

1 **TEKER | TORRES | TEKER**
2 SUITE 2A, 130 ASPINALL AVENUE
3 HAGÂTÑA, GUAM 96910
4 TELEPHONE: (671) 477-9891-4
5 FACSIMILE: (671) 472-2601

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

AUG 23 2011

TO: USK BY: JMW
FROM: CPA-PA 11-009

6 *Attorneys for Appellant*

7 OFFICE OF PUBLIC ACCOUNTABILITY
8 PROCUREMENT APPEALS

9 -----
10 IN THE APPEAL OF) DOCKET NO. OPA-PA 11-009
11)
12 HUBTEC INTERNATIONAL CORP.,) APPELLANT'S REPLY TO
13) DPW'S HEARING BRIEF
14 Appellant.)
15 -----

16 I.
17 FACTS.

18 On August 19, 2011, Appellant Hubtec International Corp. ("Hubtec") and the
19 Department of Public Works ("DPW") filed their Hearing Brief. In its Hearing Brief, DPW
20 set forth its Factual Background, Issues Presented by the Parties, and its legal discussion
21 regarding the issues raised. Hubtec does not dispute the factual background set forth by
22 DPW except for the statement that Hubtec had only completed twenty-eight percent (28%)
23 of the project at the time it was terminated and the statement that Hubtec failed to submit
a request for time extension.

1 DPW fails to quantify or explain the criteria by which it determined that only
2 twenty-eight percent (28%) of the project was completed. That figure is further cast in
3 doubt since Hubtec contends that much of the work done is yet to be paid for. With
4 respect to the extension statement, Hubtec denies that it failed to request a time extension
5 in response to the January 25, 2011 letter from DPW. Hubtec had submitted to DPW on
6 more than one occasion, a request for a time extension and had a pending time extension
7 request before DPW that was delivered to the Department in a letter dated December 6,
8 2010. Furthermore, as requested, it submitted to DPW on February 4, 2011, as part of its
9 payment increment 8, its new timeline for completion of the project. No response from
10 DPW has ever been received from DPW on payment increment no. 8 and proposed
11 timeline.

12 II.

13 A BREACH OF CONTRACT.

14 Each party to this agreement claims that the other party is in a breach of contract.
15 Hubtec has raised the issue of whether or not DPW acted in good faith in the performance
16 of this Contract which DPW denies as much in its Hearing Brief and further submits that
17 the standard of proof, "clear and convincing evidence", cannot be met by Hubtec.

18 DPW asserts that at all times it treated Hubtec reasonably, fairly, gave them every
19 accommodation and acted in good faith. During the time that this Contract was going on,
20 there were three different directors or acting directors of the DPW, Lawrence Perez,
21 Andrew Leon Guerrero and Joanne Brown. Even before the bids were made, DPW was
22 in possession of the Geo Engineering and Testing Report prepared for DPW on June 21,
23 2009. The report identified many of the environmental surface and sub-surface problems

1 that would be or could be encountered at the job site. There was no evidence that DPW
2 took the recommendations of the Report into account, either with respect to the bid or in
3 a manner in which DPW handled those issues when Hubtec brought them to the attention
4 of DPW. DPW, either through its director, employees, contract employees or construction
5 manager, failed to responsibly and timely respond to Hubtec when construction issues
6 were raised. Those failures caused significant delays in the project. Hubtec also brought
7 the obvious to the attention of DPW asking for an extension of time because of the
8 problems caused by the rainfall, runoff, saturated ground and subsequent safety issues.
9 DPW never granted an extension of time and, in fact, never responded to Hubtec's letter
10 of December 6, 2010.

11 Instead, DPW argues that one of the reasons it terminated the Contract was the
12 Hubtec did not ask for an extension of time and that simply isn't correct. DPW did send
13 Hubtec a letter on January 25, 2011 telling them they needed to ask for an extension of time
14 because the job was overdue. Hubtec found no need to do so because they had a pending
15 request.

16 There is no one incident that in and of itself Hubtec can point to and say this is the
17 act of bad faith or breach or negligence on the part of DPW. The case cited by the
18 Government to show that Hubtec must show by clear and convincing evidence to
19 overcome a presumption of good faith expressly refers only to situations when the
20 allegation is malice. Here, Hubtec is not alleging hatred, malice, or that sort of bad faith.
21 Hubtec is alleging that through the Governments negligence, the Government did not
22 adequately work with Hubtec in good faith in order to complete the contract. The implied
23 duties of good faith, fair dealing, and cooperation can be breached by failure of a

1 government agency to negotiate and make payment, and a showing of bad faith is not
2 required. Instead, plaintiff can satisfy its burden by proving a lack of diligence or failure
3 to cooperate in the other party's performance. See *Malone v. United States*, 849 F.2d 1441,
4 1445 (Fed.Cir.1988).

5 It is the overall actions and failures by the DPW through its employees and
6 construction manager and contract employees that have to be examined. Did DPW do
7 things wrong? Of course it did. Did Hubtec do things wrong, the answer is yes. On page
8 7 of DPW's Hearing Brief, it outlines eight separate actions by Hubtec that constitutes
9 breach of the contract. The question is whether there is a material breach of the contract
10 that constitutes causation and damages to DPW. DPW points to the use and installation
11 of foreign steel, specifically Korean steel, in the Project and argues that it is a violation of
12 the Buy American Act provision within the Contract. Korean steel holds up the buildings
13 in Korea and holds up a great many buildings on Guam. The use of Korean rebar doesn't
14 necessarily make the construction substandard or insufficient and, in fact, the construction
15 manager, Duenas, Camacho & Associates ("DCA"), was on the job to approve all actions
16 taken by Hubtec. DCA was aware that Korean steel was on the Project because it was
17 openly stored at the staging area by Hubtec. At one point during the project, a discussion
18 was held by Hubtec and the construction manager about the use of the Korean steel and
19 there was no indication given that its usage was not allowed. In fact, in this case,
20 everything that was done by Hubtec had to go through the permission of the construction
21 manager. Hubtec was not out there as a road contractor doing whatever it wanted. They
22 were not out there making determinations as to what plans they would follow or would
23 not follow. Everytime they ran into a problem that wasn't contemplated in the plans or

1 covered by the Contract, they documented the matter and discussed it with the
2 construction manager or wrote the problem up and sent it up the chain of command for
3 approval. Often times those problems dealt with surface and sub-surface matters that
4 prevented work from continuing until there was a response back from DPW and often
5 times, those responses were unreasonably late.

6 Payments which were submitted and approved were also late coming to Hubtec.
7 For example, payment no. 1 took seventy-five (75) days to be paid and although DPW
8 complains out of the fact that Hubtec was late in paying its contractors or failed to pay its
9 contractors it was Hubtec who was having to finance the project with its own funds instead
10 of getting timely incremental payments that allowed it to keep everything on track. It was
11 DPW's delay in responding to issues raised by Hubtec that cause it to have to continue
12 to pay its employees when little or no work was being done. It was DPW who insisted
13 that Hubtec continue on the job despite the climate challenges which eventually led to a
14 notice of violation from the Guam Environmental Protection Agency ("GEPA"). It was
15 GEPA who had said that the project should not continue under the conditions that Hubtec
16 was required to work under.

17 DPW also cites to numerous traffic and OSHA workplace safety violations,
18 however, the contract called for a certain type of traffic markings and the use of cones,
19 plastic markers or wooden markers to redirect traffic. Hubtec sought to follow the
20 drawings but instead was told by the construction manager that it would need to have
21 concrete barriers out there to protect the public and yet when Hubtec created the barriers
22 and installed the barriers, DPW did not pay for them.

23 DPW and Hubtec are supposed to work together on the project to make it work well.

1 There are always issues that come up in a construction project and it is the cooperation
2 between the parties to address those issues and help the project move forward. DPW
3 cited in its termination letter to OSHA violations, however, there were no OSHA violations
4 levied against DPW at the time. It appears that it was DCA or DPW who called OSHA to
5 ask them to inspect the project. Is that clear and convincing evidence that there was a
6 conspiracy forged between DPW and the construction manager to set up Hubtec for
7 violations and grounds for termination since it is one the stated grounds outlined in the
8 termination letter. Why would that claim exist unless DPW knew that OSHA would issue
9 violations ahead of time? In fact, OSHA did levy two violations against Hubtec at the end
10 of July 2011.

11 It all boils down to this. Hubtec was found to be a responsive and reasonable
12 bidder at One Million Eight Hundred Thirty-Five Thousand Forty Dollars (\$1,835,040.00)
13 for the project. Upon its termination, the project was recontracted for Two Million Dollars
14 (\$2,000,000.00) more than what Hubtec bid. The new contractor has the benefit of most of
15 the work done by Hubtec. On reflection, this project was never a project that could be
16 completed within Two Million Dollars (\$2,000,000.00). Had Hubtec had a copy of the Geo
17 Engineering and Testing Report or had DPW written its bid differently or even
18 subsequent to the awarding of the bid considered the information that Geo Engineering
19 and Testing Report this matter may not have ended the way it did.

20 The fact of the matter is the project was not performed on time and Hubtec asked
21 for additional time and documented its reasons. Those requests were denied. The project
22 is now going forward and has been redesigned, in part, to make it more functional. DPW
23 has accommodated the new contractor by giving him two hundred (200) days to finish the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

job which is proportionately more time than Hubtec had under its contract. DPW has allowed the new contractor to actually close Route 2 to allow it to perform its work, something that was not allowed to Hubtec.

The weight of the evidence indicates that DPW is more responsible for the failure of the Project than is Hubtec and, thus, DPW is in breach of the contract.

Dated this 23rd day of August, 2011.

TEKER | TORRES | TEKER

BY  _____

PHILLIP TORRES, ESQ.

ATTORNEYS FOR APPELLANT