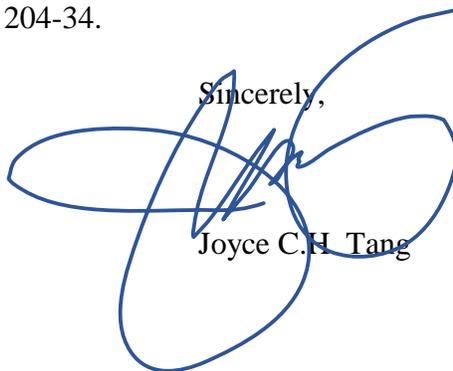
See Bill 204-34(e) (“*Notwithstanding* any other provision of law, rule or regulation...” (emphasis added)). Consequently, a determination of substantial interests by DOE and the AG e.g., their interpretation of what constitutes “substantial interests” to the Territory in the context of SHSS procurement, would not be subject to any form of review. Devoid of a review process, there will not be any check and balance on DOE and the AG’s determination of substantial interests. For these reasons, the enactment of Bill No. 205-34 in its current form, would engender litigation grounded on violations of the Separations of powers doctrine and the Organic Act.

The Court will more likely than not strike down the statute as illegally infringing upon the judiciary’s ability to review and check an executive agency’s ability to interpret its own statute. Because these are violations of federal law, recourse for a bidder would be to file a lawsuit in federal court, resulting in protracted litigation and unnecessary delays.

* * * *

Core Tech agrees that it is important to complete the Simon Sanchez procurement quickly. However, it is just as important to complete the procurement *correctly*, without compromising the integrity of our procurement and without incurring tens of millions of dollars in unnecessary costs to the people of Guam. DPW has already delayed the procurement process by rushing out RFP after RFP, only to restart once it is forced to confront fatal flaws in its process. The ITB procurement process is a far better process because, among other things, it is about the lowest price. As discussed above, enacting Bill No. 204-34 would not only delay the process, but give rise to more protest and court litigation. For the reasons discussed herein, it is not in the Territory’s and the SSHS students’ best interest to enact Bill No. 204-34.

Sincerely,



Joyce C.H. Tang

See 5 G.C.A. § 5707; 2 G.A.R. § 12115. Because review is available, the current legal landscape does not subject itself to a separation of powers problem as would the situation be if the bill was passed.