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DATE: 10-14-16

TIME: 3:30 AM PM BY: [Signature]

FILE NO OPA-PA: 16-007, 16-011

**THE OFFICE OF PUBLIC ACCOUNTABILITY
 HAGÁTÑA, GUAM**

In the Appeal of:
CORE TECH INTERNATIONAL CORP.,

Appellant,

and

**GUAM DEPARTMENT OF PUBLIC
 WORKS,**

Purchasing Agency.

) CONSOLIDATED APPEALS NOS.
) **OPA-PA-16-007 AND OPA-PA-16-011**

) **MEMORANDUM IN OPPOSITION TO**
) **APPELLANT'S REQUEST FOR**
) **DETERMINATION THAT GUAM**
) **EDUCATIONAL FACILITIES**
) **FOUNDATION'S PROPOSAL WAS**
) **NONRESPONSIVE**

The Department of Public Works ("DPW"), by and through its undersigned counsel, objects to Core Tech International's ("Core Tech") Request for Determination that Guam Educational Facilities Foundation's ("GEFF") Proposal was Nonresponsive.

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I.

REQUEST TO DETERMINE RESPONSIVENESS IS NOT PROPERLY BEFORE THE PUBLIC AUDITOR

Core Tech's request to determine that GEF's proposal was non-responsive is not properly before the Public Auditor. The issue was not raised in the three protests filed with DPW by Core Tech or in the appeals filed with the Office of Public Accountability.

The Public Auditor has the power to review any matter properly submitted to her. 5 G.C.A. § 5703. Since Core Tech has not filed a protest and DPW has not reviewed and decided Core Tech's protest on whether GEF's proposal is responsive, the request to determine responsiveness is not ripe and therefore the Public Auditor lacks jurisdiction over the matter. *See PureStone LLC v. GEDA/CLTC*, Case No. OPA-PA-15-016, Decision, 1/19/16.

Furthermore, Core Tech's request is untimely. Core Tech knew or should have known of the issue on May 13, 2016 when they received the Negotiation Committee Memorandum attached to the Notice of Intent to Award which provided that GEF has completed 10 projects on Guam (4 schools, Okkodo expansion and 5 housing projects) ALL within the contract term. Core Tech's request for determination is beyond the 14 days requirement to submit a protest. *See* 5 G.C.A. § 5425(a).

II.

DPW IS THE PROPER ENTITY TO DETERMINE RESPONSIVENESS

The proper entity to determine responsiveness is the purchasing agency which in this case is DPW. "Where contracts are to be let on terms most advantageous to the State, the discretion in making the award is necessarily broad, and should not be disturbed if it has a reasonable basis

and is untainted by fraud or other abuse. *Azimi Tabrizi v. State Dept. of Admin.*, 2003 WL 23002625 (held that the determination of responsiveness and responsibility is a matter of administrative discretion).

Proposals are not available for public inspection at this stage of the procurement process. Core Tech concedes in their request for determination that they are unable to confirm whether the current GEF, Guam Educational Facilities Foundation, identified itself as the entity that financed, developed, and constructed Okkodo High School, Ligan Elementary, Adacao Elementary and Astumbo Middle School. DPW has the proposal and is the appropriate agency to determine Responsiveness.

As previously discussed, Core Tech would need to initially submit the request to DPW for a determination in order for the Public Auditor to review the matter. *See* 5 G.C.A. §§ 5425 and 5703; 2 GARR Div. 4 §§ 9101(b) and 12103. Core Tech has not submitted such a request to DPW.

III.

CORE TECH'S REQUEST IS AN EVALUATION CRITERIA

If GEF represented in its original proposal that it is the same entity that financed, developed and constructed Okkodo High School, Ligan Elementary, Adacao Elementary and Astumbo Middle School, then Core Tech would like the Public Auditor to determine that GEF's proposal was non-responsive. However, this is not a reason to find a proposal non-responsive.

Pursuant to Section 3.7 of the RFP, proposals *may* be deemed non-responsive if any of the required information is not provided or the proposal is not within the plans and specifications of the RFP. This is not one of the factors for which a proposal may be deemed non-responsive.

Project expertise and experience of key personnel and team is an evaluation criterion for the evaluation committee to score. GEF represented during the hearing that their key personnel are the same as the Guam Education Financing Foundation that financed, developed and constructed the four schools mentioned above. GEF also stated at the hearing that it is a special purpose entity bankruptcy remote. It is required that the entity be newly formed and formed for a single purpose to be bankruptcy remote. In this instance, the lease financing for the design, renovation, rehabilitation, construction and maintenance of Guam DOE schools is the single purpose. Therefore, GEF did not misrepresent its expertise and experience as their key personnel are part of the entity that financed, developed, and constructed Okkodo High School, Liguana Elementary, Adacao Elementary and Astumbo Middle School.

IV.

RESPONSIVENESS APPLIES TO INVITATION FOR BIDS

Responsiveness of bids is determined by 5 G.C.A. § 5201(g) which defines responsive bidder as a person who has submitted a bid which conforms in all material respects to the *Invitation for Bids* ("IFB"). 2 GAR § 3109(n)(2). In this instance, DPW issued a *Request for Proposals* ("RFP"). Therefore, this standard does not apply to this RFP as an IFB is usually awarded to the lowest *responsive* bidder.

The RFP, however, did include a section regarding responsive proposals. Section 3.7 of the RFP stated that proposals *may* be found non-responsive any time during the evaluation process or contract negotiation if any of the required information is not provided or the proposal is not within the plans and specifications described and required in the RFP. It further provided that if an offeror is found non-responsive, it will not be considered further.

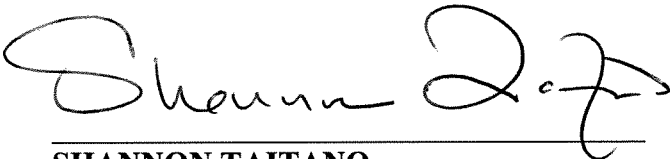
Section 3.7 is merely permissive and not mandatory. Until a determination has been made that a proposal is non-responsive, then the proposal will not be further considered. Neither DPW nor the evaluation or negotiation committee determined that any proposal was non-responsive.

CONCLUSION

Based on the foregoing argument, the Public Auditor should deny Core Tech's request for determination that GEF's proposal was non-responsive.

Dated this 14th day of October, 2016.

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

By: 
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