

1 Joyce C.H. Tang
2 Leslie A. Travis
3 CIVILLE & TANG PLLC
4 330 Hernan Cortez Avenue Ste. 200
5 Hagatna, Guam 96910
6 Tel: (671) 472-8868/9
7 Fax: (671) 477-2511

8 PROCUREMENT APPEAL
9 IN THE OFFICE OF PUBLIC ACCOUNTABILITY

10
11 In the Appeal of

12 Core Tech International Corp.,
13 Appellant.

14 and

15
16 Guam Department of Public Works,
17 Purchasing Agency.

DOCKET NO. OPA-PA-17-009

CORE TECH INTERNATIONAL
CORP.'S COMMENTS TO DPW'S
AGENCY REPORT

20
21
22 RECEIVED
23 OFFICE OF PUBLIC ACCOUNTABILITY
24 PROCUREMENT APPEALS

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28 ORIGINAL

1 I. INTRODUCTION

2 This case is about DPW’s attempts to generate and institute new policies without basis in the
3 law, during the pendency of a solicitation, to single out a contractor who has won appeals against it.

4 Core Tech International Corp. (“Core Tech”) protested the solicitation of the “Lease
5 Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Simon Sanchez
6 High School” Project No. 730-5-1057-L-YIG (the “IFB”) on September 7, 2017, asserting violations
7 of the Guam Procurement law on two grounds: (1) DPW failed to include the required critical
8 contracts for the IFB, and (2) the Department of Public Works (“DPW”) improperly included the
9 August 23, 2017 Notice of Default and Termination from DPW to Core Tech on the Rt. 1/8 Bridges
10 and Road project (“8/23/17 Default/Termination Letter”) as a Record of Default in determining Core
11 Tech’s responsibility in this IFB or any other DPW procurement (the “CTI Protest”). DPW issued its
12 decision on September 29, 2017 (“Agency Decision”), conceding the first ground, and denying the
13 second ground. Core Tech appealed the Agency Decision on October 16, 2017.

14 DPW filed its Agency Report on October 31, 2017, contending among other things, that the
15 8/23/17 Default/Termination Letter was a matter of record, and that the appeal as to this ground was
16 untimely. Core Tech submits this response to the Agency Report.

17 II. SUMMARY OF ARGUMENT

18 DPW asserts that Core Tech’s appeal was not timely, arguing that Core Tech should be
19 familiar with DPW’s capital improvement solicitation documents, and Core Tech should have
20 immediately filed a protest within fourteen (14) days after the issuance of the IFB. As demonstrated
21 below, this argument is factually and legally incorrect.

22 DPW further argues that a contracting officer, in reviewing the record of past performance to
23 determine a bidder’s ability and capacity to perform the contract requirements, should be given wide
24 discretion in determining the amount and type of information that should be considered, and, that

1 Core Tech's argument that evaluators should not be allowed to consider a record of default should be
2 rejected. This argument is also flawed. *First*, DPW has misconstrued this issue on appeal. Core Tech
3 has not said that a record of default should not be considered by the agency; rather, Core Tech's
4 argument is that a record of default should not include a notice of default until appeals of the
5 agency's determinations and actions are exhausted, adjudicated or have lapsed. *Second*, Core Tech
6 has raised the issue regarding the timing and the appropriateness of DPW's issuance of the 8/23/17
7 Default/Termination Letter, which Core Tech asserts was in retaliation to Core Tech's success in
8 challenging the three earlier SSHS procurement solicitations before the Public Auditor.
9

10 As discussed below, the facts and law support a finding that: (1) Core Tech's appeal was
11 timely filed, and (2) a Record of Default should not include notices of default that are disputed, and
12 which have not been fully adjudicated or for which the time to appeal has not lapsed.
13

14 III. ARGUMENT

15 A. CORE TECH'S APPEAL WAS TIMELY FILED.

16 In its Agency Report, DPW argues that Core Tech's Appeal was not timely filed because
17 Core Tech had previously filed protests and should therefore be familiar with DPW's standard
18 procurement documents for its capital improvement projects ("CIP"). DPW claims that its CIP
19 procurement documents include a request of past performance of contracts including a record of
20 default, which Core Tech knows or should know. The SSHS solicitation documents have been
21 challenged on the grounds that they do not comply with Guam procurement law. DPW cannot
22 require a bidder to know what will be in future procurement solicitations based on procurement
23 documents issued in previous solicitations. This standard does not exist in any body of procurement
24 law.
25

26 DPW is wrong when it describes Core Tech's appeal as merely protesting the inclusion of
27 language in the IFB that "record of default and nonpayment of obligations" should be considered a
28

1 contractor's record of past performance of government contract. Rather, Core Tech is protesting
2 DPW's incorrect interpretation of a "Record of Default," to include "written Determinations made by
3 DPW," regardless of whether they have been appealed to and/or overturned by the Public Auditor or
4 the Superior Court of Guam. In response to Core Tech's RFI to DPW on July 20, 2017, DPW for the
5 first time explained how this term is defined. Core Tech did not know, and had no reason to know,
6 of DPW's interpretation of Record of Default until it issued *Addendum 6* on August 24, 2017. In
7 fact, as explained below, DPW has never consistently defined this term, and the Protest was filed on
8 September 7, 2017, within fourteen (14) days of DPW's issuance of Addendum 6. The Protest was
9 timely filed under 5 GCA §5425 (a) and DPW's timeliness argument should be rejected.
10

11 B. A RECORD OF DEFAULT SHOULD NOT INCLUDE A NOTICE OF
12 DEFAULT UNTIL APPEALS OF SUCH NOTICE IS FULLY
13 ADJUDICATED OR UNTIL THE TIME TO APPEAL HAS LAPSED

14 1. GUAM PROCUREMENT LAW DOES NOT DEFINE "RECORD OF
15 DEFAULT" AND DPW'S DEFINITION IS UNSUPPORTED

16 Guam law does not support DPW's interpretation that it is permitted to consider a disputed
17 Notice of Default as part of bidder's record of past performance. Guam law provides that
18 "Responsible Bidder or Officer means a person who has the capability in all respects to perform fully
19 the contract requirements, and the integrity and reliability which will assure good faith performance."
20 5 GCA § 5201(f) and 2 GAR Div 4 § 1106 (27).

21 2 GAR Div 4 § 3116(b)(2) further provides that:

22 A) Standards. Factors to be considered in determining whether the standard of
23 responsibility has been met include whether a prospective contractor has:

24 (i) available the appropriate financial, material, equipment, facility, and
25 personnel resources and expertise, or the ability to obtain them, necessary to
indicate its capability to meet all contractual requirements;

26 (ii) *a satisfactory record of performance;*

27 (iii) *a satisfactory record of integrity;*
28

1 (iv) qualified legally to contract with the territory; and

2 (v) supplied all necessary information in connection with the inquiry
3 concerning responsibility.

4 2 GAR Div 4 § 3116(b)(2) (emphasis added).

5 The term “satisfactory record of performance” is not defined further in Guam Procurement
6 Law or regulations. DPW has developed its own definition over time, and as demonstrated below,
7 the definition changes depending on the document, author, and filing.
8

9

DATE	DOCUMENT	INTERPRETATION
10 7/7/2017	11 IFB at 11 (<i>See, Exhibit 1 to Protest, Exhibit A to Notice of Appeal.</i>)	12 “Record of past performance of government contracts including record of default and nonpayment of obligations.”
13 8/24/2017	14 ADDENDUM 6 at 7-8 (<i>See, Exhibit 3 to Protest, Exhibit A to Notice of Appeal.</i>)	15 “Record of Default includes but is not limited to written Determinations made 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.”
17 9/29/2017	18 AGENCY DECISION at 4. (<i>See, Agency Decision, Exhibit B to Notice of Appeal.</i>)	19 “The revised IFB will allow bidders to provide information (e.g., date contract signed, scheduled date of completion, disclosure of notices of default, determinations made by a governmental agency, any notices of appeal by the contractor, and provide bidders(s) an opportunity to explain why they believe any notices of default were improperly issued and are being contested and what action the bidder(s) has or intends on taking) concerning any completed or current project.”
23 10/31/2017	24 AGENCY REPORT at 5.	25 “A record of a termination of default should be included in a bidder’s record of past performance. A dispute of a termination of default also should be included in a bidder’s record of past performance to include the stage of dispute i.e., agency level, OPA, superior court or supreme court. DPW is within its authority to request the information.”

26
27
28

1 The IFB includes “records of default” as a category of documents under “records of past
2 performance.” IFB at 11 (*See*, Exhibit 1 to *Protest*, Exhibit A to *Notice of Appeal*.) Between July and
3 October 2017, DPW still did not not have a clear understanding of the purpose, scope and type of
4 documents that should be included in a bidder’s record of past performance. It is undisputed that
5 Guam Procurement Law does not define “record of past performance” the way DPW proposes.
6 Undeterred by the lack of statutory or legal authority, DPW defines the record of past performance to
7 suit its purpose.
8

9 In its Agency Report, DPW cited *Fed. Elec. Corp. v. Fasi*, 56 Haw. 57, 527 P.2d 1284, (1974)
10 for the proposition that a bidder’s responsibility involves an inquiry into that bidder’s financial
11 resources, experience, performance and integrity. Agency Report at 4. Core Tech does not dispute
12 this reasoning. However, *Fasi* has other relevant applications to this case. In *Fasi*, the city of
13 Honolulu solicited for services upgrading its policy department’s communications system. *Id.* at
14 1286. The city did not issue detailed specifications, but rather invited bidders to submit “unpriced
15 technical proposals based on . . . specifications, goals and objectives.” *Id.* at 1288. The city ultimately
16 rejected bidder Federal’s proposal as nonresponsive. *Id.* at 1289. The court affirmed the trial court’s
17 decision setting aside the award to another bidder, finding as follows:
18

19 The City argues that within its discretionary power it was authorized to reject Federal’s
20 proposal as being nonresponsive. The fallacy in the City’s argument is that it assumes
21 the existence of definitive specifications against which Federal’s proposals could be
22 measured, and by which the soundness of the City’s exercise of its discretion could be
23 judged. Here there were no such definitive guidelines.

24 ...

25 While a contracting officer is vested with broad discretion in determining who is the
26 lowest responsible bidder, the discretion allowed him under the method employed by
27 the City in this case exceeded permissible limits. Not only were definite and precise
28 specifications unavailable, but also lacking were regulatory guidelines aimed at
insuring fair and open competition among bidders. In consequence, the consultant and
the City were free to formulate their own rules as they deemed the occasion
demanded.

1 *Id.* (citations omitted).

2 Similarly, DPW claims unfettered discretion to interpret the meaning of “satisfactory record
3 of performance.” However, it does not have a set policy or guidelines on its interpretation. Its
4 definition has shifted significantly in the context of this procurement alone. Such unregulated
5 discretion cannot be measured for reasonableness or soundness, and is extremely susceptible to
6 abuse.
7

8 A bidder should be accorded fair treatment, and should not have to guess at what documents
9 to supply in submitting its bid, or whether disputes with the government agency on an unrelated
10 project will be used against the bidder to interfere with the evaluation and ranking process. 5 GCA
11 §5001(b)(3)(4)(7). Fairness and transparency are the guiding principles of every procurement
12 process. In this instance, fairness and transparency demand that DPW provide a clear, transparent,
13 and legally supported process for determining a bidder’s record of past performance.
14

15 2. DPW’S RELIANCE ON THE FAR IS MISPLACED BECAUSE
16 FEDERAL REGULATIONS AND CASELAW DO NOT APPLY TO
17 THE SSSH PROCUREMENT

18 DPW improperly relies on the Federal Acquisition Regulation (FAR) to support its incorrect
19 interpretation of “record of default” and “records of past performance.” The FAR only applies to
20 Government of Guam procurements that involve the use of appropriated funds. *Gov’t Servs. Corp. v.*
21 *United States*, 131 Fed. Cl. 409, 423-24 (2017) (citing 48 C.F.R. § 1.104 (“The FAR applies to all
22 acquisitions as defined in part 2 of the FAR, except where expressly excluded.”)); *see also* 48 C.F.R.
23 § 2.101 (“Acquisition means the acquiring by contract with appropriated funds of supplies or services
24 (including *424 construction) by and for the use of the Federal Government [.]”); *Fid. & Cas. Co. of*
25 *New York*, B-281281 (Jan. 21, 1999) (“[T]he FAR, by its terms, applies only to government
26 acquisitions of supplies or services with appropriated funds.”).

27 No federal funds are being used in the SSSH project. Therefore, the FAR does *not* apply to
28

1 this procurement. Furthermore, the SSHS procurement law, 5 GCA §58D105, specifically states that
2 the solicitation shall comply with Guam procurement law. Accordingly, cases interpreting or
3 applying the FAR are inapposite.
4

5
6 3. THE FAR DOES NOT DEFINE “RECORD OF DEFAULT” IN THE
7 MANNER DPW URGES

8 The FAR cases also do not support DPW’s position. DPW claims that it “should be able to
9 request information or documents evincing bidder’s (sic) responsibility,” Agency Report at 4, and
10 relies on federal case law to support its position that it is permitted virtually unfettered discretion to
11 request and consider any information it deems necessary in its determination of contractor
12 responsibility. Agency Report at 4-5 (citing *Comm’n Constr. Servs., Inc. v. United States*, 116 Fed.
13 Cl. 233, 272 (2014) (“Contracting officers are generally given wide discretion in making
14 responsibility determinations and in determining the amount of information that is required to make a
15 responsibility determination.”)).
16

17 DPW cites to cases that stand for the general proposition that procuring agencies may
18 consider a bidder’s past performance in determining that contractor’s responsibility – an issue Core
19 Tech does not actually dispute. Core Tech does dispute the conclusory statement below which is not
20 supported by any authority or cases cited by DPW:

21 A record of a termination of default should be included in a bidder’s record of past
22 performance. A dispute of a termination of default also should be included in a
23 bidder’s record of past performance to include the stage of dispute i.e., agency level,
24 OPA, superior court or supreme court. DPW is within its authority to request the
25 information.

26 Agency Report at 5. The cases interpreting the FAR simply state that bidders’ past performance can
27 be considered in determining a contractor’s responsibility, but, they do not state or even support the
28 conclusory statement that even “a dispute of a termination of default also should be included in a
bidder’s record of past performance....” *Id.*

1 While the FAR sets out corresponding federal standards for determining contractor
2 responsibility, including a review of whether a contractor has “a satisfactory performance record.” 48
3 C.F.R. § 9.104-1(c) it does not require that such record include agency determinations or decisions
4 which are disputed, appealed, and before the courts or an administrative forum for disposition. Unlike
5 Guam Procurement Laws and Regulations, the FAR specifically provides guidelines for a contracting
6 officer considering a contractor’s performance record:
7

8 (b) Satisfactory performance record. A prospective contractor that is or recently has
9 been seriously deficient in contract performance shall be presumed to be
10 nonresponsible, unless the contracting officer determines that the circumstances were
11 properly beyond the contractor’s control, or that the contractor has taken appropriate
12 corrective action. Past failure to apply sufficient tenacity and perseverance to perform
13 acceptably is strong evidence of nonresponsibility. Failure to meet the quality
14 requirements of the contract is a significant factor to consider in determining
15 satisfactory performance. The contracting officer shall consider the number of
16 contracts involved and the extent of deficient performance in each contract when
17 making this determination.

14 48 C.F.R. § 9.104-3(b). Guam Procurement law provides no such guidance to prospective bidders,
15 and more importantly, does not grant this power or discretion to contracting officers.
16

17 Further, none of the federal authorities DPW cites involve a case in which an agency finding
18 was subject to a pending dispute by the contractor. In *Commc'n Constr. Servs., Inc. v. United States*,
19 the plaintiff, an unsuccessful bidder, challenged the Army and Air Force Exchange Service’s
20 (“AAFES”) award of a contract to another contractor, Resolute, because Resolute had failed to pay
21 fees owed under a previous federal contract, for which Resolute and AAFES entered into a debt
22 repayment plan that was pending at the time of the responsibility determination. 116 Fed. Cl. 233,
23 272 (2014). The past performance issue, which ultimately did not defeat a finding of responsibility,
24 was *not* disputed by the contractor.
25

26 In *PlanetSpace, Inc. v. United States*, 92 Fed. Cl. 520, 539 (2010), the central dispute
27 regarding past performance involved whether the source selection authority was required to take into
28 account the past performance of a bidder’s key personnel or subcontractors, as Plaintiff requested.

1 There was no default at issue in *PlanetSpace*, disputed or otherwise. Likewise, the issue in *Blount*
2 *Inc. v. United States* was whether an invitation for bid's clause requiring a contractor (and not its
3 subcontractor) to perform 20 percent of the work under a contract related to a bidder's responsiveness
4 or responsibility, with no discussion whatsoever about past performance.

5 The authorities DPW cited in its Agency Report simply do not apply to this case.

6
7 4. A CONTRACTOR'S RECORD OF DEFAULT SHOULD NOT
8 INCLUDE A DISPUTED NOTICE OF DEFAULT

9 The issue of whether a contractor's Record of Default should include a disputed Notice of
10 Default is an issue of first impression in this jurisdiction. The fact that an accusation is not itself proof
11 of the conduct charged is not only intuitive, it is consistently applied in varied areas of American
12 jurisprudence, including criminal and civil law. *See State v. Gonzalez*, 212 So. 3d 1092, 1096 (Fla.
13 Dist. Ct. App. 2017) ("charging document is 'no more than an accusation, the merits of which will be
14 determined at trial..."); *Caven v. Caven*, 136 Wash. 2d 800, 809 (2005) ("Mere accusations, without
15 proof, are not sufficient to invoke the restrictions under the statute."); *Humphries v. Lynch*, 579 So.2d
16 612, 616 (Ala. 1991) ("...recusal is not required by mere accusations without proof of supporting
17 facts."); *Boxrud v. Ronning Machinery, Co.*, 217 Minn. 518, 523 (1944) ("The difficulty of finding
18 and producing sufficient evidence to sustain plaintiffs' cause does not do away with the necessity of
19 furnishing it. Mere accusations without proof do not help plaintiffs. They are in the same situation
20 as are other litigants who have similarly failed. Plaintiffs, while right in their theory of applicable
21 law, have failed to bring out the facts necessary to make their legal theory operative.").

22
23 This reasoning has been applied with equal force in procurement. In *D. Stamato & Co. v.*
24 *Vernon Twp.*, the township of Vernon, New Jersey rejected a bid submitted by contractor Stamato on
25 a repaving contract, though it was the lowest bid submitted, finding that Stamato was not a
26 responsible bidder. 329 A.2d 65, 69 (App. Div. 1974). Vernon's finding of non-responsibility did not
27 result from a challenge to Stamato's experience, financial ability or integrity, but rather from a
28

1 dispute as to whether Stamato's performance of a prior resurfacing contract was defective. *Id.* After
2 the resurfacing contract was completed and the township began using the road, the township engineer
3 determined that the road had begun to ravel, a defect the township attributed to the bituminous
4 concrete mix authorized by the township and used by Stamato. *Id.* A dispute between the parties
5 ensued, with witnesses supporting the claims of both parties. *Id.* The dispute was still pending at the
6 time the repaving contract was put out to bid, ultimately resulting in Vernon's finding of Stamato's
7 non-responsibility in the second procurement. *Id.* The Court held in favor of Stamato finding as
8 follows:
9

10 We are satisfied that, in the circumstances revealed by the record in this case, *the*
11 *existence of that single dispute* with respect to Moe Mountain Road *affords no*
12 *justification for a finding that plaintiff is not a responsible bidder so that now, and*
13 *until the dispute is resolved to the township's satisfaction*, it is to be foreclosed from
bidding for other resurfacing work in the township.

14 *Id.* (emphasis added) (citing *Peluso v. Commissioners of City of Hoboken*, 98 N.J.L. 706, 708, 126 A.
15 623, 624 (Sup. Ct. 1923) (setting aside award to second lowest bidder where procuring body's
16 finding of non-responsibility against the lowest bidder was based on a pending dispute over a prior
17 contract)). It would be improper for DPW to consider a disputed Notice of Default in a contractor's
18 Record of Default.

19
20 5. DPW'S DEFINITION OF "RECORD OF DEFAULT" WAS
RETALIATORY

21 a. *Core Tech Disputes the Notice of Default/ Termination DPW*
22 *Issued Against It in the Agana Bridges Project*

23 As Core Tech noted in its Notice of Appeal, DPW chose to unveil this new policy for the first
24 time less than twenty-four hours before it issued its Notice of Termination/Default of Contract in the
25 Route 1/Route 8 Intersection Improvements and Agana Bridges Replacement Project No. GU-DAR-
26 T01(001) ("Agana Bridges Project"). Core Tech has protested the Notice of Termination/Default, and
27 the issue in on appeal before the OPA in OPA-PA-17-010.
28

1
2 b. DPW Improperly Issued a Notice of Default/ Termination Against
3 Core Tech to Disqualify Core Tech from the SSHS Project

4 Then-DPW Deputy Director Felix Benavente, the Chief Procurement Officer in the SSHS
5 project at the time the IFB was issued, was also the Chief Procurement Officer for the prior SSHS
6 solicitations. He denied Core Tech's prior protests that led to Core Tech's prior Appeals in OPA-PA-
7 16/007, OPA-PA-16-011 and OPA-PA-17-001. Notably, he also signed the Notice of
8 Termination/Default in the Agana Bridges Project.

9
10 DPW claims that the close timing of these events is coincidental. However, DPW was not
11 compelled by Guam Procurement Law to define Record of Default in the manner it has. There is no
12 dispute that at the time DPW unveiled this new definition, it did so with full awareness that it had just
13 issued a Notice of Default to Core Tech hours earlier.

14 These types of actions by Government officials are so transparently designed to disqualify a
15 bidder that the Government has a dispute with, and wants to punish. The history of the dispute
16 between DPW and Core Tech with respect to the Simon Sanchez procurement is well known to
17 Public Auditor. The timing of the issuance of the Notice of Default/Termination letter and DPW's
18 response to RFI #32 in Addendum 6 demonstrate that DPW Deputy Director Felix Benavente and
19 other individuals working with Mr. Benavente at DPW, acted in a manner to intentionally
20 discriminate and retaliate against Core Tech for successfully pursuing protests and appeals relating to
21 DPW's numerous violations of Guam Procurement Law in connection with the Simon Sanchez High
22 School RFPs.
23

24
25 IV. CONCLUSION

26 Core Tech is not suggesting, as DPW claims, that DPW should not consider a contractor's record
27 of default in a responsibility determination, just that DPW should not be permitted to stretch the
28 definition of a record of default to include a disputed notice of default in a blatant attempt to

1 disqualify a contractor it issued a notice of default to literally hours before unveiling this new
2 definition.

3 Core Tech requests a ruling from the OPA as follows:

- 4
- 5 1. DPW should be required to exclude disputed Notices of Default from bidders'
6 "Record of Default" in a responsibility determination;
 - 7 2. For an award of reasonable attorney's fees and costs of this protest and appeal;
 - 8 3. For such other relief that the OPA may determine is just and proper; and
 - 9 4. Core Tech requests a hearing on this matter

10 Submitted this 13th day of November, 2017.

11
12 CIVILLE & TANG, PLLC

13
14 By: 
15 JOYCE C. TANG
16 LESLIE TRAVIS
17 Attorneys for Appellant
18 Core Tech International, Corp.
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