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RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 10/14/16
TIME: 4:21 AM PM BY: C. Roque
FILE NO OPA-PA: 16-007R 16-011

PROCUREMENT APPEAL
IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

Core Tech International Corp.,
Appellant.

and

Guam Department of Public Works,
Purchasing Agency.

DOCKET NO. OPA-PA-16-007
DOCKET NO. OPA-PA-16-011

CORE TECH INTERNATIONAL CORP.'S
REMEDIES BRIEF

Core Tech International Corp. ("Core Tech") respectfully submits its Remedies Brief addressing each of Core Tech's claims asserted in the appeals regarding the solicitation for the "Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Public Schools (Beginning with Simon Sanchez High School)."

I. REMEDIES REQUESTED BY CORE TECH

A. DPW VIOLATED 2 GAR §3114(I) WHICH EXPLICITLY LIMITS DISCUSSIONS REGARDING COMPENSATION DURING NEGOTIATIONS WITH GEFF.

The original proposal submitted by Guam Educational Facilities Foundation, Inc. ("GEFF") excluded over \$16.1 million in construction costs for Simon Sanchez High School required in the

1 Request for Proposals (“RFP”). See, CT Ex. 54 (Letter dated 2/29/2016 from GEFf). In addition to
2 the exclusion of \$16.1 million in construction costs, GEFf failed to include required construction
3 cost for the Astro turf and the additional access road, which GEFf subsequently quoted at \$1 million
4 and \$425,000, respectively. GEFf’s original proposal with a price of \$73,218,078, with excluded
5 costs, was \$90.7 million. §3.7 of the RFP requires that the Department of Public Works (“DPW”)
6 after opening of proposals make an initial determination of whether proposals are responsive. See,
7 §3.7, RFP. If a proposal is found to be non-responsive after opening of proposals, the RFP states
8 that “[the proposal] will not be considered further.” *Id.* The issue of the non-responsiveness of
9 GEFf’s proposal was raised and discussed with Mr. Benavente and the Negotiation Committee in
10 March, 2016. See, CT000619-621; CT Ex. 36 & 37. DPW should have made a determination in
11 March 2016 that GEFf’s proposal was not responsive, and should not have considered GEFf’s \$90.7
12 million proposal further. The appropriate remedy for accepting GEFf’s non-responsive proposal is
13 discussed *infra* in I.C.

14 Instead of disregarding GEFf’s non-responsive proposal, DPW ignored the RFP and Guam
15 Procurement law and proceeded to invite and accept from GEFf four New Proposals during the
16 negotiation phase of the procurement. 2 GAR Div. 4 §3114(l) does not permit an offeror to submit
17 New Proposals after the Procuring Agency completes evaluation of proposals and ranking of offerors.
18 See, 2 GAR Div. 4 §3114(l). §3114(l) is entitled “Elements of Negotiations” which limits the
19 Negotiating Committee and DPW’s authority during contract negotiations with GEFf.

20 Guam Procurement Law only authorizes the Procuring Agency to conduct discussions with
21 offerors to evaluate all proposals *timely* submitted—that is, proposals submitted by no later than
22 November 6, 2015. See, CT1-0009 (§2.4.3, RFP); CT2-00046 (RFP, Addendum 7). Guam
23 procurement law does not authorize the Procuring Agency to solicit and/or receive new proposals
24 after the proposal submission deadline, and definitely not after ranking of proposals. *Id.* Finally,
25 §3114(l) authorizes negotiations between the agency and offeror only to make certain “that the
26 offeror has a clear understanding of the scope of work” and to agree upon compensation. See, 2 GAR
27 §3114(l)(A).

28 The Negotiating Committee clearly exceeded its authority in soliciting and accepting four

1 additional proposals from GEF, one of which it ultimately selected. In doing so, it violated the RFP
2 and Guam Procurement Law. If the Public Auditor determines that DPW should have disregarded
3 GEF's original proposal because it was non-responsive, and/or the Negotiating Committee violated
4 Guam Procurement Law and the RFP when it invited and accepted four New Proposals from GEF,
5 the remedies applicable for violation of Guam Procurement law are as follows:

6 **§5451 Remedies Prior to Award.**

7 If prior to award it is determined that a solicitation or proposed award of a
8 contract is in violation of law, then the solicitation or proposed award shall be:

9 (a) cancelled; or

10 (b) revised to comply with the law.

11 5 GCA §5451.

12 DPW's and the Negotiating Committee's violations of law cannot be cured by revision. The
13 only remedy available is to set aside the proposed award to GEF.

14 **B. THE NEGOTIATING COMMITTEE MADE UNAUTHORIZED**
15 **MODIFICATIONS TO THE RFP WHEN IT ALLOWED GEF TO**
16 **SUBMIT NEW PROPOSALS IN VIOLATION OF GUAM**
PROCUREMENT LAW.

17 The Negotiating Committee's act of selecting GEF's final proposal despite its non-
18 compliance with the RFP amounts to an improper modification of the RFP after the deadline for
19 submissions closed, after ranking the offerors, and during the negotiations process, for GEF's
20 exclusive benefit. DPW did not accord Core Tech and Pernix the "fair and equal treatment with
21 respect to any opportunity for discussions and revisions of proposals" required under §4.9.4.3 of the
22 RFP and Guam Procurement Law. *See*, 5 G.C.A. §5001(a)(4) and CT1-00035. The Negotiating
23 Committee did not have the authority to modify the RFP requirements so that it could accept GEF's
24 New Proposal. By permitting GEF to submit New Proposals and modifying the RFP requirements
25 during contract negotiations to conform to the Final Proposal, DPW not only violated Guam
26 Procurement Laws, but gave GEF an unfair advantage over all other offerors.

27 The inherent unfairness in the negotiation process, wherein the Negotiating Committee
28 modified RFP requirements to conform to a proposal GEF submitted belatedly, is incurable by

1 revision. The only remedy applicable is to set aside the proposed award to GEFf pursuant to 5
2 G.C.A. §5451(a).

3
4 **C. GEFf'S ORIGINAL \$90.7 MILLION PROPOSAL AND ITS FOUR
NEW PROPOSALS WERE NON-RESPONSIVE.**

5 In addition to accepting the initial non-responsive \$90.7 million GEFf proposal, the
6 Negotiating Committee accepted four New Proposals from GEFf during negotiations and ultimately
7 decided to proceed with one of those New Proposals. The Final Proposal with a price of \$76.8
8 million, which DPW attached to the Negotiating Committee Memo, did not comply with the
9 technical requirements of the RFP, in particular, the technical requirements (Exhibit A) relating to the
10 "Program of Spaces." See, CT Ex. 12, at CT-12-0008-11.

11 By considering the original proposal and the four New Proposals, and ultimately selecting a
12 proposal that did not comply with the RFP, the Negotiating Committee violated Guam Procurement
13 law and the OPA should cancel the proposed award to GEFf. GEFf's original and New Proposals
14 should be deemed non-responsive and rejected. The selection of GEFf as the best qualified offeror
15 should be cancelled pursuant to 5 G.C.A. §5451(a).

16
17 **D. DPW AND THE NEGOTIATING COMMITTEE VIOLATED THE
18 BONDING REQUIREMENTS OF THE RFP IN VIOLATION OF
PROCUREMENT LAW.**

19 The RFP requires the Offeror, in this case, GEFf, or the *Offeror's* contractor to provide a
20 performance and payment bond for the IDIQ Contract. The RFP specifically requires that Offerors
21 submit a bid bond for 15% of the 100 million to be financed (*see*, §4.2.1.4, *RFP*) and that the Offeror
22 (Awardee) be bondable:

23
24 **4.2.1.5. *The Offeror [awardee] must be bondable as required by this RFP and
25 by law. A one hundred percent (100%) performance and payment bond must be
26 obtained by Offeror or its prime Contractor.*** The bond must be issued by a
company authorized to do business on Guam, and listed in the U.S. Department of
the Treasury's Listing of Approved Sureties (Circular 570).

27 *RFP* at 21 (emphasis supplied). Sections 4.1 and 4.2.1.5 of the RFP (modified by Addendum 6 at
28 page 5 replacing the word "Offeror" with "Awardee") contain the following requirements:

- 1 (1) The Awardee must be bondable; and
- 2 (2) A one hundred percent (100%) performance and payment bond must
- 3 be posted by the Awardee or its prime contractor.

4 The Negotiating Committee Memo states that “Guam Education Development Partners, Developer’s
5 Subcontractor, is required to provide a Performance Bond.” *See*, CT Ex. 12 at CT-12-0004. This
6 arrangement was confirmed by Rick Inman during his direct testimony. He stated that the
7 performance bond will be provided by Hensel Phelps for Simon Sanchez High School, *as the*
8 *contractor to Guam Education Development Partners* (“GEDP”), the development subcontractor.
9 Under the IDIQ Agreement and the agreement reached by the parties, GEFf is subcontracting the
10 development obligations, rights and responsibilities to GEDP, including the obligation under the RFP
11 to provide a performance and payment bond. *See*, CT Ex. 40 (IDIQ Contract) The subcontract of
12 the development obligations, rights and responsibilities by GEFf to GEDP does not comply with the
13 express requirement in both the RFP and the enabling legislation. Further, to the extent GEFf’s
14 proposal contemplates bonding through GEDP’s construction subcontractor, its proposal is non-
15 responsive to the RFP, and DPW’s act of accepting GEFf’s proposed bonding structure violates the
16 RFP, the enabling legislation, and Guam Procurement Law. For this reason, the OPA should cancel
17 the proposed award to GEFf.

18 GEFf representative, Rick Inman, stated during his rebuttal testimony that GEFf would
19 actually be entering into a construction contract directly with Hensel Phelps, in direct contradiction of
20 his earlier testimony during Core Tech’s case in chief, when he confirmed that GEDP would be
21 entering into a construction contract with Hensel Phelps, as described in the IDIQ Contract and the
22 Negotiating Committee Memorandum. Even more troubling perhaps was Mr. Inman’s admission
23 that a contractor has not been selected for the CCIP portion of the IDIQ Contract, that it was possible
24 that FOL Guam LLC (“FOL”), the entity owned by EC Development, might serve as contractor, and
25 that bonding for the CCIP would ideally be provided by the selected contractor for the CCIP. FOL
26 was not an offeror, it does not meet the five (5) year minimum construction contractor requirements,
27 and it was not identified in the IDIQ Contract as a party performing any of the work for this
28 solicitation. Moreover, FOL’s ability to deliver a performance and payment bond was not considered

1 or reviewed by the Evaluation Committee or the Negotiation Committee. The RFP plainly requires
2 either the Awardee or its prime contractor to provide a performance and payment bond. There is no
3 mechanism within the RFP that allows for the bond to be parsed among multiple contractors.

4 Guam Procurement Law also requires that the performance and payment bond be delivered
5 upon signing of the contract. *See*, 5 GCA §5304(a). Three of the five signers to the IDIQ Contract,
6 Phil Flores (GEFF), Jon Fernandez (DOE), and Felix Benavente (DPW), signed the IDIQ Contract.
7 Upon full execution of the IDIQ Contract, GEFF was required to provide the performance and
8 payment bond for a design build *construction* contract. This is a typical arrangement for design build
9 *construction* contract, and GEFF has stated that it would not be complying.

10 Based on Mr. Inman's rebuttal testimony, GEFF appears to have conceded the impropriety of
11 the structure set forth in its proposal which was the basis of ranking, and later negotiated between the
12 Negotiating Committee and GEDP. Mr. Inman's testimony regarding this proceeding regarding the
13 proposed new structure should be disregarded. Negotiations with the Negotiating Committee have
14 concluded, and GEFF cannot "negotiate" with the Public Auditor regarding the terms of the contract.

15 While §5451 provides that a proposed award may be cancelled or revised to comply with the
16 law, merely striking the offending language in the IDIQ Contract and the Negotiating Memorandum
17 ignores the wrongful acts of the parties, and does not ensure the parties' compliance with the RFP.
18 The Negotiating Committee and GEFF's inability or refusal to comply with the RFP in the first place
19 led to the protest and subsequent appeal on this issue. Revising the IDIQ Contract or even the
20 ultimate contractual arrangements between GEFF, GEDP, Hensel Phelps and the Government for the
21 Simon Sanchez Task Order will not correct the CCIP bonding. Furthermore, GEFF's refusal to
22 provide a performance bond for the design build construction contract is a violation of Guam
23 Procurement law. Thus, the proper remedy is setting aside the proposed award to GEFF pursuant to §
24 5451.

1 **E. DPW VIOLATED THE RFP BY NEGOTIATING AND AGREEING TO**
2 **TERMS IN THE IDIQ CONTRACT WHICH CIRCUMVENTED THE**
3 **\$100 MILLION CAP IN THE RFP.**

4 It is undisputed that the RFP places a cap on the compensation for the solicitation at One
5 Hundred Million dollars (\$100,000,000). DPW and GEFf refuse to acknowledge that Section 3.1 of
6 the execution version of the IDIQ Contract, which was signed by GEFf, GDOE and DPW
7 representatives, provides an exception to the stated compensation cap: that compensation is not to
8 exceed \$100,000,000 *unless otherwise directed by the Director of DPW in writing and permitted by*
9 *Public Laws 21-120 and 32-121 or any other law.* GEDA Deputy Director Mana Silva Taijeron, who
10 was not consulted regarding this additional contractual language, agrees that this provision does not
11 comply with the RFP mandated \$100 million cap.

12 DPW has stated repeatedly in its briefs as well as during the hearing in this matter that “if
13 necessary, Section 3.1 could still be modified as the IDIQ contract has not been executed by the
14 Governor nor approved by the Attorney General.” *Agency Report* at 6. During its closing argument,
15 DPW even stated it would likely strike that language from the contract before proceeding. DPW
16 does not get to elect which remedy the OPA should select regarding its blatant violation of the RFP,
17 and DPW’s and GEFf’s concerted effort to exceed the 100 million cap without the knowledge of
18 GEDA, the agency specifically responsible for the financing portion of the solicitation. While Core
19 Tech recognizes DPW’s attempt to correct its misconduct now that it has been caught, it still must be
20 held accountable for its misconduct in the first instance. Simply striking an errant provision will not
21 correct the wrongful acts and bad faith that caused one or both parties to draft that provision or to fold
22 that provision into the IDIQ Contract, especially when two of the other bidders, Core Tech and
23 Pernix, were operating under the RFP \$100 million cap. The appropriate remedy is cancellation of the
24 award to GEFf under 5 G.C.A. §5451. Additionally, while a finding of bad faith is not necessary to
25 cancel the award under 5 G.C.A. §5451, a finding of bad faith would also be appropriate.

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1 **F. DPW FAILED TO MAINTAIN A COMPLETE PROCUREMENT**
2 **RECORD REQUIRED UNDER GUAM PROCUREMENT LAW.**

3 Guam Procurement Law provides a clear remedy for a procuring agency’s failure to certify a
4 complete procurement record. “No procurement award shall be made unless the responsible
5 procurement officer certifies in writing under penalty of perjury that he has maintained the record
6 required by §5249 of this Chapter and that it is complete and available for public inspection.” 5
7 G.C.A. §5250 (emphasis supplied). As the Superior Court held in *Teleguam Holdings LLC v.*
8 *Government of Guam*, Superior Court of Guam Case No. CV0334-13 (*Decision and Order*, August
9 18,2016), “the Procurement record upon which [the Invitation for Bid] and the proposed awards were
10 based is incomplete. A revision of the consequent proposed awards cannot render the preceding
11 procurement record complete and it would remain in violation of the Procurement Law...Therefore,
12 the only remaining remedy available to the Court is to cancel the solicitation and proposed awards.”
13 *Id.* at 8.

14 The law is clear that no procurement award shall be made if there is an incomplete record,
15 regardless of whether the record’s incompleteness prejudices any party. 5 G.C.A. §5250.
16 Nonetheless, it is worth noting that in this case DPW’s failure to keep a complete record resulted in
17 uncertainty regarding, among other things, the motivations of GEDA Board Chairman E.J. Calvo in
18 attempting to become involved in the procurement, the details discussed in negotiations between
19 DPW and GEFF, why Core Tech’s price proposal was discussed by the negotiation team, whether
20 Core Tech’s price was disclosed in negotiations with GEFF and if so, why was it disclosed to GEFF,
21 and how and by whom the workaround to the \$100 million cap was inserted into the contract.
22 Because DPW failed to record and maintain complete communications log **and** recordings of
23 negotiations with GEFF, the procurement record is incomplete, does not comply with 5 G.C.A.
24 §5249, and can never be recreated. The OPA must cancel the solicitation and set aside the proposed
25 award to GEFF.

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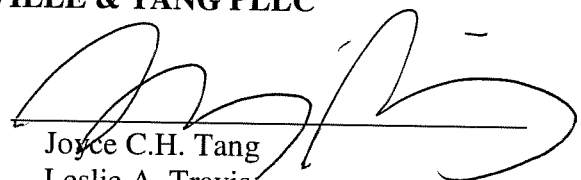
II. CONCLUSION

Core Tech respectfully requests the Public Auditor grant the remedies requested herein, and award reasonable costs to Core Tech as provided in 5 GCA §5415(h).

Respectfully submitted this 14th day of October, 2016.

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By:



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