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FILE NO OPA-PA: 16-007

PROCUREMENT APPEAL
IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

Core Tech International Corp.,

Appellant.

DOCKET NO. OPA-PA- 16-007
NOTICE OF APPEAL

ORIGINAL

1 CORE TECH INTERNATIONAL CORP. ("CORE TECH") hereby appeals a decision
2 rendered by the Department of Public Works ("DPW"), an agency of the Government of Guam, on
3 June 8, 2016, denying the Bid Protest raised by Core Tech regarding DPW's Request for Proposal for
4 the Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Public
5 Schools (Beginning with Simon Sanchez High School), Project No. 730-5-1055-L-YIG.

6
7 **I. APPELLANT INFORMATION**

8 Name: Core Tech International Corp.
9 Address: 388 S. Marine Corps Drive, Suite 400
10 Tamuning, Guam 96913
11

12 For purposes of this appeal, please direct correspondence to Core Tech's counsel, Joyce C.H.
13 Tang, Esq. (jtang@civilletang.com), Civile & Tang, PLLC, 330 Hernan Cortez Ave. Ste. 200,
14 Hagatna, Guam 96910 (Tel: 671/472-8868; Fax: 671/477-2511).

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16 **II. APPEAL INFORMATION**

- 17 A. Purchasing Agency: Department of Public Works
18 B. Contract No: 730-5-1055-L-YIG
19 C. Date of Contract: Notice of Intent to Award to GEF dated May 13, 2016
20
21 D. This appeal is made from DPW's June 8, 2016 denial of Core Tech's May 27, 2016
22 protest.
23 E. The name of competing bidders known to appellant were Guam Educational Facilities
24 Foundation, Inc. and Pernix Guam LLC.
25

26 **III. RELEVANT PROCEDURAL HISTORY**

27 On June 15, 2015, the Department of Public Works ("DPW") issued a Request for Proposals
28 for the Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of

1 Public Schools (Beginning with Simon Sanchez High School), Project No. 730-5-1055-L-YIG (the
2 “RFP”). The RFP contemplated a contract to be for a term of five (5) years to include services for
3 thirty-six (36) Guam Department of Education (“GDOE”) facilities as outlined in the Army Corps of
4 Engineering Assessment Report (Attached as A-14 to the RFP). *See*, DPW RFP No. 730-5-1055-L-
5 YIG, §2.0 at 7, attached as **Exhibit 1**, and Addendum 6, attached as **Exhibit 2**, at 7. Priority would
6 be given to Simon Sanchez High School (“SSHS”) and the development of a comprehensive capital
7 improvement plan. *Id.* Three companies submitted proposals. The appellant, Core Tech
8 International Corp. (“Core Tech”), Guam Educational Facilities Foundation, Inc. (“GEFF”), and
9 Pernix Guam LLC (“Pernix”).

10 The Bid Submission deadline was November 6, 2015. *See*, Addendum 6 at 1. The Bid
11 Opening date was November 20, 2016. *See*, Addendum 8, attached as **Exhibit 3**.

12 On December 24, 2015, DPW notified GEFF that it was ranked highest. *See*, Negotiating
13 Committee Memorandum dated May 13, 2016 (“Negotiating Committee Memo”), attached as
14 **Exhibit 4** at 1. The members of the Negotiating Committee team were Jon Fernandez
15 (Superintendent of GDOE), Mana Silva Taijeron (GEDA Deputy Director), and Felix C. Benavente
16 (DPW Deputy Director). *Id.* Negotiations with GEFF began on or about February 15, 2016. *Id.*

17 The On May 13, 2016, DPW issued its Notice of Intent to Award the RFP to GEFF. Core
18 Tech received the Notice of Intent to Award on the same day with a cover letter from the Deputy
19 Director, Mr. Felix Benavente. *See* Letter dated 5/13/16 to Core Tech with Notice of Intent to
20 Award and Attachments, attached as **Exhibit 5**. The May 13, 2016 letter states “[e]nclosed is a copy
21 of Department of Public Works May 13, 2016 Notice of Intent to Award, with attachments, [*sic*] the
22 contract to Guam Education Facilities Foundation, Inc. (“GEFF”). The May 13th letter received by
23 Core Tech included the following documents: (1) Notice of Intent to Award to GEFF, dated May 13,
24 2016; (2) Memorandum dated May 13, 2016, from the Negotiating Committee to the Procurement
25 Record file; (3) April 22, 2016 letter from GEFF to Mr. John F. Calanayan (DPW), (4) Program of
26 Spaces with the notation “Fanning/Howay Associates, Inc. Confidential”; (5) Simon Sanchez Cost
27 Comparison HS RS Means Cost Budget dated April 21, 2016 for GEDF prepared by Mr. Setiati; and
28 (6) Okkodo Simon Sanchez Cost Comparison. GEFF’s contract was not attached to the Negotiating

1 Committee Memo.

2 The Negotiating Committee Memo was prepared by the Negotiating Committee for the
3 procurement file. *See Id.* Core Tech filed a protest on May 27, 2016. *See* Core Tech’s 5/27/16
4 Protest, attached as **Exhibit 6**. DPW denied Core Tech’s protest on June 8, 2016. *See* 6/8/16
5 DPW’s Denial of Core Tech’s Protest, attached as **Exhibit 7**.

6
7 **IV. STATEMENT OF GROUNDS FOR APPEAL**

8 **A. Core Tech’s Appeal Was Timely Filed.**

9 Core Tech’s protest filed on May 27, 2017 was based on the Notice of Intent to Award, the
10 Negotiating Committee Memo, the RFP and Addenda, the Request for Information and Guam
11 Procurement Law and Regulations. The protest was filed within 14 days of Core Tech’s receipt of
12 the Notice of Intent to Award; thus, the protest was timely filed and the 5 GCA §5425(g) automatic
13 stay applies.

14 **B. DPW Violated 2 GAR §3114 When It Allowed GEF to Submit**
15 **Four New Proposals.**

16 The Negotiating Committee allowed GEF to submit four new proposals after the proposal
17 submittal deadline had passed, DPW violated Guam Procurement Law and the RFP. *See*, 2 GAR
18 §3114. Specifically, the Negotiating Committee Memo released by DPW states that the Negotiating
19 Committee “engaged in numerous meetings and communications during which GEF submitted four
20 (4) [new] separate proposals.” *Id.* (emphasis added). The price difference of GEF’s four new
21 proposals (“New Proposals”) was approximately \$25.6 million, ranging from a high of \$89,332,258
22 to a low of \$63,796,049. *Id.* at 1-2. The Negotiating Committee Memo further demonstrates that
23 there were significant design differences between the four proposals, noting that the low offer
24 “compromised the design parameters and needs for Simon Sanchez High School, and was not
25 considered to be the best value for Guam or GDOE.” *Id.* at 2. Ultimately, out of the four new
26 proposals, GEF’s new proposal of \$76,867,335 was chosen. *Id.*
27
28

1 The New Proposals were submitted after the proposal submittal deadline of November 6,
2 2015 and after review and evaluation of all proposals by the Evaluation Team, which among other
3 things, review and ranked the offerors based on the proposals submitted. Negotiating Team
4 Memorandum at 1-2. Core Tech did not know that GEFf submitted the New Proposals, and did not
5 receive a similar request for new proposals. Likewise, Core Tech believes that Pernix also did not
6 receive a request for new proposals. All of GEFf's New Proposals, including the one ultimately
7 agreed upon by DPW and GEFf, were entirely different proposals from the originally submitted
8 proposal in response to the RFP, and all four were submitted after the deadline of November 6, 2015.
9 Negotiation Committee Memo at pp. 1-2. Allowing GEFf to submitting New Proposals was a
10 violation of Guam Procurement Law and the RFP. *See*, 2 GAR §3114.

11
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13 Guam Procurement Regulations do not permit an offeror to submit new proposals after
14 evaluation and ranking is completed. *Id.* 2 GAR §3114(i)(1) allows for discussions with offerors in
15 order to evaluate all proposals timely submitted. 2 GAR §3114(i)(1). While DPW is authorized to
16 engage in discussions with offerors to "(A) determine in greater detail such offeror's qualifications,
17 and (B) explore with the offeror the scope and nature of the required services, the offeror's proposed
18 method of performance, and the relative utility of alternative methods of approach," nothing in the
19 procurement law permits the agency to solicit and/or receive new proposals after ranking. 2 GAR
20 §3114(i)(1).

21
22 Finally, §3114(l) authorizes negotiations between the agency and offeror
23 only with respect to price. *See*, 2 GAR §3114(l). The Negotiating Committee is required to follow
24 the restrictions in §3114(l), which provides, in relevant part, as follows:

25 (l) **Negotiation and Award of Contract.**

26 (1) **General.** The head of the agency conducting the procurement or a
27 designee of such officer shall negotiate a contract with the best
28 qualified offeror for the required services at compensation
determined in writing to be fair and reasonable.

1 (2) **Elements of Negotiation.** Contract negotiations shall be directed toward:

2 (A) making certain that the offeror has a clear understanding
3 of the scope of work, specifically, the essential requirements involved in providing the
4 required services;

5 (B) determining that the offeror will make available the necessary personnel
6 and facilities to perform the services within the
7 required time; and

8 (C) agreeing upon compensation which is fair and
9 reasonable, taking into account the estimated value of the
10 required services, and the scope, complexity, and nature of such
11 services. (emphasis added)

12 In denying Core Tech's protest in regards to the New Proposals, DPW relies on Section 2.0 of
13 the RFP, which states that "[o]nce a firm is selected, a scope of work and fee estimate will be
14 negotiated to perform the required services for Simon Sanchez High School." See, *Letter Response*
15 *from DPW* at 2, attached as **Exhibit 7**; RFP, §2.0 at 7. As a matter of law, the RFP must yield to
16 the enabling legislation and the regulations governing procurement, and thus the negotiations
17 between GEF and DPW must only be directed towards agreeing upon compensation. See, 2 GAR
18 §3114(l). The Negotiating Committee, in allowing GEF to submit the New Proposals and accepting
19 the New Proposals, exceeded its authority and violated §3114(l) of the Procurement Regulations.
20 The OPA should therefore invalidate the purported award to GEF. *Id.*

21 **C. The Negotiating Team Did Not Have the Authority to Modify the
22 RFP or to Accept GEF's New Proposal.**

23 GEF's final proposal attached to the Negotiating Committee Memo was non-responsive
24 because it did not comply with the technical requirements of the RFP. Furthermore, the Negotiating
25 Committee did not have the authority to modify the RFP, in this particular case, the technical
26 requirements relating to the Program of Spaces. See, **Exhibit 4**, Negotiating Committee Memo,
27 Program of Spaces at 10-12. The below modifications to the Program of Spaces and technical
28 requirements of the RFP were improper:

1. **The Number of Classrooms Was Reduced.** The number of classrooms in GEF's
final proposal (Program of Spaces) does not meet the requirements of the RFP. For example, GEF's
proposal includes only 18 of the 22 required English classrooms, 14 of the 15 required science

1 classrooms, 14 of 16 the required Social Studies classrooms, and 23 of the 34 required classrooms for
2 Fine Arts, PE, Health, World Languages, CFS, ROTC, Chamorro, and Business. GEFF's final
3 proposal also failed to match the requirements for administrative offices set forth in Addendum 6 to
4 the RFP. See **Exhibit 2**, Addendum 6 to RFP; **Exhibit 4**, Negotiating Committee Memo at 3 and
5 attached Program of Spaces.

6 2. **Task Orders For Remaining 35 Schools.** The RFP and the Ma Kâhat Act of 2013
7 required a proposal and contract inclusive of thirty-six (36) schools. The Negotiating Committee
8 Memo states regarding "important contract obligations" that, excluding Simon Sanchez High School,
9 "Task Order(s) will be issued for the remaining thirty-four (34) schools based on the priority and
10 needs of GDOE." See, **Exhibit 4**, Negotiating Committee Memo at 4. The RFP and Public Laws 32-
11 120 and 32-121 requires the offeror to provide for a total of thirty six (36) schools. See, **Exhibit 1**,
12 RFP, at §2.

13 3. **Reduction of Auditorium Seating.** The RFP requires a 700-seat Auditorium. See,
14 **Exhibit 2**, Addendum 6 to RFP. However, GEFF's final proposal proposed a 500 capacity
15 Auditorium. See **Exhibit 4**, Negotiating Committee Memo at pp. 2-3 and attached Program of
16 Spaces.

17 The Negotiating Committee did not have the authority to modify the RFP terms. In doing so,
18 and accepting GEFF's New Proposals, the Negotiation Committee violated the Guam Procurement
19 law.

20 These were significant modifications to the RFP. Core Tech estimates the reduction in class
21 rooms and in auditorium seating to be a reduction of approximately \$10 million from the
22 construction cost (not including any profit or developer fees).

23 Core Tech and Pernix were not accorded the "fair and equal treatment with respect to any
24 opportunity for discussions and revisions of proposals" required under Section 4.9.4.3 of the RFP and
25 Guam Procurement Law. DPW dismissed these claims as "frivolous." It is not a frivolous request
26 to require that a winning proposal be responsive to the RFP, and that the Negotiating Committee
27 comply with the RFP and Guam Procurement laws. By permitting GEFF to submit New Proposals
28 and modifying the RFP during contract negotiations, DPW not only violated procurement laws, but

1 gave GEFF an unfair advantage over all other offerors.

2 **D. The Offeror Must be Bondable and a 100% Performance**
3 **and Payment Bond**

4 The RFP states that all construction task orders shall contain contractual obligations which
5 include, among other things, Performance and Payment Bonds. *See*, RFP, §4.1. The *Ma Kahat Act*
6 *of 2013* provides that the construction contract *shall* contain contractual obligations typically found in
7 government of Guam construction contracts, including, but *not* limited to ... performance and
8 payment bonds....” 5 GCA §58D112.

9 A requirement of proposals submitted is that the *Offeror* must submit a bid bond for 15% of
10 the 100 million to be financed, *See*, §4.2.1.4, RFP).

11 The RFP also requires the *Offeror (Awardee)* to be bondable:

12 4.2.1.5. **The Offeror [awardee] must be bondable as required by this RFP**
13 **and by law. A one hundred percent (100%) performance and**
14 **payment bond must be obtained by Offeror or its prime**
15 **Contractor.** The bond must be issued by a company authorized to do
business on Guam, and listed in the U.S. Department of the Treasury’s
Listing of Approved Sureties (Circular 570).

16 RFP at 21 (emphasis added). The Negotiating Committee Memo states on page 4 that one of the
17 issues negotiated relates to “Guam Education Development Partners, Developer’s Subcontractor, is
18 required to provide a Performance Bond.” While the RFP requires all subcontractors to be bondable,
19 Sections 4.1 and 4.2.1.5 of the RFP (modified by Addendum 6 at page 5 replacing the word
20 “Offeror” with “Awardee”) contain the following requirements:
21

- 22 (1) The Awardee must be bondable; and
23 (2) A one hundred percent (100%) performance and payment bond must be posted by the
24 Awardee or its prime contractor.

25 If the Negotiating Committee modified the bonding requirements of the RFP in any manner,
26 such modification would be an impermissible modification of the RFP, and is a violation of the RFP
27 and the Guam Procurement laws.
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V. RELIEF REQUESTED BY CORE TECH

Core Tech requests a ruling from the OPA as follows:

1. If a contract has not yet been awarded, the proposed award to GEFV should be cancelled pursuant to 5 GCA § 5451(a) and rebid.
2. If a contract has been awarded to GEFV, it should be terminated under 5 GCA §5452(a) and rebid.
3. For an award of reasonable attorney's fees and costs of this protest and appeal; and
4. For such other relief that the OPA may determine is just and proper.
5. Core Tech requests a hearing on this matter.

Dated: June 23, 2016

By: 

Joyce C.H. Tang
Attorneys for Appellant
Core Tech International Corp.

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V. DECLARATION RE COURT ACTION

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of Public Accountability within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Dated: June 23, 2016

By: _____



Joyce C.H. Tang
Attorneys for Appellant
Core Tech International Corp.

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VERIFICATION

I, Conchita Bathan, am the CEO of Appellant CORE TECH INTERNATIONAL CORP., and I am authorized to make this verification. I have read the foregoing Notice of Appeal and, based on information and belief and to the best of my knowledge, the facts stated therein are true and correct. I declare under penalty of perjury under the laws of Guam that the foregoing is true and correct. This verification was executed on the 23rd of June, 2016.

By: 

CONCHITA BATHAN
CEO
Appellant Core Tech International Corp.