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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-17-009  
  
CORE TECH INTERNATIONAL  
CORP.'S OPPOSITION TO DPW'S MOTION  
FOR SUMMARY JUDGMENT

On November 3, 2017, the Department of Public Works' ("DPW") filed a Motion for Summary Judgment ("MSJ"), seeking dismissal of Appellant Core Tech International Corp.'s ("Core Tech") Appeal based on a standing argument – that is, DPW alleges Core Tech was not “damaged by the request to provide a record of past performance including a record of default” and the appeal is therefore premature. See MSJ at 2. DPW’s argument misses the point. First, Core Tech is challenging the DPW’s inclusion of a Notice of Default regarding claims *for which there has not been final administrative or judicial adjudication*. This issue could not be clearer, and DPW persists

**ORIGINAL**

1 in incorrectly framing the issue as whether it “would be improper for DPW to consider [any] notice  
2 of default/termination as a “Record of Default.” *Id.* Secondly, DPW stated in its September 29,  
3 2017 Agency Decision (“9/29/2017 Agency Decision”) that Core Tech’s protest was untimely.  
4 DPW, for the first time, now argues that the Protest is premature; this begs the question of how a  
5 protest can be simultaneously untimely and premature.  
6

7 For the reasons discussed below, DPW Motion for Summary should be denied.

8 **I. ARGUMENT**

9 **A. Core Tech’s Protest Was Not Premature.**

10 The crux of DPW’s argument is that Core Tech’s Appeal is premature and should be  
11 dismissed because Core Tech has not been damaged. MSJ at 3-4. Specifically, DPW argues that:

12 ...Appellant’s claim should be dismissed because there is no evidence that the  
13 Appellant has sustained damages by the [Invitation for Bids’] request to provide a  
14 record of past performance including record of default has caused them damage.  
15 Appellant’s protest and subsequent appeal of this procurement is premature as they  
16 have no determined a nonresponsible bidder and not been rejected as a bidder in this  
17 procurement.

18 MSJ at 3. DPW is arguing out of both sides of its mouth. In DPW’s 9/29/17 Agency Decision, it  
19 rejected the Protest on the ground that it was untimely. *See* 9/29/17 Response at 1. In DPW’s  
20 October 31, 2017 Agency Report, it argued that Core Tech filed its protest too late because Core  
21 Tech should have known that solicitations for DPW Capital Improvement Projects include an  
22 analysis of a contractor’s record of default.<sup>1</sup> Now, in its MSJ, DPW argues that Core Tech’s protest is  
23 premature because Core Tech has not been evaluated or deemed not responsible, a complete reversal  
24 of its prior argument that Core Tech’s protest was late. Although it is unclear which of these  
25 conflicting theories DPW intends to advance during the hearings in this matter, neither argument has  
26 merit. Core Tech’s protest was timely, and, for the reasons discussed below, is not premature.

27 5 GCA §5425(a) provides that “[a]ny actual or prospective bidder, offeror, or contractor who

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28 <sup>1</sup> Core Tech addressed DPW’s argument that the protest was untimely in its Comments to Agency Report, which Core Tech filed on November 13, 2017.

1 may be aggrieved in connection with the method of source selection, solicitation or award of a  
2 contract, may protest to the Chief Procurement Officer, the Director of Public Works ... in writing  
3 within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise  
4 thereto.” As Core Tech noted in its Notice of Appeal, its protest was based on DPW’s amendment of  
5 the IFB in Addendum 6 to state that evaluators may consider a Notice of Default in a determination  
6 of a contractor’s responsibility before the administrative and judicial appeals process has been  
7 exhausted or the time to appeal has expired. Notice of Appeal at 7. If Core Tech did not protest the  
8 solicitation within fourteen (14 ) days of the issuance of Addendum 6, it would have waived its right  
9 to protest.

10 **B. Core Tech is an Aggrieved Prospective Bidder**

11 Section 5425 does not require a contractor to protest when its bid has been rejected. It does  
12 not even require a contractor to submit a bid before it is granted the right to protest. The statute  
13 expressly allows a *prospective* bidder, *i.e.* one who intends to but has not yet submitted a bid, to file a  
14 protest. 5 GCA §5425(a). In Core Tech’s case, Core Tech obtained a copy of the IFB, attended all  
15 meetings, and submitted several Requests for Information. Section 5425(a) requires a contractor to  
16 file a protest within fourteen (14) days after it knew or should have known that it may have been  
17 aggrieved. On August 24, 2017, DPW issued Addendum 6 to the IFB, stating that an unadjudicated  
18 Notice of Default would be included in a contractor’s Record of Default, which evaluators would  
19 consider in their determination of a contractor’s responsibility. *See* Addendum 6 at 7-8, Exhibit 3 to  
20 Protest, Exhibit A to Notice of Appeal. There can be no dispute Core Tech was a prospective bidder  
21 within the meaning of §5425(a) and that Core Tech was aggrieved by DPW’s interpretation.

22 As discussed in detail in Core Tech’s Notice of Appeal and its November 13, 2017 Comments  
23 to DPW’s Agency Report, DPW unveiled its new interpretation of “Record of Default” for the first  
24 time in Addendum 6 (response to Core Tech’s RFI) to include an unadjudicated Notice of Default  
25 literally the day after it issued a Notice of Default against Core Tech in the Route 1/Route 8  
26 Intersection Improvements and Agana Bridges Replacement Project No. GU-DAR-TO1(001)  
27 (“Agana Bridges Project”). Core Tech protested and appealed the Notice of Default to the Public  
28 Auditor in OPA-PA-17-010. There is no legal or statutory basis for DPW’s new interpretation of

1 “Record of Default,” and, as discussed in Core Tech’s Comments to Agency Report, DPW’s  
2 interpretation has shifted numerous times in the context of this solicitation, further demonstrating that  
3 DPW does not have a set policy and is blindly making up standards in the course of the solicitation  
4 and this procurement appeal. *See*, Comments to Agency Report at 4. Without question, Core Tech  
5 falls squarely within the definition of an aggrieved prospective bidder under §5425(a).

6 DPW further claims that “[Core Tech’s] claim and argument that they are not a responsible  
7 bidder is speculative and conjectural...[i]t is not known what weight if any would be given to a  
8 termination of default especially if it has not been adjudicated.” MSJ at 3. **First**, Core Tech has never  
9 made this argument – it defies logic and reasoning that Core Tech or a similarly positioned protester  
10 would state affirmatively that it is a nonresponsible bidder. **Secondly**, DPW argues that it does not  
11 have set policies or guidelines regarding how much weight *evaluators* should attribute to an  
12 unadjudicated Notice of Default. This is extremely troubling because DPW should know that  
13 *evaluators* do not make determinations of responsibility. Rather, the Guam Procurement Law  
14 requires the Procurement Officer to make determinations of responsibility. *See* 2 GAR  
15 §3116(b)(2)(B). Further, not having specific policies or guidelines regarding whether certain  
16 documents such as notices of default should be considered, and if so, how much weight should be  
17 given, gives the Procurement Officer an inordinate amount of power, leaving wide open the potential  
18 for abuse by an administration with a history of disputes with Core Tech.

19 It is not proper for DPW to consider the existence of a separate unrelated procurement in a  
20 responsibility determination. *See D. Stamato & Co. v. Vernon Twp.*, 329 A.2d 65, 69 (App. Div.  
21 1974)(“the existence of that single dispute with respect to [a separate contract] affords no justification  
22 for a finding that plaintiff is not a responsible bidder so that now, and until the dispute is resolved to  
23 the township's satisfaction, [plaintiff] is to be foreclosed from bidding for other resurfacing work in  
24 the township.”). The fact that a DPW Procurement Officer (*i.e.*, Felix Benavente) can even consider  
25 an unadjudicated Notice of Default in his/her responsibility determination for the Simon Sanchez  
26 High School IFB is harmful to Core Tech. Because Core Tech is an aggrieved potential bidder, it  
27 was required to file a protest within fourteen (14) days of the issuance of Addendum 6. Core Tech  
28 timely filed its protest on September 7, 2017, and this appeal is properly before the Public Auditor.

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**II. CONCLUSION**

For the foregoing reasons, DPW'S Motion for Summary Judgment should be denied.

Respectfully submitted this 22nd day of November, 2017.

CIVILLE & TANG, PLLC



By:  
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