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7 **PROCUREMENT APPEAL**
8 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

9
10 In the Appeal of

11 Korando Corporation,

12
13 Appellant.

DOCKET NO. OPA-PA-18-002

**APPELLANT KORANDO CORPORATION'S
HEARING BRIEF**

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17 **I. INTRODUCTION**

18 On September 8, 2015, Korando appealed the Department of Public Work's wrongful
19 termination of its contract with Korando for construction of the Bile/Pigua Bridge Replacement
20 (Project No. GU-NH-NBIS(007)) ("the Project"). See OPA-PA-15-009. Following a final hearing
21 which commenced on December 5, 2015, the parties entered into a *Stipulation and Order to Rescind*
22 *Termination* ("12/16/15 Stipulation and Order"). The parties agreed under the 12/16/15 Stipulation
23 and Order that: (1) DPW would rescind its July 10, 2015 termination of the Contract; (2) a new start
24 day would be no earlier than January 25, 2016 ("New Start Date") and Korando will have original
25 Contract time of 450 days to complete the Project; (3) all liquidated damages were waived through
26 the New Start Date; (4) DPW's would in good faith process Korando's payment applications; and (5)
27 DPW would in good faith process Korando's proposed change orders for among other things, the
28 "[d]emobilization and remobilization costs, materials previously ordered or in store, which cannot be

1 used on the Project due to the delay of the Project, and any other expenses related to the termination
2 and delay of the Project.”

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

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

15 Korando believes the evidence proffered at the Final Hearing will support a breach of
16 12/16/15 Stipulation and Order and the Contract, violation of the covenant of good faith and fair
17 dealing implied therein, and violation of the Open Government Act. As a result of these breaches
18 and violations, the Public Auditor should find that Korando’s claims are valid, and that Korando is
19 entitled to an award of attorney’s fees and costs for this Appeal.

20 **II. DISCUSSION**

21 The main issues in this Appeal are: (1) whether DPW breached the 12/16/15 Stipulation and
22 Order and the terms of the Contract regarding Korando’s claims; (2) in failing to timely review and
23 process Korando’s claims, did DPW breached the 12/16/15 Stipulation and Order and its implied
24 covenant of good faith and fair dealing; and (3) whether DPW’s denial of Korando’s claims was
25 made in bad faith.

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

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

7 5. Upon the signing of this Stipulation Korando can submit written Proposed
8 Change Orders in accordance with the terms and conditions of Korando's
9 Contract. *DPW agrees that it will review on the merits and process the Change*
10 *Orders timely and in good faith, and in accordance with the terms of Korando's*
11 *Contract.* Korando's change orders will include, but are not limited to, the
12 following:

13 a. *Demobilization and remobilization costs, materials previously ordered or*
14 *in store, which cannot be used on the Project due to the delay of the*
15 *Project, and any other expenses related to the termination and delay of*
16 *the Project.*

17 Korando submitted its "Claim Due to Termination and Delay of Project" on October 18, 2016. *See*
18 *Korando Hearing Ex. 9 at KC115-124 ("10/18/2016 Change Order").* It would take over one (1) year
19 for DPW to respond. On November 15, 2017, DPW denied over ninety-five percent 95% of
20 Korando's claims, without providing sufficient justification. Korando timely appealed the Agency
21 Decision on January 16, 2018. *See Korando Hearing Ex. 20 at KC472-490.* As discussed
22 hereinbelow, not only did DPW fail to promptly review and respond to Korando's change order
23 claims, it delayed it for over one (1) year before it responded with a denial of most of the claims. The
24 communications of DPW and the actions of DPW support a finding that DPW improperly denied
25 these Korando's claims.

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1 **1. Korando's Change Order.**

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

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| | Description | Korando's Claim | Approved by DPW |
|----|--|---------------------|--------------------|
| 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 |
| 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 |
| 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 |
| 4. | Office Overhead (5%) | \$20,741.74 | \$374.11 |
| 5. | GRT (4%) | \$19,165.37 | \$1,124.67 |
| 6. | Profit (10%) | \$43,557.66 | \$0.00 |
| 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 |
| | TOTAL | \$701,288.83 | \$29,241.46 |

22 DPW approved 4.17% of Korando's claim *one year* after the claim was submitted. Three years has
 23 passed since the Stipulation was signed, the Bile and Pigua Bay bridges were open to the public on
 24 May 8, 2018, and Korando's claim has not been resolved. Furthermore, Korando has not received
 25 any payments on its claim – even the \$29,241.46 undisputed amount has not been paid by DPW.
 26

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

28 Korando is justified in claiming the amounts under its Change Order under the terms of the

1 12/16/15 Stipulation and Order because:

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

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

20
21 “Demobilization and remobilization costs, materials previously ordered or
22 in store, which cannot be used on the Project due to the delay of the
Project, and any other expenses related to the termination and delay of the
Project.”

23
24 My focus at the time I reviewed this language was on [Korando] and not
25 particularly on costs associated with Westchester Fire Insurance Company,
[Korando’s] Surety. *In revisiting the issue of whether DPW is obligated*
26 *to pay Surety’s costs the answer is clearly yes. Surety’s costs and*
27 *attorneys fees are obviously related to the termination of the Project.*
28 *Further, separate and apart from DPW’s obligations under the*
Stipulation, DPW is contractually obligated under the parties November
2016 Takeover Agreement to pay said charges under the Takeover
Agreement.... (emphasis supplied).

1 *Id.*

2 4. DPW has agreed that Office Overhead of 5% is reasonable and recoverable as part of the
3 delay claim, along with GRT of 4%.

4 5. Profit is an allowable element of equitable adjustments. Here, Korando is asking for a
5 10% profit which is a reasonable rate.

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

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

9 *1. Factual Summary*

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

- 11 • Korando first notified DPW of its claim on **October 3, 2016**, submitting a narrative of event
12 leading to and justifying its claims.¹
- 13 • On **October 18, 2016**, Korando formally submitted a Letter from Byong Ho Kim to Glenn
14 Leon Guerrero regarding the "Claim Due to Termination and Delay of Project," along with
15 supporting exhibits.² On December 5, 2016, Korando inquired as to the status of its claim.³ In
16 response, DPW claimed that "the claim is under review and a response is being prepared." *Id.*
17 at KCSUPP767.
- 18 • On **December 28, 2016**, DPW sent Korando a letter requesting additional backup documents
19 and clarification of specific items noted in Korando's claim.⁴
- 20 • Less than one month later, on **January 24, 2017**, Korando replied to DPW, submitting
21 additional supporting documents, as DPW requested.⁵ After Korando submitted additional
22 documents on January 24, 2017, DPW did not request any further supplemental material to
evaluate Korando's claim.
- 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.⁶ Of the Eight

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

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

25 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).

26 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).

27 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).

28 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).

1 Hundred Eighty-Five Thousand, Six Hundred Eleven dollars and Sixty-Seven cents
2 (\$885,611.67) Korando requested in its claim, PTG determined that Korando was only
3 entitled to Twenty-Nine Thousand, One Hundred Fifty-Six dollars and Four cents
4 (\$29,156.04).⁷ PTG did not describe at that time the basis for its findings. DPW did not notify
5 Korando of these initial findings.

- 6 • On **March 10, 2017**, Korando again inquired as to the status of its claim, requesting a meeting
7 with PTG regarding the issue.⁸
- 8 • On **March 21, 2017**, Korando again requested an update regarding the status of its claim.⁹ In
9 its 3/21/2017 email communication, Korando referenced a prior communication in which
10 Korando proposed splitting the original claim, which included claims from Smithbridge, to
11 expedite DPW's processing of Korando's claim.¹⁰ Jack Kim of Korando, noted the
12 importance of timely resolution of Korando's claim, "As I've already mentioned, it's crucial
13 we get that claim ASAP in order to finance and complete Bile/Pigua Project."¹¹
- 14 • On **March 22, 2017**, PTG emailed Tom Keeler, counsel for DPW, following up on PTG's
15 February 9, 2017 Analysis of Korando's claim, and asking if DPW had additional questions
16 and if DPW had "enough information for a response letter regarding the claim."¹²
- 17 • On **April 13, 2017**, PTG prepared a draft DPW response to Korando's claim, requesting Mr.
18 Keeler's input regarding surety costs.¹³
- 19 • On **May 10, 2017**, Korando again requested a status update on its claim.¹⁴ As of May 10,
20 2017, DPW's draft response was pending review and input from DPW's counsel, Mr. Keeler.
21 ¹⁵
- 22 • On **May 11, 2017**, Mr. Keeler emailed PTG and DPW Deputy Director Joaquin Blaz to
23 discuss the compensability of Korando's surety claim. Mr. Keeler stated in relevant part as
24 follows:
25

26 At the time the Stipulation was negotiated I advised that sums due Core Tech would
27 be limited to:
28

21 ⁷ *Id.* at KCSUPP783.

22 ⁸ *See* Korando Ex. 35 at KCSUPP785 (3/10/2017 Email from Ki Wook Han to D. Yao re: Requesting meeting re:
23 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) –
28 Bile/Pigua Bridges Replacement – Claim due to Termination and Delay of Project).

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).

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

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

11

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

- 15 • On **June 5, 2017**, PTG forwarded DPW’s draft response to Korando’s claim to Richelle
16 Takara, the Department of Transportation Federal Highway Administration Representative on
17 the Bile/Pigua Project.¹⁷ The 6/5/2017 draft DPW response notes at Section 6 that Mr. Keeler
18 requested addition of items related to surety costs.¹⁸ Specifically, the 6/5/2017 draft stated that
19 DPW would agree to pay approximately \$130,000.00 to the surety for Vertex Engineering and
20 attorneys fees.¹⁹
- 21 • On **June 5, 2017**, Ms. Takara emailed Mr. Lanning regarding the draft submitted by PTG.²⁰
22 In her 6/5/2017 email, Ms. Takara asked follow up questions regarding specific items. *Id.* Ms.
23 Takara further inquired:

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

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

You don’t have to explain the WFIC costs... we have the philosophy on that
item figured out.²¹

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).

²¹ *Id.*

- 1
- 2 • Mr. Lanning replied to Ms. Takara on **June 11, 2017**, stating in relevant part, as follows:

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

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

- 12
- 13 • On **September 18, 2017**, PTG emailed Mr. Keeler and Ms. Takara a new draft DPW response
14 to Korando's claim.²³ In its 9/18/2017 email, PTG noted that "DPW determined that
15 \$33,410.25 out of \$885,661.69 claimed by Korando is eligible for reimbursement per the
16 Stipulation."²⁴ In its 9/18/2017 draft response to Korando's claim, DPW states for the first
17 time that it did not agree that surety costs were reimbursable.²⁵ DPW did not explain in the
18 9/18/2017 draft the logic behind this determination, or why it reversed its position in the
19 6/5/2017 draft or the position stated by Mr. Keeler in his 5/11/2017 email.
- 20 • On **September 20, 2017**, Mr. Keeler responded to PTG's 9/18/2017 email.²⁶ In his 9/20/2017
21 email, Mr. Keeler stated that he did not believe he should be the point of contact referenced in
22 the 9/18/2017 draft DPW response to Korando's claim, because "I am not familiar with how
23 the figures were calculated. As such, if contacted all I can say is that the figures were prepared
24 by consultants."²⁷
- 25 • On **October 5, 2017**, Korando again requested a status update on its claim.²⁸ In its 10/5/2017
26 email, Korando noted that it had been almost a year to the day since Korando submitted its
27 claim.²⁹ Korando further stated:

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

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

23 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 ²⁴ *Id.*

25 ²⁵ *Id.*

26 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 ²⁷ *Id.*

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

29 ²⁹ *Id.*

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

- 6 • On **October 17, 2017**, Korando submitted a reformatted version of its claim, in the hopes of
7 simplifying the review process for DPW.³¹
- 8 • On **November 14, 2017**, PTG circulated the final draft of DPW's response to Korando's
9 claim, as approved by PTG, Mr. Keeler and Ms. Takara.³²
- 10 • On **November 15, 2017**, DPW finally issued its Response to Korando's claim, Three
11 Hundred Ninety-Four (394) days after Korando submitted its claim. In its 11/15/2017 Letter,
12 DPW approved Twenty-Nine thousand, Two Hundred Forty-One dollars and Forty-Six cents
13 (\$29,241.46) of Korando's claim.³³ This ultimate determination awarded less than One
14 hundred dollars (\$100) more than the initial amount PTG determined should be awarded
15 February 9, 2017, more than nine (9) months prior. Consistent with its 9/18/2017 draft
16 response, DPW did not award any surety costs.

13 2. *Duty of Good Faith and Fair Dealing*

14 "Every contract imposes upon each party a duty of good faith and fair dealing in its
15 performance and its enforcement." *Rest.2d Contracts*, §205. Good faith is defined by the Guam
16 Uniform Commercial Code as "honesty in fact in the conduct or transaction concerned," 13 G.C.A. §
17 1201 (19), and in the context of merchants as "honesty in fact and the observance of reasonable
18 commercial standards of fair dealing in the trade." 13 G.C.A. §2103 (1)(b). The implied covenant of
19 good faith and fair dealing "requires each contracting party to refrain from doing anything to injure
20 the right of the other to receive the benefits of the agreement." *Baza v. Guam Memorial Hospital*
21 *Plan, Inc.*, Superior Court of Guam Civil Case no. 1146-87 (Decision and Order, May 2, 1988)(citing
22 *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, 145, 169 Cal. Rptr. 691 (1979). It "operates as a
23 kind of safety valve to which judges may turn to fill gaps and qualify or limit rights and duties
24 otherwise arising under rules of law and specific contract language." *Ada's Inc. v. First Hawaiian*
25

26 _____
27 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.

1 *Bank*, Superior Court of Guam Civil Case No. CV0785-02 (Disisyon yan Oden, July 7, 2003) (citing
2 *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 684, 254 Cal.Rptr. 211 (1988).

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

10
11 The implied covenant of good faith and fair dealing preserves the integrity and spirit of the
12 agreement where the agreement allows parties to exercise discretion in their conduct. The covenant is
13 breached “where a party to a contract acts in a manner that, although not expressly forbidden by any
14 contractual provision, would deprive the other party of the right to receive the benefits under their
15 agreement.” *Fourth Branch Associates Mechanicville v. Niagara Mohawk Power Corp.*, 235 A.D.2d
16 962, 965-966, 653 N.Y.S.2d 412, 416 (N.Y.A.D. 3 Dept., 1997) (citing *Jaffe v. Paramount*
17 *Communications*, 222 A.D.2d 17, 22-23, 644 N.Y.S.2d 43 (N.Y. App. Div., 1996).

18
19
20 **3. DPW Failed to Comply with the Stipulation and Breached the Implied**
21 **Duty of Good Faith and Fair Dealing When It Did Not Timely Review**
22 **and Process Korando's Claim**

23 In its Agency Report, DPW contends that it complied with the 12/16/2015 Stipulation and
24 Order and the Korando Contract's requirement that it evaluate change orders timely and in good
25 faith. DPW noted that on December 28, 2016, over two months after Korando submitted its
26 10/18/2016 Change Order, DPW requested additional documents in support of the Change Order,
27 which Korando responded to on January 24, 2017. Agency Report at 3. DPW then claims that
28 ordinarily it would have responded in March or April 2017 (5-6 months after the Change Order was

1 submitted and 2-3 months after Korando provided DPW's requested documents). However, it claims
2 that it "required additional time" to properly evaluate the 10/18/2016 Change Order because Korando
3 submitted "unreasonable excessive claims" and a good faith detailed review required the involvement
4 of a number of people. *Id.* Korando submits that issuance of a denial of a change order thirteen (13)
5 months later is prima facie evidence of bad faith.
6

7 Though DPW claims that it needed additional time to review the claim because Korando
8 submitted "unreasonable excessive claims," it did not request any further information or material
9 from Korando after Korando submitted supplemental material on January 24, 2017. Korando
10 vigilantly pursued its claim, periodically requesting status updates and meetings with DPW and PTG
11 to discuss its claim in an effort to resolve it in a timely matter. Korando notified DPW of the obvious
12 hardship associated with not having its claim resolved – it needed the claim resolved to finance and
13 complete the Project. This fact had no impact on DPW – it continued to delay resolution of
14 Korando's claim. The amount DPW ultimately awarded to Korando was not substantially different
15 from the amount initially determined by PTG in February 2017. DPW's failure to resolve the claim
16 earlier is attributable solely to DPW's apathy.
17

18 DPW failed to act with the timeliness required by the 12/16/2015 Stipulation and Order.
19 While the 12/16/2015 Stipulation and Order did not specify a deadline within which DPW must act,
20 the fact that it required timely review at all demonstrates that the issue of timeliness was important to
21 Korando, and required DPW to act in good faith. DPW was required to refrain from injuring
22 Korando's rights to a timely review of its claims. It took DPW nearly 400 days to resolve Korando's
23 claim. During that time, Korando continued to perform as required under its contract with DPW
24 despite the strain on its resources resulting from DPW's failure to process its claim. Korando
25 completed work on the Project in May 2018, and DPW continues to withhold proper payment of
26 Korando's claim, further compounding Korando's injury.
27
28

1 Had DPW timely reviewed and processed Korando's claim, even if it persisted in the
2 improper amount it ultimately awarded, it would have afforded Korando an opportunity to appeal
3 DPW's decision sooner and achieve a final resolution by the Public Auditor. In its Agency Report,
4 DPW also referenced 5 GCA §5427(f) in support of its timeliness argument. Agency Report at 3-4.
5 Section 5427(f) provides in relevant part that:
6

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

11 5 GCA §5427(f) (emphasis added). Because Korando timely filed this Appeal after DPW rendered its
12 November 17, 2017 Denial, DPW has characterized Korando's actions as a "failure to exercise its
13 statutory rights under Guam's Procurement Code" which bars Korando from alleging that DPW acted
14 in bad faith. Agency Report at 5.

15 This argument is absurd. Use of the term "may" in Section 5427 is permissive. It allows
16 Korando the discretion to immediately appeal DPW's failure to issue an agency decision within sixty
17 (60) days. *See Koji v. Neves*, 2016 Guam 36, ¶ 35("The word 'may,' when used in a statute, usually
18 implies some degree of discretion.") (quoting *United States v. Rogers*, 461 U.S. 677, 706 (1983)).
19 The statute does not support DPW's claim that in electing to wait until DPW issued a written
20 decision, Korando somehow waived any claims it would have to DPW's bad faith delay.
21

22 Waiver requires a finding that there was a voluntary and intentional relinquishment of a
23 known right. *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules N.W., Inc.*, 28 Wash.App. 59, 61, 621
24 P.2d 791 (1980). As the court held in *Wagner v. Wagner*, 95 Wash. 2d 94, 102, 621 P.2d 1279, 1283-
25 84 (1980):
26

27
28 It is necessary that the person against whom waiver is claimed have intended to
relinquish the right, advantage, or benefit and his action must be inconsistent

1 with any other intent than to waive it. Further, to constitute a waiver, other than
2 by express agreement, there must be unequivocal acts or conduct evincing an
intent to waive. Intent cannot be inferred from doubtful or ambiguous factors.

3 *Id.* The burden of demonstrating waiver by a preponderance of the evidence is on Intervenor-
4 Appellees. *Seattle-First Nat. Bank v. Gibbons*, 953 F.2d 1388 (9th Cir. 1992)(“A party claiming
5 waiver must show that the opposing party intended to waive the right.”)(citing *Wagner v. Wagner*,
6 *supra*, at 1283-84 (1980)). DPW has not referenced any statutes or cases supporting its position,
7 which is fatal to its argument. It has not met its burden of demonstrating waiver by a preponderance
8 of the evidence. Accordingly, the OPA should reject DPW’s attempt to limit Korando’s rights to
9 appeal on the basis of bad faith.
10

11 **4. DPW Denied Most of Korando’s Claim in Bad Faith**

12 DPW denied over ninety-five percent 95% of Korando’s claims. As noted, the 12/16/2015
13 Stipulation and Order provides in relevant part as follows:
14

15 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**
16 **agrees that it will review on the merits and process the Change Orders timely and in**
17 **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:

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

21 It is clear from communications between PTG and Ms. Takara, however, that the overall
22 policy in resolving Korando’s claim was to only pay for demobilization/remobilization costs.
23 Korando Ex. 14 at KC219 (6/11/2017 Email from M. Lanning to J. Moretto re: RE: Korando
24 Termination Claim – question). It is unclear from PTG’s communications who directed the policy
25 stated by PTG. It is clear, however, that the policy violates the express language of the 12/16/2015
26 Stipulation and Order, in which DPW agreed to consider in good faith not just demobilization and
27 remobilization costs but also materials previously ordered or in store, which cannot be used on the
28

1 Project due to delay, and any other expenses related to the termination and delay of the Project. *Id.*
2 Mr. Keeler negotiated the 12/16/2015 Stipulation and Order on DPW's behalf. *See* Korando Ex. 3 at
3 KC97 (12/15/2015 Email from T. Keeler to G. Leon Guerrero re: 12-16-15 DPW-Korando DRAFT
4 Stipulation and Order). In his December 15, 2015 email to DPW, Mr. Keeler acknowledged that the
5 issue of change orders was crucial to Korando's approval of the stipulation, and that a representation
6 regarding compensation for demobilization and remobilization would "greatly facilitate settlement."
7 *Id.* To the extent DPW knew at the time it executed the 12/16/2015 Stipulation and Order that it did
8 not intend to fulfil its obligations thereto, but agreed to do so anyway to induce Korando to enter into
9 the stipulation, DPW's actions constitute fraud in the inducement.
10

11 Korando would not have agreed to the 12/16/2015 Stipulation and Order if DPW did not
12 agree to review all claims for expenses related to the termination and delay of the Project in good
13 faith. DPW's ultimate decision to renege on its agreement to consider other classes of delay expenses
14 and to limit recovery of Korando's claim strictly to demobilization and remobilization costs despite
15 its clear obligations under the 12/16/2015 Stipulation and Order deprives Korando of its right to
16 receive the benefits it was entitled it under the 12/16/2015 Stipulation and Order. *See Fourth Branch*
17 *Associates Mechanicville v. Niagara Mohawk Power Corp.*, 235 A.D.2d 962, 965-966, 653 N.Y.S.2d
18 412, 416 (N.Y.A.D. 3 Dept.,1997).
19
20

21 Korando is obviously injured by DPW's arbitrary decision not to award Korando surety costs.
22 The fact that these costs are reimbursable under the express language of the 12/16/2015 Stipulation
23 and Order is not subject to reasonable dispute. In fact, Mr. Keeler himself agrees. In his 5/11/2017
24 Email to Mr. Lanning re: DPW & Bile/Pigua Bridges Reconstruction – Korando's Delay Claims, Mr.
25 Keeler admits that he did not anticipate the fact that surety costs would be reimbursable under the
26 12/16/2015 Stipulation and Order. *See* Korando Ex. 42 at KCSUPP806. Mr. Keeler admits however
27 that upon further review, the costs clearly are reimbursable:
28

1 In revisiting the issue of whether DPW is obligated to pay Surety's costs the
2 answer is clearly yes. Surety's costs and attorneys fees are obviously related to
3 the termination of the Project. Further, separate and apart from DPW's
4 obligations under the Stipulation, DPW is contractually obligated under the
5 November 2016 Takeover Agreement to pay said charges under the Takeover
6 Agreement [].

7

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

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

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

16 Korando Ex. 20 at KC478. Korando vehemently disputes that Korando breached its contract with
17 DPW. Further, DPW waived this argument when it entered into the 12/16/2015 Stipulation and
18 Order, rescinded Korando's termination, and agreed to award claims for any expenses related to the
19 delay, which, as Mr. Keeler succinctly summarized, include surety costs, even if Mr. Keeler failed to
20 properly advise DPW accordingly at the time it entered the 12/16/2015 Stipulation and Order.
21 Korando bargained for DPW's review and award of surety costs, and in denying wholesale the award
22 of Korando's claim for surety costs, DPW acted in bad faith. Its own attorney advised it to pay this
23 claim. It has no proper justification not to comply.

24 III. CONCLUSION

25 Korando requests a ruling from the OPA as follows:

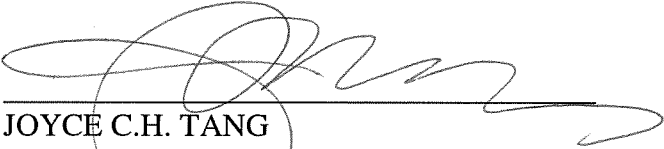
- 26 1. DPW breached the 12/16/15 Stipulation and Order;
- 27 2. DPW breached the Korando Contract;
- 28 3. DPW breached the implied covenant of good faith and fair dealing implied in both the
Korando Contract and the 12/16/15 Stipulation and Order;

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- 4. DPW breached the Open Government Act in its consideration of Korando's claim;
- 5. For an award of reasonable attorney's fees and costs of this appeal; and
- 6. For such other relief that the OPA may determine is just and proper.

Submitted this 20th day of May, 2018.

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