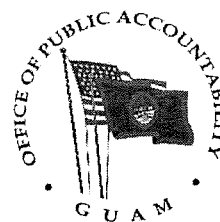


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 Hagåtña, Guam 96910



FAX

To:	Mr. Glenn Leon Guerrero Director Department of Public Works 542 North Marine Corps Drive Upper Tumon, Guam 96913 Phone: (671)646-3121/3232 Fax: (671) 649-6178	From:	Doris Flores Brooks Guam Public Auditor Office of Public Accountability
		Pages:	10 (including cover page)
CC:	Joyce C.H. Tang, Esq. (Attorney for Appellant Korando) Civile & Tang, PLLC 330 Hernan Cortez Avenue Suite 200 Hagatna, Guam 96910 Phone: (671) 472-8868/9 Fax: (671) 477-2511	Date:	January 17, 2017
		Phone: Fax:	(671) 475-0390 x. 216 (671) 472-7951

Re: OPA-PA-18-002 Notice of Receipt of Appeal

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jhernandez@guamopa.com

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OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

January 17, 2018

Mr. Glenn Leon Guerrero
Director
Department of Public Works
542 North Marine Corps Drive
Upper Tumon, Guam 96913

VIA FACSIMILE: (671) 649-6178

Re: Notice of Receipt of Appeal – OPA-PA-18-002

Dear Mr. Leon Guerrero,

Please be advised that Korando Corporation (Korando) filed an appeal with the Office of Public Accountability (OPA) on January 16, 2018 regarding the Department of Public Works' (DPW) denial of Korando's Claim Due to Termination and Delay of Project related to the contract to construct the Bile/Pigua Bridge Replacement (Project No. GU-NH-NBIS(007)). OPA has assigned this appeal case number OPA-PA-18-002

Immediate action is required of DPW pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA's office and on its website at www.opaguam.org. The notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeals. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), please submit one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated, to OPA by **Wednesday, January 24, 2018**, five work days following receipt of this notice of appeal; and one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Div. 4, Chap. 12, §12105, by **Tuesday, February 6, 2018**, twenty days following receipt of this notice of appeal.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to Korando. In addition, OPA respectfully asks that DPW provide one original and two copies of the procurement record and agency report as the Guam Procurement Law and Regulations require only one copy. The three procurement record copies requested by OPA are distributed as follows: Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 208, or jhernandez@guamopa.com, should you have any questions regarding this notice.

Sincerely,

A handwritten signature in black ink, appearing to read 'Yuka Hechanova', written in a cursive style.

Yuka Hechanova
Deputy Public Auditor

Enclosure: First eight pages of Notice of Appeal – OPA-PA-18-002

Cc: Joyce C.H. Tang, Attorney for Korando

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

11 In the Appeal of

13 Korando Corporation,

14 Appellant.

DOCKET NO. OPA-PA- 18-002

NOTICE OF APPEAL

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1 KORANDO CORPORATION (“Korando”) hereby appeals a decision rendered by the
2 Department of Public Works (“DPW”), an agency of the Government of Guam, on November 15,
3 2017, denying Korando’s Claim Due to Termination and Delay of Project dated October 18, 2016,
4 related to DPW’s termination of its contract with Korando to construct the Bile/Pigua Bridge
5 Replacement (Project No. GU-NH-NBIS(007) (“the Project”).

6
7 **I. APPELLANT INFORMATION**

8 Name: Korando Corporation
9 Mailing Address: P.O. Box 20538
10 Barrigada, Guam 96921
11 Business Address: 380 Harmon Industrial Park
12 Tamuning, Guam 96913

13 For this Appeal, please direct all correspondence to Korando’s counsel, Joyce C.H. Tang
14 (jtang@civilletang.com), Civile & Tang, PLLC, 330 Hernan Cortez Ave. Ste. 200, Hagåtña, Guam
15 96910 (Tel: 671/472-8868; Fax: 671/477-2511).

16
17 **II. APPEAL INFORMATION**

- 18 A. Purchasing Agency: Department of Public Works
19 B. Contract No: GU-NH-NBIS(007)
20 C. Date of Contract: March 25, 2014
21 D. This appeal is made from DPW’s November 15, 2017 denial of Korando’s Claim Due
22 to Termination and Delay of Project dated October 18, 2016. *See, 11/15/2017 Denial*
23 *of Claim, **Exhibit A*** attached hereto.
24 E. There is no competing bidder at issue in this Appeal.

25
26 **III. RELEVANT PROCEDURAL HISTORY**

27 On March 25, 2014, DPW and Korando executed a contract for construction of the
28 Bile/Pigua Bridge Replacement (Project No. GU-NH-NBIS(007)) (the “Korando Contract”). After

1 commencement of the Bile/Pigua Bridge Replacement project (the "Project"), delays occurred on the
2 Project caused by DPW. By a letter dated July 10, 2015, DPW terminated the Korando Contract for
3 cause ("7/10/2015 Termination Letter") on the primary basis of Korando's supposed delay in
4 prosecution of the work required under the contract. *See 7/10/2015 Termination Letter, **Exhibit B***
5 attached hereto. Korando appealed its termination to the Public Auditor. The formal hearing on
6 Korando's appeal commenced on December 9, 2015, and after four (4) days of formal hearing, the
7 parties reached agreement under which DPW would rescind the 7/10/2015 Termination Letter and the
8 parties would subsequently resolve other issues, including modifications to the Korando Contract in
9 good faith. On December 16, 2015, DPW and Korando entered into a *Stipulation and Order to*
10 *Rescind Termination* ("12/16/2015 Stipulation and Order"), attached as **Exhibit C** hereto. The
11 12/16/2015 Stipulation and Order provides in relevant part as follows:

12 5. Upon the signing of this Stipulation Korando can submit written Proposed Change
13 Orders in accordance with the terms and conditions of Korando's Contract. ***DPW***
14 ***agrees that it will review on the merits and process the Change Orders timely and in***
15 ***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:

16 a. ***Demobilization and remobilization costs, materials previously ordered or***
17 ***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.

18 b. Korando's Alternate Phasing Plan requires the construction of a new
19 temporary steel bridge ("New Steel Bridge") due to its contention of the
20 inadequacy of the existing temporary steel bridges. Korando will submit a
change order for all costs associated with the New Steel Bridge as proposed in
Submittal No. 562.001-02.

21 c. Korando contends that there is a conflict between the existing overhead
22 power lines and the operation of the crane when hoisting and positioning the
23 piles during the pile driving operation (the "Conflict"), as depicted in DPW's
24 construction documents. If DPW/owner in coordination with Korando
25 reasonably determines this is a design issue, DPW will be responsible for: (i)
26 finding a constructible solution, redesigning and providing the new plans to
address this conflict; and (ii) contacting GPA and third party communication
providers.

27 *12/16/2015 Stipulation and Order at 3.*

1 On October 18, 2016, in accordance with the 12/16/2015 Stipulation, Korando submitted its
2 change order request for modification of the Korando Contract to account for additional expenses and
3 costs for demobilization, remobilization costs, and other expenses related to the termination and delay
4 on the Project with supporting documentation. *See, 10/18/2016 Change Order (without exhibits),*
5 attached hereto as **Exhibit D.** DPW responded two (2) months later on December 28, 2016,
6 requesting additional documents and clarification. Korando responded to DPW's December 28,
7 2016 request on January 24, 2017, with supporting documents and provided clarification of the delay
8 claims ("1/24/17 Supplemental Letter"). DPW did not respond to Korando's 1/24/17 Supplemental
9 Letter. Following the submission of the 1/24/17 Supplemental Letter, Korando continued to follow
10 up on the status of the 10/18/2016 Change Order and response to its 1/24/17 Supplemental letter, for
11 modification of the Korando Contract as required under the terms of the 12/16/15 Stipulation. On
12 October 17, 2017, Korando submitted to DPW an updated version of the 10/18/2016 Change Order,
13 identifying the section in the 12/16/15 Stipulation and Order covering each claim ("10/17/2017
14 Updated Change Order"). *See, 10/17/2017 Updated Change Order, attached hereto as **Exhibit E.***

17 It took DPW over one year to process the 10/18/16 Change Order, because it was not until
18 November 15, 2017 that DPW finally responded. *See, **Exhibit A,** 11/15/17 Denial of Claim.* The
19 covenant of good faith and fair dealing implied in every contract required the parties to deal with
20 each other honestly, fairly and in good faith. Here, the parties even expressly stipulated that DPW
21 "agrees that it will review [Korando's claims] on the merits and process the Change Orders timely
22 and in good faith, and in accordance with the terms of Korando's Contract." *See, **Exhibit C,***
23 *12/16/2015 Stipulation and Order.* DPW breached the covenant of good faith and fair dealing, and
24 violated the *12/16/2015 Stipulation and Order* when it failed to timely and in good faith review
25 Korando's 10/18/16 Change Order.
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1 DPW's failure to timely review and process Korando's 10/18/16 Change Order was a breach
2 of Korando's Contract and a violation of the *12/16/15 Stipulation and Order* requiring DPW to
3 process Korando's claims on the merits *timely and in good faith*. The Project is expected to be
4 completed by March 2018, and Korando's Change Order request has yet to be resolved. Korando is
5 entitled to a modification of its contract to cover, among other things, demobilization and
6 remobilization costs, materials previously ordered or in store ... due to the delay of the Project, and
7 any other expenses related to the termination and delay of the Project." *Id.* DPW failed to respond
8 to Korando's claim until November 15, 2017, over a year after Korando submitted its 10/18/2016
9 Claim. *See, Exhibit A, 11/15/2017 Denial of Claim.*

11 Korando hereby appeals DPW's denial of its 10/18/2016 Change Order¹.

13 IV. STATEMENT OF GROUNDS FOR APPEAL

15 A. DPW Violated the 12/16/2015 Stipulation and Order and Breached the 16 Korando Contract.

17 In its 10/18/2016 Change Order, Korando submitted its claims to DPW, which was updated
18 and amended in the 10/17/2017 Updated Change Order to reflect a claim totaling Four Hundred
19 Ninety-Eight Thousand, Two Hundred Twenty-Nine dollars and Sixty-Six cents (\$498,229.66). In its
20 10/17/2017 Updated Change Order, Korando identified the sections of the 12/16/15 Stipulation and
21 Order which addresses the particular claim, and included a claim for Two Hundred Two Thousand,
22 Nine Hundred Eighty-Nine dollars and Seventeen cents (\$202,989.17) in costs incurred by WFIC due
23 to DPW's improper termination of the Korando Contract.

24 One year later, on November 15, 2017, DPW finally responded and denied all of Korando's
25 claims except for Twenty-Nine Thousand, Two Hundred Forty-One dollars and Forty-Six cents
26 (\$29,241.46) of Korando's claim, as allowed under the 12/16/2015 Stipulation and Order. DPW

27 ¹ Korando intends to seek monetary damages against DPW under the Government Claims
28 Act. However, in an abundance of caution, Korando seeks a reversal of DPW's 11/15/2017
Denial of Claim before the Public Auditor.

1 variably determined that specific claims submitted by Korando were not reimbursable, partially
2 reimbursable, or required further submissions by Korando. Further, DPW denied Korando's request
3 for payment of WCIF expenses in its entirety.

4 Korando's claims were meritorious, properly documented and should have been approved by
5 DPW. Accordingly, Korando seeks an order from the Public Auditor finding that DPW's 11/15/2017
6 Denial of Claim violated the terms of the *12/16/2015 Stipulation and Order*, and reversing DPW's
7 decision denying Korando's claims.

8
9 **B. DPW Breached the Implied Covenant of Good Faith and Fair Dealing.**

10 "Every contract imposes upon each party a duty of good faith and fair dealing in its
11 performance and its enforcement." *Rest.2d Contracts*, §205. Good faith is defined by the Guam
12 Uniform Commercial Code as "honesty in fact in the conduct or transaction concerned," 13 G.C.A. §
13 1201 (19), and in the context of merchants as "honesty in fact and the observance of reasonable
14 commercial standards of fair dealing in the trade." 13 G.C.A. §2103 (1)(b). The implied covenant of
15 good faith and fair dealing "requires each contracting party to refrain from doing anything to injure
16 the right of the other to receive the benefits of the agreement." *Baza v. Guam Memorial Hospital*
17 *Plan, Inc.*, Superior Court of Guam Civil Case no. 1146-87 (Decision and Order, May 2, 1988)
18 (citing *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, 145, 169 Cal. Rptr. 691 (1979). It "operates
19 as a kind of safety valve to which judges may turn to fill gaps and qualify or limit rights and duties
20 otherwise arising under rules of law and specific contract language." *Ada's Inc. v. First Hawaiian*
21 *Bank*, Superior Court of Guam Civil Case No. CV0785-02 (Disisyon yan Otden, July 7, 2003) (citing
22 *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 684, 254 Cal.Rptr. 211 (1988)).
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25 "The implied covenant seeks to protect the contracting parties' reasonable expectations."
26 *Hubbard Chevrolet Co. v. General Motors Corp.*, 873 F.2d 873, 876-877 (5th Cir. 1989) (citing
27 *Restatement (Second) of Contracts* § 205(a) ("Good faith ... emphasizes consistency with the justified
28 expectations of the other party; it excludes [conduct that violates] ... community standards of decency,

1 fairness or reasonableness’’)).

2 The implied covenant of good faith and fair dealing preserves the integrity and spirit of the
3 agreement where the agreement allows parties to exercise discretion in their conduct. The covenant is
4 breached “where a party to a contract acts in a manner that, although not expressly forbidden by any
5 contractual provision, would deprive the other party of the right to receive the benefits under their
6 agreement.” *Fourth Branch Associates Mechanicville v. Niagara Mohawk Power Corp.*, 235 A.D.2d
7 962, 965-966, 653 N.Y.S.2d 412, 416 (N.Y.A.D. 3 Dept.,1997) (citing *Jaffe v. Paramount*
8 *Communications*, 222 A.D.2d 17, 22-23, 644 N.Y.S.2d 43 (N.Y. App. Div., 1996).

9
10 The implied covenant of good faith and fair dealing, along with the provision contained in
11 Section 5 of the *12/15/2015 Stipulation and Order* require that DPW act timely and in good faith in
12 processing and reviewing Korando’s Claims. To respond one year after submission of Korando’s
13 Change Order is, on its face bad faith. Further, DPW’s failure to approve clearly meritorious claims
14 and discount others without a reasonable basis demonstrates that it has not acted in good faith, and is
15 a breach of Korando Contract and violation of the *12/16/15 Stipulation and Order*.

16
17 **V. RELIEF REQUESTED BY KORANDO**

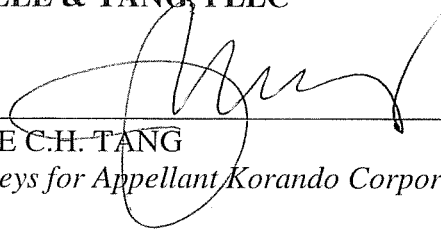
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19 Korando respectfully requests a ruling from the OPA as follows:

- 20 1. DPW violated the terms of the *12/16/15 Stipulation and Order*, and find that Korando
21 is entitled to a modification of the Korando Contract and a Change Order;
22 2. DPW breached Korando’s Contract;
23 3. DPW breached the implied covenant of good faith and fair dealing;
24 4. For an award of reasonable attorney’s fees and costs of this appeal; and
25 5. For such other relief that the OPA may determine is just and proper.
26 6. Korando requests a hearing on this matter.

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Dated: January 16, 2018

CIVILLE & TANG, PLLC



JOYCE C.H. TANG

Attorneys for Appellant Korando Corporation

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