



The Honorable
EDDIE BAZA CALVO
Governor

The Honorable
RAY TENORIO
Lieutenant Governor



GLENN LEON GUERRERO
Director

ARLEEN U. PIERCE,
Acting Deputy Director

September 29, 2017

Via Email and Hand Delivery

Joyce C.H. Tang, Esq.
Civille & Tang, PLLC
330 Hernan Cortez Avenue, Suite 200
Hagåtña, Guam 96910

Re: Protest of Information for Bids for Project No. 730-5-1057-L-YIG (“IFB”)

Ms. Tang:

This serves to respond to Core Tech International Corp. (“Core Tech”) protest as set forth in your letter of September 7, 2017. The basis for the protest is that the IFB fails to include all applicable terms and conditions required by law. A second item protested is the allegation that it is improper for the Department of Public Works (“DPW”) to consider a Notice of Default/Termination as a “record of Default” in the Determination of Responsibility.

The IFB was issued on July 7, 2017. Core Tech picked up the IFB on July 10, 2017. At the time of issuance the IFB clearly did not include any of the documents Core Tech protests as being required by the Guam Procurement Law. Under 5 GCA § 5425 (Authority to Resolve Protest Solicitations and Awards) prospective bidders have fourteen (14) days from when it knew or should have known of facts warranting a protest to file a written protest. As Core Tech did not file its protest until September 7, 2017, or approximately two (2) months after the IFB issued, its protest is not timely.

Although DPW considers the protest untimely it does not raise such as a technical objection. Instead, in order to avoid further hardships on the students, staff and SSHS community it agrees to take corrective action and instruct DPW’s CIP division to cancel and revise the IFB.

There are a number of concerns with Core Tech’s second claim that it is improper for DPW to consider a Notice of Termination/Default of Contract (“Notice of Termination/Default”) in the Route 1/Route 8 Intersection Improvements and Agana Bridges Replacement Project No. GUDAR-TO1(001) (the “Agana Bridges Project”) as a record of default.

Prior to addressing this item however it is appropriate to address Core Tech’s recitation of “facts” on the Agana Bridges Project.

- The parties Design-Build Contract provided for the Project to be completed in seven hundred and eighty four (784) calendar days from DPW's issuance of a Notice to Proceed, which CTI received on October 4, 2011.
- Core Tech was on notice that the Project sidewalks were not compliant with the Americans with Disabilities Act ("ADA") and the Plans and Specifications since the summer of 2014. DPW is not able to accept work that is not ADA compliant.
- On August 25, 2016 DPW issued substantial completion to the Agana Bridges Project. At that time Core Tech agreed to complete the remaining project work, which included correcting work that remained ADA noncompliant.
- While the parties disagree to the extent of non-compliance, Core Tech has acknowledged that over Fifty per cent (50%) of the Projects sidewalks fail to comply with the ADA and Plans and Specifications.
- Despite numerous promises, Core Tech failed to complete the remaining work. It did little, if anything, to complete the noncompliant ADA work.
- DPW's Notice of Termination/Default of Contract is a standard notice. To allege that it was improper is wrong.
- The allegation that the Notice of Termination/Default of Contract "is clearly a pretext to justify DPW's response to RFI #32 in Addendum 6" is factually inaccurate. The allegation is based on counsel's unsubstantiated speculation.
- On June 13, 2017 DPW issued a Final Demand letter to Core Tech. Core Tech was given ten (10) days to respond.
- At the time DPW's June 13, 2017 letter Project sidewalks were still not compliant with the ADA and Plans and Specifications.
- On June 16, 2017 Core Tech replied stating it needed additional time to respond. DPW agreed to give Core Tech until Monday, July 24, 2017, to submit a comprehensive plan and schedule to complete the Agana Bridges Project. DPW's Deputy Director once again offered to meet with Core Tech.
- Core Tech not only failed to submit a comprehensive plan and completion schedule by July 24, 2017 as promised, it did not provide any response. Core Tech also elected not to meet with the DPW's Deputy Director.
- On August 23, 2017, DPW issued Core Tech a Notice of Termination/Default ("Notice of Termination/Default") from the Agana Bridges Project. Attached hereto as Exhibit "A" and incorporated herein by reference is a copy of said Notice.

In addressing the substance of Core Tech's second claim, DPW believes that it also isn't timely. There is nothing in the IFB procurement record documenting what, if any, weight the Procurement Officer or Selection Committee members will give to the Notice of Termination/Default. Until each member makes such a determination the second protest is not ripe.

The second protest is also without merit. The Notice of Termination/Default was properly issued and is part of the Agana Bridges Project. The Procuring Officer's decision is a statement of fact and a matter of record. *See*, Exhibit A. DPW's responses to RFI's do not claim that this default is a final adjudicated determination. That the Selection Committee can consider a bidder(s) notice of default and other items issued on prior and current projects in deciding if a contractor is responsible is not in dispute. To contend that DPW's responses claim that a notice of default is a final adjudicated decision, as Core Tech does, is absurd and without merit. DPW appreciates and recognizes Core Tech's right to appeal the Procurement Officer's Notice of Termination/Default under the terms of the Contract and Guam's Procurement Law and Regulations.

Responsibility determinations are made on the basis of *all* information that may be submitted or available up to the time of award. 2 GAR § 3116(b)(2) provides that factors to be considered in determining whether the standard of responsibility has been met include, but is not limited to, whether a prospective contractor has a satisfactory record of performance, a satisfactory record of integrity, the ability to perform and whether it can be expected to perform. Similarly, 5 GCA 58D103(k) provides: "Responsible offeror shall mean a person or entity who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that will assure good faith performance".

DPW and the Selection Committee are required to award the contract "to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the" IFB. 5 GCA § 5211(g). Responsibility involves the question of whether a contractor can or will perform as promised. *See*, In the Appeal of J&G Construction, OPA-PA-07-005. Thus, the Procurement Officer and Selection Committee have a right to consider a bidder's work on other projects. Under the current IFB however no bids have been submitted and it is not known what weight, if any, will be given to Core Tech's default on the Agana Bridges Project.

Guam's Procurement Law and regulations are consistent with the Federal Acquisition Regulations ("FAR"). The FAR also requires an affirmative finding of responsibility prior to awarding the contract to the lowest bidder. FAR 14.408-2. To be determined responsible, the prospective awardee must have the ability and capacity to perform the contract. More specifically, the FAR requires a prospective contractor to (1) have adequate financial resources to perform the contract; (2) be able to comply with the required or proposed delivery or performance schedule; (3) have a satisfactory performance record; (4) have a satisfactory record of integrity and business ethics; (5) have the necessary organization, experience, accounting and operational controls, and technical skills; (6) have the necessary production, construction and technical equipment and facilities; and (7) be otherwise qualified and eligible to receive an award under applicable laws and regulations. FAR 9.104-1. The FAR also defines "Past Performance" as an "offeror or contractor's performance on active and physically completed contracts. *See*, § 4.804-4.

That a selection committee or Procurement Officer has the right to consider a bidder's default on current or prior projects is clear from the Procurement Law, Rules and Guam case law. To argue that a stay occurs when a bidder appeals a Procurement Officer's determination, as Core Tech appears to be doing, is in conflict with Guam's law, rules and case law. Attached hereto as Exhibit "B" is a copy of Guam Legislative Bill No. 28-34.

Accordingly, DPW considers Core Tech's second protest to be both untimely and without merit. Nonetheless, out of an abundance of caution and desire to see the Simon Sanchez High School ("SSHS") project move forward, I have instructed DPW's CIP Division to cancel and revise the IFB. The IFB will clarify the department's response to RFI #32. 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 bidder(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.

Core Tech's various comments to a DPW bias are unprofessional, based on unsubstantiated speculation and does not warrant further comment.

In closing, Core Tech's first protest is not timely. DPW however in hopes of providing SSHS students and staff a new school in the near future, agrees to amend the IFB. Its second complaint is also not timely as no bids have been received and it is not clear what, if any, weight will be given to your clients work on the Agana Bridges Project. It also misstates or misinterprets DPW's responses to the RFI. Nonetheless, Core Tech's default and termination on the Agana Bridges Project is a matter of record. In order to avoid further delays on the SSHS project DPW agrees to revise the IFB to allow bidder(s) an opportunity to explain that it is contesting any adverse decisions by a Procuring or Contracting Officer.

This is a final decision of the Contracting Officer concerning Core Tech's September 7, 2017 protest of the above referenced IFB. You are hereby advised that Core Tech has the right to seek any administrative or judicial review authorized by law.

Please contact my office if you have any questions.

Sincerely,



ARLEEN UNPINGCO PIERCE,
Acting Deputy Director

