EDDIE BAZA CALVO
Governor

RAY TENORIO
Lieutenant Governor

Office of the Governor Of Guam

January 12, 2017

GL# 34-17-033
Speaker Benjamin J.F. Cruz
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Received By

Honorable Benjamin J.F. Cruz
Speaker
I Mina'trentai Kuåtro Na Liheslaturan Guåhan
155 Hesler Street
Hagåtña, Guam 96910

2017 JAN 12 PM 12:38 KC

Dear Mr. Speaker:

Attached is Bill No. 411-33 (COR) which was passed by the 33rd Guam Legislature and entitled, *"An act to Amend § 58D105, § 58D106, § 58D108 of Chapter 58D of Title 5 Guam Code Annotated, Relative to Authorizing the use of the Multi-Step bid Source Selection Method for the Renovation or Construction of Simon Sanchez High School."* After considering the concerns raised in the enclosed letter to me from the Department of Education (GDOE), as well as similar concerns brought by the Department of Works (DPW) and the Mayor of Yigo, I have **VETOED** this bill.

When Bill 411 was first introduced, it gave the Government of Guam the option to solicit for the renovation/construction of Simon Sanchez High School either through the request for proposal (RFP) process or through the multi-step competitive sealed bid process. As passed, however, Bill 411 now *mandates* that the procurement for Simon Sanchez be done exclusively by way of a multi-step sealed bid solicitation. Moreover, Bill 411 also completely removes from the solicitation the task of repairing and maintaining the other 35 schools.

Under Section 3109(r) of the Guam Procurement Regulations, the multi-step sealed bidding method can only be used when *"it is not practical to prepare initially a definitive purchase description which will be suitable to permit an award based on price."* This condition of impracticality is not, however, the situation with Simon Sanchez or the other schools.

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From the very beginning, the Attorney General has been involved in all phases of the RFP solicitation process, including resolution of the recent protest in front of the Public Auditor. The resolution of the protest came only after weeks of testimony by numerous witnesses were taken, thousands of pages of documents were reviewed, and a great cost of time and economy was spent by all parties. Ultimately, the Public Auditor made no finding that the RFP process was not impractical or was otherwise not a proper procurement vehicle. Rather, the Public Auditor held that although there were issues concerning the execution of the solicitation process, all deficiencies could nevertheless be resolved if the RFP was cancelled and re-issued.

The Public Auditor's decision was rendered on November 22, 2016. For weeks since that date, DPW, GDOE and the Office of the Attorney General have been working to prepare a new RFP that will fully address all of the concerns raised by the protest and by the Public Auditor. The new RFP is expected to be ready very soon, possibly within the next few days.

But if a multi-step Invitation for Bid (IFB) is to be used as is required by Bill 411, this would mean that DPW, GDOE, and the Attorney General will have to go back to the drawing board and redevelop a completely different type of procurement solicitation consisting of different specifications, design parameters, evaluation factors, negotiation criteria, etcetera. For a project on the size and scale of Simon Sanchez, changing from an RFP to an IFB will likely cost millions of dollars upfront. And most certainly, the delay caused will far exceed the time it takes to re-issue the RFP as was recommended by the Public Auditor.

I am also concerned that Bill 411 violates the separation of powers doctrine and is therefore inorganic and unconstitutional. The Guam Supreme Court has said that under the Organic Act, the power to appropriate money is reserved to the Legislature. In re Request of Gov. Gutierrez, 2002 Guam 1, ¶ 38, *citing* 48 U.S.C. § 1423j(a) (1992) "Appropriations, except as otherwise provided in this chapter, and except such appropriations as shall be made from time to time by the Congress of the United States, shall be made by the legislature."

The Supreme Court defines the Legislature's power of appropriation as "the authority to set apart from the public revenue a certain sum of money for a specified object . . . ." *Id.* And although the Legislature has the authority to put limits and conditions on its appropriations, it may not impose conditions that infringe on the discretion of the executive branch to supervise and make decisions over the administration of the

appropriated funds. Instead, the activity of spending is an executive task, and the Legislature may not set limitations or conditions that undermine the executive branch's power to administer the funds lawfully appropriated to it.

For example, under Guam law the DPW Director is charged with the responsibility of serving as the "central procurement officer of the Territory with respect to construction." 5 G.CA. § 5113(a); 2 G.A.R.R. § 2104. As part of his duties, the Director is empowered with *"the discretion to select the appropriate method of construction contracting management for a particular project."*

In direct contravention, however, Bill 411 usurps the DPW Director's duty as the "central procurement officer of the Territory with respect to construction" and his executive discretion to select the method of construction contracting by ordering DPW and GDOE to use only the multi-step competitive sealed bid method and no other. For these reasons, Bill 411 violates the separation of powers doctrine and is inorganic.

There is no question that the construction and maintenance of Simon Sanchez has always been a top priority for my administration. Since 2015, I have sent environmental health inspectors, fire inspectors, and building engineers into the school to assist with safety and cleanliness pending the award of a contract for the renovation/construction. I am confident that with the months of hard teamwork put in by the Attorney General, DPW and GDOE, together with the guidance rendered by the Public Auditor, the renovation/construction of Simon Sanchez High School is an imminent reality.

Sincerely,

EDDIE BAZA CALVO

ENC: 1

DEPARTMENT OF EDUCATION
OFFICE OF THE SUPERINTENDENT

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JOSEPH L.M. SANCHEZ
Acting Superintendent of Education

January 6, 2017

The Honorable Eddie Baza Calvo
Governor of Guam
513 West Marine Corps Drive
Ricardo J. Bordallo Complex
Hagatna, Guam 96910

Subject: Request to Veto Bill 411-33 Relative to Authorizing the Use of the Multi-Step Bid Source Selection Method for the Renovation or Construction of Simon Sanchez High School

Hafa Adai Governor Calvo,

I would like to respectfully request that a veto of Bill 411-33 relative to the use of the multi-step bid source selection method for the renovation or construction of Simon Sanchez High School be done. Although I understand the concerns raised by Senator Thomas Ada during the public hearing as well as the points raised in the bill, I would like to offer you a few of my thoughts and concerns in response.

First, I have met with the procurement team and have discussed the bill and its implications thoroughly. Based on these meetings as well as my assessment of the work that has already done on the current Request For Proposal (RFP), I am in full support of maintaining this route and believe that this is the best course of action especially when financing is an fundamental part of the RFP. Another point of concern is that the bill removes the repair and maintenance of 35 other schools which may arbitrarily drive the price of the construction of Simon Sanchez at a much higher cost. The previous RFP and the to be issued RFP utilizes Simon Sanchez High School as collateral for the work conducted on the 35 schools. If this bill is approved the 35 schools will not be addressed and the cost of constructing Simon Sanchez will increase. Over the past few weeks, much work has been done to strengthen the process that DPW has set up for this procurement. Both the findings of the OPA and the points raised in the original appeal have been reviewed and taking into consideration when developing the new RFP. This includes all of the findings and recommendations as well as the points we prevailed on. This was done to ensure that all concerns originally raised were addressed as much as possible at the appropriate stage.

Second, because of the thorough reviews noted in my first point as well as the fact that the procurement team went through the entire RFP process already, it is my assessment that the team is better positioned and ready to move forward with the process this second time around. We know where the weak areas were and have addressed them in the new RFP. We know what areas were points of contention in the process and are ready to address them if issues arise. And lastly, because there has already been substantial interaction with previous offerors in the original procurement, we are now better able to anticipate questions or potential points of clarification, and when applicable, are ready to preempt them as needed.

Third, because of the familiarity noted above, it seems clear to me that this will be the fastest route that would ensure that we complete the procurement in an expedited manner without compromising the integrity of the process. Requiring the multi-step method would introduce a whole new process to the

group that would, in my opinion, require a substantial learning curve for everyone involved. As I stated in my testimony at the legislature, I am concerned that the learning curve for this process, particularly for procurement this large, would open the door for potential errors that could be brought up in an appeal or at best, cause delays in the process itself. These delays in procurement would of course, unfortunately result in further delays to the building of the new school- a condition that we cannot afford to have. Our students need a new school as soon as possible.

Fourth, although I am not an expert in the procurement process, I do want to note that I have concerns about the idea of lowest cost being preferred over best value. Cost should not be the sole determining factor. We need to ensure that the Department of Education is afforded the opportunity to negotiate with the vendor on specifics once it is awarded so that we can clarify and confirm with them exactly what is best for our students and community.

Lastly, but still a major area of concern for me is relative to the GDOE being assigned as the lead agency for the procurement instead of the Department of Public Works. I first heard this recommendation when it was proposed during the public hearing where GDOE's expertise and capacity was cited during testimony. I am, naturally, appreciative of the positive assessment given but must, unfortunately challenge its assertion, at least in regards to the department's ability to take the lead on this procurement.

As you are aware, the GDOE is currently classified as a High Risk grantee by the United States Department of Education (USEd) and our USEd funding is under the management of a Third Party Fiduciary Agent (TPFA). The TPFA is in place due to ongoing concerns with the management and expenditure of USEd funds. Additionally, in the Special Conditions letter, USEd continues to cite concerns in three major areas: personnel management, fixed assets inventory and procurement.

Additionally, while acknowledging the major improvements in our internal procurement processes and management of finances, I must point out that we have always been focused on smaller procurements that are mostly focused on professional development, professional services, custodial and small maintenance. We do not have the expertise to take the lead on a capital improvement or construction project such as this. Because of these two points, I must confirm that we do not have the current capacity or requisite expertise to take the lead on this procurement.

Thank you again for allowing me this opportunity to share with you my concerns regarding this bill. If you have any questions or require further clarification to any of the points I raised, please do not hesitate to contact me at 300-1547 or at jsanchez@gdoe.net.

Respectfully,

JOSEPH L.M. SANCHEZ
Acting Superintendent of Education

I MINA'TRENTAI TRES NA LIHESLATURAN GUÅHAN
2016 (SECOND) Regular Session

CERTIFICATION OF PASSAGE OF AN ACT TO *I MAGA'LÅHEN GUÅHAN*

This is to certify that **Substitute Bill No. 411-33 (COR), "AN ACT TO *ADD* NEW SUBSECTIONS (k), (l), AND (m) TO § 58D103, AND *AMEND* §§ 58D105, 58D106, AND 58D108, ALL OF CHAPTER 58D, TITLE 5, GUAM CODE ANNOTATED, RELATIVE TO AUTHORIZING THE USE OF THE MULTI-STEP BID SOURCE SELECTION METHOD FOR THE RENOVATION OR CONSTRUCTION OF SIMON SANCHEZ HIGH SCHOOL,"** was on the 30th day of December 2016, duly ~~and~~ regularly passed.

Judith T. Won Pat, Ed.D.
Speaker

Attested:

Tina Rose Muña Barnes
Legislative Secretary

This Act was received by *I Maga'låhen Guåhan* this 30th day of Dec, 2016, at 8:30 o'clock P .M.

PATRICK G. CORPUZ #314
Assistant Staff Officer
Maga'låhi's Office

APPROVED:
VETO

EDWARD J.B. CALVO
I Maga'låhen Guåhan

Date:_____

Public Law No._____

I MINA'TRENTAI TRES NA LIHESLATURAN GUÅHAN
2016 (SECOND) Regular Session

Bill No. 411-33 (COR)
As amended by the Sponsor; and substituted and amended on the Floor.

Introduced by: T. C. Ada
Mary Camacho Torres
B. J.F. Cruz
N. B. Underwood, Ph.D.
V. Anthony Ada
FRANK B. AGUON, JR.
Frank F. Blas, Jr.
James V. Espaldon
Brant T. McCreadie
Tommy Morrison
T. R. Muña Barnes
R. J. Respicio
Dennis G. Rodriguez, Jr.
Judith T. Won Pat, Ed.D.

AN ACT TO *ADD* NEW SUBSECTIONS (k), (l), AND (m) TO § 58D103, AND *AMEND* §§ 58D105, 58D106, AND 58D108, ALL OF CHAPTER 58D, TITLE 5, GUAM CODE ANNOTATED, RELATIVE TO AUTHORIZING THE USE OF THE MULTI-STEP BID SOURCE SELECTION METHOD FOR THE RENOVATION OR CONSTRUCTION OF SIMON SANCHEZ HIGH SCHOOL.

BE IT ENACTED BY THE PEOPLE OF GUAM:

Section 1. Legislative Findings and Intent. *I Liheslaturan Guåhan* finds that Simon Sanchez High School faces the combined challenges of deteriorating conditions, obsolescence, and overcrowding.

I Liheslaturan Guåhan finds that the government of Guam does not have the debt capacity to borrow the capital needed to build and replace the Simon Sanchez High School (SSHS). Hence, the *design, build, and finance approach*; and "*using a municipal lease as a vehicle to build new educational facilities*" would be a good alternative.

I Liheslaturan Guåhan finds that Public Law 32-120 mandates the use of the Request for Proposal (RFP) source selection method for the procurement of a "*...new education facility...*"; and the government of Guam "*...will amortize, as lease payments to the contractor, the cost of the financing, design, renovation or construction and related expenses of the education facility... for a period not to exceed thirty (30) years.*"

I Liheslaturan Guåhan intends to amend Public Law 32-120 to remove the mandated use of the RFP source selection method and prescribe the use of the Multi-Step Sealed Bid source selection method, pursuant to 5 GCA § 5211(h), and § 3109 of Chapter 3, Division 4, 2 GAR, which is deemed to be more objective in the selection of a responsible bidder whose bid is responsive and is the lowest annual leaseback cost to the government of Guam.

I Liheslaturan Guåhan further finds that when low price is desired to be a determining factor for award to the bidder of an acceptable product, e.g. an education facility, but it is considered preferable to evolve or test the adequacy of a purchase description's market feasibility, an Invitation for Bids may be issued and conducted in two (2) phases, the first requesting the submission of unpriced technical offers, which may involve description of service qualifications and performance, in one (1) or more rounds in which discussions may be conducted to supplement or amend technical offers or bid specifications or both, to be followed by a second phase in which the unsealed price bids of those bidders whose offers have been or become

qualified as acceptable under the criteria set forth in the first phase are requested and then opened as in a normal competitive sealed bid process.

Section 2. New Subsections (k), (l), and (m) are *added* to § 58D103 of Chapter 58D, Title 5, Guam Code Annotated, to read as follows:

"(k) Responsible bidder shall mean a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.

(l) Responsive bid shall mean a bid which conforms, at bid opening, in all material respects to the Invitation for Bids. A responsive bid is an offer by the bidder which unconditionally undertakes to provide the supply, service, or construction the government intends to acquire as specified in the IFB, and only on contract terms and conditions as are materially consistent with those specified in the IFB.

(m) Responsive shall mean conforming in all material respects to the purchase description and contract terms contained in the Invitation for Bids. A nonconforming bid is nonresponsive if it contains a material noncompliant term or condition that is in any respect prejudicial to other bidders, that is, the effect of such noncompliant term or condition on price, quantity, quality, delivery, or contractual terms specified in the IFB is more than negligible."

Section 3. § 58D105 of Chapter 58D, Title 5, Guam Code Annotated, is *amended* to read as follows:

"**§ 58D105. Procurement.** The Guam Department of Education, with the Department of Public Works providing support as needed, *shall* issue an Invitation for Multi-Step Competitive Sealed Bids, pursuant to 5 GCA § 5211(h) and § 3109 of Chapter 3, Division 4, 2 GAR, for the development of a comprehensive capital improvement plan, the financing, design, renovation,

or construction of the education facility, together with insurance and maintenance of the education facility over the lease-back period, according to the needs of the education agency and consistent with this Chapter. The bid invitation shall specifically state the minimum design requirements that will be required for a submitted proposal to be considered. Bidders shall be required to submit a bid bond for the full amount of their bid, with the price bid which will not be opened or disclosed until the price bids are opened. If any bid bond is determined at opening not to meet the requirements of the IFB, that bid shall be deemed non-responsive and not considered further. The government of Guam shall be the named obligee under the bid bond, and the performance and payment bonds. The government of Guam shall have the sole right to call on the bid bond.

The determination of responsible bidders and responsive bid(s) *shall* be made by a selection committee comprised of the Superintendent of the Department 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 Management or Deputy Director, the Administrator of the Guam Environmental Protection Agency or Deputy Administrator, and the Administrator of the Guam Economic Development Authority or Deputy Administrator. The committee *shall* evaluate bids received based on the requirements set forth in the Invitation for Multi-Step Sealed Bids.

The award of the contract *shall* be based upon the bid submitted by a responsible bidder that is responsive to the Invitation for Bids and offers the lowest annual leaseback rate and insurance and maintenance costs to the government of Guam for a fixed thirty (30) year term. Each bidder *shall* submit a complete breakdown of its project cost to include, at a minimum: (1) hard construction costs; (2) soft costs including management, development,

and other related project fees; and (3) the annual lease payment schedule identifying any financing, insurance, and maintenance costs and terms.

The Invitation for Multi-Step Competitive Sealed Bids for the renovation or construction of a new Simon Sanchez High School on the existing site, which may include demolition of such portions of the existing facility as necessary *shall* be issued within thirty (30) days of enactment of this Act.

Notwithstanding any other provision of law, the procurement re-solicitation for the development of a comprehensive capital improvement plan, the financing, design, renovation, or construction of the education facility to be located on the existing site of Simon Sanchez High School, together with insurance and maintenance of the education facility over the lease-back period *shall not* be combined with another procurement such as in Public Law 32-121 (the repair and maintenance of 35 other schools)."

Section 4. § 58D106 of Chapter 58D, Title 5, Guam Code Annotated, is *amended* to read as follows:

"**§ 58D106. Responsibilities of Contractor.** The contract shall require that the contractor will work with GDOE to develop the comprehensive capital improvement plan in connection with the design of a renovated or construction of a new Simon Sanchez High School. Further, the contractor shall be responsible for all costs, expenses, and fees of any kind or nature, associated with the 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 Multi-Step Competitive Sealed Bid. The contract will also require that all major subcontracts be covered

by a performance bond; and further, that there be a specific delivery date with liquidated damages for failure to deliver the school by the specified date. The contractor shall also be responsible for the capital maintenance of the schools during the lease-back period, but shall not be responsible for the capital maintenance of the furniture and equipment. The lease-back may provide that if sufficient funds are not appropriated or otherwise available for the payment of amounts due under the lease and any maintenance agreement, the education agency will have the obligation to vacate the education facility, and the contractor shall have the right of use and occupancy of the education facility for the remainder of the term of the lease, unless new mutually satisfactory terms are entered into. For this purpose, the lease may provide that its term shall be extended for a period not to exceed the shorter of ten (10) years beyond the original term of the lease-back or such period of time as is necessary to repay in full any financing arranged pursuant to § 58D108. The capital maintenance costs shall be paid by the education agency on a periodic basis as incurred by the contractor on terms to be agreed to in the contract for the education facility.

The lease-back agreement *shall* include a provision that no rental payments, reserve, advance or deposit payments, shall be paid by the government of Guam to the successful bidder until and unless the entire education facility has received a full occupancy permit and the government accepts the project."

Section 5. § 58D108 of Chapter 58D, Title 5, Guam Code Annotated, is *amended* to read as follows:

"**§ 58D108. Use of Tax-Exempt Bonds for Financing.** To minimize the financing cost to the education agency, financing utilized by the contractor to fund the design, renovation, or construction of an education

facility may be through tax-exempt obligations or other financial instruments, provided, such financing is available at interest rates determined by the education agency to be reasonable and competitive. Alternatively, the contractor may use an alternative method of financing, including, but *not* limited to, a short term debt, mortgage, loan, federally guaranteed loan, or loan by an instrumentality of the United States of America, if such financing will better serve the needs of the people of Guam. The purpose for the requirements of this Section is to assure the education agency pays the lowest possible interest rate so that the cost to the education agency of financing the design, renovation, or construction of an education facility, amortized through the lease-back payments from the education agency to the contractor, will be lower than regular commercial rates."

Section 6. Severability. If any provision of this Act or its application to any person or circumstance is found to be invalid or contrary to law, such invalidity *shall not* affect other provisions or applications of this Act that can be given effect without the invalid provisions or application, and to this end the provisions of this Act are severable.