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#### OFFICE OF PUBLIC ACCOUNTABILITY

#### PROCUREMENT APPEALS

IN THE APPEAL OF	) DOCKET NO. OPA	-PA 11-009
HUBTEC INTERNATIONAL CORP.,	) APPELLANT'S RES ) OPA'S ORDER VA ) HEARING RE: APP	CATING 'ELLANT'S
Appellant.	) APPEAL AND SCH ) ADDITIONAL BRI	

Appellant, Hubtec International Corp. ("Hubtec"), hereby submits its Response to the Department of Public Works' ("Department") OPA's August 25, 2011 Order and questions posed regarding the Route 2 Culverts and Slide Repair Project No. GU-NH-0002 ("Project") and the Department's Remedies Brief.

Hubtec brought this appeal claiming that the Department breached its contract with Hubtec and was wrongfully terminated. Guam's procurement law requires the Department to work with its contractor when disputes arise and that never reasonably happened in this case.

Hubtec was not treated fairly or reasonably by the Department in responding to

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Hubtec's requests for modifications, payments and extensions of time (Appellant's Exhibit Nos. 2C1.1, 2C1.2 and 2C1.3), specifically, requests for extensions due to inclement weather and adverse site conditions, modifications to the plans to insure the safety of its workers (Appellant's Exhibit No. 2D1.1), the public and the environment (Appellant's Exhibit No. 3.4 and 3.6), and assistance from the Department due to design flaws or insufficient information necessitating additional work (Appellant's Exhibit No. 2A2.6). Too often, Hubtec's requests were not responded to in a timely fashion. Now the Department validates those assertions in its responses to the OPA's questions and in its Remedies Brief.

# A. THE CURRENT STATUS OF THE DEPARTMENT'S PROJECT NO GU-NH-0002 (ROUTE 2 CULVERTS AND SLIDE REPAIR PROJECT).

After reviewing the Department's characterization regarding the current status of the Project, Hubtec would like to make the following additions. IMCO's progress was not prejudiced like Hubtec was by the Department's failure to issue a Preliminary Notice to Proceed. Hubtec was given 200 days to complete the Project and the time started the day after the contract was awarded. IMCO was given 240 days to complete the Project while also enjoying the considerable amount of work already performed by Hubtec at the work sites as well as the already stockpiled materials. IMCO also had the benefit of detailed knowledge of the site conditions and did not have to painstakingly discover unaccounted for obstacles as Hubtec did in following the Department's design.

Under the IMCO contract, the Project is scheduled to be finished in March of 2012. The Department admits the Project was thirty percent (30%) complete under Hubtec, but Hubtec asserts that if it was paid all moneys owned to it, the Project would have actually

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The Department admits that IMCO has not yet started any work on either the Sella Bay or Cetti Bay culvert sites. The Department states that the Umatac Baseball Culvert is eighty-five percent (85%) complete and that it should be done in a few weeks assuming no delays from weather or unforseen circumstances affect the Project. That clearly implies that if weather or circumstances warrant, extensions of time will be granted. Hubtec didn't receive that cooperation from the Department. Although the Department points out the amount of work done, the Department does not state how much of that eighty-five percent (85%) of completed work was performed by Hubtec.

According to the Department, the remedial work on the Cetti Bay Rock Slide Retaining Wall has been completed and the wall itself is sixty-four percent (64%) complete. However, according to IMCO's contract, *infra*, it is one hundred percent (100%) complete. The Department then goes on to state that Hubtec breached the "Buy American" provision of the contract and that the wall may have to be torn down. Hubtec did not materially breach the contract, but Hubtec is not without fault. It did not get the proper approvals for use of the Korean rebar. Non-American rebar can be used if American rebar is unavailable and the grade and quality is acceptable if it is the same quality and grade as the American rebar.

The Korean sixty (60) grade rebars were the only sixty (60) grade rebars available on island at that time. The Department's statement that the rebars are nonconforming ignores that the construction manager and the Department's representative were on the jobsite at the Wall during working hours and inspected and approved the major phases of the work performed on the Wall and signed off on the inspection sheets before the

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concrete for the wall had even been poured. *See Attachment* 1. Hubtec's use of sixty (60) grade Korean rebar conforms to the requirements of the contract and the use of those rebars does not require that the work performed by Hubtec to be rejected, destroyed and rebuilt by IMCO.

It should also be noted that the Department concedes that the March 2012 date for IMCO to complete the Project may be delayed due to rain and inclement weather and that the Department is graciously allowing IMCO to consider a modification of the design for the Sella Bay and Cetti Bay sites. These good faith courtesies also were not extended to Hubtec.

B. WHO MADE THE DECISION TO AWARD THE ROUTE 2 PROJECT TO IMCO FOR APPROXIMATELY 3.9 MILLION, AND IF SUCH DECISION WAS MADE, HOW WAS IT MADE?

This same question was posed by Hubtec to both the Department and Chung Kuo Insurance Company, Ltd. ("Chung Kuo") and Hubtec never received a satisfactory answer. By virtue of being Hubtec's bondholder, Hubtec and Chung Kuo are in a contractual relationship and have a legal obligation to cooperate with each other and to act in good faith with respect to each other's interests. Chung Kuo did no such thing. Chung Kuo instead catered to its own interests, to the interests of the Department, and followed the Department 's lead.

In the period right after Hubtec was terminated from the Project, Hubtec met with Chung Kuo to explain the problems that Hubtec had dealt with during the course of the Project and to assure Chung Kuo that Hubtec was able to finish the Project. After investigating the job, Chung Kuo began soliciting bids for the completion of the Project

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because they discovered that it was impossible to try to complete the Project as contracted.

After the Project was rebid, the two lowest bidders, IMCO and Black Construction, who had the benefit of Hubtec's already performed work, bid Three Million Five Hundred Sixty-Six Thousand Six Hundred Fifty-Nine Dollars and Eighty-Seven Cents (\$3,566,659.87) and Five Million Two Hundred Fourteen Thousand Three Hundred Sixty Dollars (\$5,214,360.00), respectively. IMCO's bid was twice the amount of the Hubtec contract and Black Construction's bid was three time higher than Hubtec's contract amount yet they were found to be acceptable.

#### C. IMCO CONTRACT.

In the attachments to the Department's response to the OPA's questions, the Department submitted a Memorandum written to Joanne Brown by Ramon Padilla, the Chief Engineer at the Department. At page four, the Department has a chart indicting the bid amounts made by the new bidders to the contract, and IMCO's past bid, showing the differences. The differences are enlightening in that the government would find bids which are two and three times the government's initial estimate to be reasonable and responsible. Even more enlightening is the chart at page six of the Memorandum, the government's estimate for the *Sella Bay* slide. You will note there are no estimates for saw cutting of asphalt pavement, for excavation for aggregate base grading C, 8" depth, and for reinforcing the concrete wall in column 4 of the *Cetti Bay* slide diagram. Then, looking at the last column which is IMCO's final bid, you will note that there are no monies projected there and, thus, even though the issue of Korean rebar was raised at the time of termination, it seems to have been resolved because there is no amount for reinforcing the concrete wall. Thus, the government accepted the slide.

On the next page, the *Umatac Baseball* culvert is diagramed and, again, in the fourth column of the government's estimate and in the seventh column, which is the final bid amount, you will notice that the disputed items referenced in Hubtec's Remedies Brief for clearing and grubbing, aggregate base, sub-base and grading, and reinforced concrete pipe culvert are not included in the final bid, because they have been completed by Hubtec and accepted by the Department. Yet the government still has not paid Hubtec.

In its Remedies Brief, at pages 7 and 8, the government claims that Hubtec owes or may owe it \$307,700.32. They do it by disputing some of what Hubtec claims, but mostly by their government counterclaim for \$290,223.52. *See* page 8 of the Department's Remedies Brief. However, upon closer examination set out at page 8 of the Remedies Brief, the \$290,000.00 is made up by not accepting the wall and requiring it to be destroyed and rebuilt for \$217,298.52 and by assessing liquidated damages of \$57,200.00. If those two amounts are not counted, then the only off-set the government has equals about \$15,000.00, as set forth in items 2, 3 and 4 of their diagram. That would mean that Hubtec's claim of more than \$500,000.00 is unreconciled by the government and unpaid. If, as asserted by Hubtec, the rebar is 60 grade and otherwise conforming to the strength and quality required, and if in fact the government is found to have breached the agreement and not be entitled to liquidated damages. Hubtec's claim is substantially intact.

At all aspects of this case, the government has been unwilling to cooperate and to assist Hubtec in successful completion of the project. The Department never gave Hubtec an extension of time, even though it set forth plenty of justification. The Department never assisted Hubtec in a timely fashion in dealing with changes and, to this day, attempts to create a claim for \$217,000.00 for the *Cetti Bay* slide wall and \$57,000.00 for liquidated

damages in an effort to off-set the amounts of money that it legitimately owes Hubtec. Dated this  $8^{th}$  day of September, 2011.

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PHILLIP TORRES, ESQ.

ATTORNEYS FOR APPELLANT

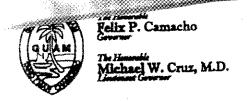
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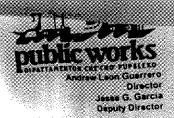
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1. VIBRATOR:  2. FINISHING:  3. CURING EQUIPMENT:  DATE AND TIME:  24 kmg to 14:00  NSPECTOR'S COMMENT:  Lap Splice inchalled as per ACI 318-08  JEXTURE BOARS in challed as per RFI Dated long 25, 10.  Deworts trench prior to Concret placement  F) Clear all trank & Debrio in side Trunk prior to Concret placement  CONCRETE PLACEMENT APPROVAL:	SURFACE CONCRETE:	PE	OK COMPACTION:	;;	WIA	7
2. FINISHING:  3. CURING EQUIPMENT:  DATE AND TIME:  24 kmg to 14:00  NSPECTOR'S COMMENT:  Lap Splice installed as per ACI 318-08  JEXTURE BAYS in stalled as per RFJ Dated lang 25, 10.  Deworth trench prior to Concret placement  P) Clean all trash & Detrice in side Trunk prior to Concret Placement  ONCRETE PLACEMENT APPROVAL:	EQUIPMENT:	2.4	OTHERS:	***************************************	<u> </u>	1
3. CURING EQUIPMENT:  DATE AND TIME:  24 Ling to 14:00  NSPECTOR'S COMMENT:  Lap 5 plice installed as per ACI 318-08  JEXTUR Bays in clothed as per RFJ Dated ling 25, 10.  Dewortz trevel prior to Conculs placement  P) Clear Altrash & Debias inside Trench prior to Conculs placement CONCRETE PLACEMENT APPROVAL:	1. VIBRATOR:	1h	-04 <u></u>	***************************************		1
INSPECTOR'S INITIAL:  DATE AND TIME:  24 kmg to 14:00  INSPECTOR'S COMMENT:  Lap Splice installed as per ACI 318-08  JEXTURE Bays in stalled as per RFJ Dated long 25, 10.  Dewortz trevel prior to Concret placement  P) Clear Alterna & Detries inside Trush prior to Concret placement  CONCRETE PLACEMENT APPROVAL:	2. FINISHING:					
NSPECTOR'S COMMENT:  Lap Splice installed as per ACI 318-08  JEXTURE Bars in elabled as per RFJ Dated long 25, 10.  Dewortz trench prior to Concrb placement  P) Clear all trash & Debrico in side Trunk prior to Concrt placement  CONCRETE PLACEMENT APPROVAL:	3. CURING EQU	IIPMENT:				
NSPECTOR'S COMMENT:  Lap Splice installed as per ACI 318-08  Jextra Bars in elabed as per RFJ Doted long 25, 10.  Dewastz trevel prior to Concub placement  F) Clear alterash & Detrior inside Trunk prior to Concust placement  CONCRETE PLACEMENT APPROVAL:	INSPECTOR'S INITIAL:		DATE	AND TIME:		
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Dewartz trench prior to Concrb placement F) Clean all trash & Debrio in side Trunk prior to Concrete Placement ONCRETE PLACEMENT APPROVAL:	Jextra Bars in 9	Placed as par Ri	~ ~ / / /	<i>.</i> 61	t menten y rest to the think of the rest to the common and provide the provide the state of the constant of the const	
4) Clean altrash & Detrior in side Trunk prior to Concrete Plaumt CONCRETE PLACEMENT APPROVAL:						Influentamen
DATE & TIME: 25 kg 10 [32.00	4) Clean all tra	sh & Debrio in sid		Coneril	i plaumt	***************************************
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Felix P. Can Michael W.	Cruz, M.D.	CEMENT RELEASE FO	Oir Jesse G. G Daputy Dir	ector
PROJECT TITLE:  PROJECT NO:  PROJECT LOCATION:	RECONSTRUCTION OF PROMITE 2 CHLVERET GU - NH - 0002 (1) CETTI BAY SLIDE	LEHABILITATION D SV SUDE REPAIR 04)		12, 2010
DATE OF CONCRETE PL DESCRIPTION OF CONC CONCRETE CLASS: ESTIMATED VOLUME: SLUMP:		AUGUET 13, 2010 LEAN CONCRETE	(WALL)	-
STEEL REINFORCEMEN FORMWORKS: SURFACE CONCRETE: EQUIPMENT: 1. VIBRATOR: 2. FINISHING: 3. CURING EC	Pt-	ADEQUATE SUPI INSERT & BLOCK COMPACTION: OTHERS: &\ear	outs: 144	
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CONCRETE PLACEME DATE & TIME:	NT APPROVAL:	7 h 13 Dug 10	083	, 0

PROJECT TITLE:	RECONSTRUCTION/R	EHABILITATION OF	DATE:	23-Dec-10
	ROUTE 2 CULVERTS A	ND SLIDE REPAIR	_	· ·
PROJECT NO:	GU-NH-0002(104)			
PROJECT LOCATION:	AGAT AND UMATAC VII	LAGE	ev	
DATE OF CONCRETE PLA	CEMENT:	12/23/2010 (4:00 PI	M)	
DESCRIPTION OF CONCR	ETE PLACEMENT:	Headwall and Wingw	rall - Outlet Str	ructure
CONCRETE CLASS:	5000 PSI	Umatac Baseball Culv	/ert	
ESTIMATED VOLUME:	8 CY	_		
SLUMP:	6" - 8"	-		de la constante de la constant
		Banan		
STEEL REINFORCEMENT:	<b>P</b> 4	ADEQUATE	SUPPORTS:	
FORMWORKS:	al	INSERT & B	LOCKOUTS:	Cakermanian
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NSPECTOR'S COMMENT	: Leinteonsement 5	teel Conforms	To Pland	erian, Forus
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lump tout, Temp	, Reading of Con	ute, air cont	ent are	) wint was well
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CONCRETE PLACEMENT	APPROVAL:	FIF-		
DATE & TIME:		23 Dec 17	_	1.1127 0

PROJECT TITLE:	RECONSTRUC	TION/REHABILIT	ATION OF	DATE:	9 s-Dec-10
	ROUTE 2 CULV	VERTS AND SLID	E REPAIR		Shark .
PROJECT NO:	GU-NH-0002(	104)			
PROJECT LOCATION:	AGAT AND UM	ATAC VILLAGE			
DATE OF CONCRETE PLA	CEMENT:	12/9/	2010 (3:00 PM)		
DESCRIPTION OF CONCR	ETE PLACEMENT	Apron	(Outlet Structure	) - Úmatac	: Baseball Culvert
CONCRETE CLASS:	5000 PS		MARAGER CO.		
ESTIMATED VOLUME:	8 CY	# <del>!!!!!!!!!!!!!!!!!!!!!!!</del>			
SLUMP:	<u>6" -8"                                  </u>	1/211			
		<u> </u>			
STEEL REINFORCEMENT:		O.Y-	ADEQUATE SI		0.6
FÖRMWORKS:	**************************************	0.K	INSERT & BLO		N/A
SURFACE CONCRETE:	***************************************	0.K	COMPACTION	l:	<u>N/A</u>
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PROJECT TITLE:	RECONSTRUCTION/R	EHABILITATION OF	DATE:	2-Dec-10
- Anna maintain - Anna Anna Anna Anna Anna Anna Anna A	ROUTE 2 CULVERTS A	ND SLIDE REPAIR		
PROJECT NO:	GU-NH-0002(104)			
PROJECT LOCATION:	AGAT AND UMATAC VII	LLAGE		
DATE OF CONCRETE PLA	CEMENT:	12/03/2010 (11:00 A	(M)	
DESCRIPTION OF CONCR	ETE PLACEMENT:	Fondation(Outlet Struc		aseball Culvert
CONCRETE CLASS:	500 PSI(Flowabl	e Fill)		
ESTIMATED VOLUME:	25 CY	And Andreas (Andreas Andreas A		
SLUMP:	6" - 8"			
STEEL REINFORCEMENT:	N/Y	ADEQUATE	SUPPORTS:	7º 21
FORMWORKS:	yeb	INSERT & B	LOCKOUTS:	yes er
SURFACE CONCRETE:	100	P COMPACTI	ON:	UA
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inspector's comment	on of Block	act for the	nd wall	
(2) Water pur	prodontal 6	excusated pit		
CONCRETE PLACEMENT	APPROVAL:	Th-		3
DATE & TIME:	and the state of t	3 Dec 1	0 11	<u> </u>

PROJECT TITLE:	RECONSTRUCTION/REHA	BILITATION OF	DATE:	2-Dec-10
,	ROUTE 2 CULVERTS AND			
PROJECT NO:	GU-NH-0002(104)			
PROJECT LOCATION:	AGAT AND UMATAC VILLAG	SE		
DATE OF CONCRETE PLA		12/03/2010 (11:00		
DESCRIPTION OF CONCR	ETE PLACEMENT: For	ndation(Outlet Stru	cture)-Umatac Ba	seball Culvert
CONCRETE CLASS:	500 PSI(Flowable Fil	<u>(I)</u>		
ESTIMATED VOLUME:	25 CY			
SLUMP:	6" - 8"			
STEEL REINFORCEMENT:	<u> </u>		TE SUPPORTS:	yax p
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CONCRETE PLACEMENT	APPROVAL:	TL		
CONCRETE PLACEMENT			. 3	3.1

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PROJECT TITLE:				
	ROUTE 2 CULVERTS	AND SLIDE REPAIR		
PROJECT NO:	GU-NH-0002(104)		Şt.	:
PROJECT LOCATION:	AGAT AND UMATAC V	ILLAGE		
DATE OF CONCRETE PLA	CEMENT:	9/24/2010 (10:30 AM		
DESCRIPTION OF CONCE	ETE PLACEMENT:	WALL - CETTI BAY SLI	DE (CPS # 2)	
CONCRETE CLASS:	5000 PSI	MMM*		
ESTIMATED VOLUME:	24 CY	ng-dujakio		
SLUMP:	6" - 8"	nonesti.		
			CLIDBODTC	
STEEL REINFORCEMENT	• • • • • • • • • • • • • • • • • • •		SUPPORTS:	
FORMWORKS:	344-10-10-10-10-10-10-10-10-10-10-10-10-10-		LOCKOUTS:	
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