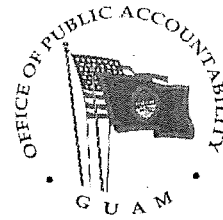


Suite 401 DNA Building
 238 Archbishop Flores St.
 Hagåtña, Guam 96910



FAX

| | | | |
|------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------|---------------------------------------------------------------------------------------------|
| To: | Mr. Glenn Leon Guerrero Director Department of Public Works 542 North Marine Corps Drive Upper Tumon, Guam 96913 Phone: (671)646-3121/3232 Fax: (671) 649-6178 | From: | Doris Flores Brooks Guam Public Auditor Office of Public Accountability |
| | Mr. Thomas Keeler Ms. Shannon Taitano Assistant Attorney Generals Office of the Attorney General of Guam 590 S. Marine Corps Drive, Suite 706 Tamuning, Guam, 96913 Fax: (671) 472-2493 | Pages: | 5 (including cover page) |
| CC: | Joyce C.H. Tang, Esq. (Attorney for Appellant Core Tech) Civile & Tang, PLLC 330 Hernan Cortez Avenue Suite 200 Hagatna, Guam 96910 Phone: (671) 472-8868/9 Fax: (671) 477-2511 | Date: | December 18, 2017 |
| | | Phone: Fax: | (671) 475-0390 x. 204 (671) 472-7951 |

Re: OPA-PA-17-009 Decision and Order Re Purchasing Agency's Motion to Dismiss

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 Rodalyn Gerardo
 Audit Supervisor
rgerardo@guamopa.com

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OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

1
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6 IN THE APPEAL OF,

7 CORE TECH INTERNATIONAL CORP,

8 Appellant
9

) **APPEAL NO: OPA-PA-17-009**

) **DECISION AND ORDER RE**
) **PURCHASING AGENCY'S MOTION TO**
) **DISMISS**

10 To: **Purchasing Agency:**
11 Department of Public Works, Government of Guam
12 C/O Thomas P. Keeler, Esq.
13 Assistant Attorney General
14 Office of the Attorney General of Guam
15 590 S. Marine Corps Drive, Suite 706
16 Tamuning, Guam, 96913
17 Facsimile: (671) 472-2493

18 **Appellant:**
19 Core Tech International Corp.
20 C/O Joyce C.A. Tang, Esq.
21 330 Hernan Cortez Ave., Suite 200
22 Hagåtña, Guam, 96910
23 Facsimile: (671) 477-2511

24 **THIS MATTER**, came before the Public Auditor on December 13, 2017 for a hearing
25 on the Purchasing Agency's (Hereafter Referred to as "DPW") Motion for Summary Judgement.
26 The Appellant (Hereafter Referred to as "CTI") was represented by Joyce C.A. Tang, Esq.
27 Andrew S. Leon Guerrero appeared on behalf of DPW and was represented by Assistant
28 Attorney General Thomas P. Keeler, Esq. After hearing the arguments of the parties and for
good cause shown, the Public Auditor hereby FINDS and ORDERS the following

1. Rule 56, Guam Rules of Civil Procedure are inapplicable to this administrative proceeding.
DPW argues that it is entitled to summary judgement pursuant to Rule 56, Guam Rules of Civil
Procedure (Hereafter Referred to as "GRCP"). Page 2, DPW's Motion for Summary Judgment
filed on November 3, 2017 in this matter (Hereafter Referred to as "DPW's Motion").

1 Specifically, DPW argues that there is no material issue of fact to decide in this matter because
2 there is no evidence that CTI sustained damages by the Invitation for Bids' request to provide a
3 record of past performance including a record of default. *Id.*, at 3. However, Rule 56, GRCP is
4 inapplicable to this matter. Procurement Appeals hearings shall be as informal as may be
5 reasonable and appropriate under the circumstances and shall not be bound by statutory rules of
6 evidence or by technical or formal rules of procedure. 2 G.A.R., Div. 4, Chap. 12, §12108(d).
7 Hence, summary judgment as permitted by Rule 56, GRCP, in civil cases being heard before the
8 Superior Court of Guam and the cases interpreting that rule are inapplicable to this matter
9 because this proceeding is an informal procurement appeal that is not bound by such formal rules
10 of civil procedure.

11 2. There are genuine issues of material fact that must be decided at the hearing for CTI's
12 Appeal. Guam Procurement regulations allow the Hearing Officer to find that there are no
13 genuine issues of material fact concerning an issue when the facts are clear from the record and
14 not in dispute. Generally, the Hearing Officer has the authority to settle, simplify, or fix the
15 issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of
16 a proceedings either by consent of the parties or upon such officer's own motion. 2 G.A.R., Div.
17 4, Chap. 12, §12109(a). Additionally, such authority may be used to find that there are no
18 genuine issues of material fact concerning an issue when the facts are clear from the record and
19 the parties do not dispute them. *In the Appeal of Guam Pacific Enterprises, Inc.*, OPA-PA-09-
20 003, Decision and Order Denying Appellant's Motion for Summary Judgment dated September
21 18, 2009, (Office of Public Accountability). Here, as will be discussed below, the record does
22 not show an absence of genuine issues of material fact, and there is a genuine dispute between
23 the parties concerning the material facts in this matter.

24 The record does not show an absence of genuine issues of material fact. The main fact
25 DPW's asserts for its motion is the fact that DPW has not found CTI to be a responsible bidder
26 or rejected CTI's bid because bids have not been submitted nor has a review of any bids been
27 made. Page 3, DPW's Motion. However, this fact by itself does not create an absence of
28 genuine issues of material fact because Guam's Procurement Law and Regulations allow
prospective bidders who may be aggrieved in connection with the method of solicitation to file a

1 protest. 5 G.C.A. §5425(a) and 2 G.A.R., Div. 4, Chap. 9, §9101(a)(1)(a). Also, protestors may
2 file a protest on any phase of the solicitation, including but not limited to, specifications
3 preparations, award, or disclosure of information marked confidential in the bid or offer. 2
4 G.A.R., Div. 4, Chap. 9, §9101(c)(2). Here, CTI states that it is a prospective bidder because it
5 obtained a copy of the IFB, it attended all the mandatory meetings required by DPW concerning
6 the IFB, and it submitted several requests for information in accordance with the terms of the
7 IFB. Page 2, line 14, CTI's Opposition to DPW's Motion filed on November 22, 2017
8 (Hereafter Referred to as "CTI's Opposition"). Additionally, CTI alleges that it is an aggrieved
9 prospective bidder because DPW has expressly stated, as part of the solicitation of the IFB, that
10 it may consider a bidder's prior Notice of Default or Contract Termination before such notice or
11 termination has received a final administrative or judicial adjudication. *Id.*, page 2, line 23.
12 Hence, the record shows that CTI is a prospective bidder, that CTI is aggrieved by DPW's
13 interpretation of what types Notices of Default or Contract Terminations DPW may use to
14 determine whether a bidder is responsible, and that CTI filed a protest concerning this issue, that
15 DPW denied CTI's protest, and that CTI is appealing DPW's denial. Accordingly, the Public
16 Auditor finds that the record does not show an absence of genuine issues of material fact.

17 There is a genuine dispute between the parties concerning the facts in this matter. Here,
18 DPW denied the portion of CTI's September 7, 2017 protest concerning, as DPW described it,
19 CTI's assertion that it would be improper for DPW to consider a bidder's past notice of default
20 or government contract termination to determine whether such bidder was a responsible bidder.
21 *Id.*, page 2. Further, CTI claims that DPW denied the portion of its protest concerning DPW's
22 belief that it could consider a bidder's Notice of Default which has not reached a final
23 administrative or judicial determination and that DPW denied this portion of its protest on the
24 grounds that it was untimely. Page 1, Line 26, CTI's Opposition. Additionally, CTI asserts that
25 it is not proper for DPW to consider a separate unrelated procurement in a responsibility
26 determination and that its September 7, 2017 protest was timely. *Id.*, at page 3, line 18, and line
27 27. Based on the foregoing, the Public Auditor finds that there are genuine disputes of material

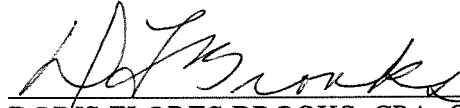
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1 facts between the parties in this matter that must be resolved through an evidentiary hearing.

2 3. Based on the foregoing, DPW's Motion for Summary Judgement is hereby DENIED.

3
4 **SO ORDERED** this 18th day of December, 2017 by:

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8 _____
9 DORIS FLORES BROOKS, CPA, CGFM
10 PUBLIC AUDITOR
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