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PROCUREMENT APPEAL
IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

Core Tech International Corp.,

Appellant.

and

Guam Department of Public Works,

Purchasing Agency.

DOCKET NO. OPA-PA-16-007
DOCKET NO. OPA-PA-16-011

**REPLY MEMORANDUM IN SUPPORT OF
REQUEST FOR DETERMINATION THAT
GUAM EDUCATIONAL FACILITIES
FOUNDATION'S PROPOSAL WAS NON-
RESPONSIVE**

On October 14, 2016, the Department of Public Works ("DPW") and Guam Educational Facilities Foundation ("GEFF") submitted their respective oppositions to Core Tech International Corp.'s ("Core Tech") Request for Determination that GEFF's Proposal was Non-Responsive ("Request"). The arguments in both briefs overlap substantially, and are addressed herein in turn.

I. ARGUMENT

A. Core Tech's Request Is Not Untimely.

In its Opposition, GEFF argues that it is too late for Core Tech to raise questions regarding GEFF's identity because Core Tech should have known of the issue at the earliest on May 13, 2016,

1 when the Negotiating Committee issued its Notice of Intent to Award which attached the Negotiating
2 Committee's memorandum identifying GEFf as the entity that constructed Liguán Elementary
3 School, Adacao Elementary School, Astumbo Elementary School, and Okkodo High School
4 (collectively "the Four Schools"). *See*, DPW Opp. at 2; GEFf Opp. at 5. GEFf further argues that
5 Core Tech should have known about the issue at the latest on September 23, 2016, when Mana Silva
6 Taijeron, the last of the Negotiating Committee members to take the stand, testified regarding her
7 understanding of GEFf's identity. GEFf concludes that because more than fourteen (14) days have
8 elapsed since September 23, 2016, pursuant to 5 G.C.A. §5425, the time for filing a protest on the
9 issue of GEFf's identity has expired, DPW is foreclosed from considering such a protest and the
10 OPA would lack jurisdiction to consider the issue in the event of an appeal.

11 GEFf has ignored a key component of 5 G.C.A. §5425's requirement that a "protest shall be
12 submitted in writing within fourteen (14) days after such aggrieved person knows or should know of
13 the facts giving rise thereto." 5 G.C.A. §5425. The time for Core Tech's filing of a protest on the
14 basis of misrepresentations arising from GEFf's proposal has not yet started to run because as of the
15 date of this filing, GEFf has not disclosed its proposal even though the relevant portions would not
16 be information considered proprietary or confidential. Because this information has not been
17 disclosed to Core Tech, Core Tech has not reviewed the portions of GEFf's proposal that relate to
18 these issues.

19 Core Tech previously requested this information during the Hearing and in the Request, Core
20 Tech enumerated specific instances during the hearing in these consolidated appeals and in the media
21 wherein GEFf misrepresented that it was the same entity that constructed the Four Schools, and
22 testimony from various insiders during the procurement process, including evaluators Jon Fernandez,
23 Felix Benavente, and Mana Silva Taijeron and DOE Capital Improvement Project specialist Randy
24 Romero, who stated that they believed GEFf to be the same entity that constructed the Four Schools.
25 Moreover, in a video tape of the RFP Committee Meeting dated August 13, 2015, which was
26 produced in a September 8, 2016 supplement to the Procurement Record, Vince Leon Guerrero,
27 liaison from the Governor's Office in this procurement, questioned the identity of the Offeror when
28 he asked:

1 **Vincent Leon Guerrero:** Is that new, is that GEFF?

2 **Fred Nishihara:** Guam Education Development Foundation...

3 **Randy Romero [offscreen]:** That's GEFF. I believe that's GEFF.

4 **Vincent Leon Guerrero:** Can we clarify for DPW? That exact company name?

5 **John Calanayan [Offscreen]:** That's GEFF, I think.

6 **Vincent Leon Guerrero:** Because we're familiar with GEFF... the four schools...

7 **Unknown [offscreen]:** Correct.

8 At this time, Core Tech does not have the information that it needs to file a protest –a
9 definitive statement of GEFF's representations regarding its identity, its ownership and experience in
10 its proposal. Until either GEFF agrees to release this non-proprietary, non-confidential information,
11 or the OPA reviews the material *in camera* to determine whether GEFF responded to the RFP
12 representing that it was a different entity entirely, and orders the material released to Core Tech, the
13 facts necessary to form the basis of a protest are not available to Core Tech. Until such time as Core
14 Tech is afforded an opportunity to review the portion of GEFF's proposal regarding its experience,
15 team, identity and ownership, the time for filing a protest on the basis of GEFF's misrepresentations
16 in its Proposal will not begin to run, and a protest by Core Tech at this preliminary stage would not be
17 ripe.

18 **B. The OPA Has The Authority To Grant The Relief Requested By Core Tech.**

19 DPW and GEFF contend that the OPA does not have the authority to issue a finding that
20 GEFF's proposal was non-responsive. *See*, DPW Opp. at 1; GEFF Opp. at 1. In the Request, Core
21 Tech asked the Public Auditor to review GEFF's proposal *in camera* for the purpose of determining
22 whether GEFF's proposal was responsive to the RFP's sections regarding ownership, identity and
23 experience, and to unseal the portion of GEFF's proposal that addresses these issues. If the Public
24 Auditor declines to render a definitive statement regarding GEFF's responsiveness to the RFP's
25 requirements for information on these items, the Public Auditor may instead simply release this non-
26 proprietary, non-confidential information to Core Tech. The proposal is without question a part of the
27 procurement record, and while disclosure of the proprietary information contained in the proposal is
28 prohibited, there was evidence and testimony regarding the identity, ownership, experience and the

1 price proposal portions of GEFF's proposal. These were issues discussed during the hearing and the
2 continued withholding of the relevant sections of the proposal have hampered Core Tech's ability to
3 fully question witnesses about the issues and, if appropriate, to file a protest on the issue.

4 While GEFF claims in its Opposition Memorandum that its proposal clearly shows who the
5 offeror is, that it provided a certificate of formation and certificate of existence and good standing
6 from DRT in its proposal, and that, by virtue of its team members, it meets or exceeds the experience
7 requirements in the RFP, a fundamental misrepresentation by GEFF regarding its identity or
8 ownership would result in a non-responsive proposal. *See, In the Appeal of Pacific Data Systems,*
9 *Inc.* OPA Appeal No. OPA-PA-10-005. (*Decision*, January 12, 2011 at 18.)

10 Furthermore, Core Tech has shown that GEFF's track record in this solicitation is marked
11 with misrepresentations and deception. *First*, GEFF misrepresented itself to the Evaluation and
12 Negotiation Committees as the "GEFF" that constructed the Four Schools (Guam Education
13 *Financing* Foundation), despite the fact that it did not have the same owners or the same team
14 members. The GEFF team involved in the construction of the Four Schools had different owners
15 (Rick Inman, James Wilson and John Hand), a different contractor (Core Tech), and a different
16 designer of record (Taniguchi Ruth & Makio – Mike Makio). Based on cross examination
17 testimonies of Rick Inman on October 5, 2016, and Sean Easter on October 4, 2016, the purported
18 awardee GEFF team is comprised of completely different team members. Mr. Inman disclosed
19 during his cross-examination on October 5, 2016, that GEFF is owned by himself, James Wilson, and
20 John Calvo¹, with Sean Easter, who is not an owner, providing construction management services.
21 Guam Educational Development Partners, LLC ("GEDP"), an entity owned by Copper Ridge
22 Partners and FOL Guam, LLC ("FOL") (owned in turn by EC Development Group, LLC), as the sub-
23 developer will contract with Hensel Phelps as the contractor for Simon Sanchez High School,
24 although it is not clear which contractor will do the work for the remaining CCIP portion. The
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27 ¹ During his direct examination by Core Tech's counsel on September 16, 2016, Mr. Inman
28 testified that GEFF was owned by two individuals, himself and Jamie Wilson. The public records
available as of September 29, 2016, show Philip Flores and Emily Hernandez as the owners of
GEFF.

1 Offeror's designer of record will be Setiadi & Associates and Fanning Howey. For Mr. Inman to
2 represent that GEFF's team is the same as the team that constructed the Four Schools is a blatant
3 misrepresentation of the facts to the Public Auditor and to the public. Because GEFF's proposal was
4 sealed, Core Tech has no way of confirming exactly what was represented in GEFF's proposal,
5 compared to testimonies of GEFF witnesses during the hearing (which as noted above, have been
6 contradictory), its filings in this proceeding, and its various media releases.

7 *Second*, from the testimonies of Mana Silva Tajeron, Felix Benavente and Jon Fernandez,
8 members of the Evaluation and Negotiation Committees, and Randy Romero, one of the authors of
9 the RFP and DOE's procurement expert, Core Tech discovered that these key decision makers
10 believed they were evaluating Guam Education Financing Foundation, the GEFF that built the Four
11 Schools. Without an audio record of the evaluations and negotiations that the respective committees
12 conducted, and review of relevant portions of the GEFF Proposal, Core Tech does not know what
13 was stated in GEFF's Proposals which were submitted under seal in this proceeding.

14 Indeed, GEFF can easily resolve these issues by disclosing all or a portion of GEFF's
15 Proposal and attaching it to its Opposition Memorandum. The information contained in GEFF's
16 proposal will provide the necessary facts to determine whether GEFF misrepresented who it was, and
17 whether GEFF had misrepresented its experience to the evaluation and negotiation committee
18 members and Randy Romero during the evaluation and negotiation phases, leading to the eventual
19 award.

20 GEFF's misrepresentation of its identity is part of an ongoing pattern of deceit and
21 misrepresentation, which the hearing revealed. GEFF's misrepresentations during the procurement
22 process included the following:

23 1. GEFF's original proposal to construct Simon Sanchez High School was \$73.2 million.
24 The documents Core Tech obtained from Sunshine Act requests revealed the true cost was \$90.7
25 million. *See*, CT Exs. 9 & 54. GEFF's original offer was deceptive and non-responsive because it
26 excluded \$17.5 million in costs for the construction for Simon Sanchez High School.

27 2. GEFF initiated an IDIQ Contract designed to circumvent the RFP's \$100 million cap.
28 First, it had the Calvo Fisher & Jacob firm issue an opinion on March 31, 2016, stating that GEFF

1 could exceed the RFP limits of “upwards of \$160 million”. *See*, CT Ex. 6. On April 13, 2016,
2 Speaker Judith Won Pat sent a letter to Jon Fernandez opining that “there is no cap to the borrowing
3 capacity,”² which Mr. Fernandez did not solicit. Two weeks later, on April 22, 2016, counsel for
4 GEF, Champ Calvo and Janalynn Damian met with Mana Silva Taijeron, the Deputy Administrator
5 of GEDA, and discussed exceeding the \$100 million cap. *See*, CT Ex. 45. Ms. Taijeron told GEF in
6 no uncertain terms that the \$100 million cap in the RFP was the result of a fiscal policy decision and
7 could not be exceeded. Four days after the meeting with GEDA, Section 3.1 of the IDIQ Contract
8 was amended to allow the parties to exceed the \$100 million cap. *See*, CT Ex. 57. The final version
9 of the IDIQ Contract signed by DPW, GEF and DOE includes a provision to exceed the cap with
10 the written permission of the Director of DPW, without providing any justification or basis. *See*, CT
11 Ex. 40. Had this IDIQ Contract gone into effect, it would have effectively provided a blank check to
12 GEF.

13 DPW has argued that the offending language in Section 3.1 of the IDIQ Contract can be
14 deleted, and the contract can be awarded to GEF. This is not an acceptable solution. GEF’s
15 deception and acts to intentionally circumvent the RFP \$100 million limit and GEDA’s specific
16 instructions regarding the cap, support a finding of bad faith. If the Public Auditor were to allow the
17 award to GEF to go forward, there is no protection or assurance that GEF would not seek an
18 amendment of the IDIQ Contract in the future to exceed the \$100 million cap, because according to
19 GEF, DPW and Speaker Won Pat, the enabling laws do not have a cap despite the explicit \$100
20 million limit in the RFP and any decision issued by the Public Auditor on this issue.

21 3. GEF obtained DPW’s consent to subcontract the entire IDIQ Contract to the sub-
22 developer under and Sub-Developer Agreement with GEDP. *See*, §17.11, Ex. 40. In §17.11 of the
23 IDIQ Contract, DPW consented to the sub-contract without having seen or reviewed the
24 Development Agreement between GEF and GEDP. Mr. Inman testified during the hearing that that
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27 ² Had Ms. Won Pat testified, evidence would have been obtained regarding the source of the
28 request for her April 13, 2016 letter, why it was requested, and whether she met with or had
communication with GEF, the negotiation team members, DPW or other government agency
employees regarding the contents of the letter.

1 the Development Agreement would be drafted by DPW, and that because DPW is a party to the
2 agreement, it was acceptable for DPW to give prior consent in the IDIQ Contract to a Development
3 Agreement DPW has not reviewed or seen. During Core Tech's examination, Mr. Inman was
4 impeached and he later acknowledged that DPW was not a party and would not be drafting the
5 agreement.

6 All of these facts show that GEFf cannot be trusted. GEFf could resolve the question of its
7 responsiveness by disclosing all or a portion of its proposal regarding its experience, ownership and
8 organizational chart. It has not done so. The fact that GEFf refuses to do so, and has not rebutted
9 the allegations made by Core Tech regarding the misrepresentations to the Public Auditor and the
10 public, leads to the inescapable conclusion that GEFf has not been honest in its representations.
11 Moreover, GEFf should not be allowed to selectively disclose information it included in its proposal
12 that supports its argument, and then use confidentiality as a shield from having to disclose
13 information Core Tech is requesting. GEFf waived any confidentiality when it disclosed selected
14 content in the context of its Opposition. *See, e.g., Ortiz v. Green Bull, Inc.*, No. 10-CV-3747 ADS
15 ETB, 2011 WL 5553843, at *3 (E.D.N.Y. Nov. 14, 2011) ("Having used the Confidential
16 Documents affirmatively in support of its motion to dismiss, the Court cannot 'so order' an
17 agreement that would prevent the Plaintiff from relying on the Confidential Documents in its
18 opposition.") The Public Auditor can and should review the proposal *in camera* and unseal the
19 portions regarding GEFf's identity, ownership and experience.

20 21 **C. The Law Regarding Responsiveness of a Proposal Applies to RFPs.**

22 DPW and GEFf argue that responsiveness is only an issue in the contexts of Invitation for
23 Bids. GEFf has attempted to make this ridiculous argument before -- with regard to the procuring
24 agency's record-keeping obligations pursuant to 5 G.C.A. §5249(b). Section 5249(b) requires the
25 procuring agency to maintain "a log of all communications between government employees and any
26 member of the public, potential bidder, vendor or manufacturer...." GEFf has argued that DPW was
27 not required to maintain a log with regard to communications between the government and GEFf
28 which was not a potential bidder but rather an *offeror*. This logic yields an absurd result, whereby a

1 procuring agency is required to keep a record of government communications with the general public
2 but not actual offerors in a procurement. Clearly, Guam Procurement Law uses the term “bidders”
3 and “offerors” interchangeably in the context of general, non-specific- solicitation statutes. To hold
4 otherwise would exempt the RFP process from the bulk of Guam Procurement Law, to a degree such
5 solicitations would be essentially unregulated. While it is understandable why GEFf would prefer
6 less regulation of its actions, to so hold would undermine the Procurement Law’s policies of
7 transparency and accountability. The argument that Procurement Law applies only to IFB and not
8 RFPs is without merit and should be rejected.

9
10 **i. The RFP Requires DPW to Classify Proposals as Being Responsive or
Non-Responsive.**

11 Although GEFf is notably silent on this issue, DPW concedes that the RFP clearly requires
12 DPW to review and determine whether a proposal is responsive. Section 3.7 of the RFP provides:

13 All proposals will initially be classified as either “responsive” or “non-responsive”.
14 Proposals may be found non-responsive any time during the evaluation process or
15 contract negotiation if any of the required information is not provided or the proposal
16 is not within the plans and specifications described and required in the RFP. If a
proposal is found to be non-responsive, it will not be considered further.

17 CT1-000015. DPW Deputy Director, Felix Benavente, testified that he relied on his technical staff to
18 perform necessary functions related to opening of proposals. DOE Superintendent Jon Fernandez
19 testified that he deferred to DPW as the procuring agency to render determinations regarding
20 responsiveness, but admitted that responsiveness was not raised at any time during the procurement,
21 which GEDA Deputy Administrator Mana Silva Tajeron echoed during her testimony. Finally,
22 DPW Engineer Supervisor of Contracts John Calanayan testified that he did not himself perform any
23 responsiveness review, and that his role in the procurement was strictly as a record-keeper. It is clear
24 from the testimony during the hearing in this matter that the initial classification of whether proposals
25 are responsive was simply not performed.

26 DPW argues that GEFf’s identity and experience are not factors which may render a proposal
27 non-responsive, but are simply evaluation criteria. They are in fact both. Section 6 of the RFP,
28 entitled “Proposal Structure” requires specific statements on “Company Overview” and “Experience

1 of Offeror". CT1-000042. The Company Overview submission requires the offeror to identify key
2 team members with a brief background of their experience and education, the number of years the
3 company has been in business, all other names by which the offeror has been known and the length of
4 time known by each name. The Experience of Offeror section requires names, education,
5 qualifications, experience and the role of each key personnel, as well as current and former clients
6 and a description of work performed. Because these items are required portions of the proposal
7 structure, any failure to respond fully or accurately should result in a finding of non-responsiveness,
8 which may be made "if any of the required information is not provided."

9 Clearly, the RFP conditions acceptance of a proposal on its responsiveness, and any failure on
10 GEFF's part to accurately identify itself, its owners, and/or its experience—much less active
11 deception—would render GEFF's proposal non-responsive. Because the RFP requires a preliminary
12 determination of responsiveness, responsiveness was a clear requirement in this procurement.

13 **D. Core Tech's Proposal And Its Other Contracts With Government of**
14 **Guam Are Not At Issue.**

15 In a desperate attempt to deflect attention from the issues in this Request, GEFF attempts to
16 raise arguments regarding what Core Tech may or may not have included in its proposal. *See*, GEFF
17 Opp. at 10. First, GEFF, which (absent some unlawful disclosure) has not seen Core Tech's
18 proposal, has no good faith basis to even suggest that Core Tech's proposal does not meet the
19 requirements of the RFP. Second, this appeal is about GEFF's proposal, the mishandling of the
20 procurement by DPW, and the misrepresentations GEFF made to the government and the public.
21 This appeal has nothing to do with Core Tech's proposal or contracts relating to Tiyan and Agana
22 Bridge reconstruction or Route 1/Route 8 construction work. In its Opposition Memorandum, GEFF
23 refers to and attaches so-called DPW Exhibit R, a 2014 letter from DPW regarding the Agana Bridge
24 construction project, which the Hearing Officer rejected as evidence during the hearing in this appeal,
25 finding that it was irrelevant. Indeed, the Hearing Officer correctly rejected all attempts by DPW and
26 GEFF to introduce evidence on this issue. Core Tech's performance on other contracts was not
27 relevant during the hearing, and it is not relevant now.

28 GEFF cannot avoid responsibility for its actions by pointing fingers at other proposers.

1 GEFF's proposal, or at least one of them, was selected for the award in this procurement. It is
2 GEFF's proposal that must withstand legal scrutiny, and its attempts to divert attention away from its
3 actions only highlights them further, and underscores the importance of unsealing the information
4 Core Tech is requesting.

5 **II. CONCLUSION**

6 For the foregoing reasons, the Public Auditor should grant Core Tech's request for a
7 determination of non-responsiveness. Alternatively, the Public Auditor should unseal the portions of
8 GEFF's proposal related to the identity and experience of GEFF and its team.

9
10 RESPECTFULLY SUBMITTED this 21st day of October, 2016.

11
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