



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

## PROCUREMENT APPEALS

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6 IN THE APPEAL OF,  
7 HUBTEC INTERNATIONAL, CO.  
8 Appellant

) APPEAL NO: OPA-PA-11-009

) DECISION

### I. INTRODUCTION

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12 This is the Decision of the Public Auditor for an appeal filed on June 24, 2011, by  
13 HUBTEC INTERNATIONAL, CO., (Hereafter referred to as "HIC") regarding the  
14 DEPARTMENT OF PUBLIC WORKS, GOVERNMENT OF GUAM'S (Hereafter referred to  
15 as "DPW") February 22, 2011 termination of HIC's contract for DPW Project No. GU-NH-  
16 0002(104) (Route 2 Culverts and Slide Repair). The Public Auditor holds that DPW's  
17 termination of HIC's contract was justified by HIC's substantial contract violations.  
18 Accordingly, HIC's appeal is hereby DENIED.

### II. FINDINGS OF FACT

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20 The Public Auditor in reaching this Decision has considered and incorporates herein the  
21 procurement record and all documents submitted by the parties pursuant to HIC's August 24,  
22 2011 Waiving of Hearing. Based on the aforementioned record in this matter, the Public Auditor  
23 makes the following findings of fact:  
24

25 1. DPW Project No. GU-NH-0002(104) (Route 2 Culverts and Slide Repair) (Hereafter  
26 referred to as the "Project"), is located on Route 2 between the southern villages of Umatac and  
27 Agat. The Sella River Culvert is within the village of Agat, the Cetti River and Umatac Baseball  
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#### Decision- 1

1 Culvert and the Cetti Slide areas are located within the village of Umatac.<sup>1</sup> The purpose of the  
2 project was to improve road infrastructure at these four (4) locations which were in dire need of  
3 repair. The Sella River Culvert was undersized and resulted in significant erosion downstream  
4 of the culvert, which if left as is, would undermine the portion of Route 2 located over it. The  
5 Cetti Bay Culvert was also undersized and it was severely deteriorated. Two (2) pipe lengths of  
6 the culvert had disengaged from the culvert and sank to the river bottom. The roadway shoulder  
7 and about eight (8) feet of the roadway located immediately over the culvert had collapsed  
8 resulting in only one lane of Route 2 over the culvert being operational. The Cetti Slide area was  
9 experiencing major surface sloughing or muddy conditions that resulted in debris and rock  
10 falling on Route 2. The Umatac Culvert was completely eroded, undersized, and through the  
11 significant erosion it was causing downstream, it would eventually erode the roadway over it.<sup>2</sup>  
12 As Route 2 is the only major roadway connecting southern Guam, the Project was vital for  
13 ensuring the continued operation of Route 2 by the people of Guam.

14 2. The Project required culvert reconstruction including the removal and replacement of  
15 the existing culverts, pavement reconstruction, signage, and various safety improvements. The  
16 work also required the construction of drop inlet structures, retaining walls, ripraps, stabilized  
17 maintenance pads, trash racks, safety railings, the construction of outlet wing walls, grading of  
18 roadway embankments, and improvements on existing roadside drainage ditches, and it also  
19 required the restoration of the roadway pavement structure at the four (4) project sites.<sup>3</sup> DPW  
20 estimated that the total project cost would be two-million-two hundred-twenty-one-and-eight-  
21 hundred-dollars (\$2,221,800) and DPW obtained federal American Reinvestment and Recovery  
22 Act (Hereafter referred to as "ARRA") funds to pay for the entire estimated project cost.<sup>4</sup>  
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25 <sup>1</sup> Memorandum dated November 20, 2009 from the DPW Director to the Governor of  
Guam, Bates Stamp No. 0009, Procurement Record filed on July 12, 2011.

26 <sup>2</sup> Page 4, Paragraph 3, Purpose and Need, Documentation for Categorical  
Exclusions Listed Under 23 CFR 771.117(d), Bates Stamp No. 0486, Id.

27 <sup>3</sup> Memorandum dated November 20, 2009 from the DPW Director to the Governor of  
Guam, Bates Stamp No. 0009, Id.

28 <sup>4</sup> DPW Request for Project Authorization, Agreement, and/or Modification, dated  
September 19, 2009, Bates Stamp No. 0010, Id., and Paragraph I, Relevant  
Background and Facts, Statement Answering Allegations of Appeal, Tab B,  
Agency Report filed on July 12, 2011.

1           3. On April 30, 2009, DPW issued the Invitation for Bids (Hereafter referred to as  
2 "IFB") for the Project and the deadline to submit bids was 2:00 p.m. on October 5, 2009.<sup>5</sup>

3           4. On October 5, 2009, DPW received three (3) bids for the Project. CHI Construction  
4 Company's bid price was four-million-nine-hundred-fifty-thousand-dollars (\$4,950,000), IMCO  
5 General Construction's (Hereafter referred to as "IMCO") bid price was five-million-five-  
6 hundred-ninety-one-thousand-and-thirteen-dollars (\$5,591,013), and HIC's bid price was one-  
7 million-eight-hundred-thirty-five-thousand-and-forty dollars (\$1,835,040) for the Project.<sup>6</sup>

8           5. On October 27, 2009, DPW issued a Letter of Intent to Award the IFB to HIC, and  
9 issued a Notice of Award to the unsuccessful bidders, CHI Construction and IMCO, on the same  
10 day.<sup>7</sup>

11           6. On January 7, 2010, DPW and HIC finalized the Project Contract.<sup>8</sup>

12           7. The Contract stated, in relevant part, that:

13               a. HIC agreed to furnish all the necessary labor, materials, equipment, tools and  
14 services necessary to perform and complete in a workmanlike manner all the work required for  
15 the construction of the Project, in strict compliance with the contract documents.<sup>9</sup>

16               b. HIC agreed to commence work under the contract upon written notice to  
17 proceed, and to complete the project ready for use within two-hundred-forty ( 240) days of the  
18 commencement of the contract time as stated in the Notice to Bidders of the contract.<sup>10</sup>

19               c. DPW agreed to pay HIC the contract amount of one-million-eight-hundred-  
20 thirty-five-thousand-forty-dollars (\$1,835,040), and any sums to be added and/or deducted  
21 resulting from all extra or omitted work in connection therewith, as authorized under the terms as  
22

23 <sup>5</sup> IFB, page 1, Bates Stamp No. 0059, Procurement Record filed on July 12,  
2011.

24 <sup>6</sup> IFB Bid Result, Bates Stamp No. 0018, Id.

25 <sup>7</sup> DPW's Intent to Award to HIC, dated October 27, 2009, Bates Stamp No. 0019,  
and Letter announcing DPW's award to HIC to unsuccessful bidders dated  
26 October 27, 2011, Bates Stamp No. 0453, Procurement Record filed on July 12,  
2011.

27 <sup>8</sup> Page FC-7, Formal Contract, Bates Stamp No. 0042, Id.

28 <sup>9</sup> Paragraph I, Page FC-2, Formal Contract, Bates Stamp No. 0037, Id. The term  
"workmanlike" is used in the Formal Contract. Webster-Merriam defines the  
term, in this context, to mean "characterized by the skill, efficiency and  
competence typical of a good workman."

<sup>10</sup> Paragraph I(a), Contract Time, Id.

1 stated in the Standard Specifications, and Special Contract Requirements of the Contract, all  
2 according to the terms as stated in the Contract Documents, and progress payments will be made  
3 according to the Special Contract Requirements of the contract.<sup>11</sup>

4 d. DPW and HIC mutually agreed that the contract documents, all of which were  
5 made a part of the contract, consisted of:

- 6 (1) Invitation and Notice to Bidders
- 7 (2) Special Contract Requirements
- 8 (3) HIC's Proposal and Bid Documents
- 9 (4) Contract Documents
- 10 (5) Project Location and Drawings
- 11 (6) Standard Specifications for Construction of Road and Bridges for  
12 Federal Highway Projects, FP-03
- 13 (7) Addendums<sup>12</sup>

14 e. HIC agreed to pay DPW reasonable liquidated damages as stipulated in FP-03  
15 for HIC's breach of the contract caused by HIC failing, neglecting, or refusing to complete the  
16 work within the time specified by the contract, and that DPW should be paid for each  
17 consecutive calendar day therefore that HIC is in default after the time stipulated in the contract  
18 for completing the work ready for use or operation.<sup>13</sup>

19 f. DPW and HIC agreed, except for as otherwise specifically provided for in the  
20 contract, that all disputes concerning questions of fact arising under the contract shall be decided  
21 by DPW's Contracting Officer, and that HIC shall diligently proceed with the work as directed.<sup>14</sup>

22 8. On January 11, 2010, DPW's Acting Engineer Supervisor was instructed to issue a  
23 Notice To Proceed (Hereafter referred to as "NTP") to HIC and to conduct a ground breaking  
24 ceremony for the project.<sup>15</sup>

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26 <sup>11</sup> Paragraph II, page FC-3, Formal Contract, Bates Stamp No. 0038, Id.

27 <sup>12</sup> Paragraph III, Id.

28 <sup>13</sup> Paragraph IV, page FC-4, Formal Contract, Bates Stamp No. 0039, Id.

<sup>14</sup> Paragraph VII, Id.

<sup>15</sup> DPW Division of Highways Transmittal Letter from Contract, Design & Analysis Section to Construction Section dated January 11, 2010, Bates Stamp No. 0003, Procurement Record filed on July 12, 2011.

1           9. Approximately five (5) months later, on May 5, 2010, DPW issued a NTP to HIC.<sup>16</sup>  
2 After receiving the NTP, HIC began mobilization and submitted materials requests for approval  
3 and began purchasing construction materials from its vendors, and started obtaining the  
4 necessary permits to start the project, and, pursuant to the Contract, HIC was obligated to  
5 complete the Project within two-hundred-forty (240) days which expired on December 31,  
6 2010.<sup>17</sup>

7           10. On May 7, 2010, DPW provided HIC a copy of a report prepared by Geo-  
8 Engineering & Testing, Inc.<sup>18</sup> This test indicated, in relevant part, that subsurface borings at the  
9 project sites indicated that subsurface ground water was found at twenty-three (23) and twenty-  
10 seven (27) feet at the Cetti River Culvert site, and at seven (7) feet and ten (10) feet at the  
11 Umatac Culvert. The report concluded that it is likely that ground water or seepage will be  
12 encountered during the excavations to install the new culverts at these sites and that dewatering,  
13 if required, or so chosen by the contractor, may be feasible because of the type of soil at the sites,  
14 however, suitable outlets or water disposal resulting from dewatering operations would be  
15 needed.<sup>19</sup>

16           11. On June, 18, 2010, HIC's Safety Consultant recommended that HIC use three-  
17 hundred-twenty-five (325) feet of concrete barriers with flashing lights instead of synthetic  
18 traffic cones to allow traffic on Route 2 to safely move through the Cetti Bay project site at  
19 night.<sup>20</sup>

20           12. On or about June 21, 2010, HIC submitted a request to DPW for an additional  
21 twelve-thousand-seven-hundred-and-twelve-dollars (\$12,712) for the removal of approximately  
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24 <sup>16</sup> Paragraph I.5., Summary of Project History, Exhibit 1A, Appellant's  
Exhibits filed on August 19, 2011.

25 <sup>17</sup> Summary of Project History, Paragraph I.6., Synopsis of Project, Exhibit  
26 1A, Id., and Paragraph I, Relevant Background Facts, Statement Answering  
Allegations of Appeal, Tab B, Agency Report filed on July 19, 2011.

27 <sup>18</sup> Summary of Project History, Paragraph I.7., Synopsis of Project, Exhibit  
1A, Appellant's Exhibit List filed on August 19, 2011.

28 <sup>19</sup> Subsurface Conditions, pages 4-7, Extract of Geo-Engineering & Testing,  
Inc., Report, Exhibit 1A2, Id.

<sup>20</sup> Letter from John Roberts, Safety Consultant, Triple RRRR Safety Services,  
to Rholly Quebec, HIC Project Engineer, Exhibit 2A2.1, Id.

1 six-hundred-twenty-three (623) square feet of three (3) inch thick asphalt at the Cetti Bay Slide  
2 project site.<sup>21</sup>

3 13. On or about July 7, 2010, HIC submitted a request to DPW for an additional  
4 nineteen-thousand-three-hundred-forty-two-dollars (\$19,342) to cut through approximately one-  
5 thousand-three-hundred-eighty-four (1,384) cubic feet of rock at the Cetti Bay Slide project  
6 site.<sup>22</sup> HIC discovered the hard rock after removing the three (3) inch thick layer of asphalt on or  
7 about June 18, 2010.<sup>23</sup>

8 14. On July 22, 2010, HIC submitted its Traffic Control Plan for the Umatac Baseball  
9 Culvert to DPW for approval, and said plan used concrete barriers with lights to control traffic  
10 on Route 2 moving through the project site.<sup>24</sup>

11 15. On or about July, 25, 2010, HIC conducted clearing and grubbing and the installation  
12 of a silt fence at the Umatac Baseball Culvert project site.<sup>25</sup>

13 16. On or about July 27, 2010, HIC submitted its request for an additional fourteen-  
14 thousand-three-hundred-ninety-eight-dollars (\$14,398) to DPW for HIC's revised traffic control  
15 plan for the Cetti Bay Slide project site incorporating the use of concrete barriers.<sup>26</sup>

16 17. On or about August 13, 2010, HIC replaced the base course aggregate with lean  
17 concrete at the Cetti Bay Slide project site, and HIC completed pouring the lean concrete after  
18 receiving approval from DPW.<sup>27</sup>

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22 <sup>21</sup> Letter from Young C. Kim, HIC Project Manager, to Andrew S. Leon Guerrero,  
23 Director, DPW, dated June 21, 2010, Exhibit 2C1, Id.

24 <sup>22</sup> Letter from Young C. Kim, HIC Project Manager, to Andrew S. Leon Guerrero,  
25 Director, DPW dated July 7, 2010, Exhibit 2C1.3., Id.

26 <sup>23</sup> Letter from Dennis Macatangay, Project Engineer and Ukrit Siriprusanan,  
27 Civil Engineer, Geo-Engineering & Testing, Inc., to HIC dated June 21, 2010,  
28 attached to Exhibit 2C1.3, Id.

<sup>24</sup> Traffic Control Plan (Umatac Baseball Culvert), Exhibit 2A2.2, Id.

<sup>25</sup> Paragraph 2, Second Performance Period, June 26, through July 25, 2010,  
Section III, Brief Summary of Monthly Performance of Work, Bates Stamp No. 7,  
Exhibit 1A, Id.

<sup>26</sup> Letter from Young C. Kim, HIC Project Manager, to Andrew S. Leon Guerrero,  
Director, DPW dated July 27, 2010, Exhibit 2C1.3, Bates Stamp No. 0158, Id.

<sup>27</sup> Paragraph 3.1.1, 3<sup>rd</sup> Performance Period: July 26, 2010 through August 25,  
2010, Section III, Brief Summary of Monthly Performance of Work, Bates Stamp  
No. 7, Exhibit 1A, Id.

1           18. On or about August 18, 2010, HIC submitted a request for an additional one-  
2 thousand-nine-hundred-twenty-five-dollars (\$1,925) to DPW for HIC's installment of an  
3 additional sixty-nine (69) square yards of base course aggregate to comply with the grading  
4 specifications at the Cetti Bay Slide project site.<sup>28</sup>

5           19. On or about August 23, 2010, HIC discovered that the soil underlying the Umatac  
6 Baseball Culvert was too soft and wet to construct the culvert over and HIC requested that DPW  
7 allow HIC to remove the underlying soil and replace it with a different soil approved by DPW.<sup>29</sup>

8           20. On or about August 25, 2010, HIC completed pouring the concrete wall at the Cetti  
9 Bay Slide project site and they also conducted clearing and grubbing work at the Cetti Bay  
10 Culvert project site.<sup>30</sup>

11           21. On or about August 26, 2010, HIC submitted its request for an additional seventeen-  
12 thousand-one-hundred-seventy-nine-dollars-and-fifteen-cents (\$17,179.15) to DPW so that they  
13 could replace the rock they removed from the Cetti Bay Slide project site with concrete to  
14 comply with specifications.<sup>31</sup>

15           22. On or about September 3, 2010, HIC transmitted a second request for additional  
16 payments for the total amount of sixty-five-thousand-five-hundred-fifty-six-dollars-and-fifteen-  
17 cents (\$65,556.15) to DPW, after DPW failed to respond to HIC's June 21, July 7, 27, and  
18 August 18, and 26, 2010, requests for additional payments concerning work HIC performed at  
19 the Cetti Bay Slide project site.<sup>32</sup>

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24 <sup>28</sup> Letter from Young C. Kim, HIC Project Manager, to Andrew S. Leon Guerrero, Director, DPW dated August 18, 2010, Exhibit 2C1.4, Bates Stamp No. 170, Id.

25 <sup>29</sup> Letter from Young C. Kim, HIC Project Manager, to Andrew S. Leon Guerrero, Director, DPW dated August 23, 2010, Exhibit 2A2.6, Id.

26 <sup>30</sup> Paragraph 3, 3<sup>rd</sup> Performance Period: July 26, 2010 through August 25, 2010, Section III, Brief Summary of Monthly Performance of Work, Bates Stamp No. 7, Exhibit 1A, Id.

27 <sup>31</sup> Letter from Young C. Kim, HIC Project Manager, to Andrew S. Leon Guerrero, Director, DPW dated August 26, 2010, Exhibit 2C1.4, Bates Stamp No. 175, Id.

28 <sup>32</sup> Letter from Young C. Kim, HIC Project Manager, to Andrew S. Leon Guerrero, Director, DPW, dated September 3, 2010, Exhibit 2C1.1, Id. Bates Stamp No. 0143.

1           23. By September 25, 2010, HIC completed the placement of the concrete wall at the  
2 Cetti Bay Slide project site and completed the removal of the existing guardrail at the Sella Bay  
3 Culvert project site.<sup>33</sup>

4           24. On or about September 28, 2010, HIC submitted a letter to DPW requesting, in  
5 relevant part, an extension of an additional one-hundred-twenty (120) days to complete the  
6 contract.<sup>34</sup>

7           25. On or about October 6, 2010, HIC submitted its Traffic Control Plan for the Cetti  
8 Bay Culvert to DPW which was approved that day.<sup>35</sup> Said plan included the use of concrete  
9 barriers with flashing lights.<sup>36</sup> On or about October 7, 2010, HIC transmitted a request that DPW  
10 pay an additional twenty-eight-thousand-nine-hundred-eighty-nine-dollars (\$28,989) for the  
11 incorporation of the concrete barriers in the traffic control plan.<sup>37</sup>

12           26. On or about October 6, 2010, HIC submitted its third request for payment to DPW  
13 concerning HIC's two previous requests for additional payments for the total amount of sixty-  
14 five-thousand-five-hundred-fifty-six-dollars-and-fifteen-cents (\$65,556.15) for the Cetti Bay  
15 Slide project site after DPW failed to respond to HIC's September 3, 2010 letter regarding the  
16 same payment request.<sup>38</sup> HIC also reported that the concrete wall at the Cetti Bay Slide project  
17 site was one-hundred percent (100%) completed.<sup>39</sup>

18           27. On October 11, 2010, DPW staff visited the Cetti Bay Slide project site and  
19 discovered that there were no advance warning signs, or traffic controls installed at the site, and  
20 that the blunt edge of the rock retaining wall adjacent to the south bound right lane was facing  
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23 <sup>33</sup> Paragraph 4, 4<sup>th</sup> Performance Period: August 26, 2010 through September 25,  
2010, Section III, Brief Summary of Monthly Performance of Work, Bates Stamp  
No. 8, Summary of Project History, Exhibit 1A, Id.

24 <sup>34</sup> Letter from Andrew S. Leon Guerrero, Director, DPW, to Young C. Kim, HIC  
25 Project Manager, dated October 18, 2010, Hubtec Claim Category III, DPW's  
Brief Re Remedies filed on September 1, 2011.

26 <sup>35</sup> HIC Traffic Control Plan for the Cetti Bay Culvert, Exhibit 2B1.1,  
Appellant's Exhibit List filed on August 19, 2011.

27 <sup>36</sup> Id.

28 <sup>37</sup> Letter from Young C. Kim, HIC Project Manager, to Andrew S. Leon Guerrero,  
Director, DPW, dated October 7, 2010, Exhibit 2B1.2, Id.

<sup>38</sup> Letter from Young C. Kim, HIC Project Manager, to Andrew S. Leon Guerrero,  
Director, DPW, dated October 6, 2010, Exhibit 2C1.2, Id.

<sup>39</sup> Id.



1 oncoming traffic without benefit of protective crash cushions, temporary traffic barriers, or  
2 traffic lane adjustments, to provide a safe clearance.<sup>40</sup>

3 28. On or about October 13, 2010, DPW issued a stop work order for the Cetti Bay Slide  
4 project site suspending all work at the site until such time as all safety issues are corrected, and  
5 traffic control and project signs were properly installed.<sup>41</sup>

6 29. On or about October 18, 2010, DPW denied HIC's September 28, 2010 request for a  
7 one-hundred-twenty (120) day contract term extension stating that HIC must submit additional  
8 shop drawings and construction methods so that DPW could evaluate the request.<sup>42</sup> DPW further  
9 directed HIC to continue construction activities and promptly submit the construction methods  
10 for the culvert installations.<sup>43</sup>

11 30. By October 25, 2010, HIC completed installation of concrete traffic control barriers  
12 and the fabrication and installation of temporary signage at the Cetti Bay Culvert project site, and  
13 HIC conducted clearing and grubbing and silt fence installation at the Sella Bay Culvert project  
14 site.<sup>44</sup>

15 31. Also, on October 25, 2010, DPW informed HIC that HIC was substantially behind  
16 the project schedule due to three (3) project sites that should have begun in August 2010, and the  
17 fact that as of October 25, 2010, no excavation at any of the three (3) project sites had begun.<sup>45</sup>  
18 DPW also reminded HIC that HIC was obligated to complete the work by December 30, 2010  
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21 <sup>40</sup> Letter from Andrew S. Leon Guerrero, Director, DPW, to Kenneth M. Rekdahl,  
22 Project Engineer, Duenas Camacho & Associates, dated October 13, 2010, Hubtec  
23 Claim Category II Documents, DPW's Brief Re Remedies filed on September 1,  
2011.

<sup>41</sup> Id.

24 <sup>42</sup> Letter from Andrew S. Leon Guerrero, Director, DPW, to Young C. Kim, HIC  
25 Project Manager, dated October 18, 2010, DPW Correspondence to Hubtec, DPW's  
Brief Re Remedies filed on September 1, 2011.

<sup>43</sup> Id.

26 <sup>44</sup> Paragraph 5, 5<sup>th</sup> Performance Period: September 26, 2010 through October 25,  
27 2010, Section III, Brief Summary of Monthly Performance of Work, Bates Stamp  
No. 8, Summary of Project History, Exhibit 1A, Appellant's Exhibit List filed  
on August 19, 2011.

28 <sup>45</sup> Letter from Andrew S. Leon Guerrero, DPW Director, to Young Kim, HIC  
President, dated October 25, 2010, DPW Correspondence to HIC, DPW's Remedies  
Brief filed on September 1, 2011.

1 and DPW ordered HIC to submit a revised project schedule clearly explaining what measures  
2 HIC would employ to complete the project by that date.<sup>46</sup>

3 32. By November 25, 2010, HIC completed the removal of unsuitable material and clay  
4 soil, completed the excavation of the concrete foundation, and completed the laying of two inch  
5 (2") drain rock and form work for the outlet structure at the Umatac Baseball Culvert project site.  
6 HIC also completed the installation of the silt fence and warning tape at the Sella Bay Culvert  
7 project site.<sup>47</sup>

8 33. On December 6, 2010, HIC advised DPW that the project was behind schedule due  
9 to heavy rainfall, unstable soil at the project sites caused by water saturation, and the delay  
10 caused by ordering equipment from off-island. HIC requested that DPW grant HIC an additional  
11 one-hundred-five (105) calendar days to complete the project.<sup>48</sup>

12 34. On or about December 7, 2010, DPW advised HIC that HIC's progress was  
13 unacceptable because on that date, HIC had only completed seventeen percent (17%) of the  
14 project work and eighty-five-percent (85%) of the contract term had lapsed.<sup>49</sup> DPW also advised  
15 HIC that it must submit an updated schedule and justification delays and extension as required  
16 by the contract documents and that DPW would apply liquidated damages if HIC failed to  
17 complete the project on time.<sup>50</sup>

18 35. By December 25, 2010, HIC completed concrete emplacement and the outlet  
19 structure at the Umatac Baseball Culvert project site.<sup>51</sup>

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21 <sup>46</sup> Id.

22 <sup>47</sup> Paragraph 6, 6<sup>th</sup> Performance Period: October 26, 2010 through November 25,  
23 2010, Section III, Brief Summary of Monthly Performance of Work, Bates Stamp  
24 No. 9, Summary of Project History, Exhibit 1A, Appellant's Exhibit List filed  
25 on August 19, 2011.

26 <sup>48</sup> Letter from Young C. Kim, HIC General Manager, to Andrew S. Leon Guerrero,  
27 DPW Director, dated December 6, 2010, Exhibit 1.A.3., Id. Bates Stamp No.  
28 0020.

<sup>49</sup> Letter from Andrew S. Leon Guerrero, DPW Director, to Young Kim, HIC  
Project manager dated December 7, 2010, Hubtec Claim Category II, DPW's  
Remedies Brief filed on September 1, 2011.

<sup>50</sup> Id.

<sup>51</sup> Paragraph 7, 7<sup>th</sup> Performance Period: November 26, 2010 through December 25,  
2010, Section III, Brief Summary of Monthly Performance of Work, Bates Stamp  
No. 10, Summary of Project History, Exhibit 1A, Appellant's Exhibit List  
filed on August 19, 2011.

1           36. On December 31, 2010, the contract period for HIC to complete the project expired  
2 and HIC had not completed all the project work.

3           37. On January 17, 2011, HIC installed two of the forty-eight inch (48”) pipes and  
4 connected them to the headwall, poured twelve (12) cubic yards of flowable fill, sand cushion  
5 and they were fifteen-percent (15%) complete in placing backfill material at the Umatac Baseball  
6 Culvert project site.<sup>52</sup>

7           38. On January 20, 2011, the Federal Highway Administration, U.S. Department of  
8 Transportation (Hereafter referred to as “FHWA”), conducted a Construction Documentation  
9 Process Review and determined that similar Certified Mill Test Reports (Hereafter referred to as  
10 “Mill Certifications”), were showing up on HIC’s project documents prompting a FHWA  
11 investigation.<sup>53</sup>

12           39. On January 21, 2011, DPW denied HIC’s December 6, 2010 request for a one-  
13 hundred-five (105) day contract term extension finding that weather conditions at the project  
14 sites did not excuse the delay and that the delay was largely caused by HIC’s failure to submit  
15 for review and approval HIC’s work methodology for site preparation, excavation, and  
16 installation of culverts in a timely manner and by HIC’s failure to order the project materials in a  
17 timely manner resulting in the arrival of said materials on Guam in November, 2010, and DPW  
18 reiterated the imposition of liquidated damages against HIC in the amount of one-thousand-one-  
19 hundred-dollars (\$1,100) for each day the project remains uncompleted after December 31,  
20 2011.<sup>54</sup>

21           40. On January 21, 2011, HIC conducted a compaction test on the newly compacted  
22 backfill at the Umatac Baseball Culvert site and the test failed.<sup>55</sup>

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25 <sup>52</sup> DPW Daily Inspection Report dated January 17, 2011, Hubtec Claim Category  
I, DPW Remedies Brief filed on September 1, 2011.

26 <sup>53</sup> Letter from Richelle M. Takara, FHWA Transportation Engineer, to Joanne  
Brown, DPW Director, dated February 18, 2011, Tab B, Agency Report Filed on  
27 July 19, 2011.

28 <sup>54</sup> Letter from Joanne M.S. Brown, DPW Director, to Young Kim, HIC President,  
dated January 21, 2011, DPW Correspondence to HIC, DPW’s Remedies Brief filed  
on September 1, 2011.

<sup>55</sup> DPW Daily Inspection Report dated January 21, 2011, Hubtec Claim Category  
I, Id.

1 41. Also on January 21, 2011, FHWA as part of their investigation into HIC's project  
2 documents, inspected the project sites and discovered that only Korean steel was found at the  
3 project sites, HIC informed the FHWA that the Korean steel was only used for silt fences and  
4 that U. S. American made steel was used for the concrete wall at the slide and the head walls at  
5 the culvert and that HIC would provide FHWA with the rebar tags to prove this.<sup>56</sup>

6 42. On January 22, 2011, DPW inspected the Umatac Baseball Culvert and discovered  
7 that HIC had failed to shore up the sides of an open trench resulting in cave-ins each time a  
8 vehicle drove through the travel lane of the project site.<sup>57</sup>

9 43. Also on January 22, 2011, FHWA requested that DPW provide FHWA copies of the  
10 mill certifications and rebar tags for the project.<sup>58</sup>

11 44. By January 25, 2011, HIC performed the saw-cutting of existing asphaltic concrete,  
12 excavation, laid two (2) inch drain rock, and the installation of the forty-eight (48) inch diameter  
13 drain pipes at the Umatac Baseball Culvert.<sup>59</sup>

14 45. On January 25, 2011, DPW notified HIC that DPW was assessing Liquidated  
15 Damages on HIC in the amount of \$1,100 per calendar day for HIC's failure to complete the  
16 project by December 31, 2010.<sup>60</sup> DPW determined that on that date, HIC had only completed  
17 twenty-eight-percent (28%) of the project.<sup>61</sup> Further, DPW ordered HIC to submit a request for a  
18 time extension and that said request must include a narrative articulating HIC's means and  
19 methods to be employed to promptly and safely complete the project and to suggest a new  
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22 <sup>56</sup> Letter from Richelle M. Takara, FHWA Transportation Engineer, to Joanne  
Brown, DPW Director, dated February 18, 2011, Tab B, Agency Report Filed on  
July 19, 2011.

23 <sup>57</sup> DPW Daily Inspection Report dated January 22, 2011, Hubtec Claim Category  
I, DPW Remedies Brief filed on September 1, 2011.

24 <sup>58</sup> Letter from Richelle M. Takara, FHWA Transportation Engineer, to Joanne  
Brown, DPW Director, dated February 18, 2011, Tab B, Agency Report Filed on  
25 July 19, 2011.

26 <sup>59</sup> Paragraph 8, 8<sup>th</sup> Performance Period: December 26, 2010 through January 25,  
2011, Section III, Brief Summary of Monthly Performance of Work, Bates Stamp  
27 No. 10, Summary of Project History, Exhibit 1A, Appellant's Exhibit List  
filed on August 19, 2011.

28 <sup>60</sup> Letter from Joanne M.S. Brown, DPW Director to Young Kim, HIC Project  
Manager, dated January 25, 2011, Exhibit E, DPW's Exhibit List filed on  
August 12, 2011.

<sup>61</sup> Id.

1 project completion date.<sup>62</sup> Finally, DPW notified HIC that failure to respond to its order within  
2 two (2) weeks, expiring on February 8, 2011, would result in DPW notifying HIC's performance  
3 bonding company that HIC has failed to complete the work on time and that HIC was in breach  
4 of the contract.<sup>63</sup>

5 46. On January 27, 2011, FHWA determined that the mill certifications did not match up  
6 with the rebar tags provided by HIC, although, DPW could not confirm that the rebar tags were  
7 for rebar used for the project.<sup>64</sup>

8 47. On January 31, 2011, DPW issued Construction Non-Conformance Report notifying  
9 HIC of HIC's failure to install the culvert pipes at the Umatac Baseball Culvert in accordance  
10 with the contract documents due to said pipes being not uniformly installed, and because the pipe  
11 joints were loose, and because one joint was three (3) inches apart allowing stagnant water to  
12 remain in the pipe.<sup>65</sup>

13 48. On February 2, 2011, HIC received a Notice of Violation (NOV) and a Stop Work  
14 Order from the Guam Environmental Protection Agency (GEPA) for the Cetti Bay and Umatac  
15 Baseball Culvert project sites, because HIC did not have erosion or sediment control devices in  
16 place at said sites.<sup>66</sup> GEPA also instructed HIC to contact GEPA before doing any more work at  
17 the sites and to start making corrections at the project sites immediately and complete them in  
18 thirty (30) days which would expire on March 4, 2011.<sup>67</sup>

19 49. On February 3, 2011, HIC admitted that it used Korean made rebar at the project  
20 sites and not U. S. American made rebar as required by the contract, and HIC stated that no one  
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24 <sup>62</sup> Id.

25 <sup>63</sup> Id.

26 <sup>64</sup> Letter from Richelle M. Takara, FHWA Transportation Engineer, to Joanne  
Brown, DPW Director, dated February 18, 2011, Tab B, Agency Report Filed on  
July 19, 2011.

27 <sup>65</sup> DPW Construction Non-Conformance Report dated January 31, 2011, Hubtec  
Claim Category I, DPW Remedies Brief filed on September 1, 2011.

28 <sup>66</sup> GEPA Notice of Violation dated February 2, 2011, Bates Stamp Nos. 0040 and  
0041, Exhibit 1.A.3., Appellant's Exhibit List filed on August 19, 2011.

<sup>67</sup> Id.

1 notified them of the requirement that the rebar must be made of American steel prior to the  
2 concrete being poured at the project sites.<sup>68</sup>

3 50. As a result of the GEPA NOV and stop work order, on February 9, 2011, DPW  
4 issued its own stop work order for the Cetti Bay and Umatac Baseball Culvert project sites and  
5 directed HIC to immediately address and correct all erosion and sediment control devices, cease  
6 the discharge of waters into Guam's waterways, and remove all excavated and stockpiled  
7 material within one-hundred-fifty (150) feet of the construction site.<sup>69</sup> DPW also instructed HIC  
8 not to resume work at the Cetti Bay and Umatac Baseball Culverts until the sites complied with  
9 GEPA and U.S. Army Corps of Engineer permits.<sup>70</sup>

10 51. On February 11, 2011, DPW inspected the Umatac Baseball Culvert project site and  
11 discovered that HIC was still conducting work at the project site in violation of the GEPA and  
12 DPW's Stop Work Orders and DPW reminded HIC that only work associated with correcting the  
13 conditions causing the Stop Work Orders was allowed until the Stop Work Orders were lifted.<sup>71</sup>

14 52. On February 15, 2011, DPW and HIC had a project meeting wherein HIC agreed to  
15 pour the concrete barriers for the Sella Bay Culvert project site that day, and wherein HIC agreed  
16 to fix mistakes it made in the installation of the guardrail at the Sella Bay Culvert (it unduly  
17 narrowed the road), and HIC also agreed that it would submit the Cetti Bay Culvert shop  
18 drawings for review and approval and requested that DPW approve the shop drawing HIC  
19 submitted for soil erosion mitigation at the Sella Bay Culvert outlet structure.<sup>72</sup> Further, HIC  
20 insisted that the stop work orders for the Cetti Bay and Umatac Baseball Culverts be lifted  
21 because all issues causing them have been addressed.<sup>73</sup>

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24 <sup>68</sup> Letter from Young C. Kim, HIC Project Manager, to Joanne M.S. Brown, DPW  
Director, dated February 3, 2011, Tab B, Agency Report filed on July 19,  
2011.

25 <sup>69</sup> Letter from Joanne M.S. Brown, DPW Director, to Young Kim, HIC President,  
dated February 9, 2011, Hubtec Claim Category III, DPW Remedies Brief filed  
26 on September 1, 2011.

27 <sup>70</sup> Id.

28 <sup>71</sup> DPW Construction Non-Conformance Report dated February, 11, 2011, Hubtec  
Claim Category I, DPW Remedies Brief filed on September 1, 2011.

<sup>72</sup> Minutes of February 15, 2011 Meeting, Bates Stamp No. 0131, Exhibit 2B1.5,  
Appellant's Exhibits, filed on August 19, 2011.

<sup>73</sup> Id.

1           53. On February 18, 2011, FHWA informed DPW that the FHWA could not reimburse  
2 the Government of Guam for pay items that were constructed with non-U.S. American made  
3 steel and that any pay item concerning the foreign made steel already reimbursed shall be  
4 deducted from the next request for reimbursement for the project, and that FHWA would also not  
5 reimburse DPW's construction manager for the time they spent inspecting the work with foreign  
6 steel or the time spent resolving the foreign steel issue.<sup>74</sup>

7           54. On February 22, 2011, HIC submitted an invoice to DPW requesting an additional  
8 forty-six-thousand-one-hundred-twenty-seven-dollars-and-sixty-three-cents (\$46,127.63) for  
9 HIC's remedial actions taken to meet GEPA's environmental protection requirement at the  
10 Umatac Baseball and Cetti Bay Culverts.<sup>75</sup>

11           55. Also on February 22, 2011, DPW sent HIC a Notice of Termination of Contract due  
12 to HIC's breach of its contractual obligations caused by HIC's: (1) Failure to timely or  
13 reasonably progress and prosecute the contracted work; (2) Performance of the work in a  
14 defective and substandard manner; (3) Intentional and wrongful substitution and installation of  
15 foreign steel imported from Korea, in violation of the express terms of the Contract and Guam  
16 and Federal Law; (4) Intentional and willful falsification of payment invoices so as to  
17 fraudulently misrepresent the Korean steel as being U.S. steel, in violation of the Contract and  
18 Guam and Federal Law; (5) Engaging in actions and conducting work in violation of OSHA  
19 standards; and (6) Numerous unauthorized deviations from the project's stated particulars and  
20 specifications, additionally, DPW ordered HIC to peacefully surrender and leave the project site  
21 forthwith.<sup>76</sup>

22           56. On that same day, DPW notified Alpha Insurers, HIC's performance bond holder for  
23 the project, of DPW's claim and demand that Alpha Insurers: (1) Promptly remedy the default,  
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25 <sup>74</sup> Letter from Richelle M. Takara, FHWA Transportation Engineer, to Joanne  
26 Brown, DPW Director, dated February 18, 2011, Tab B, Agency Report Filed on  
27 July 19, 2011.

28 <sup>75</sup> Letter from Young C. Kim, HIC General Manager, to Joanne M.S. Brown, DPW  
29 Director dated February 22, 2011, Bates Stamp No. 0260, Exhibit 3.6,  
30 Appellant's Exhibits filed on August 19, 2011.

<sup>76</sup> Letter from Joanne M.S. Brown, DPW Director, to Young C. Kim, dated  
31 February 22, 2011, Bates Stamp No. 0589, Procurement Record filed on July 12,  
32 2011.

1 or (2) Promptly complete the contract in accordance with its terms and conditions; or (3) Obtain  
2 a bid or bids for completing the contract.

3 57. On February 24, 2011, an onsite field review of the project was conducted by  
4 representatives from Chung Kuo Insurance Company, Ltd., the insurance underwriter for HIC's  
5 performance bond, and Chung Kuo Insurance Company Ltd., took over the project shortly  
6 thereafter.<sup>77</sup>

7 58. HIC submitted Invoice Nos. 1 thru 6 during the period in which they worked on the  
8 project and these invoices were for a total sum of one-hundred-forty-five-thousand-six-hundred-  
9 fifty-six-dollars (\$145,656).<sup>78</sup> DPW paid a total of four-hundred-fourteen-thousand-ninety-one-  
10 dollars-and-eighty-cents (\$414,091.80) to HIC, to include payment on HIC's invoices, leaving a  
11 remaining balance of one-million-four-hundred-twenty-thousand-nine-hundred-forty-eight-  
12 dollars-and-twenty-cents (\$1,420,948.20) from HIC's one-million-eight-hundred-thirty-five-  
13 thousand-and-forty-dollars (\$1,835,040) contract price amount.<sup>79</sup>

14 59. Subsequently, the Chung Kuo Insurance Company, Ltd., processed various claims  
15 made against HIC's one-million-eight-hundred-thirty-five-thousand-and-forty-dollars  
16 (\$1,835,040) performance bond and paid out a total of one-hundred-thirty-nine-thousand-four-  
17 hundred-eighty-four-dollars-and-eighty-five-cents (\$139,484.85) to pay HIC's subcontractors  
18 with valid project claims, and the remaining balance of one-million-six-hundred-ninety-five-  
19 thousand- five-hundred-fifty-five-dollars-and-fifteen-cents (\$1,695,555.15) went toward the  
20 completion of the project.<sup>80</sup>

21 60. On March 24, 2011, DPW and GEPA advised Chung Kuo Insurance Company, Ltd.,  
22 that they were conditionally lifting the stop work order for the Umatac Baseball Culvert project  
23 site, and that their stop work orders for the Cetti Bay project site was still in effect and would not  
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26 <sup>77</sup> DPW Procurement Memorandum dated May 20, 2011, page 3, attached to DPW's  
27 Response to OPA's Order Vacating Hearing and Requesting Additional Briefing  
filed on September 1, 2011.

28 <sup>78</sup> Page 8, DPW's Response to OPA's Request for Additional Information filed on  
October 10, 2011.

<sup>79</sup> Id.

<sup>80</sup> Page 3, Id.



1 be lifted until the environmental violations at the site have been satisfactorily corrected and  
2 approved by GEPA.<sup>81</sup>

3 61. On April 1, 2011, HIC protested DPW's termination of HIC as the contractor for the  
4 project and requested a final decision in accordance with Guam Procurement Regulations.<sup>82</sup>

5 62. On April 11, 2011, Chung Kuo Insurance Company, Ltd. notified DPW that it would  
6 be exercising its option under HIC's performance bond to obtain bids for completing the contract  
7 for the project.<sup>83</sup>

8 63. On April 12, 2011, DPW responded to HIC's April 1, 2011 letter by denying HIC's  
9 protest on the grounds that HIC's protest is legally time barred. Specifically, DPW stated that  
10 HIC was served with the Notice of Termination of Contract on February 22, 2011 and this meant  
11 that any grievance HIC may have had over DPW's decision to terminate HIC's contract should  
12 have been filed within fourteen (14) days after that date or no later than March 8, 2011, and that  
13 HIC filed their protest on April 1, 2011, which is, after the time to file a protest, had passed.<sup>84</sup>

14 64. On April 21, 2011, HIC notified DPW that DPW appeared to be responding to their  
15 contract dispute as though it were a bid protest, and HIC also gave notice that if HIC did not hear  
16 from DPW by April 25, 2011, HIC would treat this as DPW's refusal to issue a final decision in  
17 the dispute and proceed with administrative and judicial review of the decision.<sup>85</sup>

18 65. On April 29, 2011, DPW's construction manager, after reviewing outstanding claims  
19 submitted to Chung Kuo Insurance Company, Ltd., determined that HIC attempted to deceive  
20 DPW in order to increase HIC's undistributed materials payments from DPW.<sup>86</sup> Specifically,  
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23 <sup>81</sup> Letter from Joanne M.S. Brown, DPW Director, to Chen-Yi Kuo, Chung Kuo  
Insurance Co., Ltd., Representative, dated March 24, 2011, Tab B, Agency  
Report filed on July 19, 2011.

24 <sup>82</sup> Letter from Phillip Torres, Esq., to Joanne M.S. Brown, DPW Director, dated  
April 1, 2011, TAB A, Id.

25 <sup>83</sup> Page 3, DPW Procurement Memorandum dated May 20, 2011, attached to DPW's  
26 Response to OPA's Order vacating Hearing and requesting additional briefing  
filed on September 1, 2011.

27 <sup>84</sup> Letter from Joanne M.S. Brown, DPW Director, to Phillip Torres, Esq., dated  
April 12, 2011, Tab B, Agency Report filed on July 19, 2011.

28 <sup>85</sup> Letter from Phillip Torres, Esq. to Joanne M.S. Brown, DPW Director dated  
April 21, 2011, Exhibit A, Notice of Appeal filed on June 24, 2011.

<sup>86</sup> Letter from John P. Duenas, President, Duenas, Camacho and Associates, to  
Joanne M.S. Brown, DPW Director, dated April 29, 2011, Exhibit 1, DPW's

1 HIC modified an existing American Water Works International receipt to claim that it paid said  
2 vendor one-hundred-two-thousand-eight-hundred-fifty-dollars (\$102,850) and seek DPW's  
3 reimbursement for said payment when HIC actually only made a fifty-one-thousand-six-  
4 hundred-forty-eight-dollar (\$51,648) payment to said vendor for forty-eight inch (48") plastic  
5 pipes.<sup>87</sup>

6 66. Chung Kuo Insurance Company, Ltd., subsequently provided DPW with IMCO's  
7 three-million-eight-hundred-twenty-four-thousand-dollar (\$3,824,000) bid to complete the  
8 contract for the project which DPW accepted on May 20, 2011.<sup>88</sup>

9 67. On June 24, 2011, HIC filed this appeal, alleging that DPW failed to respond to  
10 HIC's April 21, 2011 demand for a final decision regarding HIC's contract dispute against DPW,  
11 and that HIC alleges that DPW breached the contract and wrongfully terminated HIC's contract,  
12 and that DPW used the termination as an excuse not to honor HIC's change orders and requests  
13 for payment for HIC's work on the project.<sup>89</sup>

14 68. As of September 30, 2011, the project was sixty-three-percent (63%) complete and  
15 DPW expected the project to be finally completed on or about December 19, 2011.<sup>90</sup>

### 17 III. ANALYSIS

18 The threshold issues presented by this appeal are whether the Public Auditor has the  
19 jurisdiction to hear it and whether HIC's appeal is properly before the Public Auditor. Pursuant  
20 to 5 G.C.A. §5703, the Public Auditor shall review these threshold issues *de novo*.  
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25 Response to OPA's Request for Additional Information filed on October 10,  
26 2011.

27 <sup>87</sup> Id.

28 <sup>88</sup> Page 8, DPW Procurement Memorandum dated May 20, 2011, attached to DPW's  
Response to OPA's Order Vacating Hearing and Requesting Additional Briefing  
filed on September 1, 2011.

<sup>89</sup> Grounds of Appeal Statement, Notice of Appeal filed on June 24, 2011.

<sup>90</sup> Page 10, DPW's Response to OPA's Request for Additional Information filed  
on October 10, 2011.

1 **A. Section 103.02 of the Contract is Unenforceable.**

2 As a preliminary matter, the Public Auditor must determine whether Section 103.02,  
3 which governs disputes, of the Special Contract Requirements, which are part of the contract  
4 documents, is an enforceable provision of the contract. That section begins by stating that the  
5 contract is subject to: “The Contract Act of 1978 (43 U.S.C. §601-613).”<sup>91</sup> The Public Auditor  
6 finds that there is no federal “Contract Act of 1978.” Also, the Public Auditor finds that the  
7 citation 43 U.S.C. §601-613 does not concern contract disputes but instead concerns the  
8 reclamation and irrigation of public lands by the federal government and sections 602-609 of this  
9 law were repealed on June 17, 1944. Guam follows the “plain meaning” or traditional approach  
10 in contract interpretation matters. *Wasson et.al., v. Berg*, 2007 Guam 16, ¶17 (Supreme Court of  
11 Guam). This means that we look to the four corners of the contract to determine the intentions of  
12 the parties which are controlling, and if the language is unambiguous, then a finder of fact must  
13 not resort to extrinsic evidence of a contract’s meaning and determines the parties’ intentions  
14 from the plain meaning of the contract as a matter of law. *Id.*, ¶16. Guam’s statutes regarding  
15 contract interpretation support this approach. The language of a contract is to govern its  
16 interpretation if the language is clear, explicit, and does not involve an absurdity. 18 G.C.A.  
17 §87104. Here, as previously stated, an ambiguity exists concerning Section 103.02(a) of the  
18 Special Contract Requirements and the Public Auditor must look to extrinsic evidence to  
19 determine the intentions of the parties. It appears, based on the remaining language of Section  
20 103.02, that the parties intended to be bound by Federal Acquisition Regulation (Hereafter  
21 referred to as “FAR”) Contract Clause No. 52.233.1 which governs disputes in federal contracts.  
22 Indeed, sub-section (a) of FAR 52.233.1 states that disputes in contracts containing this clause,  
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<sup>91</sup> Section 103.02(a), Special Contract Requirements, Bates Stamp No. 0149, IFB, Procurement Record filed on July 12, 2011.

1 are to be governed by the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-113). FAR  
2 52.233.1(a). Thus, this extrinsic federal regulation resolves the aforementioned ambiguity.

3 Therefore, the Public Auditor finds that the parties intended to be governed by FAR 52.233.1 as  
4 the language of that federal contract clause closely resembles the remaining language of Section  
5 103.02 of the Special Contract Requirements at issue here.  
6

7         However, the parties' intention to use the FAR 52.233.1's disputes clause creates a  
8 second ambiguity. Specifically, Section 103.02 of the Special Contract Requirements seeks to  
9 enforce a federal disputes procedure instead of the disputes procedure set forth in Guam  
10 Procurement Law and Regulations. Generally, where procurement involves the expenditure of  
11 federal assistance or contract funds, or other federal funds, all persons within the Government of  
12 Guam shall comply with such federal law and regulations which are applicable and which may  
13 be in conflict with Guam's Procurement Law and Regulations. 5 G.C.A. §5501 and 2 G.A.R.  
14 Div. 4, Chap. 10, §10101. Here, the disputes clause set forth in FAR 52.233.1 and Section  
15 103.02 of the Special Contract Requirements, conflicts with the administrative dispute procedure  
16 set forth in 5 G.C.A. §5427, 2 G.A.R., Div. 4, Chap. 9, §9103, and 5 G.C.A. §5706. Specifically,  
17 Section 103.02 requires HIC to submit a claim against DPW in writing and said claim must be  
18 certified to be a valid claim.<sup>92</sup> Further, as HIC's claim would be for an amount greater than fifty-  
19 thousand-dollars (\$50,000), after receiving HIC's certified claim, DPW's contracting officer  
20 must, within sixty (60) days, either render a decision on the claim, or notify HIC of the date  
21 when such decision will be made, and the DPW contracting officer's decision is final unless HIC  
22 appeals or files a suit, as provided in the Federal Contract Disputes Act of 1978.<sup>93</sup> In contrast,  
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28 <sup>92</sup> Section 103.02(d), Special Contract Requirements, IFB, Bates Stamp No. 0149, Procurement Record filed on July 12, 2011.

<sup>93</sup> Section 103.02(e) and (f), id.

1 Guam's administrative dispute procedure, as set forth in Guam Procurement Law and  
2 Regulations, does not require HIC to submit a certified claim, and if DPW fails to render a final  
3 decision regarding the contract controversy within sixty (60) days after HIC presents DPW with  
4 a written request for one, HIC is authorized to file an appeal with the Public Auditor as if it  
5 received an adverse decision from DPW. 5 G.C.A. §5427(f) and 2 G.A.R., Div. 4, Chap. 9,  
6 §9103(d)(3). The Public Auditor would have to enforce the provision of Section 103.02 of the  
7 Special Contracts Requirements if there was a federal law requiring DPW to use FAR 52.233.1's  
8 dispute clause. However, although the contract here was paid for using ARRA funds  
9 administered through the FHWA, and although both ARRA and the FHWA have specific  
10 contract clause requirements, FAR 52.233.1's dispute clause is not one of them. Government  
11 contracts must be read in light of the regulations under which they are administered.  
12 *International Transducer Corp. v. U.S.*, (30 Fed.Cl. 522) March 8, 1994. Thus, the Public  
13 Auditor finds that Section 103.02 of the Special Contract Requirements is unenforceable and will  
14 follow the dispute provisions set forth in 5 G.C.A. §5427, 2 G.A.R., Div. 4, Chap. 9, §9103, and  
15 5 G.C.A. §5706.

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19 **B. The Public Auditor Has the Jurisdiction to Hear this Matter as a Contract Controversy.**

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21 The Public Auditor has the jurisdiction to hear the issue of whether DPW properly  
22 terminated HIC's contract. The Public Auditor shall decide contract and breach of contract  
23 controversies. 5 G.C.A. §5706(c). Contract and breach of contract controversies arise between  
24 the Government of Guam and contractor under, by virtue of a contract between them and this  
25 includes, without limitation, controversies based upon breach of contract, mistake,  
26 misrepresentation, or other cause for contract modification or rescission. 5 G.C.A. §5427(a) and  
27 2 G.A.R., Div. 4, Chap. 9, §9103(a1). Here, this matter concerns a contract between the  
28 Government of Guam and a contractor because, as previously stated, DPW solicited bids for the  
project, HIC had the lowest bid and was awarded the project, and DPW and HIC entered into a

1 contract for the project on or about January 7, 2010. Further, this matter concerns a contract  
2 controversy because, as previously stated, DPW terminated its contract with HIC on February  
3 22, 2011 due to HIC's alleged breach of its contractual obligations.<sup>94</sup> Further, on April 1, 2011,  
4 HIC protested the termination.<sup>95</sup> Thus, the Public Auditor finds that HIC's appeal concerns  
5 DPW's termination of its contract, which is a contract controversy.

6 **C. This Contract Controversy is Properly Before the Public Auditor.**

7 The issue of DPW's termination of HIC's contract is properly before the Public Auditor.  
8 Generally, the Public Auditor has the jurisdiction to review and determine *de novo* any matter  
9 properly submitted before her. 5 G.C.A. §5703. Here, despite initially treating HIC's April 1,  
10 2011 letter as a procurement protest, DPW now agrees that this matter involves a contract  
11 controversy and not a bid protest.<sup>96</sup> DPW also admits that it did not issue a final decision  
12 regarding its termination of HIC's contract and DPW argues that the Public Auditor has no  
13 jurisdiction because this matter lacks such final decision.<sup>97</sup> The Public Auditor notes that DPW  
14 had a duty to issue a decision regarding HIC's contract controversy because the contract  
15 specifically stated that all disputes concerning questions of fact arising under the contract shall  
16 be decided by DPW's Contracting Officer.<sup>98</sup> Guam Procurement Law also requires DPW to  
17 issue such decision. If a contract controversy is not resolved by mutual agreement, DPW's  
18 Director, or her designee shall promptly issue a decision in writing, and the decision shall  
19 contain a description of the controversy, a reference to the pertinent contract provisions, a  
20 statement of the factual areas of agreement or disagreement, a statement of the procurement  
21 officer's decision and the reasons for the action taken, and inform the contractor of its rights to  
22 judicial or administrative review. 5 G.C.A. §5427(c) and 2 G.A.R., Div. 4, Chap. 9, §9103(d)(2).  
23 If DPW's Director, or her designee does not issue the written decision within sixty (60) days  
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25 <sup>94</sup> Letter from Joanne M.S. Brown, DPW Director, to Young C. Kim, dated  
26 February 22, 2011, Bates Stamp No. 0589, Procurement Record filed on July 12,  
2011.

27 <sup>95</sup> Letter from Phillip Torres, Esq., to Joanne M.S. Brown, DPW Director, dated  
28 April 1, 2011, TAB A, Id.

<sup>96</sup> Paragraph II.A. Stipulation Re: Contract Dispute, page 2, Tab B, Agency  
Report filed on July 19, 2011.

<sup>97</sup> Id.

<sup>98</sup> Paragraph III, Id.

1 after written request for a final decision, or within such longer period as may be agreed upon by  
2 the parties, then the contractor may proceed as if an adverse decision had been received. 5  
3 G.C.A. §5427(f) and 2 G.A.R., Div. 4, Chap. 9, §9103(d)(3). Further, the aggrieved contractor  
4 shall file his or her appeal with the Public Auditor within sixty (60) days after receipt of the  
5 decision or within sixty (60) days following the purchasing agency's failure to render a timely  
6 decision. 5 G.C.A. §5706(b). Here, as previously stated, on April 1, 2011, HIC requested in  
7 writing that DPW issue a final decision regarding the termination of HIC's contract and despite  
8 having until May 31, 2011 to comply with this request, DPW never issued a final decision.

9 DPW's failure to render a decision on HIC's contract controversy and DPW's improper  
10 treatment of the controversy as a procurement protest are not surprising as these acts arise from  
11 DPW's failure to incorporate the correct contract clauses required by Guam's Procurement Law  
12 and Regulations into the contract. Specifically, Guam Procurement Regulations spell out the  
13 administrative procedure for handling contract controversies between the Government of Guam  
14 and contractors in a contract clause and mandates that this contract clause or language  
15 substantially similar to it shall be inserted into all Government of Guam contracts. 2 G.A.R.,  
16 Div. 4, Chap. 9, §9103(g). Had DPW followed Guam's Procurement Law and Regulations, it  
17 would have included this clause into its contract and followed it by rendering a timely decision.  
18 Despite DPW's failure and the sixty (60) day delay caused by it, HIC had the right to proceed  
19 with its contract controversy. Pursuant to 5 G.C.A. §5427(f), cited above, HIC had the right,  
20 after May 31, 2011, to proceed as if it received an adverse decision from DPW. Further,  
21 pursuant to 5 G.C.A. §5706(b), HIC had sixty (60) days after May 31, 2011, to file its appeal  
22 with the Public Auditor and said period would have expired on or about July 30, 2011. Here,  
23 HIC filed its appeal with the Public Auditor on June 24, 2011, which is thirty-six (36) days  
24 before said period expired. Thus, the Public Auditor finds that HIC's appeal is timely and  
25 properly before the Public Auditor. The Public Auditor will now review *de novo* the issue of  
26 whether HIC breached the contract.  
27  
28

1 **D. HIC Breached the Contract.**

2 The facts in this matter overwhelmingly support DPW's conclusion that HIC breached  
3 the contract. As will be discussed below, HIC breached the contract by failing to complete it on  
4 time, by failing to use U. S. American made rebar at the Cetti Bay Slide and by attempting to  
5 conceal that fact. HIC also breached the contract by failing to have erosion control measures at  
6 the Cetti Bay and Umatac Baseball Culvert project sites and by failing to perform the work in a  
7 workmanlike manner in compliance with the contract.

8 HIC breached the contract by failing to complete the project within the contract term. As  
9 previously stated, the contract required HIC to commence work upon receiving DPW's written  
10 NTP, and to complete the project ready for use and operation within two-hundred-forty (240)  
11 days of the commencement of the contract time as stated in the Notice to Bidders of the  
12 contract.<sup>99</sup> The Notice to the Bidders clearly and unambiguously states that contract time for the  
13 project is two-hundred-forty (240) calendar days from the issuance of the NTP, and that the  
14 contractor is reminded that the contract time is established for a variety of reasons and DPW  
15 expects delivery of the completed project by the completion date.<sup>100</sup> As previously stated, the  
16 Notice to Bidders was specifically made part of the contract documents. Further, as previously  
17 stated, DPW issued its written NTP to HIC on May 5, 2010 and pursuant to the contract, HIC  
18 was obligated to complete the project within two-hundred-forty (240) calendar days thereafter  
19 which expired on December 31, 2010. However, it is beyond any doubt that HIC failed to  
20 complete the project by December 31, 2010. As previously stated, just twenty-four (24) days  
21 prior to the December 31, 2010 expiration of the contract term, only seventeen percent (17%) of  
22 the project was complete.<sup>101</sup> On December 31, 2010, the project was only twenty-eight percent  
23 (28%) complete.<sup>102</sup> Further, HIC did not make much progress after the December 31, 2010  
24 project completion deadline because on September 1, 2011, over nine (9) months after the  
25

26 <sup>99</sup> Notice to Bidders, IFB, Bates Stamp No. 0068, Procurement Record filed on  
27 July 12, 2011, Paragraph I (a)5), Contract Time.

<sup>100</sup> Id.

28 <sup>101</sup> Letter from Andrew S. Leon Guerrero, DPW Director, to Young Kim, HIC  
Project manager dated December 7, 2010, Hubtec Claim Category III, DPW's  
Remedies Brief filed on September 1, 2011.

<sup>102</sup> Page 5, DPW's Hearing Brief filed on August 19, 2011.



1 deadline and over seven (7) months after HIC's contract was terminated, the project was only  
2 thirty-percent (30%) complete.<sup>103</sup> Thus, the Public Auditor finds that HIC did not comply with  
3 Paragraph I(a) of the Contract because it failed to complete the project within two-hundred-forty  
4 (240) calendar days after receiving DPW's written NTP even if HIC's extension requests had  
5 been granted by DPW.

6         However, this breach is excusable because it was caused in part by DPW's failure to  
7 grant HIC's September 28, 2010 and December 6, 2010 requests for an extension. The contract  
8 states that DPW shall either terminate the contract or charge liquidated damages for delays  
9 causing the work to extend past the December 31, 2010 completion date, unless HIC notifies  
10 DPW of the cause of the delay within ten (10) calendar days, or longer period approved by  
11 DPW, from the beginning of the delay, and DPW's Contracting Officer, after ascertaining the  
12 facts and the extent of the delay, extends the time for completing the work when, in his  
13 judgment, the facts justify such extension.<sup>104</sup> The contract also states that DPW's Contracting  
14 Officer's finding of fact requests for extensions of final and conclusive on the parties subject  
15 only to arbitration as specified herein.<sup>105</sup> The phrase: "subject only to arbitration as specified  
16 herein" is problematic. First, there is no arbitration clause in the contract. Second, the  
17 arbitration language conflicts with the disputes procedure set forth in Section 103.02 of the  
18 contract, which, as previously stated, is unenforceable. Finally, the arbitration language conflicts  
19 with the contract controversy procedures set forth in 5 G.C.A. §5427 and 2 G.A.R., Div. 4, Chap.  
20 9, §9103. To resolve this dilemma, the Public Auditor finds that the arbitration language is also  
21 unenforceable and that the administrative procedures for contract controversies set forth in 5  
22 G.C.A. §5427 and 2 G.A.R., Div. 4, Chap. 9, §9103 control. The Public Auditor finds that the  
23 Government of Guam officials who affixed their approval signatures to the contract - DPW's  
24 Director, DPW's Acting Chief Engineer, DPW's Certifying Officer and Acting Program  
25 Administrator for Highway Engineering and Maintenance, the Director of the Bureau of Budget

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27 <sup>103</sup> Page 4, DPW's Response to OPA's Order Vacating Hearing and Requesting  
28 Additional Briefing filed on September 1, 2011.

<sup>104</sup> Section 108.05(h), Special Contract Requirements, Bates Stamp No. 0165 &  
0166, Procurement Record filed on July 12, 2011.

<sup>105</sup> Id.

1 and Management Research (BBMR), the Attorney General, and the Governor of Guam - did not  
2 sufficiently review the draft contract prior to the finalization of the contract to ensure the contract  
3 clauses contained therein were consistent and in accordance with Guam's Procurement Law and  
4 Regulations and applicable federal law. As previously stated, HIC requested a one-hundred-  
5 twenty (120) day extension on September 28, 2010, and a one-hundred-five (105) day extension  
6 on December 6, 2010, which were both denied by DPW. HIC's first request for an extension  
7 was based on difficulties encountered at the Sella River Culvert site relating to structure  
8 excavation and backfill and its second request was based on delays caused by heavy rainfall,  
9 unstable soil at the project sites caused by water saturation, and the delay caused by ordering  
10 equipment from off-island. The one-hundred-twenty (120) day extension would have moved the  
11 project completion date to April 30, 2011. The Public Auditor finds these reasons to be valid  
12 justifications for an extension. No prior determination shall be final or conclusive on the Public  
13 Auditor. 5 G.C.A. §5703. Therefore, the Public Auditor finds that HIC's failure to complete the  
14 project by the December 31, 2010 project completion date is excused because DPW should have  
15 granted HIC's valid September 28, 2010 and December 6, 2010 requests for an extension.

16 Further, DPW is responsible for its fair share of the delays in completing the project. As  
17 previously stated, the contract was signed and approved on January 7, 2010. On January 11,  
18 2010, DPW's Acting Engineer Supervisor was instructed to issue a NTP to HIC which would  
19 have started the project. Had DPW issued the NTP in January, 2010, the start of Guam's  
20 traditional "dry season," many of the problems caused by the heavy rains that fell during Guam's  
21 traditional "wet season," may have been avoided. DPW did not issue the NTP until five (5)  
22 months later, on May 5, 2010, at the very start of the "wet season." DPW provides no excuse for  
23 this delay and the Public Auditor finds that this delay, solely caused by DPW, may have put the  
24 project's schedule in jeopardy from the beginning. Further, DPW failed to enforce the project  
25 schedule until October 25, 2010, approximately six (6) months into the eight (8) months contract  
26 period and DPW's enforcement efforts were limited to advising HIC to submit a revised project  
27 schedule showing how HIC would complete the project during the two (2) months remaining on  
28 the project schedule. The Public Auditor finds DPW's belated attempt to enforce the project

1 schedule to be too little too late. Thus, as DPW should have granted HIC's extension requests  
2 due to DPW's delay in issuing the NTP and its delay in enforcing the project schedule, the Public  
3 Auditor finds that DPW's imposition of liquidated damages against HIC is erroneous and said  
4 damages should not have been imposed upon HIC.

5 HIC breached Paragraph I, of the Contract, Section 105.1 of the Special Contract  
6 Requirements, and Section IX of the Required Contract Provisions for Federal-Aid Construction  
7 Contracts, IFB, by using Korean made steel rebar for the Cetti Slide Project site and falsifying  
8 documents to make it appear that it was using U.S. made steel rebar. As previously stated,  
9 Paragraph I of the contract requires HIC to furnish all materials necessary to complete the project  
10 in strict compliance with the contract documents. Further, as previously stated, the Contract  
11 Documents include the Special Contract Requirements and Section 105.1 of said requirements  
12 mandates the use of U.S. made iron and steel products permanently installed on the project.<sup>106</sup>  
13 Finally, Section IX of the Required Contract Provisions for Federal-Aid Construction Contracts,  
14 which are part of the IFB which is a Contract Document, states that willful falsification,  
15 distortion, or misrepresentation with respect to any facts related to the project is a violation of  
16 federal law.<sup>107</sup> Here, as previously stated, HIC admitted that it used Korean made rebar to  
17 construct the concrete wall at the Cetti Slide project site and, as previously stated, the FHWA  
18 determined that HIC falsified documents to hide this fact. Thus, the Public Auditor finds that by  
19 committing these acts, HIC breached the aforementioned contract provisions.

20 HIC breached Section X, of the Required Contract Provisions for Federal-Aid  
21 Construction Contracts, IFB, and Sections 107.10(2) and 157 of the Special Contract  
22 Requirements. The first contract provision forbids HIC from violating §308 of the Federal  
23 Water Pollution Control Act.<sup>108</sup> The second contract provision required HIC to monitor erosion  
24 control devices weekly and augment them as necessary and to repair erosion control devices  
25

26  
27 <sup>106</sup> Section 105, Special Contract Requirements, Bates Stamp No. 0160, IFB,  
Procurement Record filed on July 12, 2011.

28 <sup>107</sup> Section IX, Required Contract Provisions for Federal-Aid Construction  
Contracts, Bates Stamp No. 0085, Id.

<sup>108</sup> Section X, Id.

1 within twenty-four (24) hours after they are damaged.<sup>109</sup> The third contract provision required  
2 HIC to furnish, construct, and maintain permanent and temporary erosion and sediment control  
3 measures necessary to control water pollution, soil erosion, and siltation as required by the plans,  
4 permits, or as directed by the Project Engineer.<sup>110</sup> As previously stated, GEPA issued NOVs and  
5 Stop Work Orders for the Cetti Bay and Umatac Baseball Culvert project sites because of HIC's  
6 failure to have erosion or sediment control devices in place at said sites. The Public Auditor  
7 finds these acts to breach the aforementioned contract provisions.

8 HIC breached Paragraph I of the contract by failing to complete the work in a  
9 workmanlike manner. As previously stated, Paragraph I of the contract requires HIC to perform  
10 and complete all the project work in a workmanlike manner in strict compliance with the  
11 contract documents. DPW issued Construction Non-Conformance Report notifying HIC of  
12 HIC's failure to install the culvert pipes at the Umatac Baseball Culvert in accordance with the  
13 contract documents due to said pipes being not uniformly installed, and because the pipe joints  
14 were loose, and because one joint was three (3) inches apart allowing stagnant water to remain in  
15 the pipe. As previously stated, HIC conducted a compaction test on the newly compacted  
16 backfill at the Umatac Baseball Culvert site and the test failed. HIC had also failed to shore up  
17 the sides of an open trench resulting in cave-ins each time a vehicle drove through the travel lane  
18 of the project site. As previously stated, on February 11, 2011, DPW inspected the Umatac  
19 Baseball Culvert project site and discovered that HIC was still conducting work at the project  
20 site violating the GEPA and DPW's Stop Work Orders and DPW had to remind HIC that only  
21 work associated with correcting the conditions causing the Stop Work Orders was allowed until  
22 the Stop Work Orders were lifted. The Public Auditor finds these acts fall short of the  
23 workmanlike standard and compliance with the Contract that HIC agreed to and as such, are all  
24 breached of Paragraph I of the Contract.

25 As previously stated, only HIC's failure to complete the project by December 31, 2010 is  
26 excusable. HIC does not provide any justifications for the remaining breaches of the contract  
27

28 <sup>109</sup> Section 107.10(c)(2), Special Contract Requirements, Bates Stamp No. 0163, IFB, Id.

<sup>110</sup> Section 157, Special Contract Requirements, Bates Stamp No. 0177, Id.

1 set forth above. The Public Auditor will now review whether these remaining contract breaches  
2 justified DPW's termination of HIC's contract.

3 **E. DPW Correctly Terminated HIC's Contract.**

4 DPW correctly terminated HIC's Contract. DPW had the right to terminate the contract  
5 if HIC committed substantial violations of any provisions of the contract.<sup>111</sup> The Public Auditor  
6 finds that the contract breaches caused by HIC's failure to use U. S. American made rebar at the  
7 Cetti Bay Slide and HIC's attempt to conceal that fact, and HIC's failure to have erosion control  
8 measures at the Cetti Bay and Umatac Baseball Culvert project sites, are substantial violations of  
9 the contract and justify DPW's rescission of HIC's contract.

10 **F. HIC is Not Entitled to any Additional Compensation from DPW.**

11 As previously stated, the contract price for HIC was one-million-eight-hundred-thirty-  
12 five-thousand-and-forty-dollars (\$1,835,040) and this amount was to be paid to HIC in  
13 accordance with the Special Contract Requirements.<sup>112</sup> The contract states that DPW was to  
14 make progress payments and retain ten-percent (10%) of such payments until the completion and  
15 acceptance of the contract work.<sup>113</sup> The parties agree that, and the Public Auditor finds that  
16 DPW paid HIC the amount of four-hundred-fourteen-thousand-ninety-one-dollars-and-eighty-  
17 cents (\$414,091.80) for HIC's Invoice Nos. 1 thru 6.<sup>114</sup> HIC claims an additional five-hundred-  
18 seventy-seven-thousand-five-hundred-forty-two-dollars-and-eighty-five-cents (\$577,542.85).  
19 This claim is based on HIC's argument that it is owed the amount of one-hundred-thirty-five-  
20 thousand-four-hundred-ninety-eight-dollars-and-twenty-cents (\$135,498.20) for progress  
21 payment No. 7(R), the amount of one-hundred-ninety-six-thousand-eight-hundred-fifty-six-  
22 dollars-and-eighty-five-cents (\$196,856.85) for additional work, and the amount of two-hundred-  
23 forty-five-thousand-one-hundred-eighty-seven-dollars-and eighty-cents (\$245,187.80) for work  
24

25  
26 <sup>111</sup> Section 108(f), Special Contract Requirements, Bates Stamp No. 0166, IFB, Id.

27 <sup>112</sup> Paragraph II., page FC-3, Contract, Bates Stamp No. 0038, Procurement Record filed on July 12, 2011.

28 <sup>113</sup> Section 109.08, Special Contract Requirements, Bates Stamp No. 0170, Id.

<sup>114</sup> Project Funding Table, Page 8, DPW Response to OPA's Request for Additional Information filed on October 10, 2011 and Exhibit 1.A.4, Appellant's Exhibits filed on August 19, 2011.

1 HIC performed but could not claim.<sup>115</sup> The Public Auditor now reviews whether this claim has  
2 any merit.

3 DPW does not dispute the total amount of fifty-six-thousand-five-hundred-thirteen-  
4 dollars (\$56,513) (Hereafter referred to as "\$56,513") for Progress Payment No. 7(R). DPW  
5 agrees that it owes three-thousand-one-hundred-fifty-dollars (\$3,150) for mobilization, the  
6 amount of eight-hundred-seventy-three-dollars (\$873) for Construction Surveying and Staking,  
7 one-thousand-two-hundred-fifty-dollars (\$1,250) for removal and resetting of fifty (50) feet of  
8 guardrail, ten-thousand-dollars (\$10,000) for removal of structures and obstructions, one-  
9 thousand-two-hundred-forty-dollars (\$1,240) for saw cutting one-hundred-twenty (120) feet of  
10 asphalt pavement, and forty-thousand-dollars (\$40,000) for the installment of forty (40) lineal  
11 feet of forty-eight-inch (48") reinforced pipe<sup>116</sup> Therefore, the Public Auditor finds that DPW  
12 owes HIC the amount of \$56,513 for Progress Payment No. 7(R).

13 The Public Auditor finds that DPW does not owe HIC the remaining balance of seventy-  
14 eight-thousand-nine-hundred-eighty-five-dollars-and-twenty-cents (\$78,985.20) for Progress  
15 Payment No. 7(R). HIC claims two-thousand-dollars (\$2,000) for clearing and grubbing at the  
16 Cetti Bay Culvert project site. Although HIC did perform some clearing and grubbing activity  
17 by August 25, 2010, at this location, the Public Auditor finds that this work did not conform to  
18 the contract specifications because GEPA issued a NOV and Stop Work Order concerning this  
19 site due to HIC's failure to install proper erosion control measures at the site. HIC claims the  
20 amount of one-thousand-two-hundred-dollars (\$1,200) for construction surveying and staking  
21 because they were terminated from the project and they should be paid one-hundred-percent  
22 (100%) of their costs regardless of the percent of the project's completion.<sup>117</sup> However, as  
23 previously stated, DPW's termination of the contract was proper considering HIC's substantial  
24 breach of the contract and the Public Auditor finds that HIC is only entitled to the eight-hundred-

25  
26  
27 <sup>115</sup> Appellant's Exhibit List filed August 19, 2011, Payment History, Exhibit  
1A4, Bates Stamp Nos. 0049 to 0051.

28 <sup>116</sup> DPW Analysis of HIC Claim, pages 2 and 3, DPW Remedies Brief filed on  
September 1, 2011.

<sup>117</sup> Line 21, page 3, Appellant's Remedies Brief filed on September 1, 2011.

1 seventy-three-dollars (\$873), the pro-rated amount that DPW does not contest, and is part of the  
2 \$56,513 amount. HIC claims the amount of one-thousand-two-hundred-fifty-dollars (\$1,250) for  
3 soil erosion control. However, the Public Auditor finds that HIC is not entitled to this payment  
4 because it completed less than fifty-percent (50%) of the total project work and due to its  
5 substantial breach of the contract concerning soil and erosion control which resulted in GEPA's  
6 NOVs. HIC claims the amount of two-thousand-seven-hundred-fifty-dollars (\$2,750) for  
7 removal and resetting fifty-five (55) lineal feet of guardrail. As IMCO had to remove and  
8 replace this same guardrail and found that the guardrail was only fifty (50) feet in length, the  
9 Public Auditor finds that HIC is only entitled to fifty percent (50%) of the pro-rated amount of  
10 two-thousand-five-hundred-dollars (\$2,500), or one-thousand-two-hundred-fifty-dollars (\$1,250)  
11 that DPW does not contest, and is part of the \$56,513 amount. HIC claims the amount of sixty-  
12 thousand-dollars (\$60,000) for the installation of sixty (60) lineal feet of forty-eight-inch (48")  
13 pipe, however, the Public Auditor finds that only forty (40) lineal feet of pipe was installed in  
14 accordance with the contract specifications and that HIC is only entitled to the pro-rated amount  
15 of forty-thousand-dollars (\$40,000) that DPW does not contest, and is part of the \$56,513  
16 amount. HIC claims two-thousand-five-hundred-dollars (\$2,500) for temporary traffic controls.  
17 However, the Public Auditor finds that HIC completed less than fifty-percent (50%) of the total  
18 project work and DPW previously paid HIC fifty-percent (50%) of the amount of the traffic  
19 controls, the Public Auditor finds that HIC is not entitled to any more payments for this item.  
20 Thus, the Public Auditor finds that HIC is not entitled to receive the amount of twenty-seven-  
21 thousand-three-hundred-twenty-seven-dollars (\$27,327) for these items.

22 The Public Auditor finds that HIC is not entitled to the remaining balance of fifty-one-  
23 thousand-six-hundred-fifty-eight-dollars-and-twenty-cents (\$51,658.20) for Progress Payment  
24 No. 7(R). It appears that this extra amount is based on HIC's belief that it completed five-  
25 hundred-forty-nine-thousand-five-hundred-ninety-dollars (\$549,590) or thirty-percent (30%) of  
26 the project.<sup>118</sup> However, this is not accurate because, as previously stated, on January 25, 2011,  
27 DPW had determined that HIC completed twenty-eight-percent (28%) of the project and just  
28

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<sup>118</sup> Exhibit No. 1.A.4, Appellant's Exhibits filed on August 19, 2011.

1 eight (8) days later, GEPA issued its NOV's stopping work at the project sites. Thus, the Public  
2 Auditor finds that HIC only completed twenty-eight-percent (28%) of the project. Second, the  
3 percent of the project completed is not the basis of payment. To be eligible for payment, HIC's  
4 work was required to be completed, accepted, and adequately measured, pursuant to federal  
5 guidelines and reporting requirements.<sup>119</sup> As previously stated, DPW accepted the HIC's work  
6 amounting to \$56,513 and the Public Auditor finds that DPW owes HIC the amount of \$56,513  
7 for HIC's Progress Payment No. 7(R).

8 HIC is not entitled to the entire amount of one-hundred-ninety-six-thousand-eight-  
9 hundred-fifty-six-dollars-and-eighty-five-cents (\$196,856.85) for additional work, instead, it is  
10 only entitled to the amount of three-thousand-nine-hundred-thirty-nine-dollars-and-twenty cents  
11 (\$3,939.20) for additional work. The contract states that HIC may be allowed a contingent sum  
12 for unforeseen work which is work not included in the contract but deemed necessary or  
13 desirable in order to complete the project.<sup>120</sup> The Public Auditor finds that HIC is not entitled to  
14 compensation for additional work it claims for the Umatac Baseball Culvert. HIC claims  
15 twelve-thousand-nine-hundred-three-dollars-and-thirty-four-cents (\$12,903.34) for laying drain  
16 rock and flowable fill concrete for the storm drain piping.<sup>121</sup> This claim has no merit, because, as  
17 previously stated, HIC improperly installed the forty-eight inch (48") pipe over this location and  
18 DPW subsequently had to remove the pipe, and the fill beneath it, and re-install it after HIC's  
19 contract was terminated.<sup>122</sup> HIC claims three-thousand-five-hundred-seventy-three-dollars-and  
20 thirty-seven-cents (\$3,573.37) for installing concrete barriers and signs.<sup>123</sup> This claim has no  
21 merit because it is included in the contract. Specifically, HIC was required to furnish temporary  
22 traffic control devices as ordered for the control and protection of public traffic through the  
23  
24

25  
26 <sup>119</sup> §109.01, Standard Specifications for Construction of Road and Bridges on  
Federal Highway Projects, FP-03. Bates Stamp No. 0167 and 0260, IFB, Id.

27 <sup>120</sup> Section 109.02(p), Special Contract Requirements, Bates Stamp No., 0167,  
Contract, Procurement Record filed on July 12, 2011.

28 <sup>121</sup> Exhibit 1.A.4, Appellant's Exhibits filed on August 19, 2011.

<sup>122</sup> Page 5, DPW's Response to HIC's Claim, DPW's Remedies Brief filed on  
September 1, 2011.

<sup>123</sup> Exhibit 1.A.4, Appellant's Exhibits filed on August 19, 2011.



1 project.<sup>124</sup> HIC claims twenty-five-thousand-six-hundred-five-dollars-and-sixty-three-cents  
2 (\$25,605.63) for a second item of laying drain rock and flowable fill concrete.<sup>125</sup> However, HIC  
3 installed a concrete outlet structure over this site and used reinforcing steel that, as previously  
4 stated, violated the Contract's strict requirements to use U.S. made steel, which did not conform  
5 with the lines and grades on the plans, and which DPW had to remove, including the drain rock  
6 and flowable fill under it, and reconstruct after HIC was terminated from the project.<sup>126</sup>

7 Therefore, the HIC is not entitled to any amounts for additional work for the Umatac Baseball  
8 Culvert.

9 The Public Auditor finds that HIC is only entitled to the amount of three-thousand-nine-  
10 hundred-thirty-nine-dollars-and-twenty-cents (\$3,939.20) for additional work HIC claims for the  
11 Cetti Bay Culvert site. HIC claims an additional three-thousand-nine-hundred-thirty-nine-  
12 dollars-and-twenty-cents (\$3,939.20) for cutting rock at the site.<sup>127</sup> DPW admits that this work is  
13 not part of the contract and DPW accepted HIC's change order for this work on January 21,  
14 2011.<sup>128</sup> HIC is not entitled to twenty-eight-thousand-nine-hundred-eighty-nine-dollars  
15 (\$28,989) for concrete barriers because, as previously stated, the installation of these barriers is  
16 required by the contract and not additional work.<sup>129</sup> HIC is not entitled to eleven thousand-two-  
17 hundred-sixty-seven-dollars-and-sixty-cents (\$11,267.60) for its shoring system, slope  
18 protection, and sedimentation control at the site because this work is required by the contract and  
19 it is not additional work.<sup>130</sup> HIC is not entitled to an additional two-thousand-six-hundred-thirty-  
20 six-dollars-and-fifty-two-cents (\$2,636.52) for two-inch (2") drain rock because IMCO had to  
21

22 <sup>124</sup> §156, Special Contract Requirements, Bates Stamp No. 0176, Contract,  
23 Procurement Record filed on July 12, 2011, and §635, FP-03, Temporary Traffic  
Control, Bates Stamp Nos. 0203 to 0204.

24 <sup>125</sup> Exhibit 1.A.4, Appellant's Exhibits filed on August 19, 2011.

25 <sup>126</sup> Page 5, DPW's Response to HIC's Claim, DPW's Remedies Brief filed on  
26 September 1, 2011.

27 <sup>127</sup> Exhibit 1.A.4, Appellant's Exhibits filed on August 19, 2011.

28 <sup>128</sup> Page 6, DPW's Response to HIC's Claim, DPW's Remedies Brief filed on  
September 1, 2011, and Exhibit 2.B.1., Appellant's Exhibits filed on August  
19, 2011.

<sup>129</sup> Exhibit 1.A.4, Appellant's Exhibits filed on August 19, 2011.

<sup>130</sup> The shoring is required by §208, Special Contract Requirements, Contract,  
Bates Stamp No. 0182, IFB, Procurement Record filed on July 12, 2011. As  
previously stated, the sedimentation control was part of the contract  
requirements.

1 replace this material as HIC failed to provide adequate protection for it and it was washed away  
2 from the project site.<sup>131</sup> Thus, HIC is only entitled to the amount of three-thousand-nine-  
3 hundred-thirty-nine-dollars-and-twenty-cents (\$3,939.20) for additional work at the Cetti Bay  
4 Culvert site.

5 The Public Auditor finds that HIC is not entitled to compensation for additional work it  
6 claims for the Cetti Bay Slide project site. HIC is not entitled to twelve-thousand-seven-  
7 hundred-twelve-dollars (\$12,712) for removing asphaltic concrete three-inches (3") thick.<sup>132</sup>  
8 This work is not additional work because the contract requires HIC to excavate the road  
9 shoulders as shown in the plans, where this material was located.<sup>133</sup> HIC is not entitled to  
10 nineteen-thousand-three-hundred-forty-two-dollars (\$19,342) for rock cuts for the foundation.<sup>134</sup>  
11 This is not additional work because the contract requires rock cuts to six (6) inches below sub-  
12 grade within the road bed limits as shown in the plans.<sup>135</sup> HIC is not entitled to fourteen-  
13 thousand-three-hundred-ninety-eight-dollars (\$14,398) for concrete barriers because, as  
14 previously stated, these temporary traffic controls were required by the contract.<sup>136</sup> HIC is not  
15 entitled to one-thousand-nine-hundred-twenty-five-dollars (\$1,925) for additional base course  
16 aggregate. Although this work is outside of the contract, it was not agreed to by DPW and was  
17 not necessary to complete the project.<sup>137</sup> HIC is not entitled to the amount of seventeen-  
18 thousand-one-hundred-seventy-nine-dollars-and-fifteen-cents (\$17,179.15) for replacing base  
19 course aggregate with concrete and it is not entitled to the amount of six-thousand-three-  
20 hundred-four-dollars (\$6,304) for additional concrete.<sup>138</sup> HIC proceeded with these items  
21

22  
23 <sup>131</sup> Exhibit 1.A.4, Appellant's Exhibits filed on August 19, 2011, and Page 7,  
24 DPW's Response to HIC's Claim, DPW's Remedies Brief filed on September 1,  
2011.

25 <sup>132</sup> Exhibit 1.A.4, Appellant's Exhibits filed on August 19, 2011.

26 <sup>133</sup> S204, Special Contract Requirements, Contract, Bates Stamp No. 0180, IFB,  
Procurement Record filed on July 12, 2011.

27 <sup>134</sup> Exhibit 1.A.4, Appellant's Exhibits filed on August 19, 2011.

28 <sup>135</sup> S204, Special Contract Requirements, Contract, Bates Stamp No. 0180, IFB,  
Procurement Record filed on July 12, 2011.

<sup>136</sup> Exhibit 1.A.4, Appellant's Exhibits filed on August 19, 2011.

<sup>137</sup> Page 8, DPW's Response to HIC's Claim, DPW's Remedies Brief filed on  
September 1, 2011.

<sup>138</sup> Exhibit 1.A.4, Appellant's Exhibits filed on August 19, 2011.

1 without DPW's approval, which the contract requires for additional work.<sup>139</sup> Thus, HIC is not  
2 entitled to compensation for additional work for the Cetti Bay Slide project site.

3 The Public Auditor finds that HIC is not entitled to compensation for additional work it  
4 claims for work covering all the project sites. HIC is not entitled to thirty-one-thousand-five-  
5 hundred-eighty-six-dollars-and-forty-three-cents (\$31,586.43) for traffic control and safety.<sup>140</sup>  
6 No additional work is authorized for this item because it is supposed to be paid in a lump sum.<sup>141</sup>  
7 Likewise, HIC is not entitled to four-thousand-four-hundred-ninety-five-dollars-and-sixty-one-  
8 cents (\$4,495.61) for contractor sampling and testing. No additional work is authorized for this  
9 item because the contract deems it incidental to the work and it will not be paid for separately.<sup>142</sup>  
10 Thus, HIC is not entitled to compensation for additional work it claims for work covering all the  
11 project sites.

12 HIC is not entitled to its claim for work done but which it could not claim. HIC is not  
13 entitled to fifty-six-thousand-four-hundred-fifty-dollars (\$56,450) for approximately fifty-eight  
14 (58) linear feet of forty-eight-inch (48") reinforced pipe at the Umatac Baseball Culvert site. As  
15 previously stated, in its analysis of HIC's Progress Payment No. 7(R), the Public Auditor found  
16 that HIC is only entitled to payment for forty (40) lineal feet of pipe that was installed in  
17 accordance with the contract specifications, and that HIC is only entitled to the pro-rated amount  
18 of forty-thousand-dollars (\$40,000) that DPW does not contest. This item appears to be for the  
19 same piping HIC claims in its Progress Payment No. 7(R) or for piping that HIC retained but did  
20 not install, thus, HIC is not entitled to additional compensation for this item. HIC is not entitled  
21 to eleven-thousand-six-hundred-three-dollars-and-fifteen-cents (\$11,603.15) for removal and  
22 replacement of unsuitable materials at the Umatac Baseball Culvert Site.<sup>143</sup> As previously stated,  
23 this work had to be redone because the culvert HIC installed above this site was subsequently  
24

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25  
26 <sup>139</sup> §109.02(p), Special Contract Requirement, Bates Stamp No. 0167, IFB,  
Procurement Record filed on July 12, 2011.

27 <sup>140</sup> Exhibit 1.A.4, Appellant's Exhibits filed on August 19, 2011.

28 <sup>141</sup> \$635.26, Special Contract Requirements, Contract, Bates Stamp No. 0204,  
IFB, Procurement Record filed on July 12, 2011.

<sup>142</sup> \$154, Special Contract Requirements, Contract, Bates Stamp No. 0174, IFB,  
Procurement Record filed on July 12, 2011.

<sup>143</sup> Exhibit 1.A.4, Appellant's Exhibits filed on August 19, 2011.

1 removed by IMCO because it did not conform to the contract specifications. HIC is not entitled  
2 to one-hundred-nineteen-thousand-eighty-dollars-and-ninety-cents (\$119,080.90) for modular  
3 slide rail system construction methodology for excavation and eleven-thousand-dollars (\$11,000)  
4 for equipment and material for shoring system, and for slope and sediment protection. As  
5 previously stated, shoring excavation and sediment control are not additional work because they  
6 are required by the contract. HIC is not entitled to six-thousand-five-hundred-dollars (\$6,500)  
7 for sheet piling consulting fee.<sup>144</sup> HIC is not entitled to compensation for this item because it  
8 was paid for by HIC's bonding company and not HIC.<sup>145</sup> HIC is not entitled to forty-thousand-  
9 five-hundred-fifty-three-dollars-and-seventy-five-cents (\$40,553.75) for additional work  
10 required to correct GEPA's NOV's.<sup>146</sup> As previously stated, GEPA's NOV's were the result of  
11 HIC's breach of contract requirement regarding sediment control and HIC's costs to bring the  
12 project back into compliance with its permits must be borne by HIC. Therefore, HIC is not  
13 entitled to any additional amounts for the work HIC states it could not claim.

14 The amounts DPW owes HIC for Progress Payment No. 7(R) and for additional work are  
15 offset by the disgorgement of federal funds caused by HIC's breach of the contract. As  
16 previously stated, DPW owes HIC the amount of fifty-six-thousand-five-hundred-thirteen-  
17 dollars (\$56,513) for Progress Payment No. 7(R) and the amount of three-thousand-nine-  
18 hundred-thirty-nine-dollars-and-twenty-cents (\$3,939.20) for cutting rock at the Cetti Bay  
19 Culvert site, for a total of sixty-thousand-four-hundred-fifty-two-dollars-and-twenty-cents  
20 (\$60,452.20). However, as previously stated, FHWA informed DPW that FHWA could not  
21 reimburse the Government of Guam for pay items that were constructed with non-U.S. made  
22 steel and that any pay item concerning the foreign made steel already reimbursed shall be  
23 deducted from the next request for reimbursement for the project. DPW states that the amount it  
24 lost as a result of the disgorgement of federal funds was one-hundred-twenty-thousand-dollars  
25

26  
27  
28  

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<sup>144</sup> Id.

<sup>145</sup> Tab 6, DPW's Response to OPA's Request for Additional Information filed on October 10, 2011.

<sup>146</sup> Exhibit 1.A.4, Appellant's Exhibits filed on August 19, 2011.

1 (\$120,000).<sup>147</sup> Thus, the Public Auditor finds that after DPW applies the sixty-thousand-four-  
2 hundred-fifty-two-dollars-and-twenty-cents (\$60,452.20) amount it owes to HIC as previously  
3 stated, to the one-hundred-twenty-thousand-dollars (\$120,000) disgorgement of federal funds  
4 caused by HIC's breach of the contract, said disgorgement is reduced to fifty-nine-thousand-five-  
5 hundred-forty-seven-dollars-and-eighty-cents (\$59,547.80). Thus, the Public Auditor finds that  
6 after DPW applies the amount it owes to HIC to the amount of the damages caused by the  
7 disgorgement of federal funds arising from HIC's breach of the contract, DPW does not owe any  
8 further payments to HIC.

#### 10 IV. CONCLUSION

11 Based on the foregoing, the Public Auditor hereby determines the following:

12 1. The Public Auditor finds that Section 103.02 of the Special Contract Requirements is  
13 unenforceable and applies the dispute provisions set forth in 5 G.C.A. §5427, 2 G.A.R., Div. 4,  
14 Chap. 9, §9103, and 5 G.C.A. §5706 to this matter instead.

15 2. The Public Auditor finds that HIC's appeal concerns DPW's termination of its  
16 contract, which is a contract controversy, and the Public Auditor has the jurisdiction to hear this  
17 matter pursuant to 5 G.C.A. §5706(c).

18 3. Pursuant to 5 G.C.A. §5427(f), 2 G.A.R., Div. 4, Chap. 9, §9103(d)(3), and 5 G.C.A.  
19 §5706(b), the Public Auditor finds that HIC's appeal is timely and properly before the Public  
20 Auditor.

21 4. The Public Auditor finds that HIC breached the contract by failing to complete it by  
22 December 31, 2010, by failing to use U. S. American made rebar at the Cetti Bay Slide and by  
23 attempting to conceal that fact. HIC also breached the contract by failing to have erosion  
24 control measures at the Cetti Bay and Umatac Baseball Culvert project sites and by failing to  
25 perform the work in a workmanlike manner in compliance with the contract. However, the  
26 Public Auditor finds that HIC's failure to complete the project by December 31, 2010 is  
27

28 <sup>147</sup> Page 6, DPW's Remedies Brief filed on September 1, 2011.

1 excusable because DPW should have granted HIC's September 28, 2010 and December 6, 2010  
2 requests for an extension of time to complete the contract.

3 5. DPW had the right to terminate the contract because HIC committed substantial  
4 violations of any provisions of the contract by failing to use U. S. American made rebar at the  
5 Cetti Bay Slide, by attempting to conceal that fact, and by failing to have erosion control  
6 measures at the Cetti Bay and Umatac Baseball Culvert project sites.

7 6. The Public Auditor finds that DPW owes HIC the amount of fifty-six-thousand-  
8 five-hundred-thirteen-dollars (\$56,513) for Progress Payment No. 7(R) and the amount of three-  
9 thousand-nine-hundred-thirty-nine-dollars-and-twenty-cents (\$3,939.20) for cutting rock at the  
10 Cetti Bay Culvert site, for a total of sixty-thousand-four-hundred-fifty-two-dollars-and-twenty-  
11 cents (\$60,452.20). DPW shall apply the sixty-thousand-four-hundred-fifty-two-dollars-and-  
12 twenty-cents (\$60,452.20) amount it owes HIC against the one-hundred-twenty-thousand-dollars  
13 (\$120,000) disgorgement of federal funds caused by HIC's breach of the contract, to reduce said  
14 disgorgement damages.

15 7. HIC's Appeal is hereby DENIED.

16 This is a Final Administrative Decision. The Parties are hereby informed of their right to  
17 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with  
18 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative  
19 Decision. 5 G.C.A. §5481(a).

20 A copy of this Decision shall be provided to the parties and their respective attorneys, in  
21 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website  
22 [www.guamopa.org](http://www.guamopa.org).

23  
24 **DATED** this 23rd day of December, 2011.

25  
26  
27 

28 DORIS FLORES BROOKS, CPA, CGFM  
PUBLIC AUDITOR



# FAX

To: **Phillip Torres, Esq.**  
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Re: **Appeal No. OPA-PA-11-009 - DECISION**

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