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BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM

IN THE APPEAL OF	)	Docket No. OPA PA-17-10
	)	
CORE TECH INTERNATIONAL CORP.,	)	**APPELLANT CORE TECH**
	)	**INTERNATIONAL CORP.'S**
Appellant.	)	**HEARING BRIEF**
	)	
	)	
	)	

Appellant Core Tech International Corp. ("CTI") hereby submits its Hearing Brief concerning the above-captioned appeal. This appeal involves a contract between CTI and the Department of Public Works ("DPW") ("the Contract") for improvements to Route 1/Route 8 and to replace Agana Bridges 1 and 2 ("Project"). The issues raised in this appeal are 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"); and 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. DPW WRONGFULLY TERMINATED THE CONTRACT.

A. DPW's own documents show that it failed to give CTI notice of default and an opportunity to cure.

DPW claims that its letter of June 13, 2017 entitle "Final Demand to Complete Project" ("Final Demand") gave CTI notice of default and an opportunity to cure any alleged breaches of the

Contract. The Final Demand is clear on its face: there is no notice of default and no statement demanding that CTI cure any alleged breaches or it would face a default and termination of the Contract.

Appellant's Exhibit 9 is an email of March 15, 2017. Attached to the email is a "ROUGH DRAFT" of a letter from DPW to CTI which was "intended to place Core Tech on notice that it has 10 days to compete Project signage and submit an acceptable plan and timetable to correct all ADA non-compliant sidewalks and sidewalk ramps." Appellant's Exh. 9 provides in pertinent part in the last full paragraph as follows:

> *If CTI fails or otherwise elects to not submit a proposal as discussed herein, DPW intends on terminating the Contract and* _____. *deduct $xxx.xx from the contract value.*

(Emphasis added). The foregoing shows conclusively that the ROUGH DRAFT letter contained a provision notifying CTI of a potential default and termination of the Contract, as well as an opportunity to cure any default. DPW elected not to send such a letter to CTI and instead issued the Final Demand, which contained no such provisions. The evidence is clear beyond doubt that DPW failed to give CTI notice of default and an opportunity to cure. This failure is especially egregious because, as will be shown at the hearing, the Project is approximately 98% complete and only final punchlist items remain for completion. *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).

B. DPW's termination of the Contract based on alleged non-compliant Americans with Disabilities Act ("ADA") issues was wrongful where DPW paid in full for the ADA Items.

DPW claims that it terminated the Contract because CTI failed to comply with the ADA in the construction of certain sidewalks, ramps, and driveways. DPW submitted an exhibit showing a

"Non-Conformance Report" of the ADA Items, yet at no time between the date of that report in December 2014 to July 2017 did DPW declare CTI in default. Instead, the evidence will establish that the ADA Items were the subject of weekly progress meetings and reports; that CTI cooperated fully with DPW in attempting to resolve the ADA Items; that CTI submitted proposals to resolve the ADA Items, which were all rejected by DPW; and that DPW caused much of the delay in resolving the ADA Items.

DPW claims that CTI has not been fully paid because $572,945.86 has been retained on the Project as Retention. *Purchasing Agency's Response to Appellant's Motion for Leave to File Motion for Partial Summary Judgment* at 4. The Retention amount is irrelevant to whether DPW paid in full for the ADA Items. Under the terms of the Contract, specifically Special Contract Requirements Section 106.01, "Acceptable Work conforming to the Contract will be paid for as specified in the Contract." Appellant's Exhibits 2, 3, and 4 show that DPW paid for the ADA items in full. By such payment, DPW deemed the ADA Items as "Acceptable Work" and waived any claims regarding their non-conformity. Moreover, Appellant's Exhibits 6 and 14 show that after paying in full for the ADA Items, DPW considered the ADA Items as "Final Inspection Punchlist Items" and not as defective work.

The total contract amount was $16 million. The total cost to complete the ADA items as punchlist items would be approximately $300,000, or 1.9% of the total contract amount. Termination of the Contract after (i) the ADA Items had been accepted and paid in full; (ii) substantial completion and beneficial use had been achieved (discussed below) and (iii) for final punchlist items totaling 19% of the total contract amount, was wrongful.

C. DPW's termination of the Contract was retaliatory.

The evidence in this matter will show the following timeline in connection with CTI's SSHS Bid appeals and the Project:

June 23, 2016	CTI filed a notice of appeal in first SSHS Bid, OPA-PA-16-007
Sept. 16, 2016	CTI filed its Time Extension Request in the Project
Nov. 10, 2016	CTI supplemented its Time Extension Request
Nov. 22, 2016	OPA issued decision in OPA-PA-16-007 finding that DPW violated Procurement Law
Mar. 16, 2017	CTI filed a notice of appeal in second SSHS Bid, OPA-PA-17-001
June 9, 2017	OPA issued decision in OPA-PA-17-001 finding that DPW again violated the law.
June 13, 2017	**DPW issued "Final Demand to Complete Project" to CTI**
July 7, 2017	DPW issued third IFB for SSHS Bid
July 20, 2017	CTI requested clarification of IFB Instructions to Bidders re "record of default"
Aug. 23, 2017	**DPW issued Notice of Termination/Default to CTI on the Project; DPW issued letter rejecting virtually all of CTI's Time Extension Requests**
Aug. 24, 2017	**DPW issued Addendum No. 6 defining "Record of Default" to bar CTI as an eligible bidder.**

DPW claims that its actions were merely "coincidental" and do not evidence retaliation. The evidence shows otherwise. Felix Benavente was Deputy Director of DPW from 2015 to September 30, 2017. F. Benavente Decl., attached as Exh. A to *Purchasing Agency's Response to Appellant's Motion to Disqualify Appellee Department of Public Work's Counsel Thomas P. Keeler*. He was also the procurement officer for the Contract at issue here **and** the first and second SSHS Bids. *Id.* All decisions in the SSHS Bids appeals and the Contract and Project were made by Mr. Benavente – in particular, he signed the Final Demand to Complete Project (CTI Exh. 13), the Notice of Termination/Default (CTI Exh. 15), the letter denying virtually all of CTI's Time Extension Requests (CTI Exh. 16), and Addendum No. 6 (CTI Exh. 17).

In order to prove retaliation, there must be a casual 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. Mr. Benavente is the key person in common with the SSHS Bids and the Project. The "unusually suggestive temporal proximity" – less than 24 hours - between the Notice of Termination/Default *issued by Mr. Benavente* and the Addendum in the third SSHS Bid *issued by Mr. Benavente* is clear. Further, DPW's "pattern of antagonism" began when CTI submitted its Time Extension Request in September, 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 Demand to Complete Project"; and DPW refused to provide CTI with notice of default and an opportunity to cure in a Project that was 98% complete with only final punchlist items remaining.

DPW asserts a reliance on advice of counsel defense, specifically that DPW's legal counsel Thomas Keeler advised DPW that there was a one year limitations period and that DPW must issue the Notice of Termination/Default in August 2017 in order to make a claim to the surety who issued the Project bond. As a threshold matter, it is not clear whether "advice of counsel" can serve as a defense to a claim of unlawful retaliation here. *See, e.g., Loveday v. Sevier County*, 2000 WL 35586774 *4 (E.D. Tenn.) (advice of counsel does not constitute defense to claim of retaliatory discharge); *E.E.O.C. v. Rekrem, Inc,* 2002 WL 27776 (S.D.N.Y.) (it is not clear whether "advice of counsel" can serve as a defense to a claim of unlawful retaliation); *Farias v. Instructional Systems. Inc.,* 259 F.3d 91, 101 (2d Cir. 2001) (questioning whether advice of counsel could constitute or assist a defense to a claim of retaliation). DPW bears the burden of proving this

affirmative defense yet DPW has not provided any caselaw or authorities establishing that the defense is applicable in this First Amendment retaliation case.

But even assuming that advice of counsel is a proper defense here, CTI will show that Mr. Keeler did not review or receive all relevant facts in order to provide advice to DPW; Mr. Keeler failed to conduct any due diligence to determine whether his advice was sound or correct; that in fact Mr. Keeler's advice was wrong, as the one-year period in the bond refers only to claimants who provided labor or services on the Project and not to the Government as Obligee; and that DPW did not in fact rely upon the advice of counsel when it issued the Notice of Termination /Default on August 23, 2017 and less than twenty-four hours later issued Addendum No. 6 in retaliation against CTI.

II. DPW BREACHED THE CONTRACT.

A. DPW failed to approve a baseline schedule.

A baseline schedule is a fixed project schedule used in measuring project progress and contract performance. As will be shown at the hearing of this matter, a baseline schedule is imperative to an orderly construction project. Here, any delays in the Project and the date for completion are relevant to termination of the Contract, assessment of liquidated damages, and whether, as DPW claims, there has been a breach of contract by failure to complete. *Blinderman Construction Co. Inc. v. United States*, 39 Fed. Cl. 529, 585 (1997) (the only way to accurately assess the effect of the delays alleged on the project's progress is to contrast updated schedules prepared immediately before and immediately after each purported delay). DPW's failure to approve a final baseline schedule resulted in confusion, disagreements, loss of productivity, extra work, and unresolvable issues leading to claims and disputes between the parties.

DPW asserts that it approved a Revised Baseline Schedule on July 21, 2013, but *none has been provided*, either with DPW's Agency Report or in its Exhibits. DPW's Exhibit E, attached to

its Agency Report, is merely a letter dated May 25, 2016 stating that it had approved a Revised Baseline Schedule on July 21, 2013. But this letter establishes that DPW did not approve a final and complete baseline schedule. Instead, the letter shows that DPW continually revised the schedule, after telephone conferences, meetings and discussions with CTI. The last entry of the letter states:

> CTI's Corrected Baseline Schedule, Revision 1 submitted on October 12, 2015 was returned on May 13, 2016, "Exceptions as Noted".

Accordingly, there was no final complete baseline schedule because DPW never approved one.

In *Fortec Constructors v. United States*, 8 Ct. Cl. 490, 492 (1985), the court addressed the validity of a contractor's fifty-six (56) time-extension claims under a contract awarded by the Army Corps of Engineers. The contractor Fortec created a baseline schedule approved by the government. The parties implemented only a single formal schedule update, but that update failed to account for any delays in work that had been performed prior to the update. The government, relying on the single outdated updated schedule, denied Fortec's time-extension request because the schedule did not show any of the additional work was on the project's critical path. The Claims Court held that because the schedule had not been updated for months, it was impossible to determine whether a particular activity was critical or non-critical, on schedule or behind schedule. The court ultimately awarded Fortec its requested breach of contract damages.

The lack of a final baseline schedule had detrimental consequences to the Project and to CTI. Like *Fortec,* CTI could not alter the baseline schedule here without the concurrence of DPW as to the time to be added and therefore the baseline schedule could not be updated during construction. DPW's failure to approve a final baseline schedule breached the Contract.

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

Because there was no approved baseline schedule, CTI was prejudiced in its ability to submit

its Time Extension Request.[1] CTI Exh. 5. 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. CTI Exh. 16, 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 violated the Contract.

III. LIQUIDATED DAMAGES ARE NOT RECOVERABLE BY DPW.

A. DPW's failure to approve a final baseline schedule precludes liquidated damages.

In *George Sollitt Construction Co. v. United States*, 64 Fed. Cl. 229 (2005), the Navy awarded the plaintiff a contract for the renovation and new construction of various buildings at a naval training center, with the construction to be performed in three phases. The baseline schedule was delayed and there were no monthly schedule updates for months. The Navy withheld liquidated damages and the contractor filed suit for delay damages. The Claims Court found that the absence of baseline schedule updates made the proof of delay damages difficult. Due to the failure to record the critical path in all phases of the Project in the baseline schedule, the court could not apportion with any certainty the cause of delays and any attempt to do so would be speculative. Since the assessment of liquidated damages could not be apportioned with any certainty, the court held that the government's assessment of liquidated damages against the contractor was not valid. *Id.; see*

[1] 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.

Fortec, 8 Cl.Ct. at 505 (if baseline schedule is used to evaluate delay on the project, it must be kept current and must reflect delays as they occur).

Here, due to the lack of an approved, updated baseline schedule DPW cannot apportion liquidated damages or contend that CTI failed to complete the Project in a timely manner.

B. Substantial completion and beneficial use of the Project bar liquidated damages.

Liquidated damages tied to completion of the work generally cannot be assessed after the project has reached substantial completion. Liquidated damages are intended to compensate the owner for late completion, and by definition at substantial completion the owner has functional use of the project. At substantial completion, the owner is no longer incurring damages. Thus, liquidated damages are not enforceable or recoverable for subsequent delays of the remaining work following substantial completion. *Schloss v. Troman*, 154 A.D. 645, 648 (1st Dept. 1913). This is especially the case if the owner has beneficially occupied the substantially completed project before the delayed final completion date. *Id.* A project should be considered substantially completed when it is capable of being used for its intended purpose. *Kinetic Builder's, Inc. v. F. Whitten Peters,* 226 F.3d 1307, 1315 (Fed. Cir. 2000). In determining whether substantial completion was achieved, the court must determine the quantity of work remaining to be done and the extent to which the project was capable of serving its intended purpose at the time of termination. *Id.*

The first factor that must be proven to establish a construction contract's substantial completion is a high percentage of completion. In this case, the Project is approximately 98% complete and only final punchlist items remain to be corrected. The second factor is the availability for use. Here, the punchlist items do not preclude beneficial occupancy or use, since DPW has used and occupied the two Hagatna bridges and the allegedly non-compliant ADA sidewalks, ramps, and driveways, they were substantially complete, and they were being used for their intended purpose. *Comtel Technologies, Inc. v. Paul H. Schwendener, Inc.*, 710 F. Supp. 2d 704, 710 (2010) (district's

use, possession and control of middle and high school projects indicated that the projects were substantially complete and that they were being used for their intended purpose). The remaining punchlist items here are not original and uncompleted work, rather they were the continuation of maintenance and repair work which does not contradict the finding of substantial completion. *See All Seasons Construction, Inc. v. Mansfield Housing Authority*, 920 So.2d 413 (La.App.2 Cir. 2006) (contractor sued to have restored to it the amount of liquidated damages withheld under construction contract; court ruled that a project owner could not assess liquidated damages after a contractor had achieved substantial completion and was performing only punch list work).

C. DPW is barred from assessing liquidated damages where DPW caused the delays.

It is well established that liquidated damages may not be assessed for delays in the completion of a construction project that are attributable to the government or that are otherwise excusable. *See, e.g., Sauer Inc. v. Danzig,* 224 F.3d 1340, 1347 (Fed.Cir.2000). In *United States v. United Engineering & Constructing Co.,* 234 U.S. 236, 242 (1914), the United States Supreme Court held that in order to enforce a liquidated damages clause, the government "must not prevent the performance of the contract within the stipulated time." '[W]here a contractor is prevented from executing his contract according to its terms, he is relieved from the obligations of the contract [as to the time of completion] and from paying liquidated damages.' " *Schmoll v. United States,* 91 Ct.Cl. 1, 28, 1940 WL 4133 (1940) (quoting *Levering & Garrigues Co. v. United States,* 73 Ct.Cl. 566, 578, 1932 WL 2094 (1932)).

CTI's Time Extension Request details that most of the delays in completion of the Project were attributable to DPW/PTG. The evidence will establish that the delays were of an unreasonable length of time, they were proximately caused by DPW/PTR, they impacted the critical path of performance, and they caused delay in overall contract completion. Under these circumstances, liquidated damages are not recoverable by DPW.

D. If there was any concurrent delay, liquidated damages should be annulled.

To the extent that there were any concurrent delays caused by DPW and CTI, the "Rule Against Apportionment" should apply. This longstanding rule provides that when the government has delayed a contractor's performance, "the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived." *United States v. United Eng'g & Constructing Co.*, 234 U.S. 236, 242 (1914). Later, the then United States Court of Claims reiterated this rule, holding that "[w]here delays are caused by both parties to the contract, the court will not apportion them, but will simply hold that the provisions of the contract with reference to liquidated damages will be annulled." *See Acme Process Equipment v. United States*, 347 F.2d 509 (1965), *rev'd on other grounds,* 385 U.S. 138 (1966). The Court of Claims reasoned that such a rule was fair because it did not deprive the government from proving its actual damages caused by the contractor's delay; instead, the government "merely loses its right to insist on an artificial measure of damages." *Id.*

IV. PTG WRONGFULLY INTERFERED WITH THE CONTRACT.

The elements of intentional interference with contract are: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Lujan v. J.L.H. Trust*, 2016 Guam 24 *7, quoting *Quelimane Co. v. Stewart Title Guar. Co.*, 960 P.2d 513, 530 (Cal. 1998). All of these elements are present here to establish that PTG intentionally and wrongfully interfered with the Contract and with CTI's work in the Project.

A. 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 is precisely what they did in this Project. Among other things, 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.

CTI will present additional evidence of PTG's constant interference with the Contract and CTI's work on the Project, which cost CTI thousands of dollars in additional labor and equipment, waste of resources, and months of delay on the Project.

B. 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*.

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

CONCLUSION

For all of the foregoing reasons, Core Tech International Corp. respectfully 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 the Contract and CTI's work under the Contract.

Dated this 7th day of December, 2017.

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By: _____
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