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 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS
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Attorneys for the Government of Guam

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

IN THE APPEAL OF:)	DOCKET NO. OPA-PA-17-009
)	
CORE TECH INTERNATIONAL CORP.,)	DEPARTMENT OF PUBLIC WORKS
)	AGENCY REPORT
)	
APPELLANT.)	

Comes now the Guam Department of Public Works (“DPW”) by and through its counsel and files its Agency Report and Statement pursuant to 2 GAR § 12105(g) in response to appeal by Core Tech International Corp. (“Core Tech”).

I. APPELLEE INFORMATION

Name: Department of Public Works
 Address: 542 N. Marine Corps Drive
 Tamuning, Guam 96913

///

ORIGINAL

For purposes of this appeal, please direct correspondence to DPW's counsel, Thomas P. Keeler (tkeeler@guamag.org) and Shannon Taitano (staitano@guamag.org), Guam Attorney General's Office, 590 S. Marine Corps Drive, Suite 802, ITC Building • Tamuning, Guam 96913. Tel: 475-3324; Fax: 472-2493.

II. APPEAL INFORMATION

- A. Purchasing Agency: Department of Public Works, Government of Guam
- B. Project No: 730-5-1057-L-YIG
- C. Date of Invitation to Bid ("IFB"): July 7, 2017. *See, IFB, Exhibit A* attached hereto.
- D. Date of Contract: N/A
- E. This appeal is made by Core Tech International Corp. ("Core Tech") from the Department of Public Works September 29, 2017 decision *See, Agency Decision, Exhibit B* of Core Tech's September 7, 2017 Protest (the "Protest"). *See, Protest, Exhibit C* attached hereto.
- F. The names of the prospective companies listed on the proposal package pickup list are Zhong Ye Inc. (Guam), Core Tech Int'l Corp., and Hensel Phelps.
- G. This Procurement has been canceled pursuant to 2 GAR, Div. 4, § 3115.

III. RELEVANT BACKGROUND

Public Law 34-19 was passed into law on June 7, 2017. *See, P.L. 34-19*, attached as **Exhibit D**. Public Law 34-19 amended the *MA KAHAT ACT OF 2013* (the "Act"). The law authorized the government to solicit for the renovation or construction of Simon Sanchez High School ("SSHS") and to award the contract to the "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.” *See, P.L. 34-19:3.*

On July 7 2017, the Department of Public Works (“DPW”), Capital Improvements Division (“CIP”), issued an Invitation to Bid Project No. 730-5-1057-L-YIG Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Simon Sanchez High School. *See, IFB, Exhibit A.* The IFB, as authorized by the Act, contemplated that the contract be awarded to a responsible offeror with a responsive offer with the lowest annual leaseback rate for a thirty (30) year term.

Core Tech filed a written protest on September 7, 2017, asserting two (2) claims. *See, Protest, Exhibit C.* Core Tech’s first claim was that the IFB failed to include all applicable contractual terms and conditions as required by Guam’s Procurement Law. Its second claim was that it would be improper for DPW to consider a notice of default/termination as a “Record of Default” in the determination of responsibility. DPW issued its Agency Decision on September 29, 2017, agreeing to revise the IFB with regard to the first claim and denying the second claim. *See, Agency Decision, Exhibit B.* DPW canceled the IFB on October 2, 2017 to revise and reissue considering Core Tech’s concerns with the IFB. Core Tech appealed DPW’s denial of the second claim as set forth in the Notice of Appeal and Protest.

III. CORE TECH’S DEFAULT AND TERMINATION ON THE AGANA BRIDGE PROJECT IS A MATTER OF RECORD

A. Core Tech’s Appeal was not timely filed.

Core Tech’s Appeal correctly recites that it has filed a number of earlier protests. As such, Core Tech is, or should be, familiar with DPW CIP’s standard procurement documents. Specifically, Core Tech knows, or should know, that DPW CIP does include a request of past performance of government contracts including record of default. As such, Core Tech was required to file its appeal on or before July 24, 2017, or within fourteen (14) days of DPW CIP’s issuance of the IFB. *See,*

Agency Decision, Exhibit B.

B. Record of Past Performance of Government Contracts that is Consistent with Guam Procurement Law and Rules and Regulations.

Public Law 34-19 directs DPW to award a contract for the renovation or reconstruction of SSSH to a responsible offeror with a responsive offer with the lowest annual leaseback rate. Public Law 34-19 defines responsible offeror, responsive offer and responsive. A responsible offeror means 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. *See P.L. 34-19:2.*

The determination of bidder responsibility involves an inquiry into the bidder's ability and will to perform the subject contract as promised. Responsibility concerns how a bidder will accomplish conformance with the material provisions of the contract; it addresses the performance capability of the bidder, and normally involves an inquiry into the potential contractor's financial resources, experience, management, past performance, place of performance, and integrity. *Blount, Inc. U.S., 22 Cl.Ct. 221 (1990)*. See also, *Federal Elec. Corp. v. Fasi, 56 Haw. 54 (1974)*. "Responsibility ... refers to a bidder's apparent ability and capacity to perform the contract requirements by the government and is determined not at bid opening but at any time prior to award based on any information received by the agency up to that time." See, *Peterson Accounting-CPA Practice, Comp Gen Decision No. 108,524 (1994)*.

DPW should be able to request information or documents evincing bidder's responsibility. "Contracting officers are generally given wide discretion in making responsibility determinations and in determining the amount of information that is required to make a responsibility determination." *Commc'n Constr. Servs., Inc. v. United States, 116 Fed. Cl. 233, 272 (2014)*

(consideration of past performance in the determination of responsibility). “The prospective contractor shall supply information requested by the Procurement Officer concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the Procurement Officer shall base the determination of responsibility upon any available information or may find the prospective contractor nonresponsible if such failure is unreasonable.” 2 *GAR Div 4 § 3116(b)(2)(B)*.

Record of past performance of government contracts illustrates whether an offeror or bidder has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that will assure good faith performance. “[P]rocuring agencies may, in the context of a comparative evaluation of proposals, use traditional responsibility criteria, such as considering an offeror's financial resources and past performance” *PlanetSpace, Inc. v. United States*, 92 Fed. Cl. 520, 546 (2010). A record of a termination of default should be included in a bidder’s record of past performance. A dispute of a termination of default also should be included in a bidder’s record of past performance to include the stage of dispute i.e., agency level, OPA, superior court or supreme court. DPW is within its authority to request the information.

Core Tech in support of its novel argument that evaluators should not be allowed to consider a Notice of Default is supported by one case and one case only, *Dent v. U.S. Tennis Ass’n, Inc. See, Protest*, p. 6. at lines 23-25. DPW fails to understand how *Dent*, a civil rights employment case, is relevant to a procurement matter. The fact is, it isn’t. Core Tech’s Appeal fails to recite one single procurement case, statute or regulation in support of its argument that evaluators can’t consider a bidder’s record of past performance. Core Tech isn’t able to recite any such authority, because no such authority exists.

The information requested is relevant to an award of a contract that may well be over \$50 Million. The construction of a school for Guam's children warrants a thorough scrutiny of a bidder's record of performance. Core Tech's contention that a record of a default should not be disclosed is alarming.

Core Tech alleges that DPW wants to "disqualify a bidder that the Government has a dispute with, and wants to punish" them. This allegation is without merit and warrants little attention. First, DPW bears no animosity to Core Tech. *See*, Mr. Joaquin Blaz's October 30, 2017 Declaration, a copy of which is attached hereto as **Exhibit E**. Further, if DPW had any animosity against Core Tech as alleged, why didn't it terminate Core Tech earlier?

On June 12, 2014 DPW issued a Non-Conformance Report to Core Tech on American with Disability Act ("ADA") deficiencies for the project's sidewalks. The survey conducted by DPW's project inspectors showed that 83.1% of the sidewalk cross-slope as non-compliant (i.e., violated Federal Law). *See, Non-Conformance Report, Exhibit F*. On October 9, 2014, Core Tech submitted its survey of the sidewalk cross-slopes that acknowledged that 58.2% of the sidewalk panels are non-compliant. *See, Survey, Exhibit G*. Thus, while the parties disagree as to the extent to which Core Tech's as-built work was non-compliant, as of October 9, 2014 (i.e., over three (3) years ago) Core Tech acknowledged that over half of its sidewalk work was not ADA compliant.

Substantial Completion on the Route 1/8 Project was achieved on August 25, 2016. *See Blaz Declaration, Exhibit E*. Notwithstanding numerous promises to complete the Route 1/8 Project, as of August 23, 2017 Core Tech failed to complete a number of outstanding items, including but not limited to, the need to correct the ADA non-compliant sidewalks as required by federal law, the parties Contract and the Plans and Specifications.

DPW also wants to address Core Tech's unfounded allegation that the timing of DPW's August 23, 2017 Notice of Termination/Default and issuance of Addendum No. 6 to the IFB was to intentionally discriminate and retaliate against Core Tech for pursuing protests and appeals relating to SSSS procurement. As noted in Mr. Blaz's, DPW's Acting Highways Administrator, Declaration, DPW relied on counsel's advice that the Route 1/8 Project's Surety's Bond might not be enforceable if DPW failed to terminate prior to the one-year anniversary of Substantial Completion (i.e., August 25, 2016). Further, this advice was given as much as three (3) months before termination. *Id.*

CONCLUSION

DPW respectfully requests that the OPA dismiss this appeal for the reasons stated above.

RELIEF REQUESTED BY DPW

DPW respectfully request a ruling from the OPA as follows:

1. Core Tech's Appeal be dismissed;
2. For such other relief that the OPA may determine is just and proper.

Submitted this 31st day of October, 2017.

OFFICE OF THE ATTORNEY GENERAL
Elizabeth Barrett-Anderson, Attorney General

By:



THOMAS KEELER
Assistant Attorney General