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**THE OFFICE OF PUBLIC ACCOUNTABILITY
HAGÁTÑA, GUAM**

In the Appeal of:

KORANDO CORPORATION,

Appellant.

DOCKET NO. OPA-PA-15-009

**GOVERNMENT OF GUAM'S
SUPPLEMENTAL AGENCY REPORT**

I. APPELLEE INFORMATION

Name: Department of Public Works

Address: 542 N. Marine Corps Drive
Tamuning, Guam 96913

For purposes of this appeal, please direct correspondence to DPW's counsel, Thomas P. Keeler and Robert M. Weinberg, tkeeler@guamag.org and rweinberg@guamag.org, Guam Attorney General's Office, 590 S. Marine Corps Drive, Suite 706, ITC Building • Tamuning, Guam 96913. Tel: 475-3324; Fax: 472 - 2493.

II. APPEAL INFORMATION

- A. Purchasing Agency: Department of Public Works, Government of Guam
- B. Contract No: GU-NH-NBIS(007)
- C. Date of Contract: March 25, 2014

ORIGINAL

- D. This appeal is made by Korando from the Department of Public Work's decision to terminate the Korando Contract for the construction of the Bile/Pigua Bridge Reconstruction Project at Merizo, Guam.
- E. Date of Termination: July 10, 2015.
- F. Reason for Termination: Breach of Contract.

III. AGENCY'S STATEMENT IN ANSWER TO KORANDO'S STATEMENT OF GROUNDS FOR APPEAL

At the time of termination Korando had completed less than one per cent (1%) of the permanent work and it was estimated that it would exceed the completion date by more than one hundred and thirty two (132) days. A fundamental problem with Korando's Appeal is that it is predicated on the assumption that **DPW's Construction Manager ("CM"), Stanley Consultants, Inc. ("Stanley")**, was the driving force behind Korando's termination. Simply stated, this is not true. The decision to terminate was made by DPW's Director, Glenn Leon Guerrero, and then only after several months, numerous meetings and telephone calls with Korando and consultation with the members of the Guam Transportation Group ("GTG").

The GTG was formed in 2009 for the purpose, among other items, of overseeing the planning, design, funding and construction of Guam's routed highways. Its members represent a vast experience of road construction issues and in addition to the Director include, DPW's Deputy Director, Felix Benavente, and Acting Highway Administrator, Joaquin Blaz, consultants Mike Lanning and Houston "Buster" Anderson, Parsons Transportation Group ("PTG") and Jeff Wilson, Parsons Brinckerhoff ("PB") (at times PTG and PB are collectively referred to as "Consultants"), and Guam's regional representative of the Federal Highway Administration ("FHWA") Richelle M. Takara. Assistant Attorney General Thomas P. Keeler also attends the weekly GTG meetings. The Director first expressed concerns to the GTG with the lack of progress on the Project in mid to late February when he inquired why there was no activity by Korando, which had been issued a Notice to Proceed ("NTP") on January 5, 2015. Director Affidavit §4 A few weeks later in an early March 2015 GTG meeting, when Korando still had yet to mobilize, let alone start construction, the Director first stated that he was considering terminating Korando. Director Affidavit §4.

On March 27, 2015 the Director met with PTG's Mike Lanning and Buster Anderson, DPW's CM representative Jack Marlowe, and DPW's Kin Blaz and stated that his earlier expressed concerns were now major concerns and that he was considering terminating Korando contract. The Director decided not to take any action at that time owing to Jack Marlowe of Stanley's belief that Korando should be given reasonable time to rectify it's issues, supply resources and progress the physical work of the Project. Director Affidavit §6. Thus, not only didn't Stanley advocate terminating Korando when the Director was ready to but owing to Stanley advocating on its behalf Korando was allowed additional time to address the Director's concerns.

On April 15, 2015 DPW's Director met with Korando President Byong Ho Kim and his engineers. Also, present for DPW was PTG's Mike Lanning and Buster Anderson, and Stanley's Jack Marlowe. Korando presented a letter, which once again failed to (a) submit a

formal time extension detailing the reason for any delays, who was responsible and why and how any delay impacted the Project's critical path; (b) complete any submissions needed to promptly commence work; and (c) submit an acceptable recovery schedule. Director Affidavit §7 The Director reiterated instructions that the contractor was to immediately improve progress and subsequently sent Korando an April 15, 2015 letter giving it fourteen (14) days in which to submit its plan to improve progress. *Id.*

Korando filed a written submission on April 27, 2015 that again failed to properly address the items agreed to by the parties at the April 15, 2015 meeting. Director Affidavit §9. Consequently the Director issued a Notice of Default on June 26, 2015, which provided Korando a final opportunity to address DPW's concerns. *Id.* Korando once again failed to respond as demanded in the Notice of Default and the Director formally terminated its contract on July 10, 2015. Director Affidavit §10

In closing, the decision to terminate Korando was driven by the Director's concerns that were first raised to the GTG in early March 2015. Further, Korando was only terminated after being given several opportunities and notices to perform.

A. STANLEY CONSULTANTS, INC. WAS NOT THE CAUSE OF DELAYS

Stanley was not responsible for Project delays. Project delays were the sole result of Korando failing to pursue work in a timely and diligent manner as required by the Contract.

1. Revised Phasing Plan on October 27, 2014

This section of Korando's Appeal is entitled "Approval of the Revised Phasing Plan on 10/27/2014" and references and relies on the "Approval" throughout its argument. This is an intentional misstatement of the facts and Project records.

Submittal 562.001-02 Construction Phasing Plan was submitted by Korando on October 27, 2014 ("October 27 Submittal"). The submittal proposed a construction phasing plan that deviated from the plan provided for in the Contract drawings. CITE. The Submittal was reviewed and returned to Korando less than ten (10) days later on November 4, 2014 marked Exceptions as Noted ("EAN"). It was not marked "Approved" and Korando has no right to claim that the Submittal was somehow transmuted into approved plans. The October 27, 2014 Submittal speaks for itself and as specifically requested that Korando make several revisions and corrections to the Submittal. This is part of an industry standard process.

By the end of February 2015, or a period over three and a half (3 & ½) months later, Korando still had failed to submit revisions to the Contract Plans that were noted in the EAN. In response to Korando's inaction and understanding that the October 27 Submittal impacted the Project's construction phasing Stanley re-reviewed the October 27 Submittal, added additional comments intended to address the new phasing, and updated the submittal from EAN to Revise/Resubmit. Stanley's response addressed additional information needed for shop drawings for the electrical plan, temporary sheet piles and temporary steel bridge. This is standard practice expected of highway construction contractors and is required under FP-03 Section 104.03 of the Contract. The reason for the second review of the October 27 Submittal

and change in review status was given to Korando along with the detailed review comments on March 2, 2014, without objection.

In closing, the October 27 Submittal was never approved and to represent it as such is misleading to the OPA and inappropriate. Instead the submittal was marked EAN, which obligated Korando to provide additional information and/or clarifications to in a timely manner. Only after Korando had shirked its responsibilities did Stanley decide to be pro-active and move the review process on to the next phase.

2. Stanley's Second Review Of The "Approved" Revised Phasing Plan (March 1, 2015)

As earlier discussed herein, Submittal 562.001-02 Construction Phasing Plan was submitted by Korando on October 27, 2014, and returned less than ten (10) days later on November 4, 2014 marked Exceptions as Noted. Korando's Appeal stating that the October 27 Submittal was a "Approved" Revised Phasing Plan is a false statement and misleading.

3. Allegations of Interference with Korando's Means and Method

Korando asserts that "the original Phasing Plan could not be executed because the existing bridge would not be able to carry the load of heavy equipment, thereby creating among other things, life safety issues and constructability issues." Appeal p. 4, lines 24 - 26. This statement is false and not supported by the record.

First, the October 27 Submittal makes no mention of the capacity of the existing bridge. Further, in a April 15, 2005 letter to DPW Korando states: "The alternate phasing plan was chosen for the one time mobilization of pile driving equipment. The proposed temporary steel bridge would be designed to support the crane used for pile driving." CITE Korando makes no reference to the capacity of the existing bridge.

The bridge capacity is mentioned for the first time by Korando in RFI#1 dated April 30, 2015. The RFI requested the maximum allowable load capacity of the existing bridges and, after additional submissions 562.006-01 and 02, was returned to Korando on June 10, 2015, DPW's response included thirteen (13) comments that have never been responded to.

In its appeal Korando claims that it is entitled to a four (4) month extension of time for the delays caused by Stanley. Appeal, p. 6. lines 24 - 25. This request however is made without Korando having ever filed a formal claim as required under Contract Section FP-03 108.03 (Determination and Extension of Contract Time), which provides that "Only delays or modifications that affect critical activities or cause noncritical activities to become critical will be considered for time extensions." The Contract further provides:

When requesting a time extension, (the Contractor shall) follow the applicable Contract clauses. Make the request in writing and include the following: (a) Contract clause(s) under which the request is made; (B) Detailed narrative description of the reasons for the requested Contract time adjustment

including the following: Cause of the impact affecting time; (2) Start date of time adjustment; (3) Duration of the impact; (4) Activities affected.

Korando's claim that it is entitled to a minimum four (4) extension of time is not supported by the facts and disregards its contractual obligations. Despite numerous verbal and written notices to submit a formal change order along with the supporting documentation. CITE See DPW May 5, 2015 letter to Korando. Director Affidavit §7 & 8.

To establish entitlement to an extension based on excusable delay, Korando must show that the delay resulted from "unforeseeable causes beyond the control and without the fault or negligence of the Contractor." 48 C.F.R. § 52.249-10(b)(1); *see International Elecs. Corp. v. United States*, 646 F.2d 496, 510 (Ct. Cl. 1981) ("To avail itself of the excusable delay provision, plaintiff has the burden of proving that the excuse was beyond its control and without its fault or negligence. Plaintiff must further prove that it took reasonable action to perform the contract notwithstanding the occurrence of such excuse."). In addition, the unforeseeable cause must delay the overall contract completion; i.e., it must affect the critical path of performance. See RIF Contract § 01311, pt. 2.4; *Mel Williamson, Inc. v. United States*, 229 Ct. Cl. 846, 850-51 (1982) (contractor failed to establish that the unforeseeable event "caused delay in the overall contract performance").

While DPW acknowledges that Korando may be entitled to some minor time delay extensions the evidence clearly and substantially documents that (1) it was primarily responsible for delays in prosecution of the work and (2) that it failed or otherwise refused to comply with the most basic of contractual and statutorily required procedures in obtaining approval for alleged time delays. Specifically, Korando, notwithstanding repeated verbal and written requests/instructions failed to submit a formal request for time extension. Absent a properly prepared and documented request that describes how the alleged delays affect critical activities or cause noncritical activities to become critical it is not possible for the government to properly analyze or evaluate a request.

4. Allegations of Falsification of a Public Record

It is unclear how this allegation bears much, if any, relationship to the Director's decision to terminate Korando. Nonetheless, similar to a majority of the allegations contained in the Appeal, the issue was manufactured after legal counsel was retained. A review of the record fails to support a single time that Korando raised a concern or objected to Stanley's use of the Submittal Log to monitor the status of project submittals by regularly updating items. Stanley's Submittal Log was routinely shared with Korando, which at no time registered an objection.

DPW's position on the alleged falsification of a public record is stated in Kin Blaz's September 22, 2015 Debarment Request Report, a copy of which is attached hereto as Exhibit "B" and incorporated by this reference.

5. Other Delays Allegedly Caused by Stanley

Korando once again misstates the facts in its Appeal when it claims that “Stanley took another 44 days to respond to the Submittal 107.0070-01.” Appeal, p. 8. lines 4 - 10. Submittal 107.0070-01 was received by Stanley on February 18, 2015, reviewed and returned to Korando on March 5, 2015. Thus, Stanley reviewed the submittal in fifteen (15) days, not forty four (44) days as misstated in the Appeal.

B. THE ORIGINAL PHASING PLAN WAS NOT FLAWED

Korando’s Appeal claims that the original Phasing Plan was flawed. Appeal, p. 8. lines 11 - 14. However October 27 Submittal makes no mention of the capacity of the existing bridge. Further, Korando’s April 15, 2015 letter states “The alternate phasing plan was chosen for the one time mobilization of pile driving equipment. The proposed temporary steel bridge would be designed to support the crane used for the pile driving.” See, Exh(C)(p)(a).

The bridge capacity was first raised by Korando in Request for Information (“RFI”)#11, dated April 30, 2015. In this RFI Korando requested the maximum allowable load capacity of the existing bridges. Korando followed this by Submittal 562.006-01 that was later replaced by on June 4, 2015 by Submittal 562.006-02. The latter Submittal was reviewed and determined to have several questionable calculations, assumptions and/or other points that needed clarification. Korando never revised and resubmit its assessment of the existing bridges and as such Korando could not have “determined prior to issuance of the NTP that the existing bridges would not support the load”.

C. KORANDO WAS TERMINATED FOR GOOD CAUSE

Approximately a quarter of Korando’s Appeal is based on the factually inaccurate statement that “DPW appears to have relied on Stanley’s recommendation to terminate Korando prior to Stanley’s completion of the Contractor Performance Analysis.” See, Appeal p. 9, lines 4-8. As addressed above, DPW’s Director, in consultation with the GTG, determined to terminate Korando’s contract. Stanley’s Draft Contractor Performance Analysis was prepared unilaterally by Stanley and while the GTG reviewed it the document was determined not to be of any use and Stanley was advised to do no further work on it. Again, while Stanley provided information to the Director and the GTG its input on whether or not to terminate Korando was nominal.

IV. RELIEF REQUESTED BY KORANDO

Korando’s relief requested is that the Director’s termination be found erroneous and that the Contract be terminated for convenience. It is clear from a review of the record that the Director was justified in terminating Korando for breach of contract. At the time of termination

The government's termination may only be converted to a termination for convenience if the delay was "excusable" under the terms of the default provision of the Contract. *See Sauer Inc. v. Sec'y of the Navy*, 224 F. 3d 1340, 1345 (Fed. Cir. 2000).

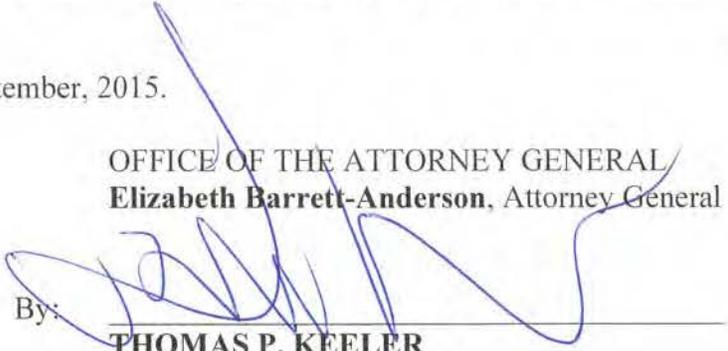
For the reasons stated herein substantial evidence supports a finding that Korando failed to demonstrate excusable delay.

CONCLUSION

The facts are beyond dispute. At the time of termination Korando had completed less than one per cent (1%) of the permanent work and it was estimated that it would exceed the completion date by more than one hundred and thirty two (132) days. Korando failed to prosecute work on the Project in a timely manner and there is no legal or factual basis for converting Korando's default and termination of contract for cause to a termination for convenience.

Dated this 23rd day of September, 2015.

OFFICE OF THE ATTORNEY GENERAL
Elizabeth Barrett-Anderson, Attorney General

By: 

THOMAS P. KEELER
Assistant Attorney General

VERIFICATION

Pursuant to 6 GCA § 4308 I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on September 23rd, 2015.

By: 

GLENN LEON GUERRERO, DIRECTOR
DEPARTMENT OF PUBLIC WORKS

**AFFIDAVIT OF
GLENN LEON GUERRERO**

Island of Guam)
) ss:
City of Tamuning)

Glenn Leon Guerrero, being duly sworn, hereby deposes and says as follows:

1. I am the Director, Department of Public Works, having been appointed to serve as Acting Director in January 2015, which appointment was subsequently approved by the Guam Legislature.

2. One of my priority concerns as DPW's Director is to ensure that the planning, design and construction of Guam's federally funded routed highway roads are completed in a timely and professional manner.

3. To assist me in overseeing the **Federal Highway Administration ("FHWA")** funded highway construction projects is the **Guam Transportation Group ("GTG")**, whose members represent a vast experience of road construction projects and in addition to me include, DPW's **Deputy Director, Felix Benavente**, and **Acting Highway Administrator, Joaquin "Kin" Blaz**, consultants **Mike Lanning** and **Houston "Buster" Anderson**, **Parsons Transportation Group ("PTG")** and **Jeff Wilson**, **Parsons Brinckerhoff ("PB")** and Guam's regional representative of the **FHWA's Richelle M. Takara**. **Assistant Attorney General Thomas P. Keeler** also attends the weekly GTG meetings.

4. In an early March 2015 GTG meeting I first advised the members that I was concerned that there was no workers and no activity on the **Bile/Pigua Bridge Reconstruction Project ("Project")**, which DPW had issued the **Notice to Proceed ("NTP")** on January 5, 2015, a period over sixty (60) before. I was informed that the Project contractor, **Korando**

EXHIBIT A

Corporation (“Korando”), had revised the construction phasing plan and was still securing required permit approvals.

5. At each and every meeting of the GTG following the early March meeting the lack of any significant progress and lack of activity at the Project site was mentioned by me.

6. On or about March 27, 2015 I met with PTG’s Mike Lanning and Buster Anderson, DPW’s **Construction Manager, Stanley Consultants, Inc. (“Stanley”)**, and DPW’s Kin Blaz and stated that my early March concerns were now major concerns and that I thought Korando should be terminated for default. I decided not to take any action at that time owing to Jack Marlowe of Stanley’s belief that Korando should be given reasonable time to rectify it’s issues, supply resources and progress the physical work of the Project. I directed staff to schedule a meeting with the contractor.

7. The meeting with Korando President Byong Ho Kim and his engineers was held on or about April 15, 2015. Present for DPW was PTG’s Mike Lanning and Buster Anderson, Stanley’s Jack Marlowe and myself. At the meeting Korando presented a letter in response to the DPW’s letter dated March 19, 2015, and I expressed my concerns and instructions to immediately improve progress. Korando’s letter provided no plans or steps to improve progress. During the meeting any number of Korando’s outstanding items were discussed including, but not limited to, the need for Korando to (a) submit a formal time extension detailing the reason for any delays, who was responsible and why and how any delay impacted the Project’s critical path; (b) complete any submissions needed to promptly commence work; and (c) submit an acceptable recovery schedule. After reviewing the required items I inquired how long was needed to comply with the reviewed items. I was informed two (2) weeks was

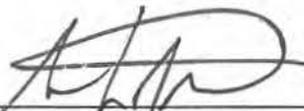
reasonable and on April 23, 2015, the DPW formally responded in writing to Korando's April 15, 2015 letter providing it fourteen (14) days in which to submit its plan to improve progress.

8. While Korando filed a submission on April 27, 2015 no formal time extension was included with the required analysis and the filing otherwise failed to materially respond to the items agreed to in the parties April 15, 2015 meeting and the DPW's letter dated April 23, 2015.

9. Following Korando's failure to properly address the items agreed to in its April 15, 2015 meeting with DPW and Korando's April 27, 2015 letter, I considered my early March 2015 concerns validated and decided to issue a formal Notice of Default, which was signed and issued on June 26, 2015. Under the Notice of Default Korando was given ten (10) calendar days to "(a) commence meaningful work on the Project; (b) supply enough properly skilled workman and provide materials to complete the work within the contract term; (c) to submit an *acceptable* update Project schedule; and (d) the other listed defects."

10. Korando failed to respond as demanded under the Notice of Default and I terminated its contract by means of a written July 10, 2015 Notice. On July 10, 2015 I also made a formal written tender of claim against Korando's Payment and Performance Bond issued by Westchester Fire Insurance Company.

11. Further affiant sayeth not.



GLENN LEON GUERRERO

Dated: September __, 2015.

SUBSCRIBED AN SWORN to before me the undersigned notary this 23 day of September, 2015 by Glenn Leon Guerrero.

Antoinette T. Leon Guerrero
NOTARY PUBLIC

ANTOINETTE T. LEON GUERRERO
NOTARY PUBLIC
In and for Guam, U.S.A.
My Commission Expires: **JULY 28, 2017**
P.O. Box 2538 Hagatna, Guam 96932



The Honorable
Eddie Baza Calvo
Governor

The Honorable
Ray Tenorio
Lieutenant Governor



MEMORANDUM

TO: Director

FROM: Acting Highway Administrator

SUBJECT: Debarment Request Report

Korando Corporation ("Korando"), which was recently terminated for breach of contract from the **Bile/Pigua Bridge Reconstruction Project No. GU-NH-NBIS(007)** ("Project"), submitted a letter on September 8, 2015 requesting that the DPW's **Construction Manager ("CM") Stanley Consultant, Inc. ("Stanley")** on the Bile/Pigua Bridge Reconstruction Contract be debarred. At the time, the department determined Korando's permanent work on the Project was less than one percent (1%), and it was estimated that Korando would exceed the completion date by more than one hundred thirty-two (132) days. The grounds for the request, and my recommendation, are in the order presented in Ms. Tang's letter.

1. Korando's allegation that Stanley breached its contract by failing to obtain Professional Liability Insurance is incorrect. It is true that updated copies of coverage were not in DPW's files, however, this is not uncommon. Upon following up with Stanley, I was advised that Stanley had changed providers for professional liability coverage in the fall of 2014 and that the new provider had mailed copies to DPW. Stanley recently provided

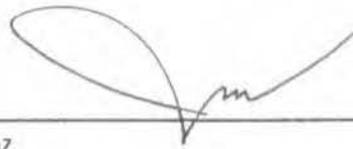
duplicate copies documenting the required coverage to update DPW's files. Stanley's files are current, with copies having been provided to Korando. This allegation doesn't serve as a basis to debar.

2. Korando's next claim is that Stanley should be terminated for failing to cooperate in responding to Korando's August 10, 2015 FOIA request. While I am concerned with Stanley's failure to fully cooperate in responding to the FOIA request(s) served on DPW, I understand that Stanley claims internal communications are privileged, and as such, I think this is a matter best addressed by the courts. This can be revisited once addressed by a court.

3. Korando also claims that Stanley should be debarred for falsifying submittal logs. Stanley states that the submittal log is used to monitor the status of Project submittals and is regularly updated/revised. These updates/revisions were done with Korando's knowledge and Korando failed to raise a concern or object to the practice. As the updating of the submittal logs was done with Korando's knowledge and without objection, I don't consider this to be a valid ground for debarment. There is nothing in the record to support a claim that Stanley intended to defraud Korando.

I also want to address Korando's demand that Stanley be removed from the Project, which I consider inappropriate. DPW doesn't need its contractors, particularly one that defaulted on a major contract after having made virtually no tangible effort to perform, to advise, let alone demand, who the DPW uses for a CM. This issue is moot, as you decided for entirely separate reasons, that it was in the best interest of the government and parties to use a different CM for the Project's takeover agreement.

In closing, I don't believe there are any good faith grounds to debar Stanley. Further, considering that Korando had completed less than one percent (1%) of the permanent work at the time of termination (and it was estimated that Korando would exceed the completion date by more than one hundred thirty-two (132) days), I recommend that the DPW consider whether it is appropriate to debar Korando and its principals for up to two (2) years.



Joaquin Blaz
Acting Highway Administrator

Dated: September 22, 2015.