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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
HAGATNA GUAM**

In the Appeal of

Korando Corporation,

Appellant.

DOCKET NO. OPA-PA-15-009

**MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Korando seeks Summary Judgment on the issues relating to Stanley Consultant Inc.'s ("Stanley" or "CM") misconduct as follows:

1. Stanley's Obligations under the CM Contract required that it maintain accurate and correct records.
2. Stanley Breached the CM Contract when it deleted four (4) critical submittals from the Submittal Logs.
3. Korando was Damaged by Stanley's misconduct.

The relevant facts are not in dispute and Summary Judgment is appropriate.

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE SUMMARY JUDGMENT STANDARD

The OPA has held that Summary Judgment is appropriate when the facts are clear from the record and not in dispute. *In the Appeal of Guam Pacific Enterprises, Inc.*, Appeal No. OPA-PA-09-003, Decision and Order Denying Appellant's Motion for Summary Judgment, at 3 (Sept. 18, 2009). It is well established that the Court may grant summary judgment pursuant to Rule 56 of the Guam Rules of Civil Procedure when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 8 (citing *Manvil Corp. v. E.C. Gozum & Co.*, 1998 Guam 20 ¶ 6.) The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987).

In rendering a decision on a motion for summary judgment, the court must draw inferences and view the evidence in a light most favorable to the non-moving party. *Edwards [v. Pacific Fin. Corp.]*, 2000 Guam 27 at ¶ 7. "If the movant can demonstrate that there are no genuine issues of material fact, the non-movant cannot merely rely on allegations contained in the [pleadings] ..., but must produce at least some significant probative evidence tending to support the [pleadings]..." *Id.* Thus, this court's "ultimate inquiry is to determine whether the 'specific fact' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *Id.* (citing *Iizuka [Corp. v. Kawasho Int'l (Guam), Inc.]*, 1997 Guam 10 at ¶ 8).

"The court may grant summary judgment pursuant to Rule 56 of the Guam Rules of Civil Procedure when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’ “ *Manvil [Corp. v. E.C. Gozum & Co.]*, 1998 Guam 20 at ¶ 6 (quoting Guam R. Civ. P. 56(c)). “A material fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.” *Edwards*, 2000 Guam 27 at ¶ 7 (quoting *Iizuka*, 1997 Guam 10 at ¶ 7). “[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510 (1986) (emphasis in original). “As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.* at 248, 106 S.Ct. at 2510. “There is a genuine issue, if there is ‘sufficient evidence’ which establishes a factual dispute requiring resolution by a fact-finder.” *Iizuka Corp.*, 1997 Guam 10 at ¶ 7.

Bank of Guam v. Flores, 2004 Guam 25 ¶¶ 7-8.

II. LEGAL ARGUMENT

1. Stanley Consultant’s Had A Duty to Update and Maintain Accurate Submittal Logs Under Its CM Contract with DPW

Stanley Consultants, Inc. was the successful bidder on DPW’s Contract for Profession Construction Management Services Project No.: (GU-NH-PCMS(002)) (“CM Contract”). See **Ex. A** (*Stanley-DPW Contract*) to Declaration of Joyce C.H. Tang (“Tang Dec.”). The CM Contract was for a total amount of \$2,000,000, for payment of “**Islandwide Professional Construction Management Services** ... [provided to] the DPW on Government of Guam and/or federally funded projects through the Federal Highway Administration (FHWA), Federal Transit Administration (FTA) and other funding sources that may arise during the time of the contract....” (emphasis original). *Id.* at 3.

Stanley was awarded Task Order No. 5 for the sum of \$761,390, to provide construction management services for the Replacement of the Bile and Pigua Bridges (“the Project”). See **Ex. B** (*Task Order No. 5*) Tang Decl. Task Order No. 5 was approximately 21% of the cost of the Project (\$3.6 million).

As of April 30, 2015 (approximately 70 days before Korando was terminated), Stanley invoiced DPW from 10/2014 to 4/30/2015 in the amount of \$100,077.60, representing 13.20% of the CM Contract amount. See **Ex. C** (*Stanley's June 15, 2015 Invoice*), Tang Dec. Meanwhile, Korando has not been paid any money.

Section 1.3. D of the CM Contract describes the kind of services Stanley was required to provide to DPW under the CM Contract, which included:

b. Review the Project progress schedule, schedule of shop drawing submissions and schedule of values prepared by the construction contractor. Maintain "as-built" schedule of the construction contractor's daily efforts during construction.

c. Attend preconstruction conferences, progress meetings, job conferences, and other Project-related meetings including public information meetings. Take and distribute minutes of all such meetings.

* * * *

j. Maintain hard copy and in the Department provided electronic document control system, orderly files for correspondence, reports of job conferences, shop drawings and same submissions, reproductions or original Contract Documents including all addenda, change orders, field orders, additional drawings issued subsequent to the execution of the construction contractor's contract, CMC's, or design professional's, or Department's clarifications and interpretations of the Contract Documents, progress reports, and other Project related documents. The electronic document control system to be used will be determined on a project specific basis and will be specified in the Task Order. . . .

* * * *

“m. . . . **Maintain a log of Requests for Information (RFI), submittals, test results, value engineering proposals, and change authorizations on the Project.** (emphasis added).

See **Ex. A** at pp. 5-6.

Pursuant to the terms of the CM Agreement, Stanley maintained the Submittal Logs which is a record of the dates and status of all submittals submitted by the Contractor, and responses of the CM. It is similar to a Docket sheet for cases filed in the OPA or a Court. The Submittal Logs were updated on a weekly basis and were attached to the Minutes of Meetings prepared by Stanley. *See Ex. D* (3/10/2015 Stanley Minutes with Submittal Log).

2. Stanley's Deletion of the Critical Logs Is Undisputed

Korando contends that at least four (4) critical submittals that were "approved" or received a status of "Exceptions as Noted" (which means the submissions were essentially approved, subject to minor comments, and Korando did not have to resubmit, unless expressly stated) were deleted and altered from the Submittal Log months later.

A. Alternate Phasing Plan Submittal No. 562.001-02 (*See Ex. 12, Korando's Response to Agency Report filed 10/19/15 "Korando's Response"*)

Original Status: 11/4/14 status "Exceptions as Noted"

Deleted from Submittal Log: 3/10/2015 (*See Ex. D, Tang Dec.*)

B. GPA Approved Underground Electrical Plan (Preliminary) Submittal No. 636-005-01 (*See Korando's Response at pp. 13-14*)

Original Status: 4/22/15 status "Exceptions as Noted"

Deleted from Submittal Log: 6/16/2015 (*See Ex. E* (6/16/15 Submittal Log, Tang Dec.).

C. Traffic Control Plan Submittal No. 156.001-01 (*See Ex.22, Korando's Response*)

Prior Status: 1/13/2015 status "No Exceptions Taken"

Deleted from Submittal Log: 3/10/2015 (*See Ex. D*, Tang Dec.)

D. As Built Survey Submittal No. 104-001-01 (*See Ex. 23, Korando's Response*)

Original Status: 11/14/14 status "Exceptions as Noted"

Deleted from Submittal Log: 3/10/2015 (*See Ex. D*, Tang Dec.)

DPW has not and does not deny that that the Submittal Logs, which are official records of the Project and part of the construction documents, were altered when the four critical submittals references were deleted from the Submittal Log. DPW claims that they were updated, however, in updating a record (like a docket sheet), one would not delete the earlier record.

The deletion of the prior approved submittals created a false record that DPW used as the basis for terminating Korando. In other words, by looking at later denials and not earlier approved submittals, it created a false record that Korando was not diligent. In fact, in a letter dated September 8, 2015, Korando raised this issue as one of the basis to debar Stanley. *See Ex. F* (Debarment Letter). DPW did not deny the submittal logs were altered, rather, DPW referred to them as "updated/revisions" and that they were done with Korando's knowledge and that Korando failed to object.

3. Korando also claims that Stanley should be debarred for falsifying submittal logs. Stanley states that the submittal log is used to monitor the status of Project submittals and is regularly updated/revised. These updates/revisions were done with Korando's knowledge and Korando failed to raise a concern or object to the practice. As the updating of the submittal logs was done with Korando's knowledge and without objection, I don't consider this to be a valid ground for debarment. There is nothing in the record to support a claim that Stanley intended to defraud Korando.

See Ex. G (DPW 9/23/15 Memo) at 2.

DPW has not and does not deny that that the Submittal Logs, which is an official record of the Project and part of the construction documents, was altered when the four critical submittals references were deleted from the Submittal Log.

The deletion of the references from the Submittal Logs cannot seriously be undisputed. The deletions are not mere updates or revision, because updates or revisions in the log requires keeping the earlier approved submittals in the log. And it is extremely significant that where other submittals may have been changed, they were “voided”, although the reference to “voided” document was still in the log.

Following Korando’s report of Stanley’s misconduct, DPW terminated Stanley’s Task No. 5 CM Contract on or about September 8, 2015. *See Ex. H* (Termination Notice).

Stanley had a duty under its CM Contract to maintain the submittal log accurately. In deleting these critical logs, it falsified documents and breached its duty to maintain accurate records.

3. Korando Was Prejudiced by Stanley’s Removal of the Record.

Korando was prejudiced by Stanley’s altering the records and thereby concealing the approvals.

III. CONCLUSION

Korando respectfully requests that summary judgment be granted in favor of Korando.

Dated: November 6, 2015

By: 
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Korando Corporation