EDDIE BAZA CALVO
Governor

RAY TENORIO
Lieutenant Governor

Office of the Governor Of Guam

May 10, 2017

GL# 34-17-502
Speaker Benjamin J.F. Cruz

MAY 10 2017
Time: 457 [ ] AM [ ] PM File No. ____
Received By: ____

Honorable Benjamin J.F. Cruz
Speaker
I Mina'trentai Kuåtro Na Liheslaturan Guåhan
Guam Congress Building
163 Chalan Santo Papa
Hagåtña, Guam 96910

Dear Mr. Speaker:

Attached is Bill No. 58-34 (COR) which was passed by the 33rd Guam Legislature and entitled, *"An act to Amend Subsections (c) and (d). . . all of Chapter 58D, Title 5 Guam Code Annotated, Relative to Soliciting for the Construction of Simon Sanchez High School under a Long Term Lease-Back. . . ,"* which I have **VETOED**.

2017 MAY 10 PM 5:

Yet again, the Legislature is attempting to change the procurement solicitation process for the construction of Simon Sanchez High School. When the Legislature originally enacted P.L. 32-120, it voted overwhelmingly to select a contractor through a Request for Proposals and for an award to be made *"based upon the proposal that delivers the best value for Guam in meeting the objectives of the education agency."* This was a sound policy decision. Unfortunately, the RFP process became mired in protests, thus delaying a final contract award.

Bill No. 58-34 furthers the delay by completely changing the solicitation from an RFP grounded in best value to a 30-year lease back arrangement, with the contract awarded to the offeror who submits the lowest annual lease back rate. This drastic change effectively cancels the current RFP solicitation and requires the Government to start the process all over again from the very beginning. Quite alarmingly, even if the process were changed to a lease back arrangement as contemplated by Bill 58-34, there is no guarantee or mechanism to safeguard against future protests. It is therefore foreseeable that no matter how the solicitation process is changed (whether to a lease back arrangement or anything else), protests will inevitably arise and the Government and

the Simon Sanchez school community will still be in the same position that they are now.

As Governor Calvo said in his veto letter to Bill No. 411-33 which sought to change the RFP process to a multi-step sealed bid solicitation, changing the type of solicitation means having to go back to the drawing board in order to redevelop a completely different type of procurement solicitation, different specifications, scope of work, evaluation factors, etcetera. Undoubtedly, such a change will cost millions of dollars in time and resources.

At this point, we are all weary. But none are more so than the Simon Sanchez school and village community. For years they have borne the terrible conditions of the school with patience, optimism, and grace. They deserve a school that represents the best value for the money that the Territory can obtain, and not a school on whatever is the lowest price.

Sincerely,

RAY TENORIO
ACTING GOVERNOR OF GUAM

I MINA'TRENTAI KUÅTTRO NA LIHESLATURAN GUÅHAN
2017 (FIRST) Regular Session

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

This is to certify that **Substitute Bill No. 58-34 (COR), "AN ACT TO *AMEND* SUBSECTIONS (c) AND (d), AND *ADD* NEW SUBSECTIONS (k), (l), AND (m) TO § 58D103; AND TO *AMEND* §§ 58D105, 58D106, AND 58D108, ALL OF CHAPTER 58D, TITLE 5, GUAM CODE ANNOTATED, RELATIVE TO SOLICITING FOR THE CONSTRUCTION OF SIMON SANCHEZ HIGH SCHOOL UNDER A LONG TERM LEASE-BACK PURSUANT TO 5 GCA § 5210 AND 2 GAR § 3108,"** was on the 27th day of April 2017, duly and regularly passed.

Benjamin J.F. Cruz
Speaker

Attested:

Régine Biscoe Lee
Legislative Secretary

This Act was received by *I Maga'låhen Guåhan* this 28 day of APRIL, 2017, at 6:02 o'clock P.M.

POI J. RECHMIL H735

Assistant Staff Officer
Maga'låhi's Office

APPROVED:

EDWARD J.B. CALVO
I Maga'låhen Guåhan

VETO

Date:

Public Law No.

I MINA'TRENTAI KUÅTTRO NA LIHESLATURAN GUÅHAN
2017 (FIRST) Regular Session

Bill No. 58-34 (COR)
As amended by the Committee on Environment, Land, Agriculture and Procurement Reform; and substituted and further amended on the Floor.

Introduced by: Thomas C. Ada
FRANK B. AGUON, JR.
William M. Castro
B.J.F. Cruz
James V. Espaldon
Fernando Barcinas Esteves
Régine Biscoe Lee
Tommy Morrison
Louise B. Muña
Telena Cruz Nelson
Dennis G. Rodriguez, Jr.
Joe S. San Agustin
Michael F.Q. San Nicolas
Therese M. Terlaje
Mary Camacho Torres

AN ACT TO *AMEND* SUBSECTIONS (c) AND (d), AND *ADD* NEW SUBSECTIONS (k), (l), AND (m) TO § 58D103; AND TO *AMEND* §§ 58D105, 58D106, AND 58D108, ALL OF CHAPTER 58D, TITLE 5, GUAM CODE ANNOTATED, RELATIVE TO SOLICITING FOR THE CONSTRUCTION OF SIMON SANCHEZ HIGH SCHOOL UNDER A LONG TERM LEASE-BACK PURSUANT TO 5 GCA § 5210 AND 2 GAR § 3108.

BE IT ENACTED BY THE PEOPLE OF GUAM:

Section 1. § 58D103(c) and (d) of Chapter 58D, Title 5, Guam Code Annotated, are *amended* to read as follows:

"(c) Contract *shall* mean the various design, renovation or construction and financing agreements entered into by and between the education agency and the contractor following award.

(d) Contractor *shall* mean the authorized entity, which *shall* be the signatory on the Contract and *shall* be fully responsible for carrying out the design, renovation or construction, financing and maintenance of the education facility. The contractor may cooperate with another entity or entities in any manner the contractor deems appropriate to provide for the financing, design, renovation, construction or maintenance of the education facility envisioned by this Act."

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

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

(l) Responsive offer *shall* mean an offer that conforms, at bid opening, in all material respects to the solicitation. A responsive offer is an offer that unconditionally undertakes to provide the education facility the government intends to acquire as specified in the solicitation, and only on contract terms and conditions as are materially consistent with those specified in the solicitation, and that includes a complete breakdown of the 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.

(m) Responsive *shall* mean conforming in all material respects to the purchase description and contract terms contained in the solicitation. A

nonconforming offer is nonresponsive if it contains a material noncompliant term or condition that is in any respect prejudicial to other offerors, that is, the effect of such noncompliant term or condition on price, quantity, quality, delivery, or contractual terms specified in the solicitation is more than negligible."

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

"**§ 58D105. Procurement.**

The government of Guam or an education agency *shall* solicit through the Department of Public Works, in compliance with the Guam procurement law, for the renovation or construction of the education facility under a thirty (30) year lease-back arrangement, 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 solicitation *shall* specifically state the minimum specifications that will be required for a submitted proposal to be considered. The determination of responsible offerors and responsive offers *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 offerors and offers received based on the requirements set forth in the solicitation for renovation or construction of the education facility.

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.

The solicitation *shall* be issued within thirty (30) days of enactment of this Act 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.

Notwithstanding any other provision of law, the solicitation for the 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 other procurement pursuant to 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 solicitation for renovation or construction of the education facility.

The contract will also require that all major subcontracts be covered by a performance bond; the government of Guam and financing entities, or

bondholders, *shall* be the named obligee under the bond; the government of Guam *shall* have the sole right to call on the bid 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 education facility 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 government of Guam 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 contractor until and unless the entire education facility has received a full occupancy permit and the education agency accepts the project."

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

"**§ 58D108. Financing.**

To minimize the financing cost to the government of Guam, 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 Guam Economic Development Authority (GEDA) 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. Such alternative financing *shall* be approved by *I Liheslaturan Guåhan*. The purpose for the requirements of this Section is to assure the government of Guam pays the lowest possible interest rate so that the cost to the government of Guam of financing the design, renovation or construction of an education facility, amortized through the lease-back payments from the government of Guam 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.