



Office of the Attorney General
Elizabeth Barrett-Anderson
 Attorney General of Guam
Solicitor Division
 590 S. Marine Corps Drive
 ITC Bldg., Ste. 802
 Tamuning, Guam 96913 • USA
 Tel. (671) 475-3324 Fax. (671) 472-2493
 www.guamag.org
Attorneys for the Government of Guam

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 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS

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

IN THE APPEAL OF:)	DOCKET NO. OPA-PA-17-010
)	
CORE TECH INTERNATIONAL CORP.,)	
)	
Appellant,)	DEPARTMENT OF PUBLIC WORK'S
)	HEARING BRIEF
AND)	
)	
DEPARTMENT OF PUBLIC WORKS,)	
)	
Purchasing Agency.)	

I. INTRODUCTION

This is an appeal by Core Tech International Corp.'s ("CTI") of two (2) decisions by the Department of Public Works' ("DPW") August 23, 2017 decision to: (a) terminate for breach of contract on the Route1/Route 8 Intersection Improvements and Agana Bridges Replacement (Design-Build) Project No. GU-DAR-T101(001); and (b) reject CTI's requests for time extensions and change orders.

On September 30, 2011, DPW and CTI signed a Design-Build contract ("Contract"), in which CTI agreed to design and build improvements to the Route 1 and Route 8 intersections, and

replacement of two (2) bridges over the Hagatna River (DPW Project No. GU-DAR-T101(001)), (“Project”). The Project required CTI to construct sidewalks, ramps and driveways that fully complied with the Projects Plans and Specifications and the American with Disabilities (“ADA”).

In connection with the Agreement, Zurich American Insurance Company, Fidelity and Deposit Company of Maryland and Colonial American Casualty and Surety Company (collectively “Surety”), as Surety issued Performance and Payment Bonds Number CMB 9060033 (the “Bond”), on behalf of CTI, as principal, and in favor of DPW, as obligee, with a penal sum of Sixteen Million Three Hundred and Eighty Four Thousand Five Hundred Dollars & 00/100 (\$16,384,500.00), *See*, Exhibit “A”.

On June 12, 2014 DPW issued a Non-Conformance Report (“NCR”) to CTI on 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 ADA non-compliant. *See*, Exhibit “B”. On October 9, 2014, CTI submitted its survey of the sidewalk cross-slopes that showed 58.2% of the Project’s sidewalk panels are non-compliant. *See*, Exhibit “C”.

CTI’s Contract with DPW was terminated on August 27, 2017, after it had failed to submit a completion plan, as promised, to complete the ADA non-compliant work and to complete the final punch list items.

CTI filled its notice of appeal with the Office of Public Accountability (“OPA”), regarding DPW’s termination of contract. In this appeal, CTI raised various issues including (1) whether DPW wrongfully terminated CTI from performing work on the Project; (2) whether DPW breached the Contract; (3) whether DPW’s termination of the Contract was in retaliation of CTI’s purportedly successful appeals against DPW concerning the Simon Sanchez High School Invitation for Bids (“SSHS Bids”); (4) whether DPW’s consultant, Parsons Transportation Group (“PTG”) wrongfully interfered with the Contract and (5) whether liquidated damages assessed by DPW should be barred

or significantly reduced.

II. ISSUES

- A. Whether CTI breached the Contract?**
- B. Whether DPW's termination of CTI on the Project was made in good faith?**
- C. Has DPW fully complied with its obligations under the Contract?**
- D. Whether liquidated damages have been properly assessed on the Project?**

III. DISCUSSION

A. DPW acted in good faith in terminating CTI.

Following Substantial Completion DPW wrote CTI on October 26, 2016 concerning the status of closeout issues (e.g., ADA non-compliant sidewalks, etc.) *See*, Ex. D (does not include attachments).

DPW never accepted the Project's ADA non-compliant sidewalks, nor has it fully paid CTI for its work. DPW has retained \$572,745.86 to complete CTI's ADA non-compliant sidewalks and remaining items. *See*, Ex. E, DPW Invoice No. 33.

CTI's own October 9, 2014 survey of the Project's ADA non-compliant sidewalk work is direct evidence that it breached the Contract. While DPW's survey shows over 83% of the Projects sidewalk work as ADA non-compliant, CTI's survey documents that it acknowledges that in excess of 58% of its sidewalk work is ADA non-compliant. Thus, CTI admits that it breached the Contract as its sidewalk fails to comply with the Contract, the Plans and Specifications and Federal and local law.

The ADA law requires a maximum sidewalk cross slopes of 2%. DPW does not have the authority to waive ADA requirements. Further, funds issued by the Federal Highway Administration ("FHWA") and Defense Access Roads Program, which fund 100% of the Project, cannot be used for work that is ADA non-compliant.

CTI is required to strictly comply with ADA requirements. In *Long v. Coast Resorts, Inc.*, 267 F.3d 918 (9th Cir. 2001), the Appellate Court for the Ninth Circuit considered a lower court's decision that found that construction work "may be considered a technical violation" of ADA standards. The lower court refused to order defendants to correct the violation. The court stated that requiring bathroom doorways to be widened would have no "appreciable benefit" for persons with disabilities and would be a "meaningless gesture". In overturning the district court's decision the appellate court noted that in refusing to order the defendant's to correct the non-complying work the effect of that refusal was "to leave in place a clear violation of the statute." The court further noted that the District Court's decision "places the burden of the owner's noncompliance on the individuals with disabilities, rather than on the violator". Finally, the Appellate Court noted that undue burden is not a justification for failing to comply with the obligation of accessibility. See, *Kinney v. Yersalim*, 9 F.3d 1067, 1071 (3rd Cir. 1993). Thus, as of October 2014 CTI was on actual notice that a) the Project's sidewalk work was ADA non-compliant, b) that DPW did not accept the work and c) that DPW withheld retention in order to correct the ADA non-compliant work and other uncompleted Project items, in the event CTI failed to do so. Notwithstanding CTI failed or otherwise refused to complete the Project resulting in its termination.

On June 13, 2017, DPW made a Final Demand to Complete Project. DPW's letter, a copy of which is attached hereto as Ex. F, provided a detailed history of the Project. *Throughout the Project* CTI repeatedly promised to complete the non-compliant ADA and other outstanding work. In a June 23, 2017 letter from CTI's Conchita Bathan to DPW requesting a time extension to reply to DPW's June 13, 2017 notice of default, she wrote:

"..., CTI does agree with DPW that it is time to complete the project and *wants to complete it as soon as possible*. Therefore, we have taken +`----`DPW/PTG's comments and forwarded them to the Designer of Record with the request of *addressing all ADA issues and drainage issues so as to meet ADA standards and specifications*. The engineers are

currently evaluating these documents. When they are done we will be able to provide a schedule for completion of the project. *We should have that schedule to you in 2 to 3 weeks.*”

(Emphasis added).

On June 30, 2017, DPW wrote CTI agreeing to its request for additional time to provide a schedule for completion of the Project. *See*, Ex. G. DPW allowed CTI until Monday, July 24, 2017 to respond. *Id.* Monday, July 24, 2017, extended deadline came and went without CTI submitting the promised schedule for completion.

B. DPW’s termination of the Contract was made in good faith.

CTI bases its false assertion that the government terminated it in retaliation for the SSHS Bids on argument only. Its argument is unfounded speculation. Appellant provides no affidavits, declaration or document to support its false allegation.

The sole “factual” basis in support of its false allegation is the argument that “The ‘unusually suggestive temporal proximity’ – less than 24 hours – between the Notice of Termination/Default and the Addendum in the third SSHS Bid is clear.” DPW asserts that it is anything but clear. CTI’s reliance on a coincidence to support an allegation of retaliation borders on bad faith.

The Guam Transportation Group (“GTG”) provides policy direction and overall guidance to the goals and objectives of the DPW’s 2030 Guam Transportation Program concerning the planning, design, construction and repair of Guam’s routed roads that are funded by the FHWA. The GTG is currently composed of DPW’s Director, Glenn Leon Guerrero, its Deputy Director, Andrew Leon Guerrero; DPW’s Acting Highway Administrator, Joaquin Blaz; FHWA’s regional representative, Richelle Takara, Parsons Transportation Group’s (“PTG”) Michael Lanning and John Moretto, WSP’s, fna Parsons Brinkerhoff, Brady Nadell and Lynden Kobayahsi and Assistant Attorney General, Thomas Keeler.

Former DPW Deputy Director, and former member of the GTG, Felix Benavente, is familiar with both the Project and SSSH Bids. Mr. Benavente can testify that the basis of DPW's Notice of Termination/Default was due to CTI's breach of Contract and violation of the ADA. He also states that Appellant's false allegation that the Termination was in retaliation for the SSSH Appeals is "patently false". Mr. Benavente can also confirm that timing of CTI's Termination was out of a concern that the Bonds might not be enforceable if DPW failed to terminate prior to the one year anniversary (i.e., August 25, 2016) of CTI achieving "substantial completion". *See*, Ex. H, Decl. of Benavente.

DPW's Joaquin Blaz mirrors the testimony of Mr. Benavente. He states that the timing of DPW's Termination was based 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)." He also states that DPW was provided this advice as early as June, 2017. This would have been over two (2) months before the "unusually suggestive temporal proximity" alleged by CTI. *See*, Ex. I, Decl. of Blaz (the original of which was filed in DOCKET NO. **OPA-PA-17-009**). The declarations of Messrs. Benavente and Blaz are consistent with that of PTG's John Moretto and other GTG members. Mr. Moretto can testify that in late May or early June the GTG was advised that the "Project's Performance and Payment Bonds may not be enforceable if [DPW] did not terminate Core Tech prior to the one year anniversary of Substantial Completion." *See*, Ex. J, Moretto Decl. Mr. Moretto also states that DPW Notice of Termination/Default was unrelated to the SSSH Appeals and was based solely on CTI's default on the Project. *Id.*

CTI's unsubstantiated allegation that DPW's Notice of Termination/Default was retaliatory is both offensive and false.

C. DPW complied with its obligations under the Contract.

1. DPW/PTG approved a baseline schedule.

CTI alleges that DPW/PTG failed to provide a baseline schedule for the Project. This is untrue. Attached hereto as Exhibit “K” is a copy of an approved baseline dated December 5, 2011.

2. CTI failed to provide information necessary to approve CTI’s Time Extension Request.

Throughout the Project CTI has been remiss in making timely submissions. DPW has repeatedly notified CTI of additional information and items needed to properly evaluate the requested time extension. DPW’s most recent letter, dated October 23, 2017, states, in part:

“As noted, until such time that CTI’s request for time can be validated and the contract amended by Change Order, DPW is required to assess liquidated damage in accordance with the terms and conditions of the contract. DPW’s letter was part of a standard contract review process needed in order for DPW to properly document the use and expenditure of Federal Highway Administration funds on the Project. Please refer to the second paragraph of the letter in which CTI is requested to “provide backup data for these items to allow DPW to determine any other impacts to the schedule and cost review.”

DPW’s second letter reminds CTI that it is delinquent in submitting other documents that are required by the contract for processing and payment of invoices. ... DPW is waiting for CTI to provide additional information needed for it to complete contract close out. Until such time as CTI submits the additional information or states in writing that it refuses to do so, DPW is not able to make a final decision.”

See, Ex. L.

Unless and until CTI submits proper documentation justifying an additional time extension(s), DPW is not able to process a Change Order.

C. PTG did not interfere with CTI’s work on the Project.

1. Neither DPW nor PTG interfered with CTI.

CTI cites a few instances when PTG allegedly interfered with work on the Project. It is up to DPW whether or not to accept Project work. If DPW directed that work be performed in a certain manner, as it did with the Bridge 2 cracks, CTI’s obligation was to perform the work. If CTI believed that DPW’s instructions required additional time or costs, the proper remedy under the Contract was to request a Change Order. There is no basis to argue, as CTI does, that DPW’s instructions are tantamount to interference.

2. DPW is responsible for Project decisions.

As elsewhere in CTI's Notice of Appeal no facts or documentation is provided to support its false allegations that PTG usurped DPW's responsibilities on the Project. CTI references submittals being rejected but fails to state why they were allegedly wrongfully reject. During the Project PTG followed the standard procedure for submittal review, which is as follows:

The Contractor shall prepare and submit for the Department's review materials to be incorporated into the work and other items or work as required by the Standard Specifications or Special Contract Requirements. Each individual material being submitted to the Department shall be accompanied by a cover sheet. When more than one material is being submitted at one time, each material submitted shall have an individual cover sheet.

Upon review, the submittal will be returned to the contractor with comments as necessary and appropriately marked as follows:

- (a) If the submittal is returned to the Contractor marked "NO EXCEPTIONS TAKEN," a formal revision of the submittal will not be required.
- (b) If the submittal is returned to the Contractor marked "EXCEPTIONS AS NOTED," a formal revision of the submittal will not be required, but the Contractor shall provide the material with the exceptions noted by the Department on the returned submittal.
- (c) If the submittal is returned to the Contractor marked "REVISE/RESUBMIT" or "REJECTED/RESUBMIT," the Contractor shall revise the submittal and resubmit one original and two copies of the revised submittal to the Department.

Actions taken by the Department in the review of submittals do not waive, modify, or supersede the requirements of the contract, the Plans, the Standard Specifications, the Special Contract Requirements, orders, codes, or regulations, nor do they relieve the Contractor or suppliers from the responsibility for errors or omissions. If the contractor requests deviations, in any submittal, from the contract documents, the Contracting Officer shall be advised and a formal determination made. The formal determination of all deviations to the contract documents shall be made in writing from the Contracting Officer to the contractor.

DPW repeatedly followed up with CTI on required documents. For example, in a November 9, 2016, letter to CTI, DPW makes a fourth (4th) follow-up for CTI to provide an electronic schedule noting "*Unfortunately, until DPW receives the electronic schedule files, DPW cannot complete its review.*" See, Ex. M (Emphasis added). See also, Ex. N (DPW follow-up on schedule and on-site

review of punch list items). PTG did not interfere with CTI on the Project. Delays, such as CTI's failure and/or refusal to correct for close to a three (3) year period, admittedly non-compliant ADA work on the Project, is the fault of CTI, and CTI only.

D. DPW properly assessed liquidated damages on the Project

DPW properly assessed liquidated damages on the Project. CTI argues that liquated damages can't be assessed when without an approved baseline schedule. However, as discussed earlier DPW did approve a baseline schedule. *See*, Ex. O, DPW Nov. 1, 2016 letter. The sum of \$3,300.00 was assessed in accordance with the Contract until Substantial Completion. Following Substantial Completion the amount of \$660 per day continues to be accessed until Final Completion. Id.

As elsewhere in its Notice of Appeal CTI fails to support any legal basis to support its claim that there is no justification for liquidated damages.

DPW properly assessed liquidated damages in accordance with the Contract.

CONCLUSION

DPW requests that the Public Auditor find that CTI breached the Contract and that DPW's termination was made in good faith; that CTI's termination was not in retaliation of the SSSH Bids; that DPW did not interfere with CTI's work under the Contract; and that DPW properly assessed liquidated damages.

Dated this 7th day of December, 2017.

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

By:



THOMAS KEELER
Assistant Attorney General