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 OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEALS

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Attorneys for the Government of Guam

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEAL**

IN THE APPEAL OF	)	DOCKET NO. OPA-PA-11-009
	)	
	)	
HUBTEC INTERNATIONAL CORP.	)	<b>DPW'S BRIEF</b>
	)	<b>RE: REMEDIES</b>
	)	
Appellant.	)	

**INTRODUCTION**

Appellant Hubtec International Corp. claims in this dispute that the **DEPARTMENT OF PUBLIC WORKS, GOVERNMENT OF GUAM** (DPW or Government) wrongfully terminated the contract at issue between the parties for the Route 2 culverts project. Hubtec alleges that it failed to get DPW's support and good faith cooperation and that as a result, Hubtec lost time and money, which in turn led to the termination of the contract. [*Appellant's Hearing Brief at 16*].



As a result of DPW's wrongful termination of the contract, Hubtec claims that it has suffered "more than \$500,000.00" in damages for work performed but not yet paid for. [*Id.* at line 6]. Hubtec further quantified and itemized this claim in one of its exhibits as being \$577,542.85. (Actually Hubtec's exhibit reports the amount of the claim as being \$571,042.85. However, this is a numeric error because the final sum stated in the Hubtec exhibit failed to account for the \$6,500 consulting fee for sheet piling claim that is listed under Section III(5)). [*Hubtec's Exhibits at pp. 0049-0051*].

For purposes of this brief, DPW submits that even assuming for the sake of argument that Hubtec's allegations of bad faith have any merit (allegations which DPW continues to vehemently deny), Hubtec's claim for \$577,542.85 in damages must be rejected. This is because nearly all of the work claimed by Hubtec is ineligible for payment due to the fact that the work was either only partial work, or because it was non-conforming work.

Moreover, even after giving Hubtec the benefit of the doubt and adjusting the work on a pro-rata basis, once any amounts owed to Hubtec are offset against amounts that Hubtec owes to DPW for liquidated damages and the cost of curing Hubtec's non-conforming work, it turns out that Hubtec actually owes DPW and not the other way around. The amount estimated to be owed to DPW by Hubtec is \$307,700.32.

## DISCUSSION

### **A. ALL PAYMENTS FOR FEDERAL-AID HIGHWAY PROJECTS MUST MEET THE STANDARDS AND CRITERIA SET FORTH IN FP-03 AND THE MUTCD.**

It is undisputed that the contract between DPW and Hubtec for the Route 2 project at issue is an ARRA-funded contract that is being administered by the FHWA, which itself is an agency within the U.S. Department of Transportation. It is further undisputed that 100% of the cost of the contract was being paid for by federal funds overseen and disbursed by the FHWA.

As a federal project, the provisions of the HIGHWAY SAFETY ACT OF 1973, 87 Stat. 282, 23 U.S.C. § 130, *et seq.*, are applicable. Under the Highway Safety Act, all federal-aid highway construction projects are "... subject to the inspection and approval of the FHWA." [23 U.S.C. § 114(a)]. Furthermore, all federal-aid highway projects are required to comply with the construction standards adopted by the FHWA. [23 U.S.C.A. § 109(b) ("The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary in cooperation with the State transportation departments.")].

The construction standards that are referenced in Section 109(b) refer to the STANDARD SPECIFICATIONS FOR THE CONSTRUCTION OF ROADS AND BRIDGES ON FEDERAL HIGHWAY PROJECTS, of which the last version is version **FP-03**.<sup>1</sup> FP-03 was expressly incorporated into the Hubtec contract as one of the specified contract documents. [Procurement Record at 0038, § III(f)]. As stated in the preface to FP-03, "**When designated in a contract, the FP-03**

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<sup>1</sup> Because FP-03 is voluminous in nature and totals 718 pages in length, a copy is not included with this brief. However, if desired a PDF file can be downloaded directly from the FHWA's website at this address: <http://fh.fhwa.dot.gov/resources/pse/specs/fp-03/fp-03use.pdf>

becomes part of the contract and binding upon all parties to the contract.” [See also, DPW Regulations at 29 G.A.R. § 1163(b) (“All highway construction contract specifications shall be a modified version of modified version of STANDARD SPECIFICATIONS FOR CONSTRUCTION OF ROADS AND BRIDGES ON FEDERAL HIGHWAY PROJECTS, commonly known as FP-69 [now updated and known as FP-03]”).

In addition to FP-03, every federal-aid highway contract must also comply with the FHWA’s MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS (MUTCD).<sup>2</sup> [23 U.S.C. § 109(e)(2); 23 CFR § 655.603(b)(1) (“Where State or other Federal agency MUTCDs or supplements are required, they shall be in substantial conformance with the National MUTCD. Substantial conformance means that the State MUTCD or supplement shall conform as a minimum to the standard statements included in the National MUTCD.”)]. The MUTCD represents the national standard for obtaining basic uniformity of all traffic control devices installed on any street, highway, or bicycle trail open to public travel. [23 C.F.R. § 655.603]

**B. UNDER FP-03, HUBTEC IS NOT ENTITLED TO PAYMENT FOR PARTIAL OR NON-CONFORMING WORK.**

Under FP-03, payment for work is done on federal-aid highway projects is measured only after the work has been fully completed and accepted:

**FP-03 § 109.01. Measurement of Work. \*\*\***

**Unless otherwise specified, measure when the work is in place, complete, and accepted. Measure the actual work performed, except do not measure work outside the design limits or other adjusted or specified limits (staked limits).** . . . (Emphasis added).

<sup>2</sup> A PDF copy of the MUTCD can be downloaded from the FHWA’s website at: [http://mutcd.fhwa.dot.gov/pdfs/2009.pdf\\_index.htm](http://mutcd.fhwa.dot.gov/pdfs/2009.pdf_index.htm)

In other words, in order to be eligible for payment, it is required that the contract specifications be strictly followed and the process well documented. Should an element(s) of a project, or the entire project be deemed not in compliance with the contract requirements, the FHWA will reject payment for that item or project.

Hubtec's Exhibit 0049-0051 is divided into three categories: (1) Progress Payment; (2) Receivable Payment for the Additional Work Done; and (3) Work Performed, but Could Not Claim. Each category will be discussed briefly below:

**I. Progress Payment (Receivable Payment Based on Monthly Application and Certification for Payment).**

This is a claim for \$135,498.20 based upon Hubtec Invoice No. 7(R) involving work done on the Cetti Bay Culvert and the Umatac Baseball Culvert. After breaking down each invoice item individually and reviewing the work, the Government finds that every item claimed by Hubtec is either for partial work or for non-conforming work. Because FP-03 requires that work be fully completed and accepted before payment can be made, none of the partial or non-conforming work is eligible for reimbursement.

In support of the Government's position, DPW is submitting together with this brief a spreadsheet correlating to Hubtec's Exhibit 0049-0051, together with supporting documentation. As can be seen on the DPW spreadsheet, even if Hubtec is given credit for its partial and non-conforming work, and even after giving Hubtec credit for the \$46,010.20 in retainage,<sup>3</sup> Hubtec would end up in the negative and *would owe DPW the sum of \$17,476.80.*

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<sup>3</sup> "Retainage" is the 10% of the estimated price of work that is kept by the Government and not released to the contractor until there has been full completion and acceptance of the contract work. [*See, SCR 109.08 (Progress Payment) of Procurement Record at 0170*].

Much of this liability would be due to the \$120,000 disgorgement for the non-conforming Cetti rock slide wall. Additionally, some of it is also to recoup from Hubtec the cost of work and materials that was paid, but which ultimately turned out to be fraudulent. [DPW's Exhibit J; Agency Report Tab B 0009-0027]. The specific documents supporting the disgorgement, together with a detailed analysis, are attached separately.

As will be demonstrated herein below, even if DPW were to later accept the wall as being adequate for its purpose and not charge Hubtec for it, at the end of the day it turns out that Hubtec is the one who owes DPW money, and not the other way around.

**2. Progress Payment (Receivable Payment Based on Monthly Application and Certification for Payment).**

This category represents a claim by Hubtec for payment of \$196,856.85.

It is DPW's position that once again, every item claimed in this category represents partial or non-conforming work and is therefore not eligible for payment under FP-03. The specific documents supporting a finding of partial or non-conforming work, together with a detailed analysis of each item is attached separately.

**3. Work Performed, but Could Not Claim.**

After including the \$6,500 sheet piling consulting fee that Hubtec inadvertently did not include in its totals, upon correction, this category represents a claim by Hubtec for \$245,187.80.

Again, every item claimed in this category represents partial or non-conforming work and is therefore not eligible for payment under FP-03. The specific documents supporting a finding of partial or non-conforming work, together with a detailed analysis of each item is attached separately.

**C. AFTER BALANCING HUBTEC'S CLAIM AGAINST DPW'S COUNTERCLAIM, HUBTEC OWES THE GOVERNMENT \$307,700.32.**

After considering the costs associated with the Cetti Wall, as well as liquidated damages for breach of contract, the Government finds that it has incurred damages of its own in an amount totaling \$290,223.52 as summarized below:

Pay Item	Description	Government Claim Amount	REMARKS
1. Cetti Slide Wall Removal & Replacement (estimated amount)	Cetti Slide Wall not built in accordance to the specifications not eligible for funding. Governments estimated costs to remove and replace non-conforming work	\$217,298.52	Cetti Slide Wall not built in accordance to the specifications not eligible for funding
2. Cetti Slide Wall Curing & Finishing (estimated amount)	Governments cost to cure and finish the wall according to the plans	\$3,027.00	DCA confirmed follow on contractor's cost
3. Cetti Slide Wall Structural Analysis (estimated amount)	Governments cost to conduct a structural analysis of the Cetti Slide Wall	\$10,000.00	Estimated cost needs to be refined
4. Cetti Slide Wall Steel Analysis (estimated amount)	Governments costs to conduct material testing on the rebar that was used	\$2,698.00	Estimated cost from testing lab
5. Liquidated Damages	Breach of Contract for failing to execute the work within the contract period	\$57,200.00	52 days over (estimated project completion was Dec.30, 2010; the contract was terminated on Feb. 22, 2011)
		<b>\$290,223.52</b>	<b>TOTAL GOVERNMENT CLAIM</b>



When added this sum of \$290,223.52 is added to the \$17,476.80 owed by Hubtec to DPW (Hubtec Category No. 1 above), and then offset against Hubtec's total claim of \$577,542.85, the amount that Hubtec owes to the Government is **\$307,700.32**:

<b>Project GU-NH-0002(104), Route 2 Culverts and Slide Repair</b>		
Summary of Hubtec Category 1 through III		
	<b>Hubtec Claim</b>	<b>Government Owed Claim</b>
Hubtec Category 1	\$ 135,498.20	\$ 17,476.80
Hubtec Category II	\$ 196,856.85	
Hubtec Category III	\$ 245,187.80	
GovGuam Counterclaim		\$ 290,223.52
<b>Sub Totals of All Claims =</b>	<b>\$ 577,542.85</b>	<b>\$ 307,700.32</b>

Finally, it is noted that even if the Government were to waive its claim for disgorgement of the \$120,000 that was paid to Hubtec for the non-conforming Cetti Bay rock slide wall, and even if the Government were to waive the liquidated damages of \$57,200 based upon Hubtec's claim of bad faith failure to cooperate which in turn allegedly caused Hubtec to be delayed, Hubtec would still owe the Government **\$130,500.32**.

### CONCLUSION

Based upon the record and documents supported herein, the DEPARTMENT OF PUBLIC WORKS respectfully prays the OPA conclude and find as follows:

- (1) That all times, DPW acted in good faith towards Hubtec;
- (2) That Hubtec was in material breach of the Route 2 highway construction contract;

(3) That based upon Hubtec's material breaches, DPW was privileged to terminate the Route 2 contract with Hubtec and that said termination was not wrongful;

(4) That if Hubtec sustained any of the injuries or damages alleged in this appeal, that such injuries or damages were caused solely by the conduct of Hubtec; and not by any act or omission on the part of DPW and the Government of Guam;

(5) That the claims of Hubtec are barred and that Hubtec take nothing; or else that they must be reduced and offset against the Government's counterclaim;

(6) That the OPA enter a decision and Decision and Order in favor of DPW and the Government of Guam;

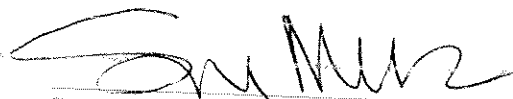
(7) That the Government recover against Hubtec damages in the amount of \$307,700.32; and

(8) That the OPA award such other and further relief as it deems just and proper, whether prayed for or not.

Respectfully submitted this 1<sup>st</sup> day of September, 2011.

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By:



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