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

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DATE: 09.02.16
TIME: 4:07 AM PM BY: JMY
FILE NO OPA-PA: 16-007, 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 COMMENTS TO DPW'S
AGENCY REPORT

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I. INTRODUCTION

Core Tech International, Corp. (“Core Tech”) appealed two decisions the Department of Public Works (“DPW”) issued, denying protests filed by Core Tech on May 27, 2016 and July 15, 2016, regarding “Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Public Schools (Beginning with Simon Sanchez High School)” Project No. 730-5-1055-L-YIG (the “RFP”). DPW denied Core Tech’s May 27th protest on June 8, 2016, and denied the July 15th protest on August 3, 2016. Core Tech appealed the denial of the May 27th protest on June 23, 2016 (Docket No. OPA PA-16-007) (“Appeal 1”), and appealed the denial of the August 3rd protest on August 10, 2016 (Docket No. OPA PA-16-011) (“Appeal 2”). The Public Auditor consolidated the two appeals on August 22, 2016, and scheduled the expedited hearing for September 7, 2016. *See, In the Appeal of Core Tech International Corp.*, OPA-PA-16-007 and OPA-PA-16-011 (*Order Consolidating Cases and Revised Expedited Briefing Schedule*, August 22, 2016).

DPW filed its Agency Report on August 23, 2016 regarding the matters raised in Appeal 2, which has since been consolidated with Appeal 1 (“Agency Report”).

Core Tech hereby submits is response to DPW’s Agency Report.

Core Tech appealed DPW’s August 10, 2016 agency decision on the following grounds: (1) Core Tech’s appeal was timely filed; (2) the Indefinite Delivery Indefinite Quantity (“IDIQ”) contract DPW and GEFf negotiated contemplates circumvention of the \$100 Million compensation cap in violation of the RFP; and (3) DPW failed to maintain a complete procurement record in violation of Guam Procurement Law.

These issues are properly before the Public Auditor and the OPA has jurisdiction to review and consider these issues in this consolidated appeal. DPW has stated that Core Tech’s Appeal 2 was timely filed. *See, Agency Report* at 4.

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II. ARGUMENT

A. THE IDIQ CONTRACT ENVISIONS CIRCUMVENTION OF THE RFP'S \$100 MILLION COMPENSATION CAP

In its Agency Report, DPW argues that the compensation and payment provision in §3.0 of the IDIQ Contract is consistent with the RFP because it merely incorporates Sections 4.0 and 4.4 of the RFP.

Section 3.1 provides in relevant part that:

The Government will compensate the Developer for services rendered for Task Orders as provided in this Contract based on available funds and not to exceed One Hundred Million and 00/100 Dollars (\$100,000,000.00) pursuant to Section I (Scope of Contract), *unless otherwise directed by the Director of DPW in writing and permitted by Public Laws 32-120 and 32-121 or any other law.* The first and second Task Orders will be for Simon Sanchez High School and the CCIP (emphasis added).

See, Ex. 13, Core Tech Hearing Exhibits filed 8/31/16 ("CT Ex."), IDIQ Contract at CT-13-000005.

First, contrary to DPW's assertions, Section 4.0 of the RFP does not allow DPW to exceed the \$100 million cap. Section 4.0 states that the scope of work for the RFP includes financing and lease financing for rehabilitation, construction, expansion and renovation of thirty-six (36) schools with a total cost of *up to One Hundred Million Dollars* (\$100,000,000.00). RFP. CT Ex. 1 at 1-00018.

DPW's argument that Section 3.0 (the IDIQ compensation provision) mirrors Section 4.0 of the RFP should be rejected because it *does not* mirror the RFP. Section 3.1 of the IDIQ Contract references the \$100 million compensation cap, as DPW notes in its Agency Report, but it goes further, contemplating potentially exceeding the \$100 million cap at DPW's direction. Section 4.0 of the RFP restricts the amount of the RFP to \$100 million:

The scope of work for this RFP includes financing and lease financing for rehabilitation, construction, expansion and renovation (inclusive of architectural and engineering design) of thirty-six (36) schools with a total cost of up to One Hundred Million Dollars (\$100,000,000.00).

1 See, CT Ex. 2 §4.0, *Addenda to RFP* at CT-2-000008 (emphasis supplied). Section 4.0 of the RFP is
2 clear in that the total funding can be no more than \$100 million. DPW’s argument that Section 3.1 of
3 the IDIQ Contract is consistent with §4.0 of the RFP is simply wrong.
4

5 Likewise, Section 4.4 of the RFP does not address the cap issue, but, provides that “[s]hould
6 there be inconsistencies between the requirements of this RFP and the stated Public Laws, the
7 requirements of the law shall prevail.” *Id.* at CT-1-000021, Section 4.4. The RFP limits the debt to
8 \$100 million and is not inconsistent with the Public Laws.
9

10 Lastly, DPW contends that “Core Tech only speculates that Section 3.1 authorizes additional
11 funds but additional funds have not been authorized” because it is capped by Section 3.1 and 4.0 of
12 the RFP. *See, Agency Report* at 6. A plain reading of Section 3.1 clearly authorizes the contract
13 amount to exceed \$100 million if “*directed by the Director of DPW in writing and permitted by*
14 *Public Laws 32-120 and 32-121 or any other law.*” It is not difficult to imagine that a director of
15 DPW, who is an appointed official, would authorize the increase of the \$100 million cap under
16 Section 3.1 of the IDIQ Contract.
17

18 The drafting of the IDIQ to allow for such compensation was not inadvertent. GEF had
19 pressured the Government to accept its interpretation of Public Laws as the basis to include Section
20 3.1, which allowed GEF to exceed the \$100 million compensation cap. In an April 1, 2016 letter
21 from GEF to DPW, GEF relying on its counsel, Calvo Fisher & Jacob’s opinion, states the
22 following regarding funding:
23

24 From a funding perspective, we have requested Calvo Fisher & Jacob,
25 our legal counsel, to review the RFP, PL 32-120 and PL 32-121 as they
26 relate to Guam Procurement law and whether the scope of work for
27 SSHS and the other thirty-six (36) schools is capped at \$100 million.
28 *Their response indicates that the process fully complies with Guam
procurement law and the scope of work to be negotiated between the
Government and GEF is not capped but is limited to the rental
payments allocated under the two laws.*

1 See, CT Ex. 7 at CT-7-0001-2 (emphasis supplied). GEFf asked its counsel, Calvo Fisher & Jacob
2 (“CFJ”) to opine on the RFP and whether under “Public Laws 32-120 and 32-121 ... the Government
3 and GEFf are able to negotiate the scope of work for the design of Simon Sanchez High
4 School...and whether the total cost for all thirty-six (36) public schools is capped at \$100 million.”

5 See, CT Ex. 6 at CT-6-000001. CFJ’s response was:
6

7 Based upon our review of the RFP, Public Laws 32-120 and 32-121,
8 and the Guam Procurement Law and Regulations [footnote omitted],
9 *we believe the parties have the ability to negotiate the scope of work
relating to the design of SSHS and that the total cost for all thirty-six
public schools is not capped at \$100 million.*

10 *Id.* (emphasis supplied). In the execution version of the IDIQ Contract, the Government agreed to
11 insert contractual language allowing the Government to compensate GEFf well beyond the \$100
12 million compensation cap. DPW and GEFf’s agreement to compensate GEFf beyond the RFP cap
13 violates §4.0 of the RFP.
14

15 The fact is, DPW and GEFf agreed to the final terms of the IDIQ Contract, which, without
16 doubt, allows the parties to spend more than the \$100 million cap, and Mr. Flores for GEFf, signed
17 the IDIQ Contract. CT Ex. 13 at 13-00001. The IDIQ Contract violated that RFP when it was
18 negotiated, it violated the RFP when GEFf signed the contract, and it violates the RFP today. Saying
19 that it could be modified does not change the fact that a violation of the RFP had occurred, cure a
20 faulty procurement, or exculpate the parties from their deliberate actions violating the RFP.
21

22 **B. DPW FAILED TO MAINTAIN A COMPLETE PROCUREMENT
23 RECORD REQUIRED UNDER GUAM LAW.**

24 Core Tech’s Notice to Appeal identified the deficiencies in the Procurement Record. DPW’s
25 failure to maintain the required documents and records under 5 GCA §5249 includes: (1) failure to
26 maintain a complete log of all communications as required under §5249(a); and (2) failure to record
27 the negotiations meetings as required under 5 G.C.A. §5249(c). In its Agency Report, DPW attempts
28 to minimize the gravity of its violations, claiming that the Procurement Record is “not missing

1 critical records nor is a (sic) materially incomplete record” and that the Government “in good faith
2 substantially complied with the Procurement Law in maintaining a demonstrative procurement
3 record.” *Agency Report* at 6. DPW’s self-serving analysis of the substantiality of its compliance or
4 lack thereof with Guam Procurement Law notwithstanding, Guam Procurement Law does not give
5 DPW the discretion to substitute its judgment for the Legislature’s, and to pick and choose which
6 classes of material are critical and should be maintained under the Procurement Law.
7

8 The “RFP Committee for SSHS & 35 DOE Schools” log book (“Log Book”) DPW
9 maintained for the procurement record in this matter begins on December 22, 2015, more than 6
10 months after issuance of the RFP, and ends on March 1, 2016, over two months before DPW issued
11 the Notice of Intent to Award. *See*, CT Ex 24. The Log Book accounts for only four (4) of the
12 procurement’s eleven (11) months of activity, and the completeness of DPW’s record even for those
13 four (4) months is unclear. DPW admitted in its denial of the Protest that it did not include
14 communications to or from government employees related to the procurement in a communications
15 log, but argued that it “substantially complied in good faith with this requirement” by providing the
16 communications themselves in the Procurement Record. *See*, CT Ex. 22 at CT-22-000001. However,
17 the law requires the government to keep and provide a log, which, in addition to creating a
18 centralized catalog of source documents that would confirm the existence of the documents in the
19 event they are lost or destroyed, would also record non-print communications, such as telephone
20 conferences and in-person meetings, information that cannot be recreated from source documents.
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23 Crucial to this particular procurement, the absence of a communications log renders the
24 general public and the Public Auditor unable to ascertain whether the government has provided all
25 communications. Because there is no complete log, the OPA must simply rely on DPW’s
26 representations that its record is now complete, a claim DPW has wrongly made before.
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1 Compounding its failure to maintain a complete communications logbook, DPW, as a
2 practice, has not recorded any negotiation meetings, as required under §5249(c). The Negotiating
3 Committee members (Jon Fernandez, Mana Silva Taijeron, and Felix Benavente) and GEFf engaged
4 in at least twelve (12) negotiation meetings with GEFf, on February 15, 2016, February 19, 2016,
5 February 23, 2016, March 2, 2016, March 15, 2016, March 23-25, 2016, April 21, 2016, April 26,
6 2016, April 27, 2016, and April 28, 2016. DPW has not provided any recordings of these meetings in
7 the Procurement Record. In fact, DPW concedes that it did not make any such recordings. DPW has
8 admitted that one of its employees, Reynaldo Junio, made a partial recording of one negotiation
9 meeting on a personal cell phone, and that DPW's attorney informed Mr. Junio that the recording was
10 part of the procurement record, but that DPW failed to preserve the recording, which was lost when
11 Mr. Junio's cell phone sustained water damage on June 4, 2016. *See*, CT Ex. 19 & 21. In its Agency
12 Report, DPW now claims that the partial recording Mr. Junio made was in lieu of meeting minutes.
13 The requirement of Section 5249(c) is clear – in requires sound recordings, not meeting minutes.
14 Sound recordings are necessarily more complete, and more accurate, than meeting minutes, and the
15 law does not permit DPW to simply substitute one method of record-keeping (minutes) for another
16 (sound recordings) at its discretion.
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19 Finally, DPW argues that the procurement record is “replete with over 3000 pages of
20 documents” and identifies classes of material it included in the procurement record, *Agency Report* at
21 6. DPW misses the mark about the necessary review in determining whether the procurement record
22 complies with the law. As the Superior Court of Guam held in *Teleguam Holdings LLC v.*
23 *Government of Guam*, Superior Court of Guam Case No. CV0334-13 (August 8, 2014), volume is
24 not part of the criteria for determining if the procuring agency has generated a complete procurement
25 record:
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1 ...[N]either time and effort nor size are the criteria for determining
2 whether a procurement record is complete under the Guam
3 Procurement Law. Instead, the statute demands the creation of the
4 procurement record, and the statute also specifies what must be
5 included in it: “Each procurement officer shall maintain a complete
6 record of each procurement. The record shall include the following...”
7 5 G.C.A. §5249 (2005). Under the plain language of the statute, the
8 procurement record is not complete unless it includes the enumerated
9 list of required documents. Nor does the assertion that “there was and is
10 nothing more GSA can give to GTA,” even if true, necessarily mean
11 that the record is complete. There could be many reasons for required
12 documents to not be included in the procurement record. It is not the
13 reason why documents are not included in the procurement record that
14 makes it complete or incomplete, but simply the fact of their inclusion
15 or lack thereof.

16 *Teleguam Holdings, supra* at 14-15.

17 When DPW denied Core Tech’s protest, DPW’s position was that the provisions of §5249(c)
18 do not apply to this procurement because the internal semicolon in the Guam Compiler of Laws’
19 version of §5249(c) evidenced that the Legislature intended that only pre-bid conferences must be
20 recorded.¹ In its August 23, 2016 Agency Report, DPW conceded that Section 5249 contains a
21 comma and not a semicolon as the Compiler of Laws’ version displays, but relies on *Town of Pacific*
22 *v. Seipert*, 79 Mo. 210, 214 (1883), a 133-year old case from Missouri, for the proposition that the
23 law as published would be deemed law, instead of the enrolled act on file. However, DPW still
24 maintains, incorrectly, that the Compiler’s incorrect version of the statute, the version with the
25 semicolon, should be *deemed* the law because the Compiler’s version has been published for twenty
26 (20) years. This argument fails to consider 1 GCA §103 which discusses relationship of the Guam
27 Code Annotated and other permanent laws. 1 GCA §103 provides in relevant part as follows:

28 § 103. Relationship Between This Code and Other Permanent Laws.

¹ The Compiler’s version of §5249 states in relevant part:

(c) *sound recordings of all pre-bid conferences; negotiations arising from a request for proposals and discussions with vendors concerning small purchase procurement[.]*

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(a) The general and permanent laws of Guam shall be:

(1) Guam Code Annotated shall be the publication of the permanent codes of Guam and the publications thereof, when certified by the Compiler of Laws, shall be legal evidence of the laws contained therein;

...

(3) Public Laws, which may be found in the Office of the Governor, the Office of the Speaker of the Legislature, the Office of Compiler of Laws (commencing with the laws of the 13th Guam Legislature), and any other location declared an official depository by the laws of Guam. Copies contained in the above shall be legal evidence of the laws contained therein.

...

(b) If there is shown to be a difference, not permitted by this Code, in contents between the Public Laws described in subsection (3), above, and any of the laws described in subsections (1), (2), (4) and (5) above, the Public Laws shall take precedence.

1 G.C.A. §103. Section 103 instructs that to the extent there is a discrepancy between the GCA and the Public Laws, the Public Laws take precedence. The Compiler’s error is not the law.

DPW’s alternate argument that it relied on the wrong version of the statute and interpreted the clauses of §5249(c) independently is not compelling. The clauses do not make sense independently and DPW understandably cannot offer an interpretation for the supposedly independent clauses of §5249. DPW’s interpretation of the incorrect Compiler’s version of §5249 would require the procurement record to include a sound recording of all pre-bid conferences and, separately, “negotiations arising from a request for proposals and discussions with vendors concerning small purchase procurement” with no stated form, whether written or recorded. Read this way, the law would require that the *negotiation itself* somehow be included in the procurement record. DPW does not explain why it believes the legislature would single out pre-bid conferences to be sound-recorded, but not any of the other items in §5249(c). DPW’s argument is further undermined by the fact that

1 its attorney informed Reynaldo Junio that his recording was part of the procurement record. *See*, CT
2 Ex. 21.

3 DPW's justification for the state of the procurement record is that it needs time to organize
4 the procurement record "as the process is stayed pending the protest." *Agency Report* at 6. The truth
5 is no amount of organizational skill will recreate sound recordings which DPW did not keep. And,
6 no amount of time will allow DPW to recover non-documentary communications it failed to
7 contemporaneously note in its communications log. These records are lost and unrecoverable. It is
8 simply impossible for DPW to attain a complete procurement record at this stage in the procurement.

9
10 Guam law mandates that "[n]o procurement award shall be made... unless the responsible
11 procurement officer certifies in writing under penalty of perjury that he has maintained the record
12 required by §5249 of this Chapter and that it is complete and available for public inspection." 5
13 G.C.A. §5250 (emphasis supplied). The Superior Court held in *Teleguam Holdings LLC v.*
14 *Government of Guam*, Superior Court of Guam Case No. CV0334-13 (*Decision and Order*, August
15 18, 2016) "the Procurement record upon which [the Invitation for Bid] and the proposed awards were
16 based is incomplete. A revision of the consequent proposed awards cannot render the preceding
17 procurement record complete and it would remain in violation of the Procurement Law...Therefore,
18 the only remaining remedy available to the Court is to cancel the solicitation and proposed awards".
19 *Id.* at 8. DPW's did not comply with the record keeping requirements of 5 G.C.A. §5249, thus, the
20 proposed award to GEFf must be cancelled.
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23 III. CONCLUSION

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

- 25 1. A determination that DPW violated the RFP by attempting to circumvent the RFP's
26 compensation cap;
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2. A determination that DPW failed to maintain a complete procurement record in this case;
3. If a contract has not yet been awarded, a declaration that the proposed award to GEF is cancelled pursuant to 5 G.C.A. §5451(a);
4. If a contract has been awarded to GEF, a declaration terminating the contract under 5 G.C.A. §5452(a);
5. For an award of reasonable attorney's fees and costs of this protest and appeal; and
6. For such other relief that the OPA may determine is just and proper.

Submitted this 2nd day of September, 2016.

CIVILLE & TANG, PLLC



By: _____
JOYCE C. TANG
LESLIE TRAVIS
Attorneys for Appellant
Core Tech International, Corp.