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6 OFFICE OF PUBLIC ACCOUNTABILITY
7 PROCUREMENT APPEALS

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9 IN THE APPEAL OF

) DOCKET NO. OPA-PA 11-009
)

10 HUBTEC INTERNATIONAL CORP.,
11)

) **APPELLANT'S HEARING BRIEF**
)

12 Appellant.)
13 -----

14 **I. PROJECT : ROUTE 2 CULVERTS & SLIDE REPAIR.**

15 **A. Hubtec did not receive good faith support from the Department**
16 **of Public Works in the performance of the Route 2 Culverts and**
17 **Slide Repair, Project No. GU-NH-0002(104).**

18 **1. Factual background.**

19 In 2009 the Department of Public Works ("DPW or the "Department") sought to fix drainage
20 problem along Route that had existed for over a decade. DPW issued a Request for Proposal for
21 Project No. GU-NH-0002(104), the Route 2 Culverts and Slide Repair Project (the "Project"). The
22 Project is funded by the Federal Highway Administration (FHWA).

23 The Bid Opening was held on October 05, 2009. DPW had estimated the project at
\$1,932,000. There were three bidders, Hubtec, Inc., who bid One Million Eight Hundred Thirty Five

1 Thousand Forty Dollars and No Cents (\$1,835,040.00), Chi Construction who bid Four Million Nine
2 Hundred Fifty Thousand Dollars and No Cents \$4,950,000 and IMCO who bid Five Million Five
3 Hundred Ninety One Thousand Twelve Dollars and No Cents \$5,591,012. Notwithstanding the
4 government's bid estimate, the discrepancy between the low bid and the other two bidders should
5 have set off alarm buttons at DPW about whether the job could be performed for the amount Hubtec
6 bid. DPW was the only one in a position to do such a review of the bids.

7 On October 27, 2009 Hubtec received an Intent to Award letter from DPW from then
8 Director Lawrence Perez. Perez was also the Contracting Officer for the project. (OPA Procurement
9 Record Exhibit, bate stamp 19). A pre-construction conference was held on May 04, 2010. At that
10 conference Hubtec requested from DPW the Geo-Engineering & Testing, Inc.'s Reports for the
11 project site. No Preliminary Notice to Proceed was ever issued. Hubtec was issued a Notice to
12 Proceed ("NTP") effective May 5, 2010 with the job to be completed within 240 days. Once issued
13 the NTP, Hubtec began mobilization that included submission of material requests for approval and
14 material procurement requests from vendors. Documents were also prepared to obtain the necessary
15 government permits to begin the Project. Hubtec received a copy of Geo-Engineering & Testing,
16 Inc.'s Report on May 07, 2010.

17 The Project ran into numerous problems and was not completed on time. On February 22,
18 2011, DPW terminated the contract. Hubtec disputed the termination and requested a final decision.
19 (DPW Exhibit H). A response to Hubtec's demand for a final decision was given by DPW but no
20 final decision was ever provided. Hubtec then filed it's appeal to the Office of Procurement Appeals.

21 **2. Scope of Work.**

22 The Project is located along Route 2 between Agat and Umatac. The Sella River Culvert is
23 within the village of Agat. The Cetti River, Umatac Baseball Culverts and the Cetti Bay Slide area

1 are located within the Village of Umatac. The culverts' reconstruction includes removal of existing
2 culverts and replacing the culverts, pavement reconstruction, signing, and safety improvements,
3 construction of drop inlet structures and retaining walls, ripraps, stabilized maintenance pads, trash
4 racks, and safety railings, construction of outlet wing wall/retaining wall structures and aprons, and
5 ripraps, grading of roadway embankments, and improvements on existing roadside drainage ditches.
6 It includes restoration of roadway pavement structure and other work to complete the project. The
7 incidental and collateral work necessary to complete the project was shown on the plans and
8 specifications.

9 **3. Performance of Work.**

10 All contracts, including government contracts, contain an implied covenant of good faith and
11 fair dealing. *See Landmark Land Co., Inc. v. United States*, 46 Fed.Cl. 261, 269 (2000) (“All parties
12 to a contract have an obligation to act in good faith, regardless of whether the contract states it.”);
13 *Allstates Air Cargo, Inc. v. United States*, 42 Fed.Cl. 118, 124 (1998); *Ebasco Servs., Inc. v. United*
14 *States*, 37 Fed.Cl. 370, 382 (1997) (“Every government contract contains an implied covenant of
15 good faith and fair dealing.”); Restatement (Second) of Contracts § 205 (1981); *cf. Essex Electro*
16 *Eng'rs, Inc. v. Danzig*, 224 F.3d 1283, 1291 (Fed.Cir.2000) (discussing one aspect of the duty of
17 good faith and fair dealing). In a government contract, the implied covenant of good faith and fair
18 dealing requires that the Government not use its unique position as sovereign to target the legitimate
19 expectations of its contracting partners. *Cf. Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569,
20 1575 (Fed.Cir.1997) (emphasis added) (“The Government-as-contractor cannot exercise the power
21 of its twin, the Government-as-sovereign, for the purpose of altering, modifying, *obstructing* or
22 violating the particular contracts into which it had entered with private parties.”). If the covenant did
23 not impose this limitation upon the Government, every contract promise made by the Government

1 would be illusory.³⁶ See *Hughes Communications Galaxy, Inc. v. United States*, 26 Cl.Ct. 123, 140
2 (1992) (discussing good faith limitations on the sovereign acts defense), *rev'd on other grounds*, 998
3 F.2d 953 (Fed.Cir.1993).

4 The contract, in its simplest explanation, was to redo the drainage at three different sites and
5 to shore up the sites. Hubtec was to construct and contain draining water in the inlet structures,
6 rebuild and install the culverts to safely drain the flowing water into the outlet structures under the
7 design plan of DPW. (DPW Procurement Record, Bate stamp 0036-0043).

8 The job sites are exposed to the elements, along roadways and waterways and surrounded
9 by dangerous and unstable. Hubtec was faced with obtaining its materials and permits, constructing
10 the areas according to the contract drawings and managing the jobsites in a safe manner for its
11 employees and the public and performing the earthwork in saturated conditions during the raining
12 season in a two hundred and forty day period!

13 Prior to the start of construction Hubtec was not provided with DPW's knowledge of the
14 existing weathered cut slopes and soil conditions that should have been reflected on the Contract
15 Drawings. After construction began, that failure created unnecessary dangers and construction delay.
16 DPW was aware of the problems and danger in performing earthwork during Guam's rainy season.
17 Those dangers involved possible landslides, collapse of shored up areas, seepage, pollution and
18 potential injury to personnel. Those problems were known to DPW. Prior to the award of the bid,
19 one of the bidders, Chi Construction, sent a letter to DPW and requested that the start of construction
20 be delayed to January, 2010 so the Project could be performed during the dry months. (See Exhibit
21 1A-1.)

22 According to the Geo-Engineering & Testing, Inc. Report prepared for DPW on January 29,
23 2009, subsurface conditions for three sites (Boring 1 through 6), ground water was found at 20feet

1 deep in Test Boring 2 (Achugao Culvert), water struck at 27ft deep. In boring 3 water and 23ft deep
2 in boring 4 (Cetti River Culvert), 7.2ft deep in Boring 5 and 9.9ft deep in Boring 6. Furthermore,
3 it could fluctuate with seasonal rainfalls. At page 7 of the Geo-Engineering & Testing, Inc. Report,
4 it stated that "It is likely that ground water or seepage will be encountered during the excavations
5 to install the new culverts at all three sites." (See Exhibit 1A2.)

6 DPW ignored the Geo-Engineering & Testing, Inc.'s recommendations in the designing stage
7 of the Project, and neglected to take into consideration the impact of the expected rainy season when
8 DPW issued its NTP. Furthermore, during construction DPW and the construction manager took
9 unreasonable amounts of time in reviewing Hubtec's Request for Information (RFI) and Change
10 Orders to deal with the environmental conditions and design flaws.

11 Because of the inclement conditions, many times during the course of the Project, Hubtec
12 could not work but it had to pay its professional and non-professional workers, as well as pay for
13 heavy equipment, causing Hubtec to incur additional costs. In addition to the problems mentioned
14 above, the Project suffered from frequent and often heavy rainfall and saturated ground conditions
15 during the Project. This is set forth in Hubtec's letter to DPW dated December 6, 2010. (Hubtec
16 Exhibit 1A3). Hubtec submitted to DPW a "10-year record of Rainfall Study", KGUIPANT 1
17 Weather Graph for 2009, and Weather Graph for 2010 showing the annual average and monthly
18 reports from May to November 2010. In addition, the Department was warned at page 15 of the Geo
19 Technical Report where it stated that:

20 "Unanticipated subsurface conditions may be encountered during construction
21 and cannot be fully determined by test borings. Additional expenditures may
22 be needed during construction to attain a properly constructed project.
Therefore, some contingency fund is thus recommended to accommodate these
possible costs."

23 Notwithstanding the warnings in the Geo-Engineering & Testing, Inc. Report's findings and

1 recommendation, neither the Construction Manager, Duenas Camacho & Associates (“DCA or
2 Construction Manager”) nor DPW paid any attention. Consequently, Hubtec wasted large amounts
3 of time during the construction period fighting rainfall and water runoff, forcing it to perform
4 additional work outside the terms of the Contract while waiting to receive DPW's confirmation or
5 approval of Change Orders or additional work.

6 Below is a brief summary of the Monthly Progress Performance, based on Application
7 Payments Nos. 1 through No.7(R) that were submitted to both DCA and DPW during the project.

8 a. **1ST PERFORMANCE PERIOD:**

9 **MAY 05, 2010 THROUGH JUNE 25, 2010.**

10 Hubtec incurred a slow pace of work at the Cetti Bay Slide Repair due to unfavorable wet
11 climate conditions. On June 8, 2010, excavation on the Cetti Bay slide began. According to the Geo-
12 Engineering & Testing Report it was anticipated that the asphalt would be two inches thick.
13 However when excavation began it was found to be three inches thick asphalt, with unforeseen rock
14 materials underneath. Notwithstanding the Geo-Engineering & Testing, Inc. Report, neither item
15 above was indicated on the Contract Drawings and, therefore, were considered items of additional
16 work under "Differing Site Conditions".

17 During excavation, Hubtec encountered water seepage and submitted a proposal to remedy
18 the problem by replacing base course aggregate (Contract Drawings calls for base course) with lean
19 concrete as per Geo-Engineering & Testing Inc., Report recommendation. Hubtec’s proposal
20 remained unanswered by DCA or DPW and work could not continue since the work constituted
21 additional work that required official confirmation, in writing, from the Construction Manager or
22 DPW before proceeding.

23 Hubtec’s work at the Umatac Baseball Culvert involved obtaining all Guam and Federal

1 government clearances for work over existing utility lines and waterways. Hubtec also set up the
2 horizontal and vertical control points for the work sites.

3 On June 18, 2010 Hubtec wrote to the contracting officer setting forth its recommendation
4 and asking to amend the Traffic Control Plan because of the open excavation of the area along the
5 road of the Cetti Bay Slide Repair. On June 25, 2010 the new plan was approved by DPW.

6 b. **2ND PERFORMANCE PERIOD:**

7 **JUNE 26, 2010 THROUGH JULY 25, 2010.**

8 During the second performance period, Hubtec encountered water seepage during excavating
9 for the Cetti Bay Slide and asked the Construction Manager to change from base course identified
10 in the Contract Drawing to lean concrete because the base course was unstable or would just wash
11 away during construction. During the Second Performance Period DPW did not respond to Hubtec's
12 Request for Information ("RFI") and proposal for replacing base course aggregates with lean concret.
13 Hubtec could not proceed with the work until it got official confirmation from DPW.

14 At the Umatac Baseball Culvert Hubtec proceeded with the clearing and grubbing work as
15 set forth in the contract drawings. Hubtec installed the silt fences along the outer construction
16 boundaries.

17 On July 6, 2010, Hubtec wrote to DPW explaining the impact and problems caused by the
18 rain and random water seepage because the ground water saturated with water and unstable. Hubtec
19 explained that Geo-Engineering Testing had conducted compaction tests on July 1 and July 4 but it
20 did not pass specifications because of continuous water seepage. The Geo-Engineering & Testing,
21 Inc. Report warned of these problems but DPW did not follow the Report recommendations. Hubtec
22 informed DPW on the need to use flowable fill or lean concrete instead of base course aggregate.

23 On July 19, 2010 Hubtec submitted a proposal to DPW for offsetting the 48" diameter storm

1 drain pipes because Hubtec felt that tilting the pipes to a different angle would make for better
2 drainage flow.

3 **c. 3RD PERFORMANCE PERIOD:**

4 **JULY 26, 2010 THROUGH AUG. 25, 2010.**

5 The work at Cetti Bay Slide began again after Hubtec received approval on Aug. 12, 2010.
6 from DPW to replace base course aggregate with lean concrete. On August 13, 2010 Hubtec poured
7 the lean concrete. On August 26, 2010, Hubtec gave DPW its invoice for approval of the lean
8 concrete additional work in the amount of \$17,179.00. DPW never paid Hubtec for the additional
9 work. Concrete was poured on the hillside retaining wall on Aug. 25, 2010.

10 Work at the Umatac Baseball Culvert encountered unsuitable material during excavation on
11 the Outlet Structure. Hubtec brought that condition to the attention of the Construction Manager and
12 submitted an RFI and proposal based on the Geo-Engineering & Testing's Reports of DPW. While
13 waiting for the reply from DPW unable to proceed with construction. At the Cetti Bay Culvert
14 Hubtec performed the clearing and grubbing work and removed the existing guardrail.

15 On July 27, 2010 Hubtec submitted an invoice for \$14,398 for the approved Traffic Control
16 Plan for the creation and installation of 30 concrete barriers. The invoice was never paid.

17 **d. 4TH PERFORMANCE PERIOD:**

18 **AUG. 26, 2010 THROUGH SEPT. 25, 2010.**

19 For safety reasons most of construction activities for Cetti Bay Culvert, Sella Bay Culvert,
20 Umatac Baseball Culvert could not be performed due to harsh weather, water saturated grounds,
21 large amounts of water runoff and ongoing rain showers. At the September 21, 2010 construction
22 meeting Hubtec informed DCA and DPW that it cannot process work at the culvert location due to
23 continuing rains that have created safety issues.

1 At Cetti Bay Slide Hubtec placed the concrete wall.

2 Work at the Umatac Baseball Culvert was on hold because Hubtec was still waiting for
3 DPW's response to our it's RFI regarding the existing unsuitable material encountered during
4 excavation stage.

5 At the Sella Bay Culvert Hubtec removed the existing guardrail which was forty linear feet.

6 **e. 5TH PERFORMANCE PERIOD**

7 **(SEPT. 26, 2010 THROUGH OCT. 25, 2010).**

8 Once again, for safety reasons, most of the construction activities for Cetti Bay Culvert, Sella
9 Bay Culvert, Umatac Baseball Culvert, could not be performed due to harsh weather conditions,
10 large amount of water runoff and scattered rain showers.

11 At the Cetti Bay Slide no construction activity could be performed. At the Umatac Baseball
12 Culvert work was again underway because DPW responded to the RFI regarding the removal of
13 unsuitable materials from the outlet structure foundation area.

14 At the Cetti Bay Culvert, work finally began again because Hubtec's Traffic Control Plan
15 was approved on Oct. 06, 2010. See Exhibit 2B1.1. As per the approved Traffic Control Plan,
16 Hubtec began to produce concrete barriers under "Additional Work". The Shop Drawings required
17 cones, wooden barriers and other types of safety equipment and devices which were not adequate
18 for the roadway so Hubtec created, poured, painted and installed the concrete barriers. It also
19 fabricated and installed temporary signage to alert traffic.

20 At the Sella Bay Culvert clearing and grubbing work was performed and a silt fence was
21 installed.

22 **f. 6TH PERFORMANCE PERIOD**

23 **(OCT. 26, 2010 THROUGH NOV. 25, 2010)**

1 For safety reasons most of construction activities for Cetti Bay Culvert, Sella Bay Culvert,
2 Umatac Baseball Culvert, could not be performed due to harsh weathers and large amount of water
3 runoff and scattered rain showers. At the Cetti Bay Slide no Construction activity could be
4 performed.

5 At the Umatac Baseball Culvert Hubtec excavated and removed the existing unsuitable
6 material, concrete foundation and clay soil. Hubtec laid two inch drain rock and form work for the
7 flowable fill concrete on the outlet structure as part of additional work to be covered by a change
8 order. DPW accepted the work performed.

9 At the Cetti Bay Culvert no construction activity could be performed. At the Sella Bay
10 Culvert additional safety measures were employed due to slippery/muddy conditions. The delivery
11 and use of a Slide Rail System for shoring protection was required during excavation for safety
12 purpose. Hubtec again installed a silt fence and warning tape.

13 **g. 7TH PERFORMANCE PERIOD**

14 **(NOV. 26, 2010 THROUGH DEC. 25, 2010)**

15 Most of Construction activities for Cetti Bay Culvert, Sella Bay Culvert, Umatac Baseball
16 Culvert, could not be performed due to harsh weather and large amounts of water runoff and
17 scattered rain showers. At Cetti Bay Slide no construction activity could be performed. At Cetti Bay
18 Culvert no construction activity could be performed. At the Umatac Baseball Culvert Hubtec
19 completed the concrete placing of the Outlet Structure construction area.

20 With the Project hampered by repeated delays due in large part to the rain and saturated
21 conditions Hubtec sent a letter on December 6, 2010 to Andrew Leon Guerrero who succeeded
22 Lawrence Perez as the Director of DPW and as the contracting officer for the Project. The letter was
23 a discussion of the Project and some of the problems that had occurred during the Project. It

1 requested a 120 day extension. The letter was supplemented with a September 25, 2010 letter from
2 Triple RRR Safety Services (a safety company hired by Hubtec) with photos attached. The letter
3 concluded that the conditions at the work sites had deteriorated because of the weather and the
4 surrounding areas were dangerous to the employees and the public. It recommended that Hubtec seek
5 an extension of time and that the Project be delay for a few months. Hubtec also submitted rainfall
6 records to support its request. DPW ignored Hubtec's letter and never called it to discuss the request.
7 A response was not received from DPW until January 21, 2011 when acting Director Joanne Brown
8 denied the request without ever talking to Hubtec.

9 **h. 8TH PERFORMANCE PERIOD**

10 **(DEC. 26, 2010 THROUGH JAN. 25, 2011)**

11 Limited construction activities occurred at Cetti Bay Culvert, Sella Bay Culvert, Umatac
12 Baseball Culvert due to harsh weather conditions and large amount of water runoff and scattered rain
13 showers for reason of safety concerns during rainy season. Hubtec informed DCA that could not
14 process any work due to weather condition, however, staff remained on payroll and on site and
15 preparations were ongoing. DCA requested that Hubtec submit a schedule for the review and
16 approval of time extensions.

17 At the Cetti Bay Slide site no construction activity could be performed. At the Umatac
18 Baseball Culvert sawcutting of existing asphaltic concrete performed. Eight foot excavation for 48"
19 diameter storm drain pipe installation was performed and the drain pipe was installed. Hubtec laid
20 a 12" wide path of 2" drain rock per instruction from DCA because of unforeseeable water seepage
21 presence within the excavated area. This requested work was performed under "Additional Work"
22 as the water seepage had not been reflected on the contract drawings, even though Geo-Engineering
23 & Testing, Inc. Reports predicted the problem. According to their Subsurface Explorations, "Ground

1 water was at 7.2 feet deep in Boring 5 and 9.9 feet deep in boring 6. It could fluctuate with seasonal
2 rainfalls." (Umatac culvert of Subsurface Conditions in Geo-Engineering & Testing, Inc.
3 Investigation Reports prepared for T.G. Engineers, P.C., dated 26 January 2009).

4 At the Cetti Bay Culvert no major construction activity was performed. On xxx Hubtec shop
5 drawings to modify the contract drawings were submitted to DPW for approval. No action taken by
6 DPW on shop drawings submitted.

7 Hubtec confirmed with DCA approval to perform rock excavation using Rock Breaker and
8 to include said activity under Contingency Sum.

9 At the Sella Bay Culvert Hubtec installed the silt fence and warning tape was able to prepare
10 for safety measures caused by slippery/muddy situation. Hubtec mobilized an excavator for clearing
11 and grubbing work.

12 **i. 9TH PERFORMANCE PERIOD**

13 **(JAN. 26, 2011 THROUGH FEB. 22, 2011 WHEN DPW ISSUED**

14 **A "NOTICE OF TERMINATION OF CONTRACT")**

15 Hubtec informed DCA that it could not regularly process any work due to weather condition,
16 however, preparation to continue work were ongoing. Ast the Umatac Baseball Culvert Hubtec
17 installed 48" storm drain pipes. Hubtec confirmed with DCA the replacement of flowable fill instead
18 of 12" thick Base Course at the Umatac Baseball Culvert. Hubtec secured the grounds by utilizing
19 sand bags to prevent overflow and erosion.

20 At the Cetti Bay Culvert Hubtec confirmed with DCA the use of Rock Breaker to attain the
21 required elevation and the said work would be included in the Contingency Sum.

22 On Feb 02, 2011 Guam Environmental Protection Agency (GEPA) visited the jobsite and issued
23 Notice of Violation. GEPA complained that construction work was going on at the jobsite during

1 rainy season and harsh environmental worksite conditions. GEPA representative stated that GEPA
2 had approved the project construction, subject to the following conditions:

3 * * *

4 "3. Work in the stream bed or channel shall be allowed during the dry season and or during
5 low stream flow conditions."

6 *

7 On the GEPA issued "Notice of Violation" to Hubtec, the same conditional requirements and
8 laws were cited by GEPA. Thereafter, during Hubtec's remedial work per GEPA's instructions a
9 United States OSHA representative visited and inspected the jobsite at the request of DCA, the
10 Construction Manager for the project. No violations or citations were issued by OSHA. Hubtec made
11 changes to fulfill the GEPA's requirements and GEPA returned and approved the corrections made
12 as shown on the attached Guam EPA Intra-Agency Routing Slip dated Feb. 11, 2011. (See
13 attachment #2-A)

14 GEPA and the Army Corps of Engineers (ACOE) set similar conditions in issuing permits.
15 For example, "Work in the streambed or channel shall be allowed during the dry season ..." (GEPA),
16 and "The work should be conducted in the dry season." (ACOE). The fact of the matter is that the
17 DPW violated the GEPA and Army Corps of Engineers' Permit Conditions in issuing the NTP.

18 • In addition to GEPA Permit Conditions, Nationwide Permits (NWPS) of Department
19 of The Army, in a letter dated June 4, 2009 stated at Paragraph 2 of Regional Condition 13 (Standard
20 Best Management Practices), Appendix D Environmental Mapping stated: ... 2) "The work shall be
21 conducted in the dry season or when any affected stream has minimal or no flow, to the extent
22 practicable. The work shall be discontinued during flooding, intense rainfall, storm surge, or high
23 surf conditions where runoff and turbidity cannot be controlled. Shore line work will be done

1 during low tides as much as possible".

2 On February 22, 2011 DPW issued a "**Notice of Termination of Contract**" for several
3 default reasons stated therein. However, many of the reasons given by DPW in the Notice were not
4 solely the fault of Hubtec but the result of harsh climate, frequent rainfall, unacceptable runoff, the
5 failure of DPW to timely respond or work with hubtec to overcome the hurdles and a Project Design
6 that had not reflected Geo-Engineering & Testing, Inc. Investigation Reports and Recommendations.

7 The contract was turned over to the bonding company who refused to complete the job.
8 Instead the bonding company agreed to pay over \$1,685,040.00 to a newly selected contractor to
9 complete the job. The contractor selected was IMCO and the contract was awarded for \$3,815,491.
10 The bonding company has informed Hubtec that it is liable for the payment to IMCO.

11 Government Procurement Law requires all parties involved in the negotiation, performance,
12 or administration of government contracts to act in good faith. 5 G.C.A. § 5003. In the *Appeal of*
13 *Town House Department Stores, Inc. dba Island Business Systems & Supplies*, Procurement
14 Appeals No. OPA-PA-08-003. In that case, the Appellant correctly argued that it was being denied
15 its substantive due process rights to appeal if the Appellee simply continued to refuse to render the
16 decision on Appellant's protect as required by Guam's Procurement Law and Regulations. In this
17 appeal, DPW did not act in good faith with Hubtec in the performance of the contract and wrongfully
18 terminated the contract. After it terminated the contract and Hubtec requested a Final Report, DPW
19 did not produce one.

20 II. CONCLUSION.

21 For over a decade DPW had ignored the erodin, drainage and roadway problems that it sought
22 to correct by the issuance of the Project to Hubtec. Hubtec was the low bidder but the next lowest
23 bidder was nearly twice as high as Hubtec's bid. That should have set off alarms with DPW but

1 DPW ignored that fact. Once the contract was awarded to Hubtec, DPW wanted the project done as
2 soon as possible. DPW issued the NTP without addressing the Permit Conditions of both GEPA and
3 the ACOE as well as the Geo-Engineering & Testing's Report.

4 Once the project began Hubtec discovered problems with DPW's design. Hubtec made
5 suggestions to the Construction Manager, orally and in writing, to address the problems. The CM
6 or DPW were slow to respond causing delays to the project. Rain and safety issues created additional
7 delays. Because of an unrealistic schedule Hubtec was at a terrible disadvantage in doing the contract
8 work and additional necessary work during the rainy season. Hubtec lost time, money and materials
9 trying to meet contract deadlines and mother nature's expected problems under such circumstances.
10 (See attachment # 2-B). In the end DPW chose not to pay Hubtec for work performed, not to work
11 with Hubtec to overcome the problems at the work sites and instead wrongfully terminated Hubtec
12 on February 22, 2011. DPW subsequently issued a new contract on the Project and awarded the job
13 to IMCO for approximately \$3,900,000, a realistic amount for the remaining scope of work to be
14 performed and completion of the project.

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1 Hubtec did not get the support and good faith cooperation from DPW to deal with the
2 condition and changes required to complete the project. As a result Hubtec lost all of its time and
3 resources and suffered a termination of the contract. It lost money by having to keep people on the
4 payroll when weather conditions prevented work and when DPW was unresponsive to Hubtec's
5 requests for changes. Hubtec has not been paid for many additional works received or requested by
6 DPW. Hubtec claims it is owed more than \$500,000.00 for work performed. Finally, as a final
7 consequence of the wrongful termination Hubtec faces liability for the payment bond that the
8 insurance company agreed to pay to IMCO.

9 Dated this 19th day of August, 2011.

10 TEKER | TORRES | TEKER

11 BY  12

PHILLIP TORRES, ESQ.

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