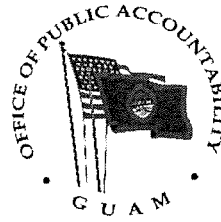


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FAX

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:	13 (including cover page)
CC:	Anita Arriola, Esq. Attorney for Interested Party: KEPCO and LG CNS Co. Ltd. Consortium Arriola, Cowan & Arriola Tel: (671) 477-9730/33 Fax: (671) 477-9734	Date:	October 24, 2017
		Phone: Fax:	(671) 475-0390 x. 208 (671) 472-7951

Re: OPA-PA-17-010 Notice of Receipt of Appeal

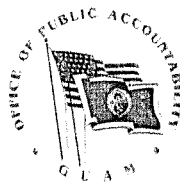
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OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

October 24, 2017

Mr. Glenn Leon Guerrero
Director
Department of Public Works
542 North Marine Corps Drive
Upper Tumon, Guam 96913

VIA FACSIMILE: (671) 649-6178

Re: Notice of Receipt of Appeal – OPA-PA-17-010

Dear Mr. Leon Guerrero,

Please be advised that Core Tech International Corp. (Core Tech) filed an appeal with the Office of Public Accountability (OPA) on October 23, 2017 regarding the Department of Public Works' (DPW) decision on contract or breach of contract controversy related to the improvements to Route 1/Route 8 and to replace Agana Bridges 1 and 2. OPA has assigned this appeal case number OPA-PA-17-010.

Immediate action is required of DPW pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA's office and on its website at www.opaguam.org. The notice of appeal filed with OPA is enclosed for your reference.

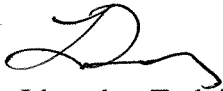
Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeals. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), please submit one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated, to OPA by **Tuesday, October 31, 2017**, five work days following receipt of this notice of appeal; and one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Div. 4, Chap. 12, §12105, by **Monday, November 13, 2017**, twenty days following receipt of this notice of appeal.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to Core Tech. In addition, OPA respectfully asks that DPW provide one original and two copies of the procurement record and agency report as the Guam Procurement Law and Regulations require only one copy. The three procurement record copies requested by OPA are distributed as follows: Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 208, or jhernandez@guamopa.com, should you have any questions regarding this notice.

Sincerely,

A handwritten signature in black ink, appearing to read 'Llewelyn Terlaje', with a stylized flourish at the end.

Llewelyn Terlaje
Audit Supervisor

Enclosure: Notice of Appeal – OPA-PA-17-010

Cc: Anita P. Arriola, Attorney for Core Tech

ANITA P. ARRIOLA, ESQ.
ARRIOLA, COWAN & ARRIOLA
259 MARTYR STREET, SUITE 201
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*Attorneys for Appellant
Core Tech International Corp.*

**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

ARRIOLA, COWAN & ARRIOLA, HAGATNA, GUAM 96910

IN THE APPEAL OF) Docket No. OPA PA-17-_____
)
CORE TECH INTERNATIONAL CORP.,)
) **NOTICE OF APPEAL**
Appellant.)
)
)
)

CORE TECH INTERNATIONAL CORP. ("CTI") hereby appeals two decisions rendered by the Department of Public Works ("DPW"), an agency of the Government of Guam, on August 23, 2017: (a) terminating for cause CTI's contract with DPW ("the Contract") for improvements to Route 1/Route 8 and to replace Agana Bridges 1 and 2 ("Project"); and (b) rejecting CTI's requests for time extensions and change orders. This appeal concerns DPW's wrongful termination of the Contract, DPW's breach of the Contract, and wrongful interference with the Contract by DPW's consultant Parson's Transportation Group ("PTG"). Further, DPW's termination of the Contract was in retaliation for CTI's successful protests and appeals against DPW concerning the Simon Sanchez High School Invitation for Bids ("SSHS Bids").

I. APPELLANT INFORMATION

Name: Core Tech International Corporation
Address: 388 South Marine Corps Drive, Ste. 400
Tamuning, Guam 96913

For purposes of this appeal, correspondence or service of pleadings may be directed to CTI’s counsel, Anita P. Arriola, Arriola, Cowan & Arriola, 259 Martyr St., Ste. 201, Hagatna, Guam 96910. Email: anitaarriola@arriolacowan.com, Tel. 477-9730/33; Fax 477-9734.

II. APPEAL INFORMATION

Purchasing agency: Department of Public Works, Government of Guam
Contract No.: 11-0929
Project No.: GU-DAR-T101(001)
Date of Contract: September 30, 2011

This appeal is made from the decisions of DPW to terminate the Contract and to reject CTI’s requests for time extension and change orders (“Time Extension Request”).

III. STATEMENT OF GROUNDS FOR APPEAL

A. DPW WRONGFULLY TERMINATED THE CONTRACT.

1. DPW failed to give CTI notice of default and an opportunity to cure.

The Contract is a Design-Build contract in which CTI agreed to design and build improvements to the Route 1 and Route 8 intersection, and replacement of two bridges over the Hagatna River. *See Exhibit A.*¹ The Project included pavement widening and strengthening, curb and gutter, driveways, signs, pavement markings, guardrail, drainage facilities, roadway lighting, utility relocations and adjustment, and traffic signal system improvements. *Id.* Despite significant delays and additional work caused by DPW and PTG, CTI substantially completed

¹ Pertinent portions of the Contract Documents are attached.

ARRIOLA, COWAN & ARRIOLA, HAGATNA, GUAM 96910

the Project and Guam now has two safe and fully functional bridges. Yet *over three years* after the first bridge was opened (on July 9, 2014) and *over a year* after the last bridge was opened to the public (on March 18, 2016), DPW sent a “Notice of Termination/Default of Contract” to CTI *on the same day*. See Exhibit B. It is unprecedented for a contractor who has substantially completed a \$16 million project to receive a notice of default and termination with little work remaining on the Project.² DPW violated the law by failing to give CTI notice of default and an opportunity to cure.

A breaching party must be given the opportunity to cure any default. See *Gulf Ins. Co. v. Fid. & Deposit Co. of Md.*, 847 N.Y.S.2d 896 (2007) (termination was wrongful because subcontractor not given notice and an opportunity to cure); *Blaine Econ. Dev. Auth. v. Royal Elec. Co.*, 520 N.W.2d 473 (Minn. Ct. App. 1994) (owner wrongfully terminated construction contract by failing to first give opportunity to cure). A cure notice should set out the extent of the deficiencies and advise that they are serious enough to warrant termination unless corrected promptly. *Hannon Elec. Co. v. United States*, 31 Fed. Cl. 135, 148 (1994). The opportunity to cure is implied in every contract as a matter of law. *U.S. for Use & Benefit of Cortolano & Barone Inc. v. Morano Constr. Corp.*, 724 F. Supp. 88, 98 (S.D.N.Y. 1989) (despite absence of contractual provision, subcontractor alleged to be in default is entitled to receive notice of default); *Bates v. Benedetti*, E2010-01379-COA-R3-CV, 2011 WL 978195 (Tenn. Ct. App. 2011) (recognizing owner’s common-law duty to give notice and opportunity to cure before termination). Because DPW failed to give notice of default and an opportunity to cure, DPW’s termination of the Contract was wrongful.

2. DPW’s termination of the Contract was retaliatory.

² The remaining work is the final punch list and reconstruction of sidewalks, ramps and driveways to be compliant with the American Disabilities Act.

CTI filed two procurement appeals alleging that DPW violated certain laws concerning the SSHS Bid. After CTI filed an appeal challenging DPW's first SSHS Bid, the Public Auditor issued a decision on November 22, 2016 finding, among other things, that DPW violated Guam Procurement Law by failing to maintain a complete procurement record, and executing an IDIQ that allows compensation to GEF to exceed the \$100M cap stated in the RFP. *In the Appeal of Core Tech International Corp.*, OPA-PA-16-007/OPA-PA-16-011.

DPW issued a second IFB for the SSHS Bid, which was again challenged by CTI. In the second appeal, the Public Auditor found that DPW violated 5 G.C.A. § 58E104 by attempting to combine the SSHS solicitation with the solicitation for services for the 34 remaining public schools. DPW failed to complete a program study for the 34 schools prior to issuing an IFB for those schools. *In the Appeal of Core Tech International Corp.*, OPA-PA-17-001. The decision on the second appeal issued on June 9, 2017.

DPW issued a third IFB for the SSHS Bid on July 7, 2017. On July 20, 2017, CTI requested clarification of the IFB Instruction to Bidders, as to what constitutes a "record of default". On August 23, 2017, DPW issued the Notice of Termination/ Default and a letter denying virtually all of CTI's requests for time extension and change orders for the Project. Less than twenty-four hours later, DPW issued Addendum No. 6 concerning the third SSHS Bid, and in answer to CTI's question, stated:

Record of Default includes but is not limited to written Determinations by DPW or the Procurement Officer. Nonpayment of obligations means payments by Contractor to vendors and subcontractors. All disputes must be disclosed with a statement on the final or pending status.

See Exhibit C.³ The timing of the Notice of Termination/Default and the Addendum are not coincidental – DPW intended to discriminate and retaliate against CTI for successfully pursuing protests and appeals relating to DPW’s violations of law in the SSHS Bids. ***DPW’s actions were intended to ensure that CTI will not be eligible to bid for any current or future government project.*** By its actions, DPW violated the First Amendment to the U.S. Constitution, the Organic Act of Guam (48 U.S.C. §§ 1421b(a), (e) and (u) and § 1423k), and the Civil Rights Act of 1871, (42 U.S.C. §§ 1981 and 1983).

CTI has a *prima facie* case of retaliation under the First Amendment and 42 U.S.C. § 1983: (1) CTI engaged in protected First Amendment speech; (2) DPW responded with retaliation sufficient to deter a person of ordinary firmness from exercising his or her rights; and (3) there was a causal connection between the protected First Amendment speech and the retaliation. *Lauren v. Deflaminis*, 480 F.3d 259, 267 (3d Cir. 2007); *Estate of Smith v. Marasco*, 318 F.3d 497, 512 (3d Cir. 2003). A causal connection is proved by either “(1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link.” *Lauren*, 480 F.3d at 267. 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. Further, DPW’s “pattern of antagonism” began when CTI submitted its Time Extension Request in October, 2016, the decision on the first appeal issued on November 22, 2016, and DPW waited nine months to reject virtually all of CTI’s requests; the decision on the second appeal issued on June 9, 2017 and four days later, on June 13, 2017, DPW issued a “Final

³ CTI has filed an appeal of this third IFB for the SSHS Bid, in *In the Appeal of Core Tech International Corp.*, OPA-PA-17-009.

Demand to Complete Project”, *see* Exhibit D; and DPW refused to provide CTI with notice of default and an opportunity to cure.

B. DPW BREACHED THE CONTRACT.

1. DPW/PTG failed to approve and provide a baseline schedule.

In its Notice of Default/Termination, DPW alleges that CTI failed to timely prosecute the construction work and correct deficiencies in the work. This is untrue. DPW/PTG failed to provide a baseline schedule for the Project and failed to amend it as the scope of the Project changed or delays caused by PTG occurred. Since the beginning of the Contract, CTI submitted four (4) proposed baseline schedules for the Project. Despite repeated requests by CTI, DPW/PTG never approved a baseline schedule for the Project. A baseline schedule is critical to any construction project, it is used to measure construction progress and contract performance by the contractor, as well as to monitor disputes between the parties. A change in the scope or work of the Project may necessitate a new or amended baseline schedule. The last baseline discussed by the parties, but never approved by PTG, was in October, 2015.

The lack of a baseline schedule had a deleterious effect on the Project. CTI was working without a clear timeframe or schedule of work for the Project and there was no coordination of different work on the Project. CTI submitted monthly reports and submittals to PTG, who refused to approve them and sent back multiple demands for further information or further documentation, yet these delays were not taken into account in a baseline schedule because there was none. Similarly, PTG made design revisions on several items, yet the delays caused by PTG for these design revisions were not documented in a baseline schedule.

DPW's termination of the Contract due to CTI's failure to prosecute the work within the time frames required by the Contract cannot be sustained when DPW failed to approve a baseline schedule for the Project.

2. DPW failed to approve CTI's Time Extension Request.

Having no baseline schedule in a construction project is like driving blind. Because there was no approved baseline schedule, CTI was prejudiced in its ability to submit its Time Extension Request.⁴ *See* Exhibit E. CTI was forced to use the last baseline schedule discussed by the parties on October 2015. CTI submitted its request on September 16, 2016 and 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. *See* Exhibit F. It is extraordinary that out of 817 days of time extensions requested by CTI, DPW granted only .0048 percent of CTI's request, particularly when the vast majority of the delays were caused by PTG. DPW's rejection of CTI's request for time extensions and change orders should be reversed.

C. PTG INTENTIONALLY AND WRONGFULLY INTERFERED WITH CTI'S WORK ON THE PROJECT.

1. PTG acted as Engineer and Designer, usurping CTI's responsibilities for the Project.

Under the Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects FP-03 ("FP-03") § 104.02, PTG is prohibited from altering contract requirements, issuing instructions contrary to the contract, or directing CTI's operations, yet that

⁴ The Time Extension Request also included a request for a change order to the Contract price, based upon the delays substantiated in the time extension requests. CTI sought a change order to increase the price of the Contract in the amount of \$5,416,509.00.

is precisely what they did in this Project. CTI's engineer and designer of record Knight McDonough ("DOR") designed the rear approach slab manhole, but PTG rejected the design and insisted on producing their own design. Similarly, storm drain inlets 40 and 41 were initially approved by PTG but the approval was reversed, requiring four additional re-designs. PTG would not let CTI finish the surface of the bridge and would not let heavy equipment on the bridge, alleging that CTI failed to construct the deck beams in accordance with the contract plans and specifications. CTI denied these claims and responded that these were crazings and not cracks. DPW failed to provide a report by a qualified engineer supporting this claim, while CTI provided the opinions of its DOR and multiple structural engineers that the crazings were not a problem and would not adversely affect the lifespan of the bridge. Further, they opined that any attempt to resolve the situation might affect the structural integrity of the beams. CTI applied a minimal surface painting of sealant on the beams, which was accepted by DPW a year later. PTG's constant interference with CTI's work on the Project cost CTI thousands of dollars in additional labor and equipment, waste of resources, and months of delay on the Project.

2. PTG acted as Owner of the Project, usurping DPW's role and responsibilities in the Project.

PTG consistently rejected CTI's submittals, monthly reports and invoices (collectively "submittals"), issuing an initial communication explaining that CTI failed to comply with one or more contractual provisions. When CTI attempted to comply with said provisions and submitted a revised or corrected submittal, weeks later PTG would issue a second communication stating that CTI failed to comply with *another, entirely separate* contract provision. This would go on for months, with PTG doling out one communication after another, rejecting submittals for one reason and then rejecting resubmitted submittals for entirely different reasons, instead of sending one communication with all of the alleged problems at one time. For example, SOW 16, CTI's

final plan for the utility relocation DOD communication/GTA, was submitted and resubmitted *twenty-two (22) times*; the shop drawings for the approach slab at rear abutment Bridge 2 were submitted and resubmitted *six (6) times*; the quality control procedure for concrete aggregate sampling and testing was submitted and resubmitted *six (6) times*. It was DPW's responsibility under the Contract to reign in PTG's excesses in requiring numerous submittals and to prevent further delays, but DPW abandoned its responsibilities, leaving it to PTG to make all decisions concerning the Project.

CTI was damaged by PTG's intentional and improper interference with the Contract. The resultant delays, expense, and waste of resources caused by PTG's actions were substantial.

D. THERE IS NO JUSTIFICATION FOR LIQUIDATED DAMAGES.

DPW has assessed more than \$2,796,420.00 in liquidated damages against CTI for alleged delays and breaches of the Contract. However, there can be no assessment of 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. In addition, DPW took early beneficial use and occupancy of different phases of the Project. Based on the substantial completion and/or beneficial use and occupancy of the Project, liquidated damages are barred or should be reduced substantially.

IV. RELIEF REQUESTED

CTI 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.

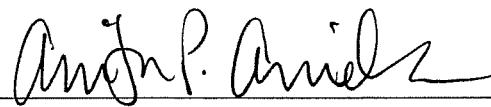
DECLARATION RE COURT ACTION

Pursuant to 5 G.C.A. Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of her knowledge, no case or action concerning the subject of this appeal has been commenced in court. All parties are required to and the undersigned agrees to notify the Office of Public Accountability within 24 hours if court action commences regarding this appeal or the underlying procurement action.

Dated this 23rd day of October, 2017.

ARRIOLA, COWAN & ARRIOLA
Counsel for Core Tech International Corp.

By: 
ANITA P. ARRIOLA

ARRIOLA, COWAN & ARRIOLA, HAGATNA, GUAM 96910

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	Mr. Thomas Keeler Ms. Shannon Tuitano Assistant Attorneys General Office of the Attorney General of Guam 590 S. Marine Corps Drive, Suite 706 Tamuning, Guam, 96913 Fax: (671) 472-2493	Pages:	13 (including cover page)
CC:	Anita Arriola, Esq. Attorney for Interested Party: KEPCO and I.G CNS Co. Ltd. Consortium Arriola, Cowan & Arriola Tel: (671) 477-9730/33 Fax: (671) 477-9734	Date:	October 24, 2017
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Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-17-010 Notice of Receipt of Appeal

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Jerrick Hernandez <jhernandez@guamopa.com>

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Regards,

Jerrick J.J.G. Hernandez, CGAP, CICA

Auditor

Office of Public Accountability – Guam

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Anita P. Arriola

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