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3 **CIVILLE & TANG PLLC**
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8 VANESSA L. WILLIAMS
9 **LAW OFFICE OF VANESSA L. WILLIAMS, P.C.**
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RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: Feb 7, 2019

TIME: 4:03 AM PM BY: FDJ

FILE NO OPA-PA: 18-002

11 **PROCUREMENT APPEAL**

12 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

13 In the Appeal of

14 Korando Corporation,

15 Appellant.

DOCKET NO. OPA-PA-18-002

DECLARATION OF JOYCE C.H. TANG

16 I, **JOYCE C.H. TANG**, hereby declare that:

17 1. I am Counsel of record for Appellant Korando Corporation (“Korando”), and submit
18 this declaration in support of Korando’s Motion for Adverse Inference.

19 2. I have personal knowledge of the facts set forth herein, and if called upon to testify, I
20 would and could competently testify thereto.

21 3. Attached as **Exhibit 1** is a true and correct copy of the November 23, 2018 Subpoena
22 issued by the Hearing Officer in this matter to Richelle Takara.

23
24
25
26
27
28
ORIGINAL

EXHIBIT 1

1 Joyce C.H. Tang
2 Leslie A. Travis
3 **CIVILLE & TANG PLLC**
4 330 Hernan Cortez Avenue Ste. 200
5 Hagåtña, Guam 96910
6 Tel: (671) 472-8868/9
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9
10 **PROCUREMENT APPEAL**
11 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

12 In the Appeal of

DOCKET NO. OPA-PA-18-002

13 Korando Corporation,

SUBPOENA TO RICHELLE TAKARA

14 Appellant.

15 **TO: RICHELLE TAKARA**

16 YOU ARE HEREBY ORDERED to appear before the Public Auditor, Office of Public
17 Accountability, Room 907, 238 Archbishop Flores Street, Hagåtña, Guam, on **Monday, December**
18 **17, 2018 at the hour of 9:00 a.m.**, and on such further dates and times as ordered, to testify on behalf
19 of Plaintiff Korando Corporation in the above-captioned matter. *See* 2 G.A.R. Div. 4 §12108(d) *and*
20 5 GCA § 9217.
21

22 If you fail to attend or answer as a witness, you may be deemed guilty of contempt, and liable
23 to pay all losses and damages sustained thereby by the parties aggrieved.
24

25 **SO ORDERED** this 23^d day of November, 2018.

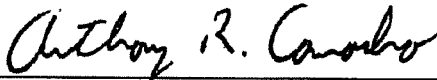
26 
27 **ANTHONY R. CAMACHO, ESQ.**
28 Hearing Officer

EXHIBIT 2



Leslie Travis <ltravis@civilletang.com>

Korando Appeal, OPA-PA-18-002; Subpoena to Richelle Takara

Leslie Travis <ltravis@civilletang.com>

Tue, Dec 4, 2018 at 4:05 PM

To: Tom Keeler <tkeeler@guamag.org>, Joyce Tang <jtang@civilletang.com>

Tom,

The Hearing Officer has issued Korando's Subpoena to Richelle Takara for the formal hearing on December 17, 2018. I am writing to formalize Korando's inquiry as to whether you are willing to accept service of the subpoena on her behalf. I have attached it here for your review.

Please let us know.

Thank you,
Leslie

--

Leslie Travis

CIVILLE & TANG, PLLC

330 Hernan Cortez Ave. Ste. 200

Hagatna, GU 96910

Tel: 671.472.8868/9

Fax: 671.477.2511

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 **Subpoena to Richelle Takara.pdf**
29K

EXHIBIT 3



Leslie Travis <ltravis@civilletang.com>

Korando Appeal, OPA-PA-18-002; Subpoena to Richelle Takara

Tom Keeler <tkeeler@guamag.org>

Wed, Dec 5, 2018 at 11:34 AM

To: Leslie Travis <ltravis@civilletang.com>, Joyce Tang <jtang@civilletang.com>, Linda Hernandez <lhernandez@guamag.org>

Leslie and Joyce,

I am not authorized to accept service of the subpoena on behalf of the FHWA's Ms. Richelle Takara. I suggest that you contact FHWA's legal counsel, who I believe your office has previously communicated with. If assistance is needed, I can request that Ms. Takara provide her agency's counsel's contact information.

Also, am I correct in assuming that your office will coordinate with the OPA on Skype or other equipment needed for the hearing?

Please note that DPW's Director is traveling most of December. He returns from a trip on Monday, December 17, 2018, and then departs for vacation Wednesday, December 19, 2018. He does not return until January 7, 2019. He is available to testify Tuesday, December 18, 2018. PTG's employee Derrick Lehman will be on island through Wednesday, December 19, 2018.

Finally, Joaquin Blaz, DPW's Acting Highway Administrator, father's health is failing. He has been served a Subpoena however it is possible that Kin's father will need to be medivaced to Hawaii. If so, Mr. Blaz intends on traveling with his father. In this event, we will coordinate on a convenient time and date for him to testify via Skype.

Please contact me if you have any questions. Thanks.

Tom

Saina Ma'ase,
Si Thomas P. Keeler
Assistant Attorney General
Office of the Attorney General
590 South Marine Corps Dr.
Ste. 706, ITC Bldg.
Tamuning, Guam 96931
Tel. No.: (671) 475-3324
Fax No.: (671) 472-2493
Email: tkeeler@guamag.org
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From: Leslie Travis [ltravis@civilletang.com]
Sent: Tuesday, December 04, 2018 4:05 PM
To: Tom Keeler; Joyce Tang
Subject: Korando Appeal, OPA-PA-18-002; Subpoena to Richelle Takara

Tom,

The Hearing Officer has issued Korando's Subpoena to Richelle Takara for the formal hearing on December 17, 2018. I am writing to formalize Korando's inquiry as to whether you are willing to accept service of the subpoena on her behalf. I

2/7/2019

Civille & Tang PLLC Mail - Korando Appeal, OPA-PA-18-002; Subpoena to Richelle Takara

have attached it here for your review.

Please let us know.

Thank you,
Leslie

--

Leslie Travis

CIVILLE & TANG, PLLC

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Hagatna, GU 96910

Tel: 671.472.8868/9

Fax: 671.477.2511

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[Quoted text hidden]

EXHIBIT 4

CIVILLE & TANG, PLLC

www.civilletang.com

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

December 10, 2018

VIA E-MAIL

(brett.gainer@dot.gov)

Brett Gainer, Esq.
Federal Highway Administration
California Division
650 Capitol Mall, Suite 4-100
Sacramento, CA 95814-4708

***Re: In the Appeal of Korando Corporation, OPA-PA-18-002;
Request for Testimony of Richelle Takara***

Dear Mr. Gainer:

I am writing in reference to our telephone conference on December 7, 2018. As we discussed, the hearing officer in the above-captioned matter issued a subpoena to Richelle Takara, FHWA Assistant Division Administrator, Hawaii Division for a hearing scheduled to commence on December 17, 2018 before the Guam Office of Public Accountability.

This is a procurement appeal of the Guam Department of Public Works ("DPW") denial of Korando Corporation's ("Korando") request for a change order related to a FHWA project, the Bile/Pigua Bridge Construction in Merizo, Guam ("the Project"). Three years ago, on December 16, 2015, DPW entered into a stipulated settlement with Korando to resolve Korando's appeal of DPW's prior improper termination of Korando for the Project. In the Stipulation, Korando was permitted to complete work on the Project and DPW agreed to consider, in good faith, change orders for Korando's demobilization and remobilization costs, the cost of materials that were stored for the Project but were unusable as a result of the stopping of the Project, and other expenses related to the termination and delay of the Project.

On October 18, 2016, Korando submitted a change order for DPW's review. In February 2017, Parson's Transportation Group ("PTG"), DPW's consultant project manager, prepared and circulated its analysis of Korando's claim, proposing to approve less than ten percent (10%) of Korando's \$701,288.83 claim. In a June 11, 2017 email between Ms. Takara and PTG, Ms. Takara asked what the philosophy was behind the award, to which PTG responded that it had received instructions to award only demobilization and remobilization costs. Despite being informed that DPW did not intend to honor its agreement to consider in good faith other expenses related to termination and delay of the Project, Ms. Takara approved DPW's decision to award Korando less than 10% of the amount Korando sought on the change order. Ms. Takara's decision unreasonably denied Korando, the contractor on a federal highway project, fair compensation under the settlement

Brett Gainer, Esq.
December 10, 2018
Page 2

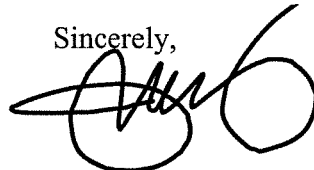
agreement.

Ms. Takara is a key witness in Korando's appeal. We understand the DOT's general policy against its employees providing testimony during hearings and trials between private parties. However, given Ms. Takara's direct involvement in the decision-making process for the change order at issue, it is imperative that Korando be permitted to question her about her involvement. To this end, Korando requests that Ms. Takara be present to testify at the December 17, 2018 hearing.

You have suggested that Korando withdraw its Subpoena to Ms. Takara, and instead submit a formal request for interrogatories. Interrogatory responses are always drafted by counsel, rarely candid, and do not provide an opportunity for follow up. As such, they are an entirely unsatisfactory alternative to live testimony. We do not believe interrogatories will suffice under the circumstances of this case. We are willing to accommodate Ms. Takara by agreeing that she be permitted to testify under oath by video.

In the event the DOT denies Korando's request that Ms. Takara testify at the hearing in this matter, we will notify the hearing officer regarding the denial, and consider withdrawing Korando's Subpoena. Please advise regarding the DOT's position regarding Ms. Takara's testimony.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joyce C.H. Tang', with a large, stylized flourish at the end.

Joyce C.H. Tang

EXHIBIT 5



U.S. Department
of Transportation
Federal Highway
Administration

OFFICE OF THE CHIEF COUNSEL
Western Legal Services Division
Sacramento Office
December 14, 2018

650 Capitol Mall
Suite 4-100
Sacramento, CA
Telephone: 916-498-5891

In Reply Refer To:
HCC-WE

Joyce C.H. Tang, Esq.
Civille & Tang, PLLC
330 Herman Cortez Ave., Suite 200
Hagåtña, Guam 96910
jtang@civilletang.com

SENT VIA ELECTRONIC MAIL

Re: In the Appeal of Korando Corporation, OPA-PA-18-002;
Guam Office of Public Accountability

Dear Ms. Tang:

The Federal Highway Administration (FHWA), an operating administration of the U.S. Department of Transportation (Department), has reviewed your December 10, 2018, request for the deposition testimony of Ms. Richelle Takara, Assistant Division Administrator for FHWA's Hawaii Division Office. We understand the Korando Corporation (Korando), which you represent, is engaged in an administrative contract claim proceeding against the Guam Department of Public Works (GDPW) regarding the Bile/Pigua Bridge Project (Project) in Merizo, Guam, a federal-aid project.

The FHWA is not a party to this administrative proceeding. On November 23, 2018, a hearing officer in Guam's Office of Public Accountability issued a subpoena for Ms. Takara to appear at a hearing in this matter and provide testimony. As you should be aware, the territorial administrative forum in which the action is pending has no general subpoena power with respect to an agency of the federal government such as FHWA.

Your request, submitted pursuant to the provisions of 49 CFR Part 9, Testimony of Employees of the Department and Production of Records in Legal Proceedings (Part 9 or *Touhy* regulations) seeks Ms. Takara's testimony regarding her involvement, if any, in GDPW's denial of Korando's request for a change order related to the Project. Your letter claims Ms. Takara is a "key witness" in the appeal process.

Upon consideration and for the reasons set forth below, FHWA hereby denies the request.

In Part 9, the Department promulgated regulations governing the testimony of its employees and the discovery and disclosure of its documents and records. The U.S. Supreme Court case of

United States ex. rel. Touhy v. Ragen, 340 U.S. 462 (1951), and the federal “housekeeping” statute provide the legal foundation for those regulations. In *Touhy*, the Supreme Court recognized the authority of the heads of federal agencies to restrict the testimony of federal employees by regulation.

The regulations in Part 9 set forth a general prohibition against allowing employee testimony in legal proceedings between private litigants unless authorized by agency counsel. 49 C.F.R. § 9.5. The reasons for the prohibition against employee testimony include: conserving the time of employees for conducting official business; minimizing the possibility of involving the agency in controversial issues not related to its mission; maintaining the impartiality of the Department among private litigants; avoidance of spending the time and money of the United States for private purposes; and protecting confidential, sensitive information and the deliberative process of the agency. See 49 C.F.R. § 9.1(b).

Exceptions to this prohibition are allowed under very limited circumstances. Testimony is permitted only when the deviation will not interfere with matters of operational necessity and when agency counsel determines that: the exception is in the best interests of the Department or the United States; it is necessary to prevent a miscarriage of justice; or the Department has an interest in the decision that may be rendered in the legal proceedings. 49 C.F.R. § 9.1(c).

As noted above, your letter requested Mr. Takara’s testimony “regarding the decision-making process for the change order at issue.” However, your letter indicates Koranda is in possession of emails from Ms. Takara regarding the issue. These emails speak for themselves.

Moreover, as a general matter, the Department’s *Touhy* regulations establish a policy against Departmental employees disclosing confidential or privileged information, such as the deliberative process behind agency decisions. §9.9(b)(3). While such testimony is not strictly forbidden it would be permitted only in exceptional circumstances. One of the stated purposes of the regulations is “[t]o protect confidential, sensitive information and the deliberative processes of the Department,” yet that is precisely what your deposition seeks to discover. The agency objects to your request for Ms. Takara’s testimony on the grounds, among others, that the information sought is protected from disclosure by the deliberative process and other privileges. Were FHWA to allow Ms. Takara’s deposition, it would thereby permit counsel for both sides in the administrative litigation to probe FHWA’s deliberations.

Another purpose of the *Touhy* regulations is to “[m]aintain the impartiality of the Department among private litigants.” FHWA has not attempted to intervene and is not a named party in this litigation. As a result, FHWA is not taking a position on the merits of this administrative action.

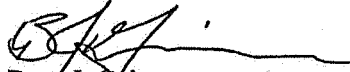
Further, in order to treat litigants equitably, if the agency were to grant this request it would also have to grant requests for testimony in many other cases. The cumulative effect of the type of testimony sought here would severely erode the agency’s ability to conduct its important business and activities. *Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007) (noting an agency’s legitimate concern about the potential cumulative effect of responding to multiple individual subpoenas). FHWA has a limited number of employees and the agency lacks the resources to spare them to participate in private litigation. The time needed to prepare for and appear at a

deposition is time that cannot be spent performing the agency's official operational duties. Each day an employee spends preparing for and testifying at a deposition is a day that he or she is kept away from the agency's official business. Consequently, FHWA's public safety mission would be adversely affected, which would not be in the best interests of the agency or the United States under 49 C.F.R. § 9.1(c)(3).

Your letter proposes the testimony of Ms. Takara but does not specify the duration of the deposition. We assume, therefore, the requested testimony would take at least one day. Ms. Takara would need to prepare for the deposition and review documents and other materials. The time Ms. Takara would need to perform those activities would be at the expense of her official duties. Taking Ms. Takara away from her primary duties for at least two days to prepare for and testify about a dispute between private litigants would not be in the best interests of the Department or the United States. If the agency were to routinely accede to requests from private parties for the testimony of its employees, FHWA's official business would be severely hindered. As a result, the time and money of the United States would be spent for private purposes. *See, e.g., Houston Bus. Journal v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1213 (D.C. Cir. 1996) noting that "courts are not free-standing investigative bodies whose coercive power may be brought to bear at will").

For the reasons set forth above, FHWA is denying your request to take testimony from Ms. Takara. If you have any further questions, please do not hesitate to contact me directly at 916-498-5891.

Sincerely,



Brett J. Gainer
Sr. Attorney

cc: Richelle Takara, FHWA Hawaii Division Office (email)
Ralph Rizzo, FHWA Hawaii Division Office (email)
Lance Hanf, FHWA Western Legal Services Division (email)
Adam Sleeter, Sr. Attorney, FHWA Program Legal Services Division (email)
Joy Park, Trial Attorney, USDOT Office of the General Counsel (email)