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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

OBJECTION TO DPW'S *NINTH* SUPPLEMENTAL TO PROCUREMENT RECORD AND REQUEST FOR AN ORDER REQUIRING DPW TO COMPLY WITH THE 5 GCA §5425(g) AUTOMATIC STAY

I. INTRODUCTION

Core Tech International, Inc. ("Core Tech") objects to the Department of Public Works' *ninth Supplemental to Procurement Record* as a vehicle to sneak new evidence into the record after the hearing on the consolidated appeals has closed. DPW's submission is not only untimely, but unauthorized. Allowing DPW to submit evidence more than a month after the close of evidence and conclusion of the hearing, without Core Tech having an opportunity to cross examine witnesses or otherwise challenge the evidence, would be highly prejudicial and would deny Core tech due process.

The consolidated hearing on this matter concluded on Friday, October 7, 2016. On that date, the parties rested their cases, the taking of testimony and evidence was closed, and the parties

delivered closing arguments based on the testimony and evidence elicited during the hearing. The only submittals permitted by the Hearing Officer after that date were the submission of Remedies Briefs and briefing on Core Tech's Request for Determination That GEFF's Proposal Was Non-Responsive.

On November 14, 2016, more than a month *after the closing of the hearing,* DPW brazenly attempted to provide additional evidence in the form of a *ninth Supplemental to Procurement Record* that includes twelve (12) emails between GEFF and DOE parties with attachments. DPW also submitted the Declaration of Thomas P. Keeler notifying the Public Auditor that three of the tapes of negotiation committee were not audible and could not be transcribed, and stating that DPW will be filing an Amended IDIQ Contract with the OPA. *See*, ¶10, Declaration of Thomas P. Keeler ("Keeler Dec."). The hearing on this matter has closed, no leave was sought or given to respond to the hearing, and no additional evidence should be permitted. DPW's filing is late, unauthorized and unjustified, and it should be disregarded and stricken.

Additionally, Core Tech requests that the Public Auditor issue an order directing DPW to obey the automatic stay provisions of 5 GCA §5425(g), and to cease and desist from proceeding with the solicitation, including but not limited to discussing, negotiating and amending the IDIQ Contract until final resolution of this case.

II. ARGUMENT

A. DPW HAS VIOLATED THE AUTOMATIC STAY PROVIDED IN 5 GCA §5425(g).

In his declaration, Mr. Keeler stated that DPW intends to submit an Amended Indefinite Delivery, Indefinite Quantity Contract to the OPA. *See*, ¶10, Keeler Dec. When was the IDIQ Contract amended? He does not say. Clearly it was not amended before Core Tech filed its protests, nor was it amended by the time of the hearing. Had it been amended before the hearing closed, DPW certainly was required to produce it during the hearing. The inescapable conclusion is that the amendment was or will be prepared after Core Tech filed its appeal, and most likely after the close of evidence. The fact that Mr. Keeler did not attach it to his declaration suggests that the Amended IDIQ Contract has not yet been finalized. What this means is that DPW has been in discussions and/or

negotiations with GEFF regarding the proposed Amended IDIQ Contract *after* Core Tech filed its protests. Any discussions, negotiations or efforts to amend the IDIQ Contract *after* the protests were filed were flagrant violations of the automatic stay required by §5425(g). Core Tech has repeatedly argued that DPW's actions throughout this procurement have shown a cavalier disregard of the Procurement Law, and the declaration of Mr. Keeler further proves that argument.

DPW and its counsel are fully aware that the automatic stay is in place. In fact, in its August 23, 2016 Agency Report, DPW erroneously cited the automatic stay as a justification for its failure to maintain the Procurement Record, arguing that "[b]ecause this process is stayed pending the protest determination, DPW has yet to enter all the communications in the log, *See,* Exhibit I, and organize the procurement record." *See,* August 23, 2016 Agency Report at 7. DPW previously argued that its hands are tied by the automatic stay when it was convenient for DPW, and now intends to fly in the face of the automatic stay to avoid the consequences of its and GEFF's actions regarding the negotiation of the IDIQ Contract. *See*, CT Ex. 57. These actions include amending §3.1 of the IDIQ Contract to circumvent the $100 million cap, DPW's consent to allow GEFF to subcontract the entire development agreement to GEDP, and permitting GEFF not comply with the bonding requirements of the RFP and Guam law.

GEFF and DPW are subject to the §5425(g) stay and there should be no further actions, including discussions, negotiations, amendments or modifications of the IDIQ Contract until such time the Public Auditor renders her decision and a finding that the stay no longer applies.

B. THE HEARING HAS CLOSED AND NO ADDITIONAL EVIDENCE OR TESTIMONY SHOULD BE ALLOWED.

On November 14, 2016, more than a month after the conclusion of the Hearing in this matter, DPW submitted its *ninth Supplemental Filing to Procurement Record* consisting of emails from February through May, 2016, *i.e.* emails readily available to DPW long before the hearing. DPW did to seek leave to submit these documents long after the close of evidence, and it does not argue that these emails are newly discovered, or that they were not available at the time of the hearing, or that they could not have been discovered with the exercise of due diligence. The email communications were between DOE representatives Jon Fernandez, Randy Romero and GEFF representatives, Sean

Easter. All three were witnesses who testified at the hearing, and communications from them were presented by them. These emails were available to GEFF and to DPW. A month after the hearing, DPW nonchalantly presents the emails and expects them to be admitted into the record. This is utterly improper and the filing should not be entertained.

Oblivious to the fact that the hearing concluded a month ago, DPW intends to submit even more evidence. In his declaration, Mr. Keeler, without leave and ignoring the fact that the adequacy of the Procurement Log was one of the key points in contention during the hearing, and that hours and hours of testimony were spent examining the patent deficiencies in the Procurement Log, blithely says that the Attorney General's Office intends to submit a completed Procurement Log and an Amended IDIQ Contract. *See*, ¶10, Keeler Dec. This should not be allowed. DPW was given more than ample opportunity to submit a complete Procurement Log, and it was unable to do so. The problem of course, as Mr. Calanayan admitted, is that DPW did not maintain a Procurement Log and that it could not be recreated. The accuracy and veracity of a document prepared after the hearing has closed would obviously be suspect. As Core Tech has repeatedly argued, any log created after the fact would fail to show communications such as phone calls and in-person meetings, as well as any communication whose source documents are not in DPW's possession—and based on DPW's continual supplementations of the Procurement Record, Core Tech has strong reason to believe such documents exist. If such a document were admitted into evidence, Core Tech would insist on the right to cross examine DPW on when and how the Log was finalized, and how DPW went about recreating information which Mr. Calanayan testified could not be recreated and was never compiled in the first place. The hearing is over and DPW's untimely submission should be ignored and stricken. Allowing DPW to submit evidence after the conclusion of a full blown evidentiary trial violates the basic tenets of due process.

The hearing in this Appeal spanned 11 separate days over the course of a month. The parties were given ample time and opportunity to introduce evidence. The Hearing Officer was very generous in allowing new evidence to be introduced even late in the hearing. There came a point where the Hearing Officer ruled that no further evidence would be permitted. That point came during closing arguments on October 7, 2016, when GEFF's counsel attempted to introduce new evidence in

the form of video testimony from the principals of GEFF. The Hearing Officer denied the request on the basis that the testimony was not part of the record as they had not been provided during the hearing. A partial excerpt is as follows:

Mr. Aguigui:	Its statements arguments from principals –
Ms. Tang:	Is it part of the record?
HO Camacho:	But were these from the records?
Mr. Aguigui:	It's not evidence that was on the record, but it's argument.
Ms. Tang:	We're going to object to that. I think it should be –
HO Camacho:	You understand – okay, this is closing arguments made by the parties' attorneys?
Mr. Aguigui:	Okay, so are you making – so, this is not something that is going to be allowed then – I mean closing –
HO Camacho:	I'm not going to allow witnesses to testify again on closing.
Mr. Aguigui:	Okay. It's not testimony. But if the hearing officer doesn't want to Allow it, it's okay.
HO Camacho:	No, I'm not going to go with that; okay?

See, *Partial Transcription of Hearing before the Office of Public Accountability*, October 7, 2016, marked and attached hereto as **Exhibit A**.

DPW should not be permitted to submit new evidence now, over a month after the hearing's conclusion, unless the hearing is reopened and Core Tech is given an opportunity to fully address the evidence and question witnesses about it. DPW has already supplemented the record eight times on 7/12/16, 7/15/16, 8/3/16, 9/6/16, 9/9/16, 9/8/16, 9/21/16, and 9/27/16. DPW's November 14, 2016 Supplement is its *ninth* supplement to the Procurement Record, and in the Keeler Declaration, DPW stated that it intends to supplement the record a tenth time. Yet DPW continually asserts that the Procurement Record is complete. The information in the ninth supplement is not new information; it includes emails from February through May 2016, well before this Appeal was initiated. If anything, the mere fact that DPW continues to attempt to supplement the Procurement Record is further proof that DPW has not kept a sufficient procurement record. It is impossible for Core Tech or any other

party to know what other information DPW has failed to produce in connection with this procurement.

The Notice of Hearing in this Appeal vouchsafed Core Tech's right to subpoena and cross-examine witnesses. *See,* Notice of Hearing, filed on July 13, 2016; August 11, 2016 Notice of Re-Scheduled Hearing ("You may be present at the hearing; may be, but need not be, represented by counsel; may present any relevant evidence; and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Hearings Officer for Procurement Appeals, Office of the Public Auditor"). The submission of documents by DPW after the close of the hearings in this appeal completely vitiates Core Tech's right to subpoena the witnesses who have knowledge of the documents and to cross-examine these witnesses regarding the documents. As the Armed Services Board of Contract Appeals observed in the context of the post-hearing submission of evidence where there was express authorization to re-open:

> The time for testing of proof is at the time of trial, and the rights of the litigants should not be held in abeyance in order that hindsight may provide a more accurate appraisal of the evidence. *Locklin v. Switzer Brothers, Inc.*, 299 F.2d 160 (9th Cir. 1961). *See, Ramsey v. United Mine Workers of America*, 481 F.2d 742 (6th Cir. 1973) *cert. den.* 414 U.S. 1067 (1973). Therefore, attempts to introduce evidence after trial are not viewed with favor by boards of contract appeals or by the courts. *U.S. Optics Corporation, supra; Lockheed Shipbuilding and Construction Company*, DOT CAB No. 73–36C, 76–1 BCA ¶11,698. *See, Stanley Consultants, Inc. v. H. Kalicak Construction Co.*, 383 F. Supp. 315 (E.D. Mo. 1974, attempt to correct evidence in post-trial brief).
>
> Reopening of the trial to admit additional evidence invites serious potential evils. The practice unnecessarily protracts the adjudicative process and undermines the objective of achieving a speedy and inexpensive determination of every action. Such practice may also have the effect of dispensing with the trial already concluded by offering one party the opportunity to retry its case and to correct what, through hindsight, it now considers errors or oversights in its own conduct of the case. *See, Kollsman Instrument Corp.*, ASBCA Nos. 8633 and 8635, 65–1 BCA ¶4740 (on recon.). Moreover, the admission of documents offered by one party after trial places the other

> party at a serious disadvantage and denies the other party its opportunity to subject the proof 'to the evidentiary tests and challenges that cross-examination and the other incidents of trial provides.' *Lockheed Shipbuilding and Construction Company, supra. See, Ramsey v. United Mine Workers of America, supra.*

Appeal of Gulf & W. Indus., Inc., ASBCA No. 21090, 78-1 B.C.A. (CCH) ¶ 12988, 1977 WL 2788 (Dec. 23, 1977).

In addition to Core Tech's right to due process, the concerns raised in *Appeal of Gulf W. Industries* should apply here where the Hearing Officer had previously refused to allow the introduction of evidence after the hearing was closed and where the appellant has been promised the right to cross-examine witnesses and necessarily to subject the documents "to the evidentiary tests and challenges that cross-examination and the other incidents of trial provides." *Ibid.* (internal marks and citation omitted).

III. CONCLUSION

For the foregoing reasons, Core Tech respectfully requests that:

1. The Public Auditor order DPW to comply with the automatic stay and refrain from discussing, negotiating or amending the IDIQ Contract until such time the automatic stay is lifted and there is final resolution of these appeals;

2. The Public Auditor order DPW to refrain from submitting or filing additional evidence in the form of supplemental procurement file or records, declarations or affidavits; and

3. The Public Auditor strike and disregard all supplemental filings after closing of evidence from DPW.

Respectfully submitted this 16th day of November, 2016.

By: _____

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

EXHIBIT A

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of	)Docket Number OPA-PA 16-007
	)Docket Number OPA-PA 16-011
CORE TECH INTERNATIONAL CORP.,	)
	)
Appellant,	)
	)
and	)
	)
GUAM DEPARTMENT OF PUBLIC WORKS,	)
	)
Purchasing Agency.	)
	)

PARTIAL TRANSCRIPTION OF HEARING

BEFORE THE

OFFICE OF PUBLIC ACCOUNTABILITY

October 7, 2016

ORIGINAL

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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of	) Docket Number OPA-PA 16-007
	) Docket Number OPA-PA 16-011
CORE TECH INTERNATIONAL CORP.,	)
	)
Appellant,	)
	)
and	)
	)
GUAM DEPARTMENT OF PUBLIC WORKS,	)
	)
Purchasing Agency.	)
	)

Partial transcription of Hearing Before the Office of Public Accountability in the **Appeal of Core Tech International Corp. versus Guam Department of Public Works** of Monday, October 7, 2016, at the Office of Public Accountability, Hagatna, Guam, pursuant to Notice. That at said time and place there transpired the following.

HAGATNA, GUAM, THURSDAY, OCTOBER 7, 2016

MR. AGUIGUI: Okay. I just have one more thing to show, some parting thoughts from --

HEARING OFFICER CAMACHO: Mr. Aguigui?

MR. AGUIGUI: Yes.

HEARING OFFICER CAMACHO: Is this part of the evidentiary record?

MR. AGUIGUI: It's statements arguments from principals --

MS. TANG: Is it part of the record?

HEARING OFFICER CAMACHO: But were these from records?

MR. AGUIGUI: It's not evidence that was on the record, but it's argument.

MS. TANG: We're going to object to that. I think it should be --

HEARING OFFICER CAMACHO: You understand -- okay, this is closing arguments made by the parties' attorneys?

MR. AGUIGUI: Okay, so are you making -- so, this is not something that is going to be allowed then -- I mean closing --

HEARING OFFICER CAMACHO: I'm not going

to allow your witnesses to testify again on closing.

MR. AGUIGUI: Okay. It's not testimony. But if the hearing officer doesn't want to allow it, it's okay.

HEARING OFFICER CAMACHO: No, I'm not going to go with that; okay?

MR. AGUIGUI: So, GEFF concludes its closing arguments.

HEARING OFFICER CAMACHO: Thank you very much.

HAGATNA, GUAM, THURSDAY, OCTOBER 7, 2016

REPORTER'S CERTIFICATE

I, **George B. Castro**, Court Reporter, do hereby certify the foregoing 4 pages to be a true and correct transcript of the audio recording provided to me in the within-entitled and numbered case at the time and place as set forth herein.

I do hereby certify that thereafter the transcript was prepared by me or under my supervision.

I further certify that I am not a direct relative, employee, attorney or counsel of any of the parties, nor a direct relative or employee of such attorney or counsel, and that I am not directly or indirectly interested in the matters in controversy.

In testimony whereof, I have hereunto set my hand and seal of Court this 15th day of November, 2016.

George B. Castro

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CHANGES TO TRANSCRIPTION

Page	Line	Change	Reason

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