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7 **PROCUREMENT APPEAL**
8 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

11 In the Appeal of

12 Core Tech International Corp.,

14 Appellant.

DOCKET NO. OPA-PA- 17-009

NOTICE OF APPEAL

28 **ORIGINAL**

1 CORE TECH INTERNATIONAL CORP. (“Core Tech”) hereby appeals the decision
2 rendered by the Department of Public Works (“DPW”), an agency of the Government of Guam, on
3 September 29, 2017, denying Core Tech’s protest filed on September 7, 2017, relating to the
4 Invitation for Bids for the Lease Financing for Design, Renovation, Rehabilitation, Construction and
5 Maintenance of Simon Sanchez High School, Project No. 730-5-1057-L-YIG issued by DPW on July
6 7, 2017.

7
8 **I. APPELLANT INFORMATION**

9 Name: Core Tech International Corp.

10 Address: 388 S. Marine Corps Drive, Suite 400
11 Tamuning, Guam 96913

12 For this Appeal, please direct all correspondence to Core Tech’s counsel, Joyce C.H. Tang
13 (jtang@civilletang.com) and Leslie A. Travis (ltravis@civilletang.com), Civile & Tang, PLLC, 330
14 Hernan Cortez Ave. Ste. 200, Hagåtña, Guam 96910 (Tel: 671/472-8868; Fax: 671/477-2511).

15
16 **II. APPEAL INFORMATION**

17 A. Purchasing Agency: Department of Public Works

18 B. Contract No: Not applicable.

19 C. Date of Contract: Not applicable.

20 D. This appeal is made from DPW’s September 29, 2017 denial of Core Tech’s
21 September 7, 2017 Protest (the “Protest”). *See, Protest, Exhibit A* attached hereto.

22 E. The names of competing bidders are not known to Appellant at this time.

23
24 **III. RELEVANT PROCEDURAL HISTORY**

25 On July 7, 2017, the Department of Public Works (“DPW”) issued an Invitation for Bids for
26 the Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Simon
27 Sanchez High School, Project No. 730-5-1057-L-YIG (the “IFB”). *See, IFB, Exhibit 1 to the Protest,*
28 *attached as Exhibit A hereto. On July 20, 2017, Core Tech submitted its Second Request for*

1 Information (“RFI”) which contained fifty-three (53) questions from Core Tech regarding the IFB,
2 requesting clarification of, among other things, provisions contained in the IFB and contracts required
3 to be included in the IFB. *See, RFI*, Exhibit 2 to the *Protest*, Exhibit A attached as **Exhibit A** hereto.
4 DPW responded to Core Tech’ RFI in its *Addendum 6* to the IFB on August 24, 2017. *See,*
5 *Addendum 6*, Exhibit 3 to the *Protest*, attached as **Exhibit A** hereto.

6 Core Tech’s raised two (2) claims in its Protest. *See, Protest, **Exhibit A**.* The first claim
7 concerned DPW’s failure of include in the IFB critical contract documents, even after DPW was
8 informed by Core Tech in the RFI that the following critical contract documents were missing: (1)
9 the Formal Contract between the Government of Guam and the awardee of the IFB, (2) Lease
10 Agreement, (3) Maintenance Agreement, (4) Ground Lease, (5) Project Development Agreement, and
11 (6) Financing Documents (“Omitted Contracts”). *See, RFI*, Exhibit 2 to the *Protest*, attached as
12 **Exhibit A** hereto.

13
14 The second claim was that DPW’s termination of Core Tech was pretextual, and that DPW’s
15 interpretation of whether a “record of default” contained in the Instruction to Bidders at Section 9.i
16 requiring the Contractor to submit “Record of Past performance of government contracts including
17 record of default and non-payment of obligations” includes default disputed by the bidder and for
18 which there has not been a final adjudication through Guam courts, including all appeals. *See,*
19 *Addendum 6* at pp. 7-8, Exhibit 3 to the Protest, attached as **Exhibit A** hereto.

20
21 DPW’s response was that “Record of Default includes but is not limited to written
22 Determinations made by DPW or the Procurement Officer.” *Id.* This means that, even a notice of
23 default that is being contested administratively or in the Courts, for which there has not been a final
24 adjudication may be considered by evaluators in their determination of a bidder’s competency. As
25 discussed in Core Tech’s protest, DPW’s novel interpretation of the term “Record of Default” is
26 legally incorrect and extremely prejudicial to bidders’ due process rights. In this case – not by
27 coincidence -- DPW timed the issuance of the Notice of Default/Termination of Core Tech in a
28

1 separate DPW procurement, the Route 1/Route 8 Intersection Improvements and Agana Bridges
2 Replacement Project No. GU-DAR-T01(001) (the “Agana Bridges Project”) within twenty-four (24)
3 hours of issuing Addendum 6 – the Addendum 6 which contained DPW’s novel interpretation of the
4 term “Record of Default.” *Id.* It is against this factual background that DPW came up with the
5 pretext for trying to disqualify Core Tech on the contrived grounds that Core Tech was in default.
6

7 DPW issued its Agency Decision on September 29, 2017, denying Core Tech’s protest on
8 grounds of timeliness and the merits; but, nevertheless, agreed to “cancel and revise the IFB” in
9 response to both claims. *See, Agency Decision, Exhibit B* attached hereto.

10 Core Tech hereby appeals DPW’s denial of its second claim.

11 **IV. STATEMENT OF GROUNDS FOR APPEAL**

12 **A. Core Tech’s Appeal was Timely Filed.**

13 Core Tech timely filed its Protest on September 7, 2017, within fourteen (14) days of
14 receiving *Addendum 6*, when it became aware of the facts giving rise to its protest; thus, the Protest
15 was timely filed and the 5 GCA §5425(g) automatic stay applies.
16

17 **B. DPW Incorrectly and Improperly Included a Notice of Default Regarding** 18 **Claims for Which There Has Not Been Final Administrative or Judicial** 19 **Adjudication in its Interpretation of “Record of Default.”**

20 **1. Factual Background**

21 The IFB was issued on July 7, 2017, by DPW pursuant to Public Law 34-19, that was passed
22 requiring DPW to the Department of Public Works (“DPW”) to issue an Invitation for Bids for the
23 Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Simon
24 Sanchez High School, Project No. 730-5-1057-L-YIG. *See, IFB*, Exhibit 1 to the *Protest*, attached as
25 **Exhibit A** hereto. On July 20, 2017, Core Tech submitted its RFI, requesting clarification of, among
26 other things, provisions contained in the IFB and contracts required to be included in the IFB. *See,*
27 *RFI*, Exhibit 2 to the *Protest*, Exhibit A attached as **Exhibit A** hereto. In Question No. 32 of Core
28 Tech’s RFI, Core Tech asked DPW to provide clarification regarding Instruction to Bidders. DPW’s
response to RFI No. 32 is set forth below:

1
2 RFI # 32.

3 The Instructions to Bidders, Section 9.i at p. 11 of the ITB requires the Contractor to submit "Record of past performance of government contracts including record of default and nonpayment of obligations."

4 a. Please confirm whether "record of default" includes defaults alleged by the
5 of obligations" refers to payments by government that are disputed by the Contractor
6 and for which there has not been a final adjudication through Guam courts, including all

7 appeals.

8 Answer:

9 Record of Default includes but is not limited to written Determinations made by DPW
10 or the Procurement Officer. Nonpayment of obligations means payments by Contractor
11 to vendors and subcontractors. All disputes must be disclosed with a statement on the
12 final or pending status.

13 See, Addendum 6 at pp. 7-8, Exhibit 3 to the Protest, attached as Exhibit A.

14 On August 23, 2017, DPW issued its Notice of Termination/Default of Contract in the Route
15 1/Route 8 Intersection Improvements and Agana Bridges Replacement Project No. GU-DAR-
16 T01(001)¹. Less than twenty-four hours later, DPW issued the Addendum, which contained DPW's
17 response to RFI No. 32, with the novel interpretation of "Record of Default." DPW approved and
18 accepted both bridges, and opened them for public use – the Paseo bridge was accepted and opened
19 in July 2014, and the Bank of Guam bridge was accepted and opened on March 18, 2016². More than
20 three (3) years have passed since DPW accepted the Paseo bridge, and seventeen (17) months have
21 passed since DPW accepted the Bank of Guam bridge. Substantial completion was achieved at the
22 latest on March 18, 2016, when the Bank of Guam bridge and connected roadway were opened for
23 public use. The issues regarding the validity of the Notice of Termination and Default, and when
24 substantial completion was achieved on the Agana Bridges Project are important issues that will be

25
26 ¹ The Route 1/Route 8 Project involves the roadway connecting two Hagåtña bridges, one located
27 near Paseo ("the Paseo bridge") and the other near the Bank of Guam building ("the Bank of
28 Guam bridge") (the "Agana Bridges Project")

² [http://www.guampdn.com/story/news/2016/03/18/hagt-bridge-reopens-after-closed-almost-2-
years/81952086/](http://www.guampdn.com/story/news/2016/03/18/hagt-bridge-reopens-after-closed-almost-2-years/81952086/)

1 addressed in Core Tech's separate appeal of the Notice of Termination/Default of Contract to the
2 Public Auditor.

3 Despite the fact that Core Tech turned the Agana Bridges Project over to DPW in July 2014
4 and March 2016, in its August 23, 2017 Notice of Default/Termination, DPW demanded that Core
5 Tech "peacefully surrender and leave the Project site," and threatened Core Tech with criminal
6 prosecution if it did not comply: "[a]ny attempt to act or perform otherwise than as ordered herein
7 shall be construed as being intentionally hostile, and may subject [Core Tech] to criminal
8 prosecution."
9

10 Shockingly, Felix Benavente, the Deputy Director who signed the Core Tech Notice of
11 Termination/Default of Contract admitted in a Whatsapp response that he

12 signed the letter as presented to me by Atty Keeler. I made no amendments. The draft
13 as presented became the final version as I know it. I have nothing to provide re this
14 [Sunshine Act] request. I did not originate this letter, nor did I make notes about it.

15 See, Whatsapp Messages DPW000125-127, DPW Sunshine Act Production 10.6.2017, attached as
16 **Exhibit C** hereto.

17 When he was asked if he reviewed any documents in connection with the issuance of the
18 Notice of Termination/Default of Contract, he replied:

19 No. Just the final draft/letter. I held it for several days wanting to discuss it.
20 Tom advised me that deadline for Surety closing within days. Had to be sent out or
21 DPW/GovGuam will lose opportunity for claims per agreement/contract.

22 *Id.*

23 These types of actions by Government officials are so transparently designed to disqualify a
24 bidder that the Government has a dispute with, and wants to punish. The history of the dispute
25 between DPW and Core Tech with respect to the Simon Sanchez procurement is well known to
26 Public Auditor. The timing of the issuance of the Notice of Default/Termination letter and DPW's
27 response to RFI #32 in Addendum 6 demonstrate that DPW Deputy Director Felix Benavente and
28 other individuals working with Mr. Benavente at DPW, acted in a manner to intentionally

1 discriminate and retaliate against Core Tech for successfully pursuing protests and appeals relating to
2 DPW's numerous violations of Guam Procurement Law in connection with the Simon Sanchez High
3 School RFPs.

4 **2. "Record of Default" Should Not Include Notices of Default.**

5 It is improper for DPW to consider a Notice of Default or Notice of Termination in a bidder's
6 "Record of Default," when there has not been a final administrative and judicial adjudication of the
7 claims, before all appeals have been exhausted, and before the time to file such appeals have expired.
8 Core Tech has demonstrated twice in previous SSSH solicitations that DPW has violated Guam
9 Procurement Law. A bidder's competency should not hinge on DPW's unverified assessment of a
10 bidder's purported wrongdoing. In its September 29, 2017 Agency Decision, DPW indicated that it
11 would cancel and reissue the IFB, and clarify its response to RFI #31. *Agency Decision* at 4.
12

13 DPW claims that the forthcoming IFB:

14 will allow bidders to provide information (e.g. date contract signed, scheduled date of
15 completion, disclosure of notices of default, determinations made by a governmental
16 agency, any notices of appeal by the contractor, and provide bidder(s) an opportunity
17 to explain why they believe any notices of default were improperly issued and are
18 being contested and what action the bidder(s) has or intends on taking) concerning any
completed or current project.

19 *Id.* DPW intends to continue to require bidder disclosure of notices of default in the reissued IFB,
20 and seems to believe that allowing a bidder an opportunity to explain its position on a Notice of
21 Default will resolve the clear impropriety of allowing potential disqualification of a bidder based on
22 an unadjudicated claim. Mere accusations or complaints do not constitute evidence of the conduct
23 charged. *Dent v. U.S. Tennis Ass'n, Inc.*, 08 Civ. 1533(RJD)(VVP), 2008 WL 2483288 at *3
24 (E.D.N.Y. June 17, 2008) ("[U]nproved allegations of misconduct are not proof of anything.").
25 Allowing evaluators to consider such notices would effectively punish a bidder for an unproven
26 accusation, and deprive bidders like Core Tech of a fair opportunity to be evaluated equally against
27 other bidders.
28

