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BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM

IN THE APPEAL OF	)	Docket No. OPA PA-17-10
	)	
CORE TECH INTERNATIONAL CORP.,	)	**APPELLANT CORE TECH INTERNATIONAL CORP.'S COMMENTS TO APPELLEE DEPARTMENT OF PUBLIC WORK'S AGENCY REPORT**
Appellant.	)	

Appellant Core Tech International Corp. ("CTI") hereby submits its Comments to Appellee Department of Public Work's Agency Report.

I. DPW FAILED TO PROVIDE CTI WITH NOTICE OF DEFAULT AND AN OPPORTUNITY TO CURE.

DPW argues that it gave CTI notice of default and an opportunity to cure in a letter entitled "Final Demand to Complete Project", delivered to CTI on June 13, 2017. The pertinent provisions of the Final Demand state:

> This serves to notify CTI that they have 10 days from receipt of this letter *to submit a plan* acceptable to DPW and the FHWA (1) to correct all drainage issues and (2) to bring all project sidewalks, driveways and pedestrian raps into full compliance with its contracts or obligations and ADA requirements. CTI's proposal shall also include a deadline to complete all remaining punch list work, understanding that liquidated damages continues to be incurred.
>
> CTI should contact DPW immediately if they believe additional time is needed or to coordinate a meeting on the project.

> If CTI fails or otherwise refuses to not submit an acceptable proposal as discussed herein, *DPW will review the options and contact CTI shortly thereafter.*

(Emphasis added). Nowhere does the Final Demand notify that CTI must comply with the terms of the Final Demand or that it would face a default and termination of the Contract. Nowhere does the Final Demand give CTI the opportunity to cure or it would face a default and termination of the Contract.

In response to CTI's Sunshine Act requests, DPW produced the emails of David Yao, of Parsons Transportation Group (PTG). One email shows that on March 15, 2017 DPW's legal counsel drafted a "ROUGH DRAFT" of a letter from DPW to CTI which was "intended to place Core Tech on notice that it has 10 days to compete Project signage and submit an acceptable plan and timetable to correct all ADA non-compliant sidewalks and sidewalk ramps." *See* Appellant's Exh. 9 attached to its Exhibit List. The "ROUGH DRAFT" provides in pertinent part in the last two full paragraphs as follows:

> This serves to notify CTI that it has 10 days from receipt of this letter to 1) complete the past due signage work; and 2) submit a plan acceptable to DPW and FHWA for how to bring all Project sidewalks, driveways and ~~sidewalk~~ pedestrian ramps into full compliance with its contractual obligations and ADA requirements. CTI's proposal is also required to provide a firm deadline for completing all outstanding items.
>
> *If CTI fails or otherwise elects to not submit a proposal as discussed herein, DPW intends on terminating the Contract and* _____. *deduct $xxx.xx from the contract value.*

Appellant's Exh. 9 (emphasis added). The foregoing shows conclusively that the ROUGH DRAFT letter contained a provision notifying CTI of a potential default and termination of the Contract, as well as an opportunity to cure any default. For whatever reason, DPW elected not

to send such a letter to CTI and instead issued the Final Demand, which contained no such provisions. The evidence is clear beyond doubt that DPW failed to give CTI notice of default and an opportunity to cure.

II. DPW'S RELIANCE ON ADVICE OF COUNSEL DEFENSE REQUIRES DISQUALIFICATION OF THOMAS KEELER AND PRODUCTION OF ALL ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT COMMUNICATIONS AND INFORMATION.

In response to CTI's retaliation claim, DPW belatedly asserts that dates asserted in CTI's notice of appeal are merely "coincidental" and that it relied in good faith upon advice of its counsel Thomas Keeler. Filed contemporaneously with these Comments is a Motion to Disqualify Mr. Keeler from the trial of this matter, as well as all other lawyers who provided legal research, advice, or assistance concerning DPW's defense. In addition, CTI is entitled to obtain all attorney-client communications, work product and other information concerning this defense. CTI has issued Sunshine Act requests to Mr. Keeler and DPW for these documents. DPW clearly knew about this defense but did not include any of these documents as part of the procurement record. Yet these documents are clearly "relevant" to this appeal and should have been provided to CTI. See 2 GAR, Div. 4, § 12104 (c)(3).

III. DPW WAIVED ANY DEFECTS IN THE ADA ITEMS BY ACCEPTING SUCH WORK AND PAYING FOR THEM IN FULL.

An issue in this case is whether certain sidewalks, ramps, and driveways were required to be constructed in accordance with the Americans with Disabilities Act (ADA) (hereafter collectively "ADA items"). DPW claims that CTI failed to comply with the ADA in the construction of the ADA items and that it terminated CTI for such failure. However, Appellant's Exhibits 2, 3, and 4 show that DPW paid for the ADA items in full. Under the terms of the Contract, specifically Special Contract Requirements Section 106.01, "Acceptable Work

conforming to the Contract will be paid for as specified in the Contract." By paying for the ADA items in full, DPW accepted the ADA Items as "Acceptable Work" and waived any claims regarding their non-conformity.

Moreover, Appellant's Exhibits 6 and 14 show that after paying in full for the ADA Items, DPW considered the ADA Items as "Final Inspection Punchlist Items" and not as defective work. Therefore, DPW's termination of the Contract based on the alleged non-conforming ADA Items was wrongful and without justification.

IV. DPW BREACHED THE CONTRACT.

Although DPW asserts that it approved a Revised Baseline Schedule on July 21, 2013, *none has been provided*, either with DPW's Agency Report or in its Exhibits. DPW's Exhibit E, attached to its Agency Report, is merely a letter dated May 25, 2016 stating that it had approved a Revised Baseline Schedule on July 21, 2013. But this letter establishes that DPW did not approve a final and complete baseline schedule. Instead, the letter shows that DPW continually revised the schedule, after telephone conferences, meetings and discussions with CTI. The last entry of the letter states:

> CTI's Corrected Baseline Schedule, Revision 1 submitted on October 12, 2015 was returned on May 13, 2016, "Exceptions as Noted".

Accordingly, there was no final complete baseline schedule because, as stated in CTI's appeal, DPW never approved one. The above-quoted sentence also supports CTI's assertions that DPW and its consultant Parsons Transportation Group (PTG) engaged in an inordinate amount of delay in the Project, taking seven (7) months to turn around CTI's Corrected Baseline Schedule.

Further, CTI provided all of the documents and information necessary to support its change order and time extension requests. *See* Appellant's Exh. 5. Like all of the other instances where CTI provided information and documentation to DPW, such as the baseline schedule

discussed above, DPW and PTG have consistently delayed the Project by requesting information that has already been provided or by requiring information that is unnecessary to a decision by DPW/PTG. In the case of CTI's change order and time extension request, CTI submitted the request on September 16, 2016, with the associated Primavera 6 schedule submitted on November 10, 2016 via email. CTI's request detailed 28 delays spanning the period of April 17, 2012 through January 14, 2016. DPW did not respond until nine months later, on August 23, 2017, rejecting *all* of CTI's requests except for four (4) days of delays due to archaeological obstruction and related excavations.

All of the foregoing, in addition to the grounds stated in CTI's notice of appeal, establish that DPW breached the Contract.

V. PTG INTERFERED WITH CTI'S WORK ON THE PROJECT.

In its Agency Report, DPW does not address the specifics of CTI's arguments concerning PTG's interference with CTI's work on the Project. DPW does not address the instances cited in the notice of appeal concerning PTG's usurpation of CTI's role as Designer-Builder of the Project. DPW has therefore waived any defense to these claims.

Similarly, DPW does not address the specific instances cited in the Notice of Appeal of DPW's failure to prevent delays caused by PTG on the Project. DPW has waived any defense to these claims.

Finally, DPW asserts, "It (sic) CTI objects to DPW's refusal to accept certain work, its obligation under the Contract is to complete the work as directed by the department and submit a change order for additional time, costs and compensation." DPW Agency Report at 5. This is precisely what CTI did, yet DPW rejected virtually all of CTI's time extension and change order requests.

VI. DPW'S ASSESSMENT OF LIQUIDATED DAMAGES CANNOT BE SUSTAINED.

CTI rejects DPW's assertion that "substantial completion" occurred in August 2016, as the beneficial use and occupancy of the two bridges and of other different phases of the Project occurred long before then. DPW does not address these contentions but merely asserts that DPW properly assessed liquidated damages based on Exhibit H, a letter from Felix Benavente to Robert Marks. DPW also does not address CTI's argument that there can be no liquidated damages when DPW and PTG failed to provide a baseline schedule for the Project and where delays in completion of the Project were caused by DPW and PTG. CTI contends that based on the substantial completion and/or beneficial use and occupancy of the Project, liquidated damages are barred or should be reduced substantially.

CONCLUSION

For all of the foregoing reasons, Appellant Core Tech International Corp. requests that the Public Auditor find that DPW's termination of the Contract was wrongful and retaliatory; that DPW breached the Contract; and that PTG wrongfully and intentionally interfered with CTI's work under the Contract.

Dated this 27th day of November, 2017.

ARRIOLA, COWAN & ARRIOLA
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By: _____
ANITA P. ARRIOLA