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11 **PROCUREMENT APPEAL**

12 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

13 In the Appeal of

14 Korando Corporation,

15
16 Appellant.

DOCKET NO. OPA-PA-18-002

**APPELLANT KORANDO CORPORATION'S
MOTION FOR ADVERSE INFERENCE;
MEMORANDUM OF POINTS AND
AUTHORITIES**

19
20
21 **MOTION**

22
23 Appellant Korando Corporation ("Korando"), by and through counsel, moves the Hearing
24 Officer for an order drawing an adverse inference from DPW's failure to produce Richelle Takara,
25 the Assistant Division Administrator at Federal Highway Administration, at the formal hearing in this
26 matter scheduled to commence on February 11, 2019. This motion is based on the memorandum of
27 points and authorities that follows, the record before the Hearing Officer, and arguments that may be
28 adduced at the hearing hereon.

ORIGINAL

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. FACTS

3 At the scheduling conference on September 14, 2018, the Hearing Officer, Mr. Anthony
4 Camacho, asked the parties if they intended to call off-island witnesses, at which time counsel for
5 Korando informed the Hearing Officer that Korando will be calling Ms. Takara, the person from the
6 Department of Transportation Federal Highway Administration (“FHWA”) in charge of overseeing
7 and approving all of the federal highway funding for the Bile/Pigua Bridge Replacement (Project No.
8 GU-NH-NBIS(007)) (“the Project”). In addition, Ms. Takara has personal knowledge of issues,
9 including but not limited to, the termination of the Korando contract and rescinding of the
10 termination, negotiation and approval regarding the terms of the Stipulation and Order Rescinding the
11 Termination (“Stipulation”), the review of change orders and requests for equitable adjustments
12 submitted to DPW pursuant to the agreed upon terms contained in the Stipulation, and review of and
13 denial of Korando requests for equitable adjustments and recovering of expenses related to the
14 wrongful termination. Tom Keeler, counsel for DPW, stated that Ms. Takara did not intend to appear
15 voluntarily. The Hearing Officer stated that if Ms. Takara does not appear, he would entertain a
16 motion for an adverse inference from Korando. The formal hearing was then scheduled to commence
17 on December 10, 2018, and at a later time continued to commence on December 17, 2018.

19 Korando requested that the Hearing Officer issue a number of witness subpoenas, including a
20 subpoena for Ms. Takara. The Hearing Officer issued a subpoena to Ms. Takara on November 23,
21 2018. *See Declaration of Joyce C.H. Tang* (“Tang Decl.”), **Ex. 1**. On December 4, 2018, counsel for
22 Korando emailed Mr. Keeler and asked if he was willing to accept service of the subpoena on Ms.
23 Takara’s behalf. *Id.*, **Ex. 2**. On December 5, 2018, Mr. Keeler responded that he was not authorized
24 to accept service of the subpoena on behalf of Ms. Takara and suggested that Korando contact
25 FHWA’s legal counsel. *Id.*, **Ex. 3**.

27 On December 7, 2018, Joyce Tang, counsel for Korando, contacted Brett Gainer, legal
28 counsel for the FHWA. Ms. Tang told Mr. Gainer that Ms. Takara was a key witness in Korando’s

1 appeal, because the Bile/Pigua Project was a federal highway project and Ms. Takara has personal
2 knowledge of the Project of the matters at issue in this OPA proceeding. Because Ms. Takara is a
3 necessary witness Korando requested Ms. Takara be present to testify at the formal hearing. The
4 substance of the telephone conference was subsequently memorialized in a letter from Ms. Tang to
5 Mr. Gainer dated December 10, 2018. *Id.* at **Ex. 4.** On December 17, 2018, Mr. Gainer sent a letter
6 to Ms. Tang, denying Korando's request that Ms. Takara be produced to testify at the formal hearing.
7 *Id.* at **Ex. 5.**

8 **II. ARGUMENT**

9 **A. Legal Standard**

10 The "missing witness" or "uncalled witness" rule is a centuries old rule that allows an adverse
11 inference to be drawn based on a party's failure to produce a witness it has the power to produce. *See*
12 *Graves v. United States*, 150 U.S. 118, 121, 14 S. Ct. 40, 41, 37 L. Ed. 1021 (1893) ("The rule...is
13 that, if a party has it peculiarly within his power to produce witnesses whose testimony would
14 elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if
15 produced, would be unfavorable."). "This instruction, commonly referred to as a 'missing witness
16 charge', derives from the commonsense notion that 'the nonproduction of evidence that would
17 naturally have been produced by an honest and therefore fearless claimant permits the inference that
18 its tenor is unfavorable to the party's cause.'" *People v. Gonzalez*, 68 N.Y.2d 424, 427, 502 N.E.2d
19 583, 586 (1986) (quoting 2 Wigmore, Evidence § 285, at 192 [Chadbourn rev. ed. 1979]).

20
21 In modernity, the rule remains widely used in many jurisdictions in both criminal and civil
22 matters. *See, e.g. Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 81 (2d Cir. 2000) ("It is well-
23 settled that a party's failure to call a witness may permissibly support an inference that that witness's
24 testimony would have been adverse."); *Burgess v. United States*, 440 F.2d 226, 231 (D.C. Cir. 1970);
25 *Driscoll v. Stucker*, 2004-0589 (La. 1/19/05), 893 So. 2d 32, 47 ("Despite the advent of modern,
26 liberal discovery rules, this rule remains vital, especially in cases, such as this one, in which a witness
27 with peculiar knowledge of the material facts is not called to testify at trial.").

1
2 The missing witness rule applies where a party demonstrates: (1) that the absent witness was
3 peculiarly within the other party's power to produce, and (2) that the testimony of the witness would
4 elucidate issues in the case. *United States v. Mahone*, 537 F.2d 922, 926 (7th Cir. 1976). The first
5 element “is met both when a witness is physically available only to the opposing party, and when the
6 witness has a relationship with the opposing party ‘that would in a pragmatic sense make his
7 testimony unavailable to the opposing party regardless of physical availability.’” *Id. See also, People*
8 *v. Savinon*, 100 N.Y.2d 192, 200, 791 N.E.2d 401, 406–07 (2003) (“[F]or purposes of
9 the uncalled witness rule, control ‘does not concern physical availability but rather the relationship
10 between the witness and the parties’... Where there is ‘a relationship, in legal status or on the facts, as
11 to make it natural to expect the party to have called the witness to testify in his favor,’ the so-called
12 control element is satisfied”) (citations omitted).

13
14 **B. DPW’s Failure to Produce Ms. Takara at Trial Warrants an Adverse**
15 **Inference Against DPW**

16 Korando is entitled to an adverse inference that Richelle Takara’s testimony would be
17 unfavorable to DPW based on the missing witness rule. With regard to the first element, although
18 DPW has claimed that does not have control over Ms. Takara, a federal employee, this claim is easily
19 debunked. Ms. Takara has authority over the Bile/Pigua project, a federal project. DPW employees,
20 including Mr. Glenn Leon Guererro, Mr. Keeler, the PTG Consultants, and other employees report to
21 Ms. Takara and seek her approval regarding all aspects of the Project -- including DPW’s decisions
22 regarding Korando’s change orders and the approval of all payments to Korando. The relationship
23 between DPW and Ms. Takara is such that it would “be natural to expect” DPW to call Ms. Takara at
24 trial. The first element is clearly satisfied by the nature of the relationship.

25 The second element requires that Ms. Takara’s testimony would elucidate or clarify the issues
26 at the hearing in this matter. There is no question that Ms. Takara’s testimony is material to the issues
27 in this case. The main issues in this Appeal are: (1) whether DPW breached the 12/16/15 Stipulation
28

1 and Order and the terms of the Contract regarding Korando's claims; (2) in failing to timely review
2 and process Korando's claims, whether DPW breached the 12/16/15 Stipulation and Order and its
3 implied covenant of good faith and fair dealing; and (3) whether DPW's denial of Korando's claims
4 was made in bad faith. Ms. Takara's testimony as to all three of these issues are not cumulative of
5 evidence to be presented through other witnesses. Specifically, although DPW was responsible for
6 reviewing and resolving Korando's claim timely and in good faith, all DPW's decisions regarding
7 review, response, payment and acceptance or rejection of the change orders required Ms. Takara's
8 approval. Ms. Takara was presented with DPW's analysis and participated in the decision-making
9 process regarding Korando's claim. DPW itself acknowledged Ms. Takara's role in the process,
10 noting in its March 30, 2018 Response to Korando's Motion to Compel ("3/30/2018 Response to
11 Motion to Compel") that "Following Mr. Moretto's preparation of draft responses...DPW's Director
12 and upper management, John Moretto and other PTG staff members and FHWA's regional
13 representative, Ms. Richelle Takara, discussed and analyzed each claim through a series of meetings
14 and telephone conversations." 3/30/2018 Response to Motion to Compel at 2-3.

16 Korando is entitled to question Ms. Takara regarding her knowledge of the reason behind the
17 lengthy delay in issuing a decision on Korando's claim, and the underlying reasons less than 10% of
18 a contractor claim on this federal project met her approval. This information is uniquely available to
19 Ms. Takara and cannot be substituted by testimony from other individuals.

21 Specifically, Korando intends to question Ms. Takara regarding her June 5, 2017 email to
22 Mike Lanning of Parsons Transportation Group ("PTG") regarding the draft submitted by PTG. In
23 her 6/5/2017 email, Ms. Takara asked follow up questions regarding specific items. *Id.* Ms. Takara
24 further inquired:

25 What is the philosophy behind what we are paying for and not paying
26 for? For example, if a piece of equipment was mobilized for the
27 original contract and then the on-going contract, we are we (sic) paying
28 for? If we paid for an item in the pay applications for the original
contract, we are not paying for it again under the claim?

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

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

5 Korando Ex. 13 at KC217 (6/5/2017 Email from R. Takara to M. Lanning re: RE: Korando
6 Termination claim – question). Mr. Lanning replied to Ms. Takara on June 11, 2017, stating in
7 relevant part, as follows:

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

13 Korando Ex. 14 at KC219 (6/11/2017 Email from M. Lanning to J. Moretto re: RE: Korando
14 Termination Claim – question). It is clear from Mr. Lanning's 6/11/2017 email that he believed DPW
15 would reconsider its decision to award certain amounts at Ms. Takara's direction.

16 Ms. Takara's testimony goes to the heart of Korando's claims and DPW's failure to produce
17 her for the hearing in this matter deprives Korando of a meaningful opportunity to present its case.
18 Accordingly, the Hearing Officer should draw an adverse inference from FPW's failure to produce
19 Ms. Takara that her testimony would have been unfavorable to DPW at trial.

21 III. CONCLUSION

22 For the foregoing reasons, Korando respectfully requests that the Hearing Officer issue an
23 order drawing an inference that Ms. Takara's testimony at the formal hearing in this matter would
24 have been adverse or unfavorable to DPW.

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1 Submitted this 7th day of February, 2019.

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