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Attorneys for Korando Corporation

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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 11/6/15

TIME: 4:31 AM PM BY: Thyze

FILE NO OPA-PA: 15-109

IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

Korando Corporation,

Appellant.

DOCKET NO. OPA-PA-15-009

**KORANDO CORPORATION'S REQUEST
FOR DISCOVERY**

Korando Corporation, through counsel, moves the Public Auditor to issue an Order for Discovery for this appeal, pursuant to Title 2 Guam Administrative Rules & Regulations, Division 4, §12109(c), and require that DPW supplement the procurement record with additional documents required by Title 2 Guam Administrative Rules & Regulations, Division 4, §12105(e). This Motion is based upon the pleadings, the Memorandum of Points and Authorities submitted herein, and further evidence which may be presented at hearing on the motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Procedural and Factual Background

This appeal involves Korando Corporation's January 10, 2015 termination for default from DPW Project No. GU-NYH-NBIS (007), a project to replace the Bile & Pigua Bridges in Merizo. Korando filed its Notice of Appeal and Verification on September 8, 2015.

DPW's procurement record has been deficient from the outset of the appeal. On September 16, 2015, DPW filed a "Preliminary Agency Response & Agency Statement," which included part of its Procurement Record. This record excluded a substantial number of exhibits, which were submitted in DPW's Errata the following day, although Korando was not served with these documents until September 25, 2015. On September 23, 2015, DPW submitted its "Supplemental Agency Report." These documents together can be viewed as DPW's Initial Procurement Record.

The Initial Procurement Record excluded all pre-award documents in violation of Title 2 Guam Administrative Rules & Regulations, Division 4, §12105. Consequently, on October 12, 2015, the Hearing Officer ordered that DPW "file with the OPA, no later than 5:00p.m., on October 19, 2015, the complete procurement record for DPW Project No. GU-NYH-NBIS (007), to include, but not limited to, any and all documents relating to the solicitation and award of said project." *Order to Augment Procurement Record*, 2. The issue was also raised at the preliminary hearing on October 21, 2015. DPW belatedly filed a second Errata to Procurement Record on October 22, 2015, which added only pre-award documents.

DPW's Preliminary Agency Response & Agency Statement states that it includes "[a]ny other documents relevant to the Appeal" in response to 2 GAR § 12105(e).

Preliminary Agency Response and Agency Statement, 2. While DPW submitted letters and correspondence relating to Korando's termination, conspicuously absent from the documents were emails between members of the "Guam Transportation Group," which directly address Korando's termination. DPW produced a number of these emails in response to Korando's August 10, 2015 Sunshine Act Request. However, despite the obvious relevance of these emails and DPW's assertion that it had provided all relevant documents, DPW failed to submit these emails as part of the Procurement Record. Moreover, DPW failed to include these emails in its supplement to the Initial Procurement Record, despite being ordered to include all relevant documents.

In addition to its failure to produce relevant documents in the Procurement Record after being ordered to supplement, DPW has refused to fully respond to Sunshine Act Requests. Korando has filed four Sunshine Act Requests with DPW since its termination, and to date only two of those requests have been completely fulfilled. On August 10, 2015, Korando requested multiple documents including documents, emails, and correspondence between DPW, Stanley, and/or Parsons regarding various aspects of the Project. See **Exhibit A**, *08/10/15 Sunshine Act Request*. While DPW produced emails from Parsons, it never produced any emails or correspondence from DPW or between Stanley. DPW's counsel made multiple assurances that DPW would supplement its response with more emails, but DPW never did so. See **Exhibit B**, *Emails from Tom Keeler to Joyce Tang*. DPW now claims that it has provided all emails to Korando. However, in DPW's October 10, 2015 Rebuttal to Korando Corporation's Response to Agency Report, DPW included as Exhibit J a redacted email which Korando had never before seen or received. *Department of Public Works Rebuttal to Korando Corporation's Response*, ("DPW Rebuttal"), Ex. J.

Korando filed its fourth Sunshine Act Request on October 5, 2015. See Exhibit C, *10/05/15 Sunshine Act Request*. Instead of producing responsive documents, DPW's counsel, Mr. Keeler, objected to the filing of Sunshine Act Requests on the basis that DPW claimed were burdensome and, in its view, unrelated to the instant appeal. Moreover, DPW unilaterally decided that it would disregard the Sunshine Act's deadlines and refused to provide an estimated time frame for response. See Exhibit D, *Email from Tom Keeler to Joyce Tang*.

Despite DPW's insistence that Korando modify its request, DPW's counsel refused to meet and confer on the issue until November 1, 2015. To date, the requested documents remain pending, with no indication of when, if ever, DPW intends to produce the documents.

In light of DPW's refusal to answer Sunshine Act Requests fully, let alone in a timely manner, Korando no longer has confidence it can obtain required documents through Sunshine Act Requests.

II. ARGUMENT

A Procurement Record must include, among other things, "Any other documents which are relevant to the protest..." 2 GAR § 12105(e). While the present case involves a termination appeal, rather than a protest, DPW interpreted this to mean "Any other documents relevant to the Appeal." *Preliminary Agency Response & Agency Statement*, 2. Korando agrees with DPW's interpretation that the statute applies not only to protests but to all procurement appeals. However, DPW has not in fact provided all relevant documents. DPW should be required to once again supplement the Procurement Record, this time including *all* relevant communications and not just those favorable to DPW.

The Hearing Officer in a Procurement Appeal has broad authority to order discovery and require that witnesses and documents be produced in procurement appeals. 2 GAR § 12109(c) permits the Hearing Officer to “require parties to produce for examination those relevant witnesses and documents under their control.” Between DPW’s false claim that it has provided all relevant documents and its refusal to answer Sunshine Act Requests, Korando is concerned that DPW will continue to withhold critical documents. Korando therefore requests that the Hearing Officer intercede to ensure that all relevant documents are produced.

III. CONCLUSION

Based on the foregoing, Korando seeks an order permitting discovery and an order requiring DPW to supplement the Procurement Record.

Respectfully submitted this 6th day of November, 2015.

CIVILLE & TANG PLLC



Joyce C.H. Tang
Attorneys for Korando Corporation

EXHIBIT A

CIVILLE & TANG, PLLC

www.civilletang.com

Sender's Direct E-Mail:
jtang@civilletang.com

August 10, 2015

VIA HAND DELIVER AND E-MAIL

Mr. Glenn Leon Guerrero
Director
GUAM DEPARTMENT OF PUBLIC WORKS
542 North Marine Corp Drive
Tamuning, Guam 96913

Re: *Sunshine Act Request to DPW regarding Korando Corporation's Contract to Construct the Replacement of Bile & Pigua Bridges, Project No. GU-NH-NBIS(007)*

Dear Mr. Leon Guerrero:

Korando Corporation requests, pursuant to the Guam Sunshine Act set forth at 5 G.C.A. §10101 *et seq.*, copies of the following documents related to Korando Corporation's contract to construct the Replacement of Bile & Pigua Bridges:

1. All invoices together with description of services provided by Stanley Consultants, Inc. ("Stanley") in relation to Task Order No. GU-NH-PCMS (002) - STANLEY05 BILE/PIGUA BRIDGE REPL PJCT# GUNHNBIS007 and any amendments to the Task Order ("Task Order") or the Replacement of Bile & Pigua Bridges (the "Project").
2. All payments made to Stanley for its invoices on the Project and Task Order.
3. All documents, emails, and correspondence between DPW, Stanley, and/or Parson's Transportation Group relating to:
 - a. The Revised Phasing Plan (Submittal 562.001-02)
 - b. The October 27, 2014 approval of Submittal 562.001-02
 - c. The November 4, 2014 comments to Submittal 562.001-02
 - d. The March 1, 2015 comments to Submittal 562.001-02
 - e. The deletion of or removal of the reference to the October 27, 2014 approval of Submittal 562.001-02 from the Submittal Logs.
4. Any contract and modifications or amendments to the contract, between DPW and Stanley Consultants relating to the Task Order and the Project.

Mr. Glenn Leon Guerrero

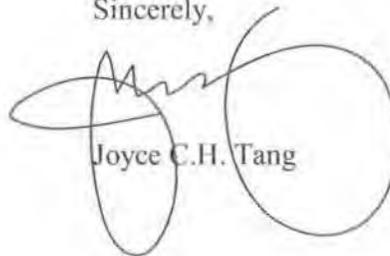
August 10, 2015

Page 2

5. Any and all documents related to the extension and/or changes to the completion date of the Project.
6. Any and all documents, emails and correspondence regarding the termination of the Korando on the Project.
7. Any and all documents, emails and correspondence submitted to the Federal Highway Administration regarding the Project.

If you deny any of these requests, please cite each specific exemption justifying the refusal to release the information. We look forward to your prompt and expeditious response.

Sincerely,



Joyce C.H. Tang

EXHIBIT B

Sara Fitzpatrick

From: Tom Keeler [mailto:tpkeeler@gmail.com]

Sent: Thursday, August 27, 2015 2:17 PM

To: jtang@civilletang.com

Subject: Re: Sunshine Act Docs

Joyce,

I am advised that Stanley Consultants verbally advised Parsons (which coordinated on the FOIA response) that it refused to provide any project related emails. I don't know why it is taking this position but it is possible that it is relying on contractual obligations to maintain confidentiality of project documents. The department is asking that Stanley state the basis for its refusal to provide emails in *writing*. Once the department knows the basis of Stanley's position it will act to get you the emails as soon as possible. I will keep you posted on any developments. My apologies for the delay.

Tom

On Wed, Aug 26, 2015 at 2:17 AM, Joyce Tang <jtang@civilletang.com> wrote:

Tom,

I have a chance to review the documents provided. I note that we did not receive copies of emails from Mr. Marlowe, Mr. Senecal, Chelsea Richards, Heramil Ligaya, or Hernan Bonsembiante (Stanley employees)? Was this an oversight? If so, please provide as soon as possible.

Thank you.

Joyce

Joyce C.H. Tang

Civille & Tang, PLLC

From: Tom Keeler [mailto:tpkeeler@gmail.com]

Sent: Thursday, August 20, 2015 1:11 PM

To: jtang@civilletang.com

Subject: Re: Sunshine Act Docs

Joyce,

I am a simple man. I had hoped to review the emails before forwarding on however Parsons uses a program that I am not able to access. In lieu of making you wait any longer I've directed Parsons to provide you the info directly. I just met with Mike Lanning and expect you will have the emails missing from the earlier produced documents this afternoon. My apologies for the delay. Please touch base if any questions. Thanks.

Tom

On Wed, Aug 19, 2015 at 8:21 PM, Joyce Tang <jtang@civilletang.com> wrote:

Dear Tom,

I checked the upload site and did not see any documents in the file. Please let me know when you think the documents might be available. Thank you!

Joyce

Joyce C.H. Tang

Civille & Tang, PLLC

T: 671.472.8868

F: 671.477.2511

www.civilletang.com

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Sara Fitzpatrick

Subject: FW: FW: 8/10/2015 Korando Sunshine Act Request

From: Tom Keeler [mailto:tpkeeler@gmail.com]
Sent: Monday, September 21, 2015 8:52 AM
To: Joyce Tang
Cc: Alisa Munoz
Subject: Re: 8/10/2015 Korando Sunshine Act Request

Joyce,

I would appreciate your directing communications to me only. Upon receipt I will coordinate with my client and prepare the appropriate response. I am meeting with Director Leon Guerrero early this afternoon on a separate matter and will review your correspondence with him. I should get back to you no later than tomorrow morning. Thanks.

Tom

On Fri, Sep 18, 2015 at 1:31 AM, Joyce Tang <jtang@civilletang.com> wrote:

Tom,

On August 26, 2015, I followed up on Korando's Sunshine Act Request dated August 10, 2015, for copies of communications and documents from from Stanley Consultants, Inc., namely, Mr. Jack Marlowe, Mr. Senecal, Chelsea Richards, Heramil Ligaya, and Mr. Hernan Bonsembiante. On August 27, 2015, you informed me that Stanley Consultants verbally advised Parsons that it refused to provide any project related emails... and that [DPW] is asking that Stanley state the basis for its refusal to provide emails in *writing*." Stanley responded on August 31, 2015, refusing to produce any "documents retained by Stanley Consultants, Inc., as part of our company communications."

While we have received documents from Parsons, but we do not have DPW's documents, records and communications responsive to Korando's 8/10/15 Sunshine Act Requests. Please let me know if DPW will be supplementing its response to Korando's 8/10/15 Sunshine Act Requests from DPW's files/records.

Thanks.

Joyce

Joyce C.H. Tang

Civille & Tang, PLLC

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EXHIBIT C

CIVILLE & TANG, PLLC

www.civilletang.com

Sender's Direct E-Mail:
jtang@guamattorneys.com

October 5, 2015

VIA E-MAIL

Mr. Glenn Leon Guerrero
Director
GUAM DEPARTMENT OF PUBLIC WORKS
542 North Marine Corp Drive
Tamuning, Guam 96913

Re: ***Sunshine Act Request to DPW regarding DPW Federal
Highway Funded Projects***

Dear Glenn:

Korando Corporation requests, pursuant to the Guam Sunshine Act set forth at 5 G.C.A. §10101 *et seq.*, copies of the following:

1. The following documents for each federally-funded DPW highway project from 2010 to October 5, 2015:
 - a. Notice of Award
 - b. Contract, and any amendments or modifications to the Contract.
 - c. Notice to Proceed
 - d. Final or Last Payment Application
 - e. Any Notice of Completion
 - f. Final or Last Submittal Log
 - g. Any DPW reports relating to progress on each of these projects.
2. All documents in the Sharepoint server for Project No. GU-NH-NBIS(007).
3. All minutes, records, or documents related to the May 6, 2015 meeting referenced in Tom Keeler's May 7, 2015 email to Glenn Leon Guerrero, Joaquin Blaz, Joy Jean Mantanona, Michael Lanning, Anderson Butler, Joseph Pecht, and Jack Marlowe.
4. All minutes, records, or documents related to the May 15, 2015 meeting between representatives of DPW, Parsons Transportation Group, Korando, and Stanley Consultants.

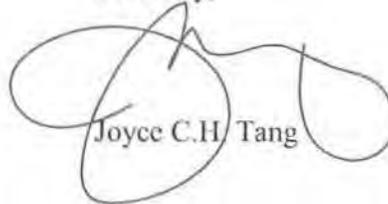
Mr. Glenn Leon Guerrero
October 5, 2015
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5. All written communication, including but not limited to electronic mails, reports, pleadings, appraisals, letters, and hand written notes related to any property condemned in connection with the Bile & Pigua Bridge Reconstruction Project, Project No. GU-NYH-NBIS(007).

If any of the foregoing documents or information are exempt from disclosure, please release the non-exempt portions. My client agrees to pay reasonable fees incurred in the copying of these documents. If you are able to provide the copies electronically, that would be greatly appreciated.

Please do not hesitate to contact me at 671-472-8868 if you have further questions or comments.

Sincerely,



Joyce C.H. Tang

EXHIBIT D

Sara Fitzpatrick

From: Tom Keeler <tpkeeler@gmail.com>

Sent: Wednesday, October 7, 2015 3:09 PM

To: Joyce Tang

Reply To: tpkeeler@gmail.com

Cc: Glenn LeonGuerrero; Felix Benavente; joaquin.blaz; Ken Orcutt; Karl P. Espaldon; Rob Weinberg

Subject: Re: Sunshine Act Request

Joyce,

DPW's Director has requested that I write you concerning your 2 most recent FOIA requests served on him, one of which includes a request for a vast volume of contract documents and materials concerning all Federal Highway Administration (FHWA) projects for the past 5 years. These requests are of serious concern as they appear to have little, if any, relationship to Korando Corporation's (Korando) breach of contract appeal to the Office of Public Accountability (OPA Appeal). Forcing DPW to respond to the FOIA requests is unreasonable as 1) there is no evidence the requested items are related to Korando's OPA Appeal; and 2) the requests are unreasonable and impose a substantial burden on the department and its consultants, Parsons Transportation Group (PTG). Accordingly, you are requested to resubmit the 2 FOIA requests narrowing the request to matters reasonably related to the OPA Appeal.

In any event, it is obvious that DPW and PTG are not able to respond to the 2 latest FOIA requests within 4 working days as required by 5 GCA Section 10103(d). Frankly it is not possible to respond within 10 calendar days as required by subsection (e). I spoke to PTG's Mike Lanning yesterday who was unable to estimate when PTG would be able to furnish the documents to DPW for the director to formally respond to you. He also expressed concern with the staff and resources needed to respond to the latest FOIA requests. The bottom line is DPW will provide the documents as soon as reasonably possible.

I also want to respond to your requests to coordinate on the scheduling of depositions. Stanley Consultants is not cooperating with DPW. I am informed that Stanley is represented by Elyze Iriarte of Carlsmith who you can follow-up directly. The director is trying to contact DPW's former director Carl Dominguez however has had difficulty getting a hold of him and isn't certain if he is on island. I'll touch base when I know more. As for scheduling Mr. Lanning's deposition I suggest you contact PTG's local counsel, Patrick Civile of Civile & Tang.

I only learned yesterday that your firm has represented PTG since the fall of 2014 and fail to understand how your office is able to represent Korando in the OPA Appeal. PGT provides a large array of services on FHWA Projects that requires that it work directly with DPW on a daily, if not hourly, basis. That Korando's OPA Appeal is in direct conflict with PGT's interests is not subject to debate, as is evidenced by your request to depose Mr. Lanning in an adversarial setting and the fact that your unreasonable and overly burdensome FOIA requests adversely impact DPW's operations as well as PTG's day to day operations and its ability to perform the job it was hired to do to, assist DPW on FHWA projects.

In closing, you are respectfully requested to resubmit the October 5, 2015 FOIA requests narrowing the scope to matters reasonably related to the OPA Appeal. It also seems appropriate that your firm office revisit the propriety of representing Korando, which appears to be in actual conflict with its representation of PTG.

Please contact me if you have any questions.

Sincerely,

Tom Keeler

On Mon, Oct 5, 2015 at 1:29 AM, Joyce Tang <jtang@civilletang.com> wrote:

Dear Glenn,

Please find attached two separate Sunshine Act requests for information.

Thank you.

Joyce

Joyce C.H. Tang

Civille & Tang, PLLC

T: [671.472.8868](tel:671.472.8868)

F: [671.477.2511](tel:671.477.2511)

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