



OFFICE OF THE PUBLIC AUDITOR
Doris Flores Brooks, CPA, CQFM
Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF,
GUAM COMMUNITY IMPROVEMENT
FOUNDATION, INC.,
Appellant

APPEAL NO: OPA-PA-09-005
DECISION AND ORDER RE
PURCHASING AGENCY'S MOTION
FOR CONFIRMATION OF
SUBSTANTIAL INTEREST

To: **Purchasing Agency:**
Department of Public Works, Government of Guam
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Appellant:
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Interested Party:
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THIS MATTER came before the Public Auditor on September 28 and 29, 2009 pursuant to Purchasing Agency's Motion for Confirmation of Substantial Interest. Mr. Anthony Sgro was present on behalf of the Appellant and was represented by Attorney F. Randall Cunliffe, Esq.

Decision and Order Re Motion for Confirmation of Substantial Interest- 1

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1 The Purchasing Agency (hereafter referred to as "DPW") was represented by Assistant Attorneys
2 General Benjamin M. Abrams, Esq., and John Weisenberger, Esq. Interested Party International
3 Bridge Corporation (hereafter referred to as "IBC") was represented by its Counsel of Record,
4 Attorney Joyce C. H. Tang, Esq. After receiving the evidence presented by the parties and
5 hearing the arguments of the parties, the Public Auditor hereby issues her Decision and Order on
6 said Motion for Confirmation of Substantial Interest.
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8 **BACKGROUND**

9
10 On June 9, 2008, John F. Kennedy High School (hereafter referred to as "JFK") was
11 closed by a Government of Guam Health and Safety Task Force (hereafter referred to as "Task
12 Force"). On November 21, 2008, DPW issued Request for Proposal for Project No. 700-5-1020-
13 L-TAM (Construction of the New John F. Kennedy High School - Finance, Demolition, Design,
14 Build, Maintain, and Leaseback (FDDBML) Part I and Part II (hereafter referred to as "RFP").
15 In a letter dated January 16, 2009, which was signed by DPW Director Lawrence P. Perez on
16 March 4, 2009, DPW selected IBC as the best ranking qualified offeror for the RFP. On August
17 5, 2009 the Appellant lodged a protest with DPW. On August 11, 2009 and August 14, 2009
18 DPW denied the Appellant's protest. On August 26, 2009, the Appellant filed this appeal. On
19 September 1, 2009, DPW filed its Declaration of Substantial Interest. On September 3, 2009, the
20 Appellant filed its opposition to DPW's Declaration of Substantial Interest. On September 21,
21 2009, DPW filed its reply to the Appellant's Opposition. The Public Auditor heard DPW's
22 Motion for the Public Auditor to Confirm DPW's Declaration of Substantial Interest from
23 September 28-29, 2009.
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FINDINGS OF FACT

Based on the evidence presented by the parties, the Public Auditor makes the following findings of fact:

1. JFK was closed on June 9, 2008 by the Task Force because it was in the poorest condition of all of the Department of Education's (hereafter referred to as "DOE") schools due to years of neglect caused by lack of funding to maintain and repair it.¹

2. After JFK's closure, DOE chose to keep the 2,300 JFK students together rather than transfer them to DOE's five remaining high schools. DOE did not want to "break-up" the JFK student body.²

3. DOE sent the JFK students to GW in split or double sessions with GW's students for the 2008-2009 school year.³

4. The split or double sessions at GW caused the JFK students to: (1) Lose approximately 30 minutes of instruction time per day; (2) Incur disruptions in their athletic and

¹ Testimony of Lawrence P. Perez, Testimony of Gayle F. Hendricks, and the Guam Education Policy Board Resolution No. 2009-09 Relative to Re-Building John F. Kennedy High School, Exhibit D, Declaration of Substantial Interest dated September 1, 2009.

² Testimony of Arlene Reyes Unpingco and Testimony of Gayle F. Hendricks.
Note: The five high schools mentioned in this paragraph include the new Okudo High School.

³ Testimony of Gayle F. Hendricks, Testimony of Lawrence P. Perez, and the Guam Education Policy Board Resolution No. 2009-09 Relative to Re-Building John F. Kennedy High School, Exhibit D, DPW's Declaration of Substantial Interest dated September 1, 2009.

1 physical education programs due to a lack of practice and teaching space, and lack of
2 transportation to off-campus practice areas.⁴

3 5. From April 20-21, 2009, JFK was inspected by the Western Association of Schools
4 and Colleges (WASC) and received WASC accreditation while JFK students were attending
5 double sessions at GW. This WASC accreditation will continue for two years. However, JFK is
6 subject to a WASC revisit during this period.⁵

7 6. WASC recommended that DPW, the JFK High School Task Force, and all
8 stakeholders need to continue to advocate for the new JFK High School to be completed as soon
9 as possible and that JFK's teachers need to continue being creative and resourceful to meet
10 student educational needs while temporarily located at an alternative school site.⁶

11 7. To end the split or double sessions at GW, the Government of Guam, through the
12 Office of the Governor, issued IFB-GSA-025-09 for the Lease and Maintenance of Interim
13 Facilities for John F. Kennedy High School and Collateral Equipment which was awarded to
14 Core Tech International (Hereafter referred to as "Core-Tech"). A contract was finalized
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20 ⁴ Testimony of Gayle F. Hendricks and the August 13, 2009 Letter of
21 Substantial Government Interest from Gayle F. Hendricks, Exhibit C, DPW's
22 Declaration of Substantial Interest dated September 1, 2009.

23 ⁵ Testimony of Arelene R. Unpingco, Testimony of Gayle F. Hendricks, and the
24 August 13, 2009 Letter of Substantial Government Interest from Gayle F.
25 Hendricks, Exhibit C, DPW's Declaration of Substantial Interest dated
26 September 1, 2009.

27 ⁶ Page 11, WASC Limited-Term Revisit Visting Committee Report dated April 20-
28 21, 2009, Purchasing Agency's Exhibit J, and Testimony of Gayle F. Hendricks.

1 between the Governor's Office and Core-Tech on June 25, 2009 for the interim JFK Campus
2 located at Tiyan.⁷

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4 8. DOE moved 2,300 JFK students from GW to the interim JFK Campus for the 2009-
5 2010 school year.⁸

6 9. Construction of the new JFK campus could take nine months to two years after the
7 RFP contract is awarded.⁹

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9 10. This appeal was filed on August 26, 2009 and the hearing on the merits of the appeal
10 was held on October 26-28, 2009. Further, the Public Auditor is required to issue her written
11 decision within 30 days of the hearing on the merits. 2 G.A.R. Div. 4, Chap. 12, §12110(a).
12 Thus, the total delay to the project caused by this appeal will be approximately three months.

13 ANALYSIS

14 Standard of Review

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16 As a preliminary matter, the Public Auditor must determine the appropriate standard of
17 review to decide the DPW's Motion for Confirmation of Substantial Interest. DPW and IBC
18 argue that the Public Auditor's standard of review should be limited to whether the DPW's
19 Declaration of Substantial Interest has a rational basis and is not arbitrary, and that the Public
20 Auditor should accord considerable weight to DPW's decision as set forth in the rulings *Pacific*
21 *Data Systems, Inc., v. Superior Court of Guam*, Civ. No. 90-00029, page 2, (1990 WL 320357)
22 (D.Guam A.D., October 24, 1990), and *Pedco Incorporated v. Guam Power Authority and*
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24 ⁷ Lease Agreement with Option to Purchase, the Appellant's Exhibit A dated
25 September 18, 2009, Testimony of Joshua Tenorio, and Testimony of Eunice
26 Aflague.

27 ⁸ Testimony of Arlene R. Unpingco.

28 ⁹ Testimony of Lawrence P. Perez.

1 *Raymond Camacho*, CV1536-94, Decision and Order dated December 12, 1994, page 3, line 9
2 (Superior Court of Guam). The Public Auditor finds that the rulings in those cases do not apply.
3 The Public Auditor's statutory authority to confirm a Purchasing Agency's Declaration of
4 Substantial Interest mandates that the Public Auditor conduct such reviews *de novo*. 5 G.C.A.
5 §5425(g)(3) and §5703. Thus, the Public Auditor shall review DPW's Declaration of Substantial
6 Interest *de novo* to determine whether the Public Auditor should confirm it.
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8 **Substantial Interest**

9 DPW moves that the Public Auditor confirm its Declaration of Substantial Interest. The
10 threshold issue concerning this matter is whether DPW has standing to make this motion on
11 appeal. *Guam Imaging Consultants, Inc., and RADS, v. Guam Memorial Hospital Authority and*
12 *Guam Radiology Consultants, Inc.*, 2004 Guam 15, ¶16-17 (Supreme Court of Guam).
13 Generally, the filing of a protest should halt the procurement until the controversy is resolved. 5
14 G.C.A. §5425(g) and 2 G.A.R., Div. 4, Chap. 9, §9101(e). However, in order to allow essential
15 government functions to continue, the Purchasing Agency may proceed with the solicitation or
16 award of the contract despite the protest if the Chief Procurement Officer or the Director of
17 Public Works after consultation with and written concurrence of the head of the using purchasing
18 agency and the Attorney General or designated Deputy Attorney General, makes a written
19 determination that the award of the contract without delay is necessary to protect the substantial
20 interest of the Government of Guam. 5 G.C.A. §5425(g)(1) and 2 G.A.R., Div. 4, Chap. 9,
21 §9101(e)(1). Further, if the protest is pending before the Public Auditor, any action continuing
22 the solicitation or award of the contract is void unless the Public Auditor confirms the Chief
23 Procurement Officer's or the Director of Public Works' written determination that the award of
24 the contract without delay is necessary to protect the substantial interest of the Government of
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1 Guam. 5 G.C.A. §5425(g)(3). Here, DPW has made such a written determination during this
2 appeal before the Public Auditor. Thus, the Public Auditor finds that DPW has standing to move
3 the Public Auditor to confirm DPW's Declaration of Substantial Interest.
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5 The Public Auditor must now determine whether the substantial interest claimed by DPW
6 meets the statutory requirements to justify the award of the contract without delay to the
7 Interested Party IBC. A determination that a substantial interest is merely involved is not
8 sufficient. *Carl Corporation v. State Department of Education et.al.*, 946 P.2d 1, 22 (Hawaii,
9 1997). Instead, the determination of substantial interest must specifically identify the
10 government interest and articulate why it is necessary to protect those interests and award the
11 contract without delay. *Id.* at 24. Further, the Purchasing Agency must sufficiently establish
12 necessity to avoid the automatic stay of actions continuing the solicitation or award of the
13 contract. *Guam Imaging Consultants, Inc., and RADS, v. Guam Memorial Hospital Authority*
14 *and Guam Radiology Consultants, Inc.*, 2004 Guam 15, ¶16 and ¶41 (Supreme Court of Guam).
15 Here, the Purchasing Agency is DPW, which the Director of Public Works signed the written
16 determination of substantial interest and the Attorney General of Guam concurred with it. Thus,
17 the Public Auditor finds that the written determination has the statutorily required approvals.
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20 The Public Auditor will now review DPW's alleged government interests and determine
21 whether they sufficiently establish necessity to avoid the automatic stay. DPW has identified the
22 following substantial interests of the Government of Guam: (1) Delay in the re-construction of
23 JFK; (2) Legal mandates requiring the Government of Guam to provide an adequate public
24 education; (3) Legal mandates requiring the timely re-construction of JFK; (4) Hardship
25 caused by double sessions at GW; (5) Disruption of phases of JFK's education program; (6)
26 Inadequacy of the temporary JFK campus located at Tiyan; (7) Possible increases in financing
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1 costs or the ability to obtain financing for the JFK re-construction; (8) Possible damage to the
2 Government of Guam's relationship with investors; (9) Possible price increases in labor and
3 materials and possible labor shortages. The Public Auditor will now review each of these
4 reasons *de novo*.
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6 **This Appeal will cause a Minimal Delay.**

7 DPW and IBC argue that avoiding significant delay completing the JFK re-construction
8 project justifies avoiding the automatic stay.¹⁰ As stated above, this appeal will take
9 approximately three months and the Public Auditor will not speculate on whether any party in
10 this matter will appeal her decision to the Superior Court of Guam or how long such an appeal
11 will take. This three-month delay, by itself, will not prevent the project from being completed on
12 time for the 2010-2011 school year. DPW has confirmed that it could award the contract within
13 thirty days and that the JFK re-construction project could be completed in nine months.¹¹ Thus,
14 if the project is awarded in December 2009, it could be completed by September 2010. Further,
15 as stated above, if the project is not completed, by the 2010-2011 school year, DOE could
16 continue to use the interim JFK campus at Tiyan or temporarily transfer the JFK students to
17 DOE's other high schools until the project is completed. Thus, the Public Auditor finds that the
18 delay caused by this appeal is minimal and does not sufficiently justify award of the contract
19 without delay.
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25 ¹⁰ Id., and the August 14, 2009 Letter of Substantial Interest of the
26 Territory from Ramon B. Padua, P.E., Chief Engineer, Exhibit G, DPW's
27 Declaration of Substantial Interest dated September 1, 2009.

28 ¹¹ Testimony of Lawrence P. Perez.

1 **Legal Mandates Requiring the Government of Guam**
2 **to Provide an Adequate Public Education do not justify**
3 **award of the contract without delay.**

4 DPW and IBC argue that legal mandates requiring the Government of Guam to provide
5 adequate public education and to establish, maintain, and operate public schools in healthy, safe,
6 and sanitary learning environments constitute substantial interests that justify award of the
7 contract without delay.¹² The Appellant concedes that the Organic Act of Guam requires the
8 Government of Guam to maintain and operate public schools but does not require it to operate
9 JFK at its original location and that JFK's students are being provided an adequate public
10 education at the interim JFK campus in Tiyan.¹³ The Government of Guam shall provide an
11 adequate public educational system of Guam, and to that end shall establish, maintain and
12 operate public schools according to the laws of Guam. The Organic Act of Guam, 48 U.S.C.
13 §1421g(b). Further, the term "adequate public education" means, in relevant part, that public
14 schools provide a healthful, safe, and sanitary learning environment. 1 G.C.A. §715(12)(l).
15 This mandate clearly articulates the government's interest of maintaining and operating healthy,
16 safe, and sanitary schools to provide an adequate public education to the children of Guam.
17 These broad and general mandates justify the closure of JFK and its re-construction to resolve
18 the longstanding health, safety, and sanitary concerns that plagued JFK prior to its closure.
19 However, JFK is merely one of several high schools on Guam operated by DOE and JFK's
20 closure on June 9, 2008 has not prevented DOE from continuing to operate the remaining high
21 schools.

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¹² DPW's Declaration of Substantial Interest dated September 1, 2009,
26 paragraphs 1 and 2, page 2.

27 ¹³ The Appellant's Memorandum Re Declaration of Substantial Interest dated
28 September 3, 2009, paragraph 1, page 1.

1 schools on Guam, including the interim JFK campus at Tiyan. The closure of JFK during its re-
2 construction has a minimal effect on the Government of Guam's ability to provide an adequate
3 public education. Thus, the Public Auditor finds that the legal mandates requiring an adequate
4 public education do not sufficiently establish necessity to award the contract without delay.
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6 **Legal mandates requiring the timely re-construction of JFK do not**
7 **justify award of the contract without delay.**

8 DPW and IBC argue that legal mandates requiring the timely re-construction of JFK
9 justify award the contract without delay.¹⁴ The Appellant argues that despite these legal
10 mandates, there was a ten-month delay prior to the filing of the Appellant's initial protest in
11 August 2009, and that these legal mandates do not justify the award of the contract without
12 delay.¹⁵ There are legal mandates requiring the re-construction of JFK. The Guam Legislature
13 has found that due to a critical shortage of public school facilities on Guam and that many
14 existing facilities are antiquated and are not fit for the purpose of public education; that Guam is
15 in need of at least three new public schools; and that there is an immediate need to build a
16 modern school facility on the existing JFK site. 5 G.C.A. §58A102. The Guam Legislature also
17 found an immediate need to build a modern school facility on the existing JFK site and that the
18 request for proposal for the replacement of JFK must be issued within 30 days of October 10,
19 2008, and that the RFP shall require that occupancy of the new JFK facility take place no later
20 than nine months after execution of the contract. 5 G.C.A. §58A105. These short timelines
21 resulted in the Governor of Guam expressing serious concerns. First, the 30 day deadline to
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25 ¹⁴ DPW's Declaration of Substantial Interest dated September 1, 2009,
26 paragraphs 3, 4, and 5, page 2.

27 ¹⁵The Appellant's Memorandum Re Declaration of Substantial Interest dated
28 September 3, 2009, paragraph 3, 4, and 5, page 2.

1 issue the RFP put the government at a great disadvantage and may have exposed the government
2 to a very costly construction project. Second, the requirement to occupy the JFK facility within
3 nine months after award might compromise the structural integrity of the new facility causing
4 greater harm from quick and poor construction.¹⁶ The Public Auditor finds that these are valid
5 concerns and that the short time-lines to issue the RFP and re-construct JFK made the RFP an
6 unnecessarily difficult, risky, and possibly more expensive project. Notwithstanding these
7 concerns, DPW proceeded with issuing the RFP and the selection of the best qualified offeror.
8 The Public Auditor finds that DPW was not timely and caused delays. The RFP was issued 12
9 days late on November 21, 2008. There was an unexplained delay of one month and 16 days
10 between the date the evaluation committee selected the best qualified offeror on January 16,
11 2009 and the date DPW's Director signed and approved the selection on March 4, 2009.¹⁷
12 Further, DPW engaged in a prolonged negotiation period with the best qualified offeror that
13 lasted five months. If DPW truly believed that there were substantial interests in complying with
14 the short timelines, DPW would have issued the RFP on time and would not have engaged in
15 prolonged negotiations. Thus, the Public Auditor finds that compliance with the legal mandates
16 requiring timelines for the issuance of the RFP and the completion of the new JFK campus after
17 the contract is awarded do not sufficiently establish the necessity to award the contract without
18 delay.
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24 ¹⁶ The Appellant's Memorandum re. Declaration of Substantial Interest dated
25 September 3, 2009, attachment of October 20, 2008 letter from the Governor of
26 Guam.

27 ¹⁷ Testimony of Lawrence P. Perez and the Appellant's Protest dated August 5,
28 2009, Exhibit A, Agency Report dated September 11, 2009.

**Hardship caused by Double Sessions at GW during the
Past School Year do not justify award of the contract without delay.**

DPW and IBC argue that the hardship endured by students and the educational community caused by split or double sessions between JFK and GW students at the GW campus during the 2008-2009 school year justify award of the contract without delay.¹⁸ The Appellant argues that such hardship has passed because the JFK students have been moved to the interim JFK campus in Tiyan.¹⁹ As stated above, the JFK students did endure hardship while at GW in the form of: (1) Lost approximately 30 minutes of instruction time per day; and (2) Incurred disruptions in their athletic and physical education programs due to a lack of practice and teaching space, and lack of transportation to off-campus practice areas. However, despite these hardships, WASC did accredit JFK for the next two years. Further, the Public Auditor finds that such hardship was caused, in large part, to DOE's decision to keep the 2,300 JFK students together instead of transferring them to other DOE high schools to avoid double sessions at GW. Also, the Public Auditor finds that any hardship resulting from the double sessions at GW has passed since JFK students are now attending the interim JFK campus at Tiyan. Thus, the Public Auditor finds that the hardships resulting from the GW double sessions for the 2008-2009 school year do not sufficiently establish necessity to award the contract without delay.

¹⁸ DPW's Declaration of Substantial Interest dated September 1, 2009, paragraphs 6 and 7, page 3.

¹⁹ The Appellant's Memorandum Re Declaration of Substantial Interests dated September 3, 2009, paragraph 6 and 7, page 2.

**Any Disruption of JFK's Education Program was caused by
DOE and does not justify award of the contract without delay.**

DPW and IBC argue that the disruption of all phases of JFK's education program from August 2008 to the present justifies award of the contract without delay.²⁰ The Appellant argues that this disruption has been resolved with the placement of the JFK students at the interim JFK campus in Tiyan.²¹ The evidence in this matter indicates that JFK is currently accredited, the JFK students are no longer enduring split or double sessions, and that said students are attending school at the interim JFK campus in Tiyan.²² Further, the only evidence of current disruption to the education program is that the JFK students do not have adequate chemistry labs and a complete and full physical education curriculum at the interim JFK campus in Tiyan.²³ Thus, the Public Auditor finds that the alleged disruptions to JFK's education program do not sufficiently establish the necessity to award the contract without delay because not all of JFK's education program phases were disrupted. Any existing disruption is caused by DOE's decision to keep the JFK students together rather than transfer them to DOE's other high school facilities and not due to the delays in the solicitation or award of the contract in this matter.

²⁰ DPW's Declaration of Substantial Interest dated September 1, 2009, paragraphs 6 and 7, page 3.

²¹ The Appellant's Memorandum Re Declaration of Substantial Interest dated September 3, 2009, paragraphs 6 and 7, page 2.

²² Testimony of Gayle F. Hendricks and Testimony of Kenneth Chargualaf.

²³ Testimony of Kenneth Chargualaf.

**Inadequacy of the Temporary JFK Campus located at Tiyan
does not justify award of the contract without delay.**

DPW and IBC argue that the inadequacy of the interim JFK campus at Tiyan justifies award of the contract without delay.²⁴ The Appellant argues that the Government of Guam's delay in taking adequate action in response to the closure of JFK on June 9, 2008 does not create a substantial interest.²⁵ The interim JFK campus at Tiyan is DOE's second attempt to keep the JFK students together after JFK's closure and is an integral part of DOE's plan to return them to a re-constructed JFK. Due to a finding that the double sessions at GW were not a conducive learning environment, DOE's plan is to house the JFK students at the interim JFK campus at Tiyan for the 2009-2010 school year and return them to a re-constructed JFK for the 2010-2011 school year.²⁶ However, there are many allegations that the interim JFK campus at Tiyan is an inadequate facility for a high school.

First, there are allegations that the interim JFK campus at Tiyan is environmentally unsafe due to chlordane soil contamination caused by its prior use as a military facility.²⁷ This

²⁴ DPW's Declaration of Substantial Interest dated September 1, 2009, paragraph 8, page 3.

²⁵ The Appellant's Memorandum Re Declaration of Substantial Interest dated September 3, 2009, paragraph 8, page 3.

²⁶ The Guam Education Policy Board Resolution No. 2009-09 dated August 7, 2009, Exhibit D, DPW's Declaration of Substantial Interest dated September 1, 2009.

²⁷ DPW's Declaration of Substantial Interest dated September 1, 2009, paragraph 8, page 3, and the August 13, 2009 Letter of Substantial Government Interest from Gayle F. Hendricks, Exhibit C, DPW's Declaration of Substantial Interests dated September 1, 2009.

1 allegation has no merit because the contamination issue was resolved by encapsulating soil areas
2 surrounding the buildings prior to the interim JFK campus being opened for the 2009-2010
3 school year.²⁸ Second, there are allegations that there are no library or chemistry labs at the
4 interim JFK campus.²⁹ However, these allegations have no merit because the interim JFK
5 campus has a library and lab rooms.³⁰ DOE accepted the space for the library facility at the
6 interim JFK campus on Tiyan because they were going to use an e-library.³¹ Unfortunately, due
7 to a belief that the library at the interim campus is too small, DOE has not moved any of the
8 48,000 books from the original JFK campus to the interim JFK campus at Tiyan.³² Further, due
9 to a lack of communication between DOE and DPW, which conducted the solicitation for the
10 interim JFK campus, the lab tables contained in the specifications do not fit in the lab rooms at
11 the interim JFK campus.³³ Thus, although there is designated space for a library at the interim
12 JFK campus, the space is not being used as library due to DOE's actions not related to this
13 appeal. There are allegations that student access to the second floors of the buildings is limited
14 because there is no elevator in the buildings, and that the campus suffers from low water
15 pressure.³⁴ These allegations have no merit because DPW found the interim JFK campus to be
16 compliant with the Americans with Disabilities Act (ADA) and the Guam Waterworks Authority
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22 ²⁸ Testimony of Joshua Tenorio.

23 ²⁹ Testimony of Arlene Unpingco.

24 ³⁰ Testimony of Kenneth Chargualaf and Joshua Tenorio.

25 ³¹ Testimony of Joshua Tenorio.

26 ³² Testimony of Kenneth Chargualaf.

27 ³³ Id.

28 ³⁴ Id.

1 cleared the use of the second floors of the buildings.³⁵ Further, the JFK RFP's Technical
2 Specification, Item 5 – Special Need states that “the special needs program will continue to be
3 located on the first floor”.

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5 The interim JFK campus at Tiyan has the same number of air-conditioned classrooms and
6 a cafeteria that will accommodate the same number of students as the re-constructed JFK will
7 have.³⁶ If this space is insufficient for the 2,300 students currently assigned to the interim JFK
8 campus at Tiyan, or, if DOE truly believes they are not receiving an adequate education due to
9 the condition of the facilities, DOE still has the option of transferring the JFK students so they
10 can be absorbed into DOE's other high schools. Thus, the Public Auditor finds that there is no
11 merit to the alleged inadequacies of the interim JFK campus at Tiyan, and that such allegations
12 do not sufficiently justify award of the contract without delay.
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15 **There is no merit to DPW's allegations concerning possible**
16 **increases in financing costs or difficulty in obtaining financing,**
17 **possible damage to the Government of Guam's relationship with investors,**
18 **and possible price increases in and shortages of labor and materials.**

19 DPW and IBC allege that award of the contract without delay is justifiable because doing
20 so avoids: (1) Possible increases in financing costs or the ability to obtain financing for the JFK
21 re-construction;³⁷ (2) Possible damage to the Government of Guam's relationship with
22 investors;³⁸ and (3) Possible price increases and shortages in labor and materials prices due to

23 ³⁵ Testimony of Joshua Tenorio.

24 ³⁶ Testimony of Joshua Tenorio.

25 ³⁷ DPW's Declaration of Substantial Interest dated September 1, 2009,
26 paragraph 9, page 3.

27 ³⁸ DPW's Declaration of Substantial Interest dated September 1, 2009,
28 paragraph 10, page 3.

1 the upcoming military build-up.³⁹ As stated above, DPW must sufficiently establish that these
2 possibilities create sufficient necessity to avoid the automatic stay of actions continuing the
3 solicitation or award of the contract. *Guam Imaging Consultants, Inc., and RADS, v. Guam*
4 *Memorial Hospital Authority and Guam Radiology Consultants, Inc.*, 2004 Guam 15, ¶16 and
5 ¶41 (Supreme Court of Guam). However, the evidence presented by the DPW has failed to
6 establish such necessity. IBC took a long period of time to obtain financing. Despite being
7 selected as the best qualified offeror on January 16, 2009, and Director of DPW's approval of the
8 notice on March 4, 2009, and despite being responsible to obtain financing for the project, IBC
9 was just about to complete its efforts to obtain financing on August 5, 2009 when it was stopped
10 by the Appellant's protest.⁴⁰ If DPW truly feared that financing costs were rising, it should have
11 terminated negotiations with IBC and it should have started negotiations with the next most
12 qualified offeror. In fact, this eight-month delay caused by the delayed notice and the
13 negotiations between DPW and IBC far exceeds the minimal delay caused by this appeal.
14 Further, DPW failed to show that the short delay caused by the Appellant's protest and this
15 appeal has actually resulted in higher investment or borrowing costs.⁴¹ Additionally, if IBC is
16 unable to obtain financing as required after this appeal is resolved, DPW, pursuant to the RFP
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21 ³⁹ DPW's Declaration of Substantial Interest dated September 1, 2009,
22 paragraph 11, page 3, and August 14, 2009 Letter from Ramon B. Padua and
23 Dionisio M. De Leon, Exhibit G, DPW's Declaration of Substantial Interests
24 dated September 1, 2009.

25 ⁴⁰ Testimony of Anthony C. Blaz and Testimony of Lawrence P. Perez.

26 ⁴¹ August 14, 2009 Letter re Substantial Interests of the Territory from
27 Anthony C. Blaz, Exhibit G, DPW's Declaration of Substantial Interest dated
28 September 1, 2009 and Testimony of Anthony C. Blaz.

1 procedures, must terminate its negotiations with IBC and begin negotiations with the next most
2 qualified offeror. Thus, Public Auditor finds that any financing cost increases incurred during
3 the six months between the date the DPW Director signed and approved the selection notice on
4 March 4, 2009, which was the date IBC was selected as the best qualified offeror, and the date
5 the Appellant lodged its protest on August 9, 2009, do not constitute substantial interest that
6 would justify award of the contract without delay.
7

8 As to possible damage to the Government of Guam's relationship with its investors,
9 DPW fears that investors may have a perception of heightened risks that Government of Guam
10 securities may not be delivered after their sale due to these protests, and that a delay caused by
11 prolonged protest resolution may result in Guam being viewed in a negative light by potential
12 investors, developers, and future business partners.⁴² However, DPW and IBC were not able to
13 produce the name of a single potential investor, developer, or future business partner that holds
14 this view as a result of this matter, except for two persons employed by a financial advisor for
15 the Guam Economic Development Authority.⁴³ The Public Auditor finds that it is unlikely the
16 three-month delay, caused by this appeal, will result in any significant damage to the Government
17 of Guam's relationship with its investors, and this allegation does not sufficiently justify
18 awarding the contract without delay.
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22 Concerning the possibility of price increases and shortages of labor and materials, DPW
23 failed to present proof of any price increases in labor and materials during the one-month period
24 this appeal was pending at the time this motion was heard, or that there would be less labor
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27 ⁴² Id.

28 ⁴³ Testimony of Anthony C. Blaz.

1 available in the three months it would take to resolve this appeal. Thus, the Public Auditor finds
2 that these mere allegations do not sufficiently justify awarding the contract without delay.
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5 **CONCLUSION**

6 Based on the foregoing, DPW's Motion to Confirm Substantial Interest is hereby
7 DENIED. DPW is hereby reminded that it may not proceed further with the solicitation or
8 award of contract until this appeal is resolved, and that any further such action is void, pursuant
9 to 5 G.C.A. §5425(g) and 2 G.A.R., Div. 4, Chap. 9, §9101(e).
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12 **SO ORDERED** this 29th day of October, 2009 by:
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16 DORIS FLORES BROOKS, CPA, CGFM
17 Public Auditor
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