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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 HEARING BRIEF

I. INTRODUCTION

This is an Appeal from the Department of Public Works' ("DPW") decision denying Core Tech's protest of the July 7, 2017 Invitation for Bids for the Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Simon Sanchez High School, Project No. 730-5-1057-L-YIG (the "IFB"). *See*, **Ex. 1** Core Tech Hearing Exhibits ("CTI Ex."), *IFB* at CTI 2.

There are two issues in this appeal:

1. Whether DPW incorrectly and improperly included a Notice of Default Regarding Claims for which there has not been a final administrative or judicial adjudication in its interpretation of "Record of Default."

2. Whether DPW interpreted "Record of Default" to include a disputed Notice of Default and issued its August 23, 2017 Notice of Default against Core Tech in the Route 1/Route 8 Intersection Improvements and Agana Bridges Replacement Project No. GU-DAR-T01(001) ("Agana Bridges Project") in retaliation against Core Tech.

The IFB provided in relevant part that "all bidders are to submit satisfactory evidence that he has sufficient experience and he is fully prepared with necessary capital, material, machinery and skilled workmen and supervision staff to carry out the contract satisfactorily." *Id.* at CTI 10-11. Accordingly, the IFB required bidders to submit a number of statements with their bids, including the following:

> i) Record of past performance of government contracts including record of default and nonpayment of obligations.

Id. at CTI 11. On July 20, 2017, Core Tech submitted its Requests for Information ("RFI"), requesting clarification of, among other things, provisions contained in the IFB related to bidders' record of past performance. *See,* **CTI Ex. 4**, *RFI* at CTI 175. Specifically, Core Tech inquired as follows:

> 32. The Instructions to Bidders, Section 9.i at p.11 of the ITB requires the Contractor to submit "Record of past performance of government contracts including record of default and nonpayment of obligations."
>
> a. Please confirm whether "record of default" includes defaults alleged by the government that are disputed by the contractor and for which there

has not been a final adjudication through Guam courts, including all appeals.

b. Please confirm whether "nonpayment of obligations" refers to payments by Government to Contractor or Contractor to vendors and subcontractors.

Id. On August 24, 2017, DPW issued Addendum No. 6, responding to RFI 32 as follows:

> **RFI # 32.**
> The Instructions to Bidders, Section 9.i at p. 11 of the ITB requires the Contractor to submit "Record of past performance of government contracts including record of default and nonpayment of obligations."
>
> a. Please confirm whether "record of default" includes defaults alleged by the of obligations" refers to payments by government that are disputed by the Contractor and for which there has not been a final adjudication through Guam courts, including all appeals.
>
> Answer.
> 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.

See, **CTI Ex. 14**, *Addendum 6* at CTI 248-249.

Core Tech filed a protest on September 7, 2017, asserting violations of the Guam procurement law on two grounds: (1) DPW failed to include the required critical contracts for the IFB, and (2) DPW improperly included the August 23, 2017 Notice of Default and Termination from DPW to Core Tech on the Agana Bridges Project ("8/23/17 Default/Termination Letter") as a Record of Default in determining Core Tech's responsibility in this IFB or any other DPW procurement in retaliation against Core Tech. *See,* **CTI Ex. 16**, *Protest* at CTI 285-292. DPW issued its decision on September 29, 2017 ("Agency Decision"), conceding the first ground, and denying the second ground. *See,* **CTI Ex. 20**, *Agency Decision* at CTI 299-302. Core Tech timely appealed the Agency Decision on October 16, 2017.

The evidence and the testimony of witnesses to be presented at the final hearing will support a

finding that DPW incorrectly and improperly interpreted "Record of Default" to include a disputed and unadjudicated Notice of Default, and should require DPW to exclude disputed and unadjudicated Notice of Default from bidders' "Record of Default" in a responsibility determination. The Public Auditor should also award Core Tech reasonable attorney's fees and costs of the underlying protest and this Appeal.

II. BIFURCATION OF ISSUES FOR FINAL HEARING

Core Tech's retaliation claim relating to the Agana Bridges Project is one of the issues in a separate Appeal before the Public Auditor in OPA-PA-17-010 (the "Rt. 1/Rt. 8 Appeal"). The procurement record for the Rt. 1/Rt. 8 Appeal consists of over ten thousand pages of material and DPW is still producing its full procurement record to Core Tech in the Rt. 1/Rt. 8 Appeal. The documents and records related to the retaliation claim are voluminous, and DPW has not produced all of the records relating to the retaliation claim in Rt. 1/Rt. 8 Appeal in this appeal. The parties appeared before the Public Auditor and Hearing Officer for a Pre-Hearing Conference on November 6, 2017, at which time the Public Auditor and Hearing Officer determined that it was appropriate to resolve the retaliation claim in the Rt. 1/Rt. 8 Appeal ***before*** the SSHS Appeal. Resolving the retaliation claim in the Rt. 1/Rt. 8 Appeal would streamline the litigation and conserve resources of the Public Auditor, DPW and Core Tech. Also, it was recognized that a decision on the retaliation claim in the Rt. 1/Rt. 8 Appeal would resolve the retaliation issue in this appeal. The parties agreed with the Public Auditor's reasoning and consented to the hearing schedule setting the respective hearings for the Rt. 1/Rt. 8 Appeal on December 13, 2017 and this Appeal on December 20, 2017.

On December 13, 2017, there was a status hearing in the Rt. 1/Rt. 8 Appeal and this appeal. The Public Auditor rescheduled the formal hearing in the Rt. 1/Rt. 8 Appeal to February 5, 2018, to allow Anita Arriola, who represents Core Tech in that appeal, additional time to review the thousands of additional pages in the procurement record, which DPW was ordered to produce to Core Tech by

December 20, 2017. With respect to this appeal, the Public Auditor stated that she intended to proceed with the formal hearing as scheduled in this matter on December 20, 2017, despite having rescheduled the formal hearing in the Rt. 1/Rt. 8 Appeal to February 5, 2018.

The change in the final hearing date for the Rt. 1/Rt. 8 Appeal to a date ***after*** the December 20, 2017 formal hearing in this Appeal creates a myriad of problems. First, the voluminous procurement record and documents – in excess of 10,000 pages relating to project and the retaliation issue – have not been produced in their entirety in the Rt. 1/Rt. 8 Appeal, and except for a few documents, have not been produced in this Appeal.

Second, Core Tech's Motion to Disqualify Tom Keeler filed December 11, 2017, has not been resolved. Core Tech is not only seeking to disqualify Mr. Keeler, but it is asking the Public Auditor to find that by asserting the affirmative defense of reliance on advice of counsel, DPW has waived the attorney-client privilege, and Core Tech is, therefore, entitled to see all communications and documents relating to the retaliation issue over which DPW asserts the attorney-client privilege.

On December 15, 2017, DPW and Core Tech submitted a stipulation requesting bifurcation of the hearing in this matter and proceeding with a hearing only one issue – namely, the "Record of Default" issue, on December 20, 2017, and staying the retaliation issue until after the Rt. 1/Rt. 8 Appeal. Bifurcating the hearing is appropriate because Core Tech's retaliation claim should be resolved in the larger Rt. 1/Rt. 8 Appeal, and because the retaliation issue does not affect DPW's ability to reissue the IFB. Bifurcation will also promote the efficient and judicious use of the Public Auditor's, Attorney General's, and DPW's time and resources.

Staying the retaliation issue until it is resolved at the Rt. 1/Rt. 8 Appeal – as the parties originally agreed – will not affect DPW's ability to reissue the IFB for Simon Sanchez High School today. In the event the Public Auditor nonetheless orders the parties to proceed with a full hearing on both claims, in consideration of DPW's position on producing the procurement record and

documents relating to the retaliation claim, Core Tech reserves the right to seek an Order requiring DPW to produce all relevant material to its retaliation claim which has not been produced in this Appeal, and a continuance of the hearing date to allow Core Tech to review the full record and supplement its Hearing Brief.

III. DISCUSSION

A. DPW SHOULD BE ORDERED TO PRODUCE ALL PRIVILEGED COMUNICATIONS REGARDING ITS INTERPRETATION OF "RECORD OF DEFAULT"

DPW has waived the attorney-client privilege with regard to the documents underlying its new interpretation of "Record of Default." As demonstrated in Core Tech's Trial Exhibit 7, the Attorney General's office supplied the interpretation of "Record of Default" that DPW ultimately adopted in Addendum 6. *See*, **CTI Ex. 7**, *Email from S. Taitano to Committee re: Responses to Requests for Information*, CTI 207-208. "[T]he attorney-client privilege may not be involved to protect a document adopted as, or incorporated by reference into, an agency's policy." *National Council of La Raza v. Department of Justice*, 411 F.3d 350, 360 (2d Cir. 2005); *see also General Elec. Co. v. Johnson*, No. Civ.A.00-2855(JDB), 2006 WL 2616187, at *16 (D.D.C. Sept. 12, 2006); *Falcone v. IRS*, 479 F. Supp 985, 990 (E.D. Mich. 1979). To waive privilege, the agency need not explicitly mention the document in the public statement "so long as its conduct, considered as a whole, manifests an express adoption of the documents." *See New York Times Co. v. U.S. Department of Justice*, 138 F. Supp. 3d 462, 474 (S.D.N.Y. 2015). This express adoption doctrine applies to attorney-client communications adopted or incorporated into final agency actions or decisions such as an agency officer's statutorily required decision on disputes. *See United States v. BAE Systems Tactical Vehicle Systems, LP,* Case No. 15-12225, 2017 WL 1457493, at *6 (E.D. Mich. Apr. 25, 2017).

Based on Core Tech's Trial Exhibit 7, DPW wholesale adopted the Attorney General's interpretation of "Record of Default" as its official policy. *See*, **CTI Ex. 7**, *Email from S. Taitano to Committee re: Responses to Requests for Information*, CTI 207-208. Accordingly, the attorney-client privilege over any and all legal analyses performed by the Attorney General's office underlying the adopted policy should be deemed waived. This information is properly part of the procurement record in this Appeal, and DPW should be required to produce all documents related to such analyses.

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

1. GUAM PROCUREMENT LAW DOES NOT DEFINE "RECORD OF DEFAULT" AND DPW'S DEFINITION IS NOT SUPPORTED BY ANY AUTHORITY

Guam law provides that "Responsible Bidder or Officer means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." 5 GCA § 5201(f); 2 GAR Div 4 § 1106 (27).

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

> A) Standards. Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor has:
>
> (i) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
>
> (ii) *a satisfactory record of performance;*
>
> (iii) a satisfactory record of integrity;
>
> (iv) qualified legally to contract with the territory; and
>
> (v) supplied all necessary information in connection with the inquiry concerning responsibility.

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

The term "satisfactory record of performance" is not defined further in Guam Procurement

Law or regulations. DPW has developed its own definition over time in the context of this, and as demonstrated below, the definition changes depending on the document, author, and filing.

DATE	DOCUMENT	INTERPRETATION
7/7/2017	*See,* **CTI Ex. 1**, *IFB* at CTI 11.	"Record of past performance of government contracts including record of default and nonpayment of obligations."
8/24/2017	*See,* **CTI Ex. 14**, *Addendum 6* at CTI 248-249.	"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."
9/29/2017	*See,* **CTI Ex. 20**, *Agency Decision* at CTI 302.	"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."
10/31/2017	*Agency Report* at 5.	"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."

The IFB includes "records of default" as a category of documents under "records of past performance." *See,* **CTI Ex. 1**, *IFB* at CTI 1. Between July and October 2017, DPW still did not have a clear understanding of the purpose, scope and type of documents that should be included in a bidder's record of past performance. It is undisputed that Guam procurement law does not define "record of past performance" the way DPW proposes. Undeterred by the lack of statutory or legal

authority, DPW defines the record of past performance to suit its purpose.

DPW's own confusion regarding its standard and the complete absence of any statutory guidance undermines DPW's supposed discretion to require contractors to disclose disputed and unadjudicated notices of default. In *Fed. Elec. Corp. v. Fasi*, 56 Haw. 57, 527 P.2d 1284 (1974) the city of Honolulu solicited for services upgrading its policy department's communications system. *Id.* at 1286. The city did not issue detailed specifications, but rather invited bidders to submit "unpriced technical proposals based on . . . specifications, goals and objectives." *Id.* at 1288. The city ultimately rejected bidder Federal's proposal as nonresponsive. *Id.* at 1289. The court affirmed the trial court's decision setting aside the award to another bidder, finding as follows:

> The City argues that within its discretionary power it was authorized to reject Federal's proposal as being nonresponsive. The fallacy in the City's argument is that it assumes the existence of definitive specifications against which Federal's proposals could be measured, and by which the soundness of the City's exercise of its discretion could be judged. Here there were no such definitive guidelines.
>
> ...
>
> While a contracting officer is vested with broad discretion in determining who is the lowest responsible bidder, the discretion allowed him under the method employed by the City in this case exceeded permissible limits. Not only were definite and precise 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.

Id. (citations omitted).

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

A bidder should be accorded fair treatment, and should not have to guess at what documents to supply in submitting its bid, or whether disputes with the government agency on an unrelated

project will be used against the bidder to interfere with the evaluation and ranking process. 5 GCA §5001(b)(3)(4)(7). Fairness and transparency are the guiding principles of every procurement process. In this instance, fairness and transparency demand that DPW provide a clear, transparent, and legally supported process for determining a bidder's record of past performance.

2. FEDERAL REGULATIONS AND CASELAW DO NOT APPLY TO THE SSHS PROCUREMENT

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

No federal funds are being used in the SSHS project. Therefore, the FAR does *not* apply to this procurement. Furthermore, the SSHS procurement law, 5 GCA §58D105, specifically states that the solicitation shall comply with Guam procurement law. Accordingly, cases interpreting or applying the FAR are inapposite.

3. THE FAR DOES NOT DEFINE "RECORD OF DEFAULT" IN THE MANNER DPW URGES

If the Public Auditor were to rely on the FAR for guidance, the FAR line of cases do not support DPW's position. DPW claims that it "should be able to request information or documents evincing bidder's (sic) responsibility," Agency Report at 4, and relies on federal case law to support

its position that it is permitted virtually unfettered discretion to request and consider any information it deems necessary in its determination of contractor responsibility. Agency Report at 4-5 (citing *Commc'n Constr. Servs., Inc. v. United States*, 116 Fed. Cl. 233, 272 (2014) ("Contracting officers are generally given wide discretion in making responsibility determinations and in determining the amount of information that is required to make a responsibility determination.")).

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

> 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.

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

While the FAR sets out corresponding federal standards for determining contractor responsibility, including a review of whether a contractor has "a satisfactory performance record," 48 C.F.R. § 9.104-1(c), it does not require that such record include agency determinations or decisions which are disputed, appealed, and before the courts or an administrative forum for disposition. Unlike Guam procurement laws and regulations, the FAR specifically provides guidelines for a contracting officer considering a contractor's performance record:

> (b) Satisfactory performance record. A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control, or that the contractor has taken appropriate

> corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility. Failure to meet the quality requirements of the contract is a significant factor to consider in determining satisfactory performance. The contracting officer shall consider the number of contracts involved and the extent of deficient performance in each contract when making this determination.

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

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

In *PlanetSpace, Inc. v. United States*, 92 Fed. Cl. 520, 539 (2010), the central dispute regarding past performance involved whether the source selection authority was required to take into account the past performance of a bidder's key personnel or subcontractors, as plaintiff requested. There was no default at issue in *PlanetSpace*, disputed or otherwise. Likewise, the issue in *Blount Inc. v. United States* was whether an invitation for bid's clause requiring a contractor (and not its subcontractor) to perform 20 percent of the work under a contract related to a bidder's responsiveness or responsibility, with no discussion whatsoever about past performance.

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

4. A CONTRACTOR'S RECORD OF DEFAULT SHOULD NOT INCLUDE A DISPUTED AND UNADJUDICATED NOTICE OF DEFAULT

The issue of whether a contractor's Record of Default should include a disputed and

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

This reasoning applies with equal force in procurement law. In *D. Stamato & Co. v. Vernon Twp.*, the township of Vernon, New Jersey rejected a bid submitted by contractor Stamato on a repaving contract, though it was the lowest bid submitted, finding that Stamato was not a responsible bidder. 329 A.2d 65, 69 (App. Div. 1974). Vernon's finding of non-responsibility did not result from a challenge to Stamato's experience, financial ability or integrity, but rather from a dispute as to whether Stamato's performance of a prior resurfacing contract was defective. *Id.* After the resurfacing contract was completed and the township began using the road, the township engineer determined that the road had begun to ravel, a defect the township attributed to the bitomunous concrete mix authorized by the township and used by Stamato. *Id.* A dispute between the parties ensued, with witnesses supporting the claims of both parties. *Id.* The dispute was still pending at the time the repaving contract was put out to bid, ultimately resulting in Vernon's finding of Stamato's

non-responsibility in the second procurement. *Id.* The Court held in favor of Stamato finding as follows:

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

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

IV. CONCLUSION

DPW has no factual or legal basis for interpreting "Record of Default" to include a disputed and unadjudicated Notice of Default. Its standards are constantly shifting, and it has no guidelines for the weight to be attributed to such notices. DPW has not cited any authority for its claim that a disputed Notice of Default is an appropriate factor for consideration of a contractor's responsibility. In fact, DPW's position is contrary to established authority in procurement law and other areas of law. Core Tech therefore requests a ruling from the Public Auditor as follows:

1. DPW should be required to exclude disputed Notices of Default from bidders' "Record of Default" in a responsibility determination.

Respectfully submitted this 15th day of December, 2017.

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