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11 **PROCUREMENT APPEAL**

12 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

13
14 In the Appeal of

15 Korando Corporation,

16
17 Appellant.

DOCKET NO. OPA-PA-18-002

**APPELLANT KORANDO CORPORATION'S
AMENDED HEARING BRIEF**

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21 **I. INTRODUCTION**

22 On September 8, 2015, Korando appealed the Department of Public Work's ("DPW")
23 wrongful termination of its contract with Korando for construction of the Bile/Pigua Bridge
24 Replacement (Project No. GU-NH-NBIS(007)) ("the Project"). See OPA-PA-15-009. Following a
25 final hearing that commenced on December 5, 2015, the parties entered into a *Stipulation and Order*
26 *to Rescind Termination* ("12/16/15 Stipulation and Order"). The parties agreed under the 12/16/15
27 Stipulation and Order that: (1) DPW would rescind its July 10, 2015 termination of the Contract; (2)
28 a new start date would be no earlier than January 25, 2016 ("New Start Date") and Korando will have

1 the original Contract time of 450 days to complete the Project; (3) all liquidated damages were
2 waived through the New Start Date; (4) DPW would [in good faith] process Korando's payment
3 applications; and (5) DPW would in good faith process Korando's proposed change orders for among
4 other things, the "[d]emobilization and remobilization costs, materials previously ordered or in store,
5 which cannot be used on the Project due to the delay of the Project, and any other expenses related to
6 the termination and delay of the Project."

7 Three years have passed and Korando's change orders for expenses and costs from the
8 wrongful termination, demobilization and remobilization of the Project have not been resolved. The
9 evidence will show that DPW withheld these monies, delaying payment applications and other
10 change orders for over three years, effectively forcing Korando to finance a significant portion of the
11 Project without payments from the Contract. Korando believes that DPW wanted Korando to fail. In
12 spite of DPW's wrongful termination of its Contract, its failure to comply with the 12/16/15
13 Stipulation and Orders, and its wrongful withholding of Korando's monies, Korando completed
14 construction of the Bile and Pigua Bay bridges. They were opened to the public on May 8, 2018.

15 Korando filed this procurement appeal because DPW violated the conditions of the 12/16/15
16 Stipulation and Order and the Contract terms when it failed to promptly and properly review and
17 process Korando's change orders after the Contract termination was rescinded. Korando is entitled to
18 a prompt, fair and independent review of its claims, which it did not receive from DPW.

19 In May 2018, DPW's construction manager, TG Engineers, represented by Jeff Miller,
20 conducted an independent review of Korando's claims on DPW's behalf. As shown below, TG
21 Engineers' review of Korando's claims resulted in a substantially higher sum than DPW's original
22 approved amount of \$29,241.46. DPW proceeded to disavow Mr. Miller's independent review,
23 stating that DPW did not agree with Mr. Miller's independent review and that it was not binding on
24 DPW.

1 The evidence Korando will present at the Final Hearing will support that DPW breached the
2 12/16/15 Stipulation and Order and the Contract, violation of the covenant of good faith and fair
3 dealing implied therein, and violated the Open Government Act. As a result of these breaches and
4 violations, the Public Auditor should find that Korando's claims are valid, and that Korando is
5 entitled to an award of attorney's fees and costs for this Appeal.

6 **II. DISCUSSION**

7 The main issues in this Appeal are: (1) whether DPW breached the 12/16/15 Stipulation and
8 Order and the terms of the Contract regarding Korando's claims; (2) in failing to timely review and
9 process Korando's claims, whether DPW breached the 12/16/15 Stipulation and Order and its implied
10 covenant of good faith and fair dealing; and (3) whether DPW's denial of Korando's claims was
11 made in bad faith.

12 **A. DPW BREACHED THE 12/16/2015 STIPULATION AND ORDER AND 13 ORDER AND THE KORANDO CONTRACT.**

14 Korando submitted a change order pursuant to the terms of both the 12/16/15 Stipulation and
15 Order and the Contract. DPW was required to review and process Korando's change orders timely
16 and in good faith, and in accordance with the terms of Korando's Contract. The 12/16/2015
17 Stipulation and Order specifically provides, in relevant part, as follows:

- 18 5. Upon the signing of this Stipulation Korando can submit written Proposed
19 Change Orders in accordance with the terms and conditions of Korando's
20 Contract. *DPW agrees that it will review on the merits and process the
21 Change Orders timely and in good faith, and in accordance with the
22 terms of Korando's Contract.* Korando's change orders will include, but
23 are not limited to, the following:

- 24 a. *Demobilization and remobilization costs, materials previously
25 ordered or in store, which cannot be used on the Project due to
26 the delay of the Project, and any other expenses related to the
27 termination and delay of the Project.* (emphasis supplied).

28 Korando submitted its "Claim Due to Termination and Delay of Project" on October 18, 2016. *See*
Korando Hearing Ex. 9 at KC115-124 ("10/18/2016 Change Order"). It took over one (1) year for
DPW to respond. On November 15, 2017, DPW denied over ninety-five percent 95% of Korando's
claims, without providing sufficient justification. Korando timely appealed the Agency Decision on

January 16, 2018. *See* Korando Hearing Ex. 20 at KC472-490. As discussed herein, not only did DPW fail to promptly review and respond to Korando's change order claims, it delayed it for over one (1) year before it responded with a denial of most of the claims. The communications of DPW and the actions of DPW support a finding that DPW improperly denied Korando's claims.

1. Korando's Change Order.

Korando's change order totaled \$701,288.83, and is summarized in the chart below:

	Description	Korando's Claim	Approved by DPW	TG Review	CCG Review
1.	Mobilization & Demobilization Expenses (equipment rental, surveying expenses, clearing and grubbing, remobilize equipment, construction schedule preparation, temporary traffic control costs), <i>see</i> ¶5.a. 12/15/16 Stipulation and Order.	\$72,861.50	\$22,392.10	\$21,632.52	\$37,028.09
2.	Pre-termination expense (Engineering Study to determine capacity of bridges), <i>see</i> ¶¶5.a. and 5.b. 12/15/16 Stipulation and Order.	\$29,120.00	\$ 0.00	\$0.00	\$ 9,120.00
3.	Extended Overhead Expense (Construction manager office rental, utilities, staging yard rental, supervisory and project management expense, standby vehicles and equipment expense), <i>see</i> ¶5.a. 12/15/16 Stipulation and Order.	\$341,973.38	\$ 5,530.58	\$150,485.47	\$244,790.70
4.	Office Overhead (5%)	\$20,741.74	\$ 374.11	Not covered	\$ 14,546.94
5.	Profit (10%)	\$43,557.66	\$ 0.00	Not covered	\$ 30,548.57
6.	GRT (4.17%)	\$19,165.37	\$ 1,124.67	Not covered	\$ 14,012.63
	SUBTOTAL	\$498,299.66	\$29,241.46	\$172,117.99	\$350,046.93
7.	Surety Expenses resulting from termination of the Contract (Surety's legal fees, consulting fees and take over contractor's charges)	\$202,989.17	\$ 0.00	Legal Issue (Not covered)	Legal Issue (Not covered)
	TOTAL	\$701,288.83	\$29,241.46		

DPW approved only 4.17% of Korando's claim *one year* after the claim was submitted. Three years has passed since the Stipulation was signed, the Bile and Pigua Bay bridges project was completed and opened to the public on May 8, 2018, and Korando's claim has still not been resolved. DPW has refused to honor the agreements it made under the terms of the Stipulation and Order and the Korando Contract to pay Korando for work it performed. To date, Korando has not received any

1 payments on its claim – even the \$29,241.46 undisputed amount has not been paid.

2 **2. Korando is Entitled to Amounts in its Change Order.**

3 Korando is justified in claiming the amounts under its Change Order under the terms of the
4 12/16/15 Stipulation and Order:

- 5 1. The parties agreed the Contract time would be extended by issuing an amended Notice to
6 Proceed (“NTP) which revised the NTP date *from January 5, 2015 to March 14, 2016,*
7 and gave Korando the full Contract time – *450 days* – to complete the Project after the
8 March 14th NTP.
- 9 2. Having agreed to reinstate the original Contract period of 450 days, DPW also expressly
10 agreed to change the Contract price by a change order to address the time extension
11 granted. Specifically, the Stipulation provides that Korando will submit a change order
12 for among other things, *“[d]emobilization and remobilization cost ... and any other*
13 *expenses related to the termination and delay of the Project.”* See ¶5.a, 12/16/15
14 Stipulation and Order. The change order claim that is the subject of this Appeal clearly
15 falls within the scope and type of expenses Korando is entitled to recover under the
16 Stipulation.
- 17 3. With respect to the Surety costs of \$202,989 in Item No. 7, DPW’s counsel has admitted
18 that the amounts claimed by the surety are recoverable. *See* Korando Hearing Ex. No. 42
19 (Email dated 5/11/17 from T. Keeler to DPW parties). Mr. Keeler advised DPW of the
20 following:

21 At the time the Stipulation was negotiated I advised that sums due
22 [Korando] would be limited to:

23 “Demobilization and remobilization costs, materials previously ordered
24 or in store, which cannot be used on the Project due to the delay of the
25 Project, and any other expenses related to the termination and delay of
the Project.”

26 My focus at the time I reviewed this language was on [Korando] and
27 not particularly on costs associated with Westchester Fire Insurance
28 Company, [Korando’s] Surety. *In revisiting the issue of whether*
DPW is obligated to pay Surety’s costs the answer is clearly yes.
Surety’s costs and attorneys fees are obviously related to the

1 *termination of the Project. Further, separate and apart from DPW's*
2 *obligations under the Stipulation, DPW is contractually obligated*
3 *under the parties November 2016 Takeover Agreement to pay said*
4 *charges under the Takeover Agreement.... (emphasis supplied).*

5 *Id.*

- 6 4. DPW also has agreed that Office Overhead of 5% is reasonable and recoverable as part of
7 the delay claim, along with GRT of 4.17%.
- 8 5. Profit is an allowable element of equitable adjustments. Here, Korando is asking for a
9 10% profit, which is a reasonable rate.

10 Based on the foregoing, the Stipulation and Order justifies award of Korando's claim.

11 **B. DPW BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND**
12 **FAIR DEALING IN ITS EVALUATION OF KORANDO'S CLAIM**

13 **1. Factual Summary**

14 The following is a timeline of relevant facts regarding this issue:

- 15 • Korando first notified DPW of its claim on **October 3, 2016**, submitting a narrative of event
16 leading to and justifying its claims.¹
- 17 • On **October 18, 2016**, Korando formally submitted a Letter from Byong Ho Kim to Glenn
18 Leon Guerrero regarding the "Claim Due to Termination and Delay of Project," along with
19 supporting exhibits.² On December 5, 2016, Korando inquired as to the status of its claim.³ In
20 response, DPW claimed that "the claim is under review and a response is being prepared." *Id.*
21 at KCSUPP767.
- 22 • On **December 28, 2016**, DPW sent Korando a letter requesting additional backup documents
23 and clarification of specific items noted in Korando's claim.⁴
- 24 • Less than one month later, on **January 24, 2017**, Korando replied to DPW, submitting
25 additional supporting documents, as DPW requested.⁵ After Korando submitted additional
26 documents on January 24, 2017, DPW did not contact Korando and did not request additional
27 information to evaluate Korando's claim.

28 ¹ See Korando Ex. 27 at KCSUPP753 (10/3/2016 Email from D. Yao to M. Lanning re: FW: Bile/Pigua Bridge Replacement – Claim due to termination and delay).

² See Korando Ex. 9 at KC115-124 ("10/18/2016 Change Order").

³ See, Korando Ex. 29 at KCSUPP769 (12/12/2016 Email from C. Bensen to J. Miller re: RE: bile/Pigua Bridge Replacement – Claim due to Termination and delay of Project based on OPA Stipulation).

⁴ See Korando Ex. 10 at KC125 (12/28/2016 Letter from G. Leon Guerrero to B.H. Kim re: CLAIM DUE TO TERMINATION AND DELAYS OF PROJECT).

⁵ See, Korando Ex. 11 at KC127 (Letter from B.H. Kim to G. Leon Guerrero re: Claim Due to Termination and Delay of Project).

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- On **February 9, 2017**, Parsons Transportation Group (“PTG”), DPW’s design consultant on the Bile/Pigua project, performed its initial evaluation of Korando’s claim for DPW in a spreadsheet summary.⁶ Of the Eight Hundred Eighty-Five Thousand, Six Hundred Eleven dollars and Sixty-Seven cents (\$885,611.67) Korando requested in its claim, PTG determined that Korando was only entitled to Twenty-Nine Thousand, One Hundred Fifty-Six dollars and Four cents (\$29,156.04).⁷ PTG did not provide any explanation or basis at that time for its findings. *DPW did notify Korando or provide PTG’s spreadsheet summary to Korando.*
 - On **March 10, 2017**, Korando again inquired as to the status of its claim, requesting a meeting with PTG regarding the issue.⁸
 - On **March 21, 2017**, Korando again requested an update regarding the status of its claim.⁹ In its 3/21/2017 email communication, Korando referenced a prior communication in which Korando proposed splitting the original claim, which included claims from Smithbridge, to expedite DPW’s processing of Korando’s claim.¹⁰ Jack Kim of Korando, noted the importance of timely resolution of Korando’s claim, “As I’ve already mentioned, it’s crucial we get that claim ASAP in order to finance and complete Bile/Pigua Project.”¹¹
 - On **March 22, 2017**, PTG emailed Tom Keeler, counsel for DPW, following up on PTG’s February 9, 2017 Analysis of Korando’s claim, and asking if DPW had additional questions and if DPW had “enough information for a response letter regarding the claim.”¹²
 - On **April 13, 2017**, PTG prepared a draft response to Korando’s claim for DPW, requesting Mr. Keeler’s input regarding surety costs.¹³
 - On **May 10, 2017**, Korando again requested a status update on its claim.¹⁴ As of May 10, 2017, DPW’s draft response was pending review and input from DPW’s counsel, Mr. Keeler.¹⁵
 - On **May 11, 2017**, Mr. Keeler emailed PTG and DPW Deputy Director Joaquin Blaz regarding Korando’s claim and Korando’s right to recovery of its surety costs. An excerpt from Mr. Keeler’s email is as follows:

21 ⁶ See Korando Ex. 34 at KCSUPP781 (Email from D. Yao to T. Keeler re: RE: GU-NH-NBIS (007) – Bile/Pigua Bridges Replacement – Claim due to Termination and Delay of Project).

22 ⁷ *Id.* at KCSUPP783.

23 ⁸ See Korando Ex. 35 at KCSUPP785 (3/10/2017 Email from Ki Wook Han to D. Yao re: Requesting meeting re: Claim due to termination).

24 ⁹ See Korando Ex. 37 at KCSUPP788 (3/21/2017 Email from J. Kim to D. Yao re: Status of Request to Split Korando & Smithbridge’s Claims (Re: Claim on DPW/Project: Bile & Pigua Bridge)).

25 ¹⁰ *Id.*

26 ¹¹ *Id.*

27 ¹² Korando Ex. 38 at KCSUPP789 (3/22/2017 Email from M. Lanning to T. Keeler re: RE: GU-NH-NBIS(007) – Bile/Pigua Bridges Replacement – Claim due to Termination and Delay of Project).

28 ¹³ See Korando Exhibit 40 at KCSUPP798 (Email from D. Lehman to T. Keeler re: Bile/Pigua – Korando Termination Claim Response)

¹⁴ See Korando Ex. 41 at KCSUPP805 (Email from J. Kim to D. Yao re: Request for Status Update on Time Extension Claim).

¹⁵ See Korando Ex. 43 (5/11/2017 Email from T. Keeler to J. Moretto re: RE: Letter status/update).

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2 At the time the Stipulation was negotiated I advised that sums due [Korando] would be limited to:

3 “Demobilization and remobilization costs, materials previously ordered
4 or in store, which cannot be used on the Project due to the delay of the
5 Project, and any other expenses related to the termination and delay of
6 the Project.”

7 My focus at the time I reviewed the language was on [Korando] and not
8 particularly on costs associated with Westchester Fire Insurance
9 Company, [Korando’s] Surety. In revisiting the issue of whether
10 DPW is obligated to pay Surety’s costs the answer is clearly yes.
11 Surety’s costs and attorneys fees are obviously related to the
12 termination of the Project. Further, separate and apart from
13 DPW’s obligations under the Stipulation, DPW is contractually
14 obligated under the November 2016 Takeover Agreement to pay
15 sair charges under the Takeover Agreement [].

16

17 In closing, Surety and its counsel’s costs and charges are best
18 agreed to. I don’t see any grounds to deny them and believe DPW’s
19 position would be undermined if these costs and charges weren’t
20 paid.¹⁶

- 21 • On **June 5, 2017**, PTG forwarded DPW’s draft response to Korando’s claim to Richelle
22 Takara, the Department of Transportation Federal Highway Administration Representative on
23 the Bile/Pigua Project.¹⁷ The 6/5/2017 draft DPW response notes at Section 6 that Mr. Keeler
24 requested addition of items related to surety costs.¹⁸ Specifically, the 6/5/2017 draft states at
25 Sections 6.1 – 6.3 that DPW agrees to pay Korando for costs incurred by its surety, which
26 include \$82,853.83 for Vertex Engineering, \$48,826.42 for attorney’s fees, and administration
27 costs of an undetermined amount.¹⁹
- 28 • On **June 5, 2017**, Ms. Takara emailed Mr. Lanning regarding the draft submitted by PTG.²⁰
In her 6/5/2017 email, Ms. Takara asked follow up questions regarding specific items. *Id.* Ms.
Takara further inquired:

What is the philosophy behind what we are paying for and not
paying for? For example, if a piece of equipment was mobilized for
the original contract and then the on-going contract, we are we

¹⁶ Korando Ex. 42 at KCSUPP806 (5/11/2017 Email from T. Keeler to M. Lanning re: DPW & Bile/Pigua Bridges Reconstruction – Korando’s Delay Claims).

¹⁷ See Korando Ex. 12 at KCSUPP199 (Email from M. Lanning to R. Takara re: Korando Termination Claim).

¹⁸ *Id.* at KC214.

¹⁹ *Id.*

²⁰ See Korando Ex. 13 at KC217 (6/5/2017 Email from R. Takara to M. Lanning re: RE: Korando Termination claim – question).

1 (sic) paying for? If we paid for an item in the pay applications for
2 the original contract, we are not paying for it again under the
3 claim?

4 This would be concepts (sic) that Glenn could explain. Put into our words
5 instead of the way they presented the information.

6 You don't have to explain the WFIC [surety] costs... we have the philosophy
7 on that item figured out.²¹

- 8 • Mr. Lanning replied to Ms. Takara on **June 11, 2017**, stating in relevant part, as follows:

9 The overall philosophy we took was to only pay for
10 demobilization/remobilization costs. We were provided direction as
11 to what other expenses should be reasonably included. From your
12 questions below, it seems to me there's a need to go over Korando's
13 claim items again. Quite possibly Glenn/Kin/Tom may want to take a
14 different approach on potentially allowable costs as related to "other
15 expenses" in the stipulation and order.²²

16 It is clear from Mr. Lanning's 6/11/2017 email that he believed DPW would reconsider its
17 decision to award certain amounts at Ms. Takara's direction.

- 18 • On **September 18, 2017**, PTG emailed Mr. Keeler and Ms. Takara a new draft DPW response
19 to Korando's claim.²³ In its 9/18/2017 email, PTG noted that "DPW determined that
20 \$33,410.25 out of \$885,661.69 claimed by Korando is eligible for reimbursement per the
21 Stipulation."²⁴ In its 9/18/2017 draft response to Korando's claim, DPW stated for the first
22 time that it did not agree that surety costs were reimbursable.²⁵ DPW did not explain in the
23 9/18/2017 draft the logic behind this determination, or why it reversed its position in the
24 6/5/2017 draft or the position stated by Mr. Keeler in his 5/11/2017 email.
- 25 • On **September 20, 2017**, Mr. Keeler responded to PTG's 9/18/2017 email.²⁶ In his 9/20/2017
26 email, Mr. Keeler stated that he did not believe he should be the point of contact referenced in
27 the 9/18/2017 draft DPW response to Korando's claim, because "I am not familiar with how
28 the figures were calculated. As such, if contacted all I can say is that the figures were prepared
by consultants."²⁷

21 *Id.*

22 Korando Ex. 14 at KC219 (6/11/2017 Email from M. Lanning to J. Moretto re: RE: Korando Termination Claim –
question).

23 See Korando Ex. 15 at KC222 (9/18/2017 Email from J. Moretto to M. Lanning re: FW: LTR_DPW-KC_Re
Claim Due to Termination and Delay of Project draft_02_11SEP2017.docx).

24 *Id.*

25 *Id.*

26 See Korando Ex. 44 at KCSUPP824 (9/20/2017 Email from T. Keeler to J. Moretto re: RE: LTR_DPW-KC_Re
Claim Due to Termination and Delay of Project draft_02_11SEP2017.docx).

27 *Id.*

- 1 • On **October 5, 2017**, Korando again requested a status update on its claim.²⁸ In its 10/5/2017
2 email, Korando noted that it had been almost a year to the day since Korando submitted its
3 claim.²⁹ Korando further stated:

4 Korando are simply looking for a fair and timely response. I understand
5 there are probably some legal issues to address, but for almost a year to
6 pass without any meaningful acknowledgement of their submission is
7 discouraging.

8 My very basic understanding of the OPA Stipulation is that Korando
9 were to be reinstated and responsible for completion of the contract,
10 and that DPW were to pay Korando's costs incurred as a result of the
11 Termination. Korando are doing their best kept (sic) their end of the
12 bargain. I'm sure they will appreciate DPW responding in kind.³⁰

- 13 • On **October 17, 2017**, Korando submitted a reformatted version of its claim, in the hopes of
14 simplifying the review process for DPW.³¹
- 15 • On **November 14, 2017**, PTG circulated the final draft of DPW's response to Korando's
16 claim, as approved by PTG, Mr. Keeler and Ms. Takara.³²
- 17 • On **November 15, 2017**, DPW finally issued its Response to Korando's claim, Three
18 Hundred Ninety-Four (394) days after Korando submitted its claim. In its 11/15/2017 Letter,
19 DPW approved Twenty-Nine thousand, Two Hundred Forty-One dollars and Forty-Six cents
20 (\$29,241.46) of Korando's claim.³³ This ultimate determination awarded less than One
21 hundred dollars (\$100) more than the initial amount PTG determined should be awarded
22 February 9, 2017, more than nine (9) months prior. Consistent with its 9/18/2017 draft
23 response, DPW did not award any surety costs.
- 24 • On **May 30, 2018**, DPW provided a copy of Mr. Miller's independent consultant's report
25 regarding Korando's claim ("Miller Report"). See Korando Ex. 46. The Miller Report was
26 prepared by TG Engineers at DPW's request which covered Korando's claims, *excluding the*
27 *parts of Korando's claim for surety costs, profit, GRT and office overhead* ("Excluded
28 Costs"). The Miller Report determined that Korando was entitled to at least \$172,117.99, not
including the Excluded Costs.
- On **June 10, 2018**, Keith Farrell, the principal for Construction Consulting Guam LLC,
Korando's construction manager consultant's review of the Miller Report, concluding that
Korando was entitled to at least \$350,046.93, not including the Excluded Costs.

25 ²⁸ See Korando Ex. 45 at KCSUPP835 (10/5/2017 Email from D. McCallum to D. Yao re: RE: Bile/Pigua Bridge
26 Replacement – Claim due to Termination and delay of Project based on OPA Stipulation).

²⁹ *Id.*

³⁰ *Id.* at 834.

³¹ See Korando Ex. 16 at KC231.

³² See Korando Ex. 19 at KC451.

³³ See Korando Ex. 20 at KC472.

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2. *Duty of Good Faith and Fair Dealing*

“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” *Rest.2d Contracts*, §205. Good faith is defined by the Guam Uniform Commercial Code as “honesty in fact in the conduct or transaction concerned,” 13 G.C.A. § 1201 (19), and in the context of merchants as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” 13 G.C.A. §2103 (1)(b). The implied covenant of good faith and fair dealing “requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement.” *Baza v. Guam Memorial Hospital Plan, Inc.*, Superior Court of Guam Civil Case no. 1146-87 (Decision and Order, May 2, 1988)(citing *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, 145, 169 Cal. Rptr. 691 (1979). It “operates as a kind of safety valve to which judges may turn to fill gaps and qualify or limit rights and duties otherwise arising under rules of law and specific contract language.” *Ada’s Inc. v. First Hawaiian Bank*, Superior Court of Guam Civil Case No. CV0785-02 (Disisyon yan Otden, July 7, 2003) (citing *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 684, 254 Cal.Rptr. 211 (1988).

“The implied covenant seeks to protect the contracting parties’ reasonable expectations.” *Hubbard Chevrolet Co. v. General Motors Corp.*, 873 F.2d 873, 876-877 (5th Cir. (Miss.), 1989). (citing *Restatement (Second) of Contracts* § 205(a) (“Good faith ... emphasizes consistency with the justified expectations of the other party; it excludes [conduct that violates] ... community standards of decency, fairness or reasonableness”). The implied covenant of good faith and fair dealing limits the parties’ conduct when their contract defers decision on a particular term, omits terms or provides ambiguous terms. *Hubbard, supra* at 876-877.

The implied covenant of good faith and fair dealing preserves the integrity and spirit of the agreement where the agreement allows parties to exercise discretion in their conduct. The covenant is breached “where a party to a contract acts in a manner that, although not expressly forbidden by any

1 contractual provision, would deprive the other party of the right to receive the benefits under their
2 agreement.” *Fourth Branch Associates Mechanicville v. Niagara Mohawk Power Corp.*, 235 A.D.2d
3 962, 965-966, 653 N.Y.S.2d 412, 416 (N.Y.A.D. 3 Dept.,1997) (citing *Jaffe v. Paramount*
4 *Communications*, 222 A.D.2d 17, 22-23, 644 N.Y.S.2d 43 (N.Y. App. Div., 1996).

5
6 **3. DPW Failed to Comply with the Stipulation and Breached the Implied**
7 **Duty of Good Faith and Fair Dealing When It Did Not Timely Review**
8 **and Process Korando’s Claim**

9 In its Agency Report, DPW contends that it complied with the 12/16/2015 Stipulation and
10 Order and the Korando Contract’s requirement that it evaluate change orders timely and in good
11 faith. DPW noted that on December 28, 2016, over two months after Korando submitted its
12 10/18/2016 Change Order, DPW requested additional documents in support of the Change Order,
13 which Korando responded to on January 24, 2017. Agency Report at 3. DPW then claims that
14 ordinarily it would have responded in March or April 2017 (5-6 months after the Change Order was
15 submitted and 2-3 months after Korando provided DPW’s requested documents). However, it claims
16 that it “required additional time” to properly evaluate the 10/18/2016 Change Order because Korando
17 submitted “unreasonable excessive claims” and a good faith detailed review required the involvement
18 of a number of people. *Id.* Korando submits that issuance of a denial of a change order thirteen (13)
19 months later is prima facie evidence of bad faith.

20
21 Although DPW claims that it needed additional time to review the claim because Korando
22 submitted “unreasonable excessive claims,” it did not request any further information or supporting
23 documents from Korando after Korando submitted supplemental material on January 24, 2017.
24 Korando vigilantly pursued its claim, periodically requesting status updates and meetings with DPW
25 and PTG to discuss its claim in an effort to resolve it in a timely matter. Korando notified DPW of the
26 obvious hardship associated with not having its claim resolved – it needed the claim resolved to
27 finance and complete the Project. This fact had no impact on DPW – it continued to delay resolution
28

1 of Korando's claim. The amount DPW ultimately awarded to Korando was not substantially different
2 from the amount initially determined by PTG in February 2017. DPW's failure to resolve the claim
3 earlier is attributable solely to DPW's apathy.

4 DPW failed to act with the timeliness required by the 12/16/2015 Stipulation and Order.
5 While the 12/16/2015 Stipulation and Order did not specify a deadline within which DPW must act,
6 the fact that it required *timely* review at all demonstrates that the issue of timeliness was important to
7 Korando, and required DPW to act in good faith. DPW was required to refrain from injuring
8 Korando's rights to a timely review of its claims. It took DPW nearly 400 days to resolve Korando's
9 claim. During that time, Korando continued to perform as required under its contract with DPW
10 despite the strain on its resources resulting from DPW's failure to process its claim. Korando
11 completed work on the Project in May 2018, and DPW continues to withhold proper payment of
12 Korando's claim, further compounding Korando's injury.

13 Had DPW timely reviewed and processed Korando's claim, even if it persisted in the
14 improper amount it ultimately awarded, it would have afforded Korando an opportunity to appeal
15 DPW's decision and achieve a final resolution by the Public Auditor sooner. In its Agency Report,
16 DPW also referenced 5 GCA §5427(f) in support of its timeliness argument. Agency Report at 3-4.
17 Section 5427(f) provides in relevant part that:

18 (f) Failure to Render Timely Decision. If the Chief Procurement Officer, the Director
19 of Public Works, the head of a purchasing agency, or the designee of one of these
20 officers does not issue the written decision required under Subsection (c) of this
21 Section within sixty (60) days after written request for a final decision, or within such
22 longer period as may be agreed upon by the parties, then *the contractor may proceed*
23 *as if an adverse decision had been received.*

24 5 GCA §5427(f) (emphasis added). Because Korando timely filed this Appeal after DPW rendered its
25 November 17, 2017 Denial, DPW has characterized Korando's actions as a "failure to exercise its
26 statutory rights under Guam's Procurement Code," which bars Korando from alleging that DPW
27 acted in bad faith. Agency Report at 5.

1 This argument is wrong. Use of the term “may” in Section 5427 is permissive. It allows
2 Korando the discretion to immediately appeal DPW’s failure to issue an agency decision within sixty
3 (60) days. *See Koji v. Neves*, 2016 Guam 36, ¶ 35(“The word ‘may,’ when used in a statute, usually
4 implies some degree of discretion.”) (quoting *United States v. Rogers*, 461 U.S. 677, 706 (1983)).
5 The statute does not support DPW’s claim that in electing to wait until DPW issued a written
6 decision, Korando somehow waived any claims it would have to DPW’s bad faith delay.
7

8 Waiver requires a finding that there was a voluntary and intentional relinquishment of a
9 known right. *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules N.W., Inc.*, 28 Wash.App. 59, 61, 621
10 P.2d 791 (1980). As the court held in *Wagner v. Wagner*, 95 Wash. 2d 94, 102, 621 P.2d 1279, 1283–
11 84 (1980):
12

13 It is necessary that the person against whom waiver is claimed have
14 intended to relinquish the right, advantage, or benefit and his action
15 must be inconsistent with any other intent than to waive it. Further, to
constitute a waiver, other than by express agreement, there must be
unequivocal acts or conduct evincing an intent to waive. Intent cannot
be inferred from doubtful or ambiguous factors.

16 *Id.* The burden of demonstrating waiver by a preponderance of the evidence is on DPW. *Seattle-First*
17 *Nat. Bank v. Gibbons*, 953 F.2d 1388 (9th Cir. 1992)(“A party claiming waiver must show that the
18 opposing party intended to waive the right.”)(citing *Wagner v. Wagner, supra*, at 1283-84 (1980)).
19 DPW has not referenced any statutes or cases supporting its position, which is fatal to its argument. It
20 has not met its burden of demonstrating waiver by a preponderance of the evidence. Accordingly, the
21 OPA should reject DPW’s attempt to limit Korando’s rights to appeal on the basis of waiver.
22

23 **4. DPW Denied Korando’s Claim in Bad Faith**

24 DPW’s actions in dealing with Korando’s claim smacks of bad faith. *First*, DPW denied over
25 ninety-five percent 95% of Korando’s claims. The 12/16/2015 Stipulation and Order states clearly
26 that:
27

28 5. Upon the signing of this Stipulation Korando can submit written Proposed Change
Orders in accordance with the terms and conditions of Korando’s Contract. DPW

1 agrees that it will review on the merits and process the Change Orders timely and in
2 good faith, and in accordance with the terms of Korando's Contract. Korando's
change orders will include, but are not limited to, the following:

3 a. Demobilization and remobilization costs, materials previously ordered or
4 in store, which cannot be used on the Project due to the delay of the Project,
5 and any other expenses related to the termination and delay of the Project.

6 It is clear from communications between PTG and Ms. Takara, however, that the overall
7 policy in resolving Korando's claim was to only pay for demobilization/remobilization costs.
8 Korando Ex. 14 at KC219 (6/11/2017 Email from M. Lanning to J. Moretto re: RE: Korando
9 Termination Claim – question). It is unclear from PTG's communications who directed the policy. It
10 is clear, however, that the policy violates the express language of the 12/16/2015 Stipulation and
11 Order, in which DPW agreed to consider in good faith not just demobilization and remobilization
12 costs but also materials previously ordered or in store, which cannot be used on the Project due to
13 delay, and any other expenses related to the termination and delay of the Project. Id.

14
15 DPW's rejection of the Miller Report further evidences DPW's bad faith. DPW suggested to
16 Korando that an independent consultant be engaged to review the claim. DPW proceeded to engage
17 its construction manager consultant, Jeff Miller, to conduct an independent review of Korando's
18 claims in May 2018. Mr. Miller determined that Korando was entitled to at least \$172,117.99, which
19 amount did not include the Excluded Costs. When DPW Deputy Director, Joaquin "Kin" Blaz
20 provided a copy of the Miller Report to Korando on May 30, 2018, he told Korando that "DPW does
21 not necessarily agree with all the analysis that Jeff did in the report. This report is non-binding...."
22 See Korando Ex. 46 at KCSUPP000854 & Korando Ex. 47. DPW's actions in disavowing the Miller
23 Report are further evidence of its bad faith.

24
25 Another example of DPW's bad faith is DPW's renegeing of the agreements made in the
26 12/16/2015 Stipulation and Order. See Korando Ex. 3 at KC97 (12/15/2015 Email from T. Keeler to
27 G. Leon Guerrero re: 12-16-15 DPW-Korando DRAFT Stipulation and Order). In Mr. Keeler's
28

1 December 15, 2015 email to DPW, Mr. Keeler acknowledged that the issue of change orders was
2 crucial to Korando's approval of the stipulation, and that a representation regarding compensation for
3 demobilization and remobilization would "greatly facilitate settlement." *Id.* The Stipulation was
4 signed after receiving approval from FHWA. If DPW and FHWA did not intend to fulfill the terms
5 of Stipulation at the time DPW executed the 12/16/2015 Stipulation and Order, but signed it to induce
6 Korando to enter into the Stipulation, DPW's and FHWA's actions constitute fraud in the
7 inducement.
8

9 Korando would not have agreed to the 12/16/2015 Stipulation and Order if DPW did not
10 agree to review all claims for expenses related to the termination and delay of the Project in good
11 faith. DPW's ultimate decision to renege on its agreement to consider other classes of delay expenses
12 and to limit recovery of Korando's claim strictly to demobilization and remobilization costs despite
13 its broader obligations under the 12/16/2015 Stipulation and Order deprives Korando of its right to
14 receive the benefits it was entitled to under the 12/16/2015 Stipulation and Order. *See Fourth Branch*
15 *Associates Mechanicville v. Niagara Mohawk Power Corp.*, 235 A.D.2d 962, 965-966, 653 N.Y.S.2d
16 412, 416 (N.Y.A.D. 3 Dept.,1997).
17

18 Korando is obviously injured by DPW's arbitrary decision not to award Korando surety costs.
19 The fact that these costs are reimbursable under the express language of the 12/16/2015 Stipulation
20 and Order is not subject to reasonable dispute. In fact, Mr. Keeler himself agrees. In his 5/11/2017
21 Email to Mr. Lanning re: DPW & Bile/Pigua Bridges Reconstruction – Korando's Delay Claims, Mr.
22 Keeler admits that he did not anticipate the fact that surety costs would be reimbursable under the
23 12/16/2015 Stipulation and Order. *See Korando Ex. 42 at KCSUPP806.* Mr. Keeler admits however
24 that upon further review, the costs clearly are reimbursable:
25

26 **In revisiting the issue of whether DPW is obligated to pay Surety's costs the**
27 **answer is clearly yes. Surety's costs and attorneys fees are obviously related to**
28 **the termination of the Project. Further, separate and apart from DPW's**
obligations under the Stipulation, DPW is contractually obligated under the

1 November 2016 Takeover Agreement to pay said charges under the Takeover
2 Agreement [].

3

4 In closing, Surety and its counsel's costs and charges are best agreed to. I don't
5 see any grounds to deny them and believe DPW's position would be undermined
6 if these costs and charges weren't paid.

7 Korando Ex. 42 at KCSUPP806. DPW reverses this position in its 11/15/2017 Denial of Korando's
8 claim, stating simply as follows:

9 The DPW does not agree with Korando's assessment regarding surety expenses.
10 Included is a copy of DPW's Notice of Default dated June 26, 2015, which provides
11 the multiple contract provisions breached by Korando prior to termination.

12 Korando Ex. 20 at KC478. Korando disputes that Korando breached its contract with DPW. Further,
13 DPW waived any argument regarding Korando's breach when it entered into the 12/16/2015
14 Stipulation and Order, rescinding Korando's termination, and agreeing to award claims for any
15 expenses related to the delay, which, as Mr. Keeler succinctly summarized, include surety costs.
16 Korando bargained for DPW's review and award of surety costs, and in denying wholesale the award
17 of Korando's claim for surety costs, DPW acted in bad faith. Its own attorney advised it to pay this
18 claim and it has no proper justification not to comply.


19 **III. CONCLUSION**

20 Korando requests a ruling from the OPA as follows:

- 21 1. DPW breached the 12/16/15 Stipulation and Order;
- 22 2. DPW breached the Korando Contract;
- 23 3. DPW breached the implied covenant of good faith and fair dealing implied in both the
24 Korando Contract and the 12/16/15 Stipulation and Order;
- 25 4. For an award of reasonable attorney's fees and costs of this appeal; and
- 26 5. For such other relief that the OPA may determine is just and proper.
- 27
- 28

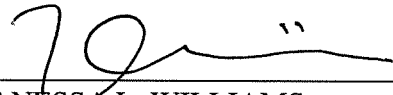
Submitted this 16th day of November, 2018.

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