

**ORIGINAL**

**JOYCE C.H. TANG**  
**CIVILLE & TANG, PLLC**  
SUITE 200, 330 HERNAN CORTEZ AVENUE  
HAGATNA, GUAM 96910  
TELEPHONE: (671) 472-8868/9  
FACSIMILE: (671) 477-2511

*Attorneys for Korando Corporation*

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FILE NO OPA-PA: 15-009

**IN THE OFFICE OF PUBLIC ACCOUNTABILITY  
HAGATNA GUAM**

In the Appeal of

Korando Corporation,  
Appellant.

**DOCKET NO. OPA-PA-15-009**

**OPPOSITION TO DPW'S MOTION FOR  
SUMMARY JUDGMENT**

**I. INTRODUCTION**

Korando Corporation submits its Opposition to the Motion for Summary Judgment ("Motion") filed by the Department of Public Works ("DPW") on November 6, 2015.<sup>1</sup> In responding to the Motion, Korando is not waiving or withdrawing its Motion to Strike filed on November 10, 2015.

DPW seeks summary judgment on three issues: (a) whether Korando materially breached its contract, (b) whether Stanley Consultants Inc.'s practice of updating (by deleting submittal references) and correcting the Project's Submittal Log was proper, and (c) whether DPW acted

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<sup>1</sup> Korando was served with an incomplete copy of the Motion on November 9, 2015, three days after the filing and service deadline. Korando filed a Motion to Strike on November 9, 2015, on the grounds that the Motion did not include the two declarations attached as Exhibits B (Declaration of Michael Lanning) and C (Declaration of Joe Pecht) to the Motion. Instead DPW filed a placeholder. DPW belatedly filed the two missing declarations calling it an "Errata" filing, when it was clearly a late filing on November 10, 2015, four days after the motion deadline. Both Declarations were signed November 9, 2015, three days after the motion deadline.

in good faith in terminating Korando.

As discussed below, the record and the facts presented by DPW are replete with factual inconsistencies and misstatements. Furthermore, Korando asserts that because there are numerous material facts in dispute, DPW's motion should be denied. *See In the Appeal of Guam Pacific Enterprises, Inc.*, Appeal No. OPA-PA-09-003, Decision and Order Denying Appellant's Motion for Summary Judgment, at 3 (Sept. 18, 2009). It is well established that the Court may grant summary judgment pursuant to Rule 56 of the Guam Rules of Civil Procedure when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 8 (citing *Manvil Corp. v. E.C. Gozum & Co.*, 1998 Guam 20 ¶ 6.). When deciding a motion for summary judgment, "the court must draw inference and view the evidence in a light most favorable to the non-moving party." *Id.* at ¶7 (citing *Edwards v. Pacific Fin. Corp.*, 2000 Guam 7). The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987).

## **II. LEGAL ARGUMENT**

### **A. KORANDO DID NO BREACH ITS CONTRACT.**

DPW seeks summary judgment on the issue of whether or not Korando materially breached its contract, claiming that this fact is undisputed. *See* Motion at 4. Korando denies that it breached the Contract and disputes DPW's contentions. Korando's position is that it was wrongfully terminated, and but for the delays caused by DPW, it could and would have completed the Project within the contract period. Korando and DPW agree that the Project was delayed; however, there is a genuine issue of material fact regarding the cause of these delays.

A major point of contention between DPW and Korando is whether DPW's Original Phasing Plan was unconstructable, and therefore, flawed. Korando's position even before the issuance of the Notice to Proceed ("NTP") was that DPW's original phasing plan (the "Original Phasing Plan") was unconstructable.

The original bridges were built in or about 1930 ("Original Bridges") "and are estimated to be over 80 years old." **Exhibit A** 6/23/11 Letter from R. Takara (FHWA) to J. Aguon at 2, Declaration of Joyce C.H. Tang ("Tang Dec."). The bridges had deteriorated to a point where it was unsafe for the public to use, and DPW "undertook temporary emergency repairs to both bridges" by constructing temporary steel bridges on top of one lane of the Original Bridges in 2007 ("Existing Temporary Bridge") so that the public could safely travel over the bridges. *Id.* In a March 22, 2012, DPW report, the conditions of the bridges as inspected by Federal Highway was described as follows:

Bile and Pigua Bridges were inspected by FHWA and found to be in critical condition due to severe deterioration of the structural members and undermining of the abutments. The 16-foot span bridges are also insufficient length to accommodate high water flows. DPW closed both bridges in 2007 due to safety issues. . . . The project is urgently needed because the existing bridges are unsafe and structurally deficient. . . .

**Exhibit B** 3/22/2012 DPW Report at 1, *Tang Dec.*

The Existing Temporary Bridge on both Bile and Pigua bridges have deteriorated and are now unsafe. The DPW Contract required Korando to construct two new concrete bridges, and demolish the Original Bridges and the Existing Temporary Bridges.

The Original Phasing Plan, was a plan specified in the bid documents which outlined the different phases of the project. After the contract was awarded, Korando evaluated the Original Phasing Plan and determined that it was not constructable because: (1) the Existing Temporary

Bridges could not support the load of a crane; and (2) the boom of the crane would have collided with the power lines when placing the precast concrete members as called for in the construction documents.

**1. Original Bridges Could Not Support the Load.**

The Original Phasing Plan required Korando to move their construction cranes across both bridges while it conducted its work. The Existing Temporary Bridges had deteriorated to a point where heavy equipment such as cranes could not safely travel over the bridges. If the Existing Temporary Bridge collapsed, the Original Bridge also would not be able to support the load given the 5 ton limit imposed in 2004 by DPW. *See* ¶ 5, *Declaration of Terangue E. Gillham* filed herewith (“Gillham Dec.”). Thus, on October 27, 2014, Korando proposed an Alternate Phasing Plan on April 27, 2014 (“10/27 APP”) which involved the construction of a second temporary steel bridge (“Second Temporary Bridge”) at each bridge site on top of the Original Bridge, parallel and adjacent to the existing temporary steel bridges, so that their cranes and heavy equipment could travel safely over the bridges.

The Original Bridges were approved for a maximum of 5 ton load capacity. *See* **Exhibit C**, *6/8/15-6/9/15 Email Exchange, Tang Dec.* The load capacity of the Existing Temporary Bridges should have been provided to Korando in the bid documents. It was not provided. *Id.* In addition, a “5 ton” maximum load signage is required under Section 6.82 of the Manual of Bridge Evaluation produced by AASHTO (American Association of State Highway and Transportation Officials). ¶ 3, *Gillham Dec.* The signage was not posted at the entry points of either bridge. ¶ 2, *Gillham Dec.*; **Ex. C**, *Tang Dec.* Had this information been provided with the bid documents, a contractor like Korando would have considered this in its bid. ¶ 4, *Gillham Dec.*

Korando correctly proposed the Alternate Phasing Plan on October 27, 2014 to solve this problem. Stanley initially reviewed this plan on November 4, 2011 and gave it a status of "Exceptions As Noted" ("EAN,") without requiring resubmission. Four months later, on March 1, 2015, Stanley abruptly decided to re-review the 10/27 APP and change its status to require resubmission. This created delays, as Korando was no longer able to proceed as planned.

On May 20, 2015, Korando submitted a *Structural Assessment Report* for Existing Bile & Pigua Steel Bridge. The report concluded that "the existing bridge superstructures are structurally inadequate" to support the necessary loads. See Exhibit D *Structural Assessment Report, Tang Dec.* Despite all evidence to the contrary, DPW continues to insist that the Original Phasing Plan was not flawed. A June 8-9, 2015, email chain produced by DPW on November 9, 2015 to Korando confirms that as late as June 2015, the issue of the constructability of the Original Phasing Plan had not been resolved. DPW's consultant, Lynden Kobayashi of Parsons Brinckerhoff<sup>2</sup> expressed his concern about the ability of the bridges to carry the load of the crane and DPW's failure to inform Korando of the 5 ton limitation on the bridge's load:

**I can't find any evidence that we informed the contractor of the fact that the bridge cannot carry Guam legal loads during the bidding process and the bridge was never load posted. We feel that this could open us up to a claim as in the fact that this affected his means and methods of constructing the bridge and moving material and equipment** (There is only one other detour which is a 57 km detour through Route 17 which is two lanes, very rural and has many deficient horizontal curves which may be difficult to impossible to transport without encroaching into oncoming traffic) The other detour is through Route 4 which I would guess would be a 100 km detour). In addition to your review of the calculations can you also provide us some recommendations for our options in the likely event we see a claim. (i.e, static permit load allowances, bracing, Wide load transport with pilot cars along route 17, or paying additional to the contractor for additional costs that are attained to move equipment, etc.).

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<sup>2</sup> Parsons Brinckerhoff is a distinct entity and unrelated to Parsons Transportation Group.

**Exhibit C** 6/8/15-6/9/15 Email Exchange at 6, *Tang Dec.* (Emphasis added.) This June 8<sup>th</sup> email clearly established that DPW failed to inform Korando critical information that affected Korando's means and methods and its bid. *Id.*

The June 9<sup>th</sup> email from Mark Hirota (Parsons Brinkerhoff) in the same email chain confirmed that DPW consultants were unsure of the ability of the existing temporary bridge to carry the necessary loads, noting with respect to the Structural Assessment Report provided by Korando that "it is unclear whether the [Structural Assessment Report] analysis is too conservative," and "it is difficult to draw any anecdotal conclusions if the crane would work or not." **Exhibit C** 6/8/15-6/9/15 Email Exchange at 3-4, *Tang Dec.* (Emphasis added.)

It should be noted that this email exchange began on June 8, 2015, long *after* DPW had decided to terminate Korando. Despite DPW's insistence that Korando failed to revise its calculations and that the Original Phasing Plan was not flawed, the truth is Korando was fired before it had the opportunity to do so, and that the issue of the viability of the Original Phasing Plan was still being discussed internally by DPW.

## **2. There Was Not Sufficient Clearance For the Crane Boom**

Under the Original Phasing Plan, there was not sufficient clearance for the crane boom to move the piles during pile driving. The proposed positioning of the crane would result in the boom striking the high voltage power lines at both bridges and violating the OSHA requirements regarding 10 foot setback from existing high voltage power lines. ¶7, *Gillham Dec.*; ¶5, *Declaration of Keith Farrell* filed herewith ("Farrell Dec."). To address the issue of insufficient clearance for the power lines, Korando planned to reroute the GPA power lines underground. It submitted preliminary plans to Stanley, which were initially reviewed and given the status of "EAN" on April 28, 2015. The submittal was then re-reviewed and rejected by Stanley on June

13, 2015. On June 22, 2015, Korando submitted a change order for the electrical work, but Korando was fired before it received a response. See Exhibit E *Request for Major Changes to Electrical Plan, Tang Dec.*

**3. DPW Misrepresented the Record on Korando's Procurement of the Building Permit.**

DPW incorrectly states that it was "Not until March 5, 2015, nearly a year following DPW's Notice of Intent to Award the Contract, and two (2) months following DPS issuance of DPW's January 5, 2015 Notice to Proceed, did Korando obtain the permit". Motion at 11.

There can be no dispute that Korando obtained the Building Permit on October 30, 2014, two months *before* the issuance of the Notice to Proceed. See Exhibit F, *Building Permit, Tang Dec.* After obtaining the Building Permit, Korando proceeded to fulfill the conditions to the building permit (*e.g.*, EPA approval, approval of Hazard Analysis Critical Control Points Plan). §2, *Farrell Dec.* Korando should not be expected to commence work before the issuance of the NTP because, any work performed would be at Korando's risk and without the Government being obligated to pay for such work. *Id.* Furthermore, in bridge construction projects especially, it is normal for there to be a long lead time of preparation before permanent construction work begins. *Id.*

DPW failed to inform the OPA that the Application for Building Permit was timely submitted on or about June 30, 2014 (when DPW accepted the Application). A snapshot of the Application is provided below:

| VII. COMMENTS BY OTHER AGENCIES (Route as indicated) |         |             |                |
|--|---------|-------------|----------------|
| Agency   | Date    | Print Name  | Comments       |
|  |         | Signature   |                |
| Land Management Zone                                 | 6/30/14 | [Signature] | Approved       |
| Contractor's License Board                           |         | [Signature] | 11 JUL 01 2015 |

See **Exhibit F** *Building Permit* at 4, *Tang Dec.* DPW also conveniently overlooked the fact that Korando could not have submitted the Application in March 2014, when the Notice of Award was issued, because the DPW-Korando Construction Contract had not been signed. The Governor signed the Korando Contract on June 10, 2014, twenty (20) days before Korando submitted the Building Permit Application. See DPW Procurement Record. To accuse Korando of a delay of one year from the date of the Notice of Award in obtaining the Building Permit is a misrepresentation of the facts and the record.

Finally, DPW presents its single piece of evidence in support of its claim for summary judgment on the issue of default: meeting minutes from a June 23, 2015 meeting. See Motion **Exhibit A**, *06/23/17 Meeting Notes*. Once again, it should be noted that this meeting occurred *after* DPW had already decided to terminate Korando. Contrary to DPW's continuing claim that Korando had only accomplished 1% of work at the time of termination, these meeting notes show a percent completion of 3.79%, which is completely inconsistent with certifications made by Stanley and the record. *Id.* Moreover, the schedule overview shows that work was scheduled all week: pile casting on Tuesday 6/23/15, electrical work at pedestal on Wednesday 6/25/15, and concrete pouring for the precast yard on Thursday 6/26/15. *Id.* Despite the delays resulting from the revision of the 10/27 APP, Korando was trying to do its work.

Additional evidence that work was progressing and that the percentage completion was more than 1% is the approval of Korando's *Payment Application No. 1* for the amount of \$195,367.36. See **Exhibit G** *Payment App. No. 1 Voucher, Tang Dec.* Payment Application No. 1 was approved by Stanley Consultants (April 21, 2015), the Director of DPW (July 6, 2015), and the Certifying Officer (July 2015). As shown below, Stanley Consultants certified that as of April 21, 2015, that "**the work covered by this estimate has been completed in**



Declaration of Joe Pecht. Neither of these declarations should be considered, as both were signed and filed after the motion filing deadline. *See Korando's Motion to Strike* filed November 9, 2015.

Even if the OPA were to consider these late filed exhibits, the declarations do not address the issue of *deletions* to the submittal log. Korando agrees that the purpose of a submittal log, like a docket sheet, is to present an accurate list and status of documents or records, and to update as additional documents or records are submitted or filed. Korando certainly agrees that ~~this is a useful and even necessary practice when there are numerous documents being filed or submitted.~~

To be clear, Korando does not take issue with the update of the records and their status as they are submitted. Korando's objection is that Stanley *deleted* critical references to submittals "approved" given an "EAN" status by Stanley. The words "delete" and "deletion" do not appear anywhere in the two declarations submitted by DPW. The OPA can easily understand the difference between "updating" and "deleting" records in submittal logs. By deleting the submittals approved by Stanley, it was not merely updating or correcting the submittal logs: the approved submittals disappeared from the Log. An individual such as the Public Auditor who may not be familiar with the project or the submittals, would not know that these submittals were previously approved, unless that person had access to copies of the submittals and knew they had been approved or had a different status at an earlier time. The declarations also do not specifically state that "deleting" a submittal record is an appropriate way to maintain and update the log. That is because it is not an acceptable practice of keeping a log. *See §8, Farrell Dec., §8, Gillham Dec.* As shown below, Stanley had an established process for making submittals

“disappear” as it had done so on three other occasions when it “voided” the submittals, but left the reference to the submittal affected by the change in status.



Bile/Pigua  
 Project No. GU-NH-NBIS(007)  
 Contractor: Korando Corporation  
 Client: Department of Public Works

**SUBMITTAL LOG**  
 7/7/2015

| Submittal No. | Pay Item No. | Date      | Description  | Response Date    | Total Days | Action | Resubmit |   | Days Out        | Reviewer  |                  |                    |
|---------------|--------------|-----------|--|------------------|------------|--------|----------|---|-----------------|-----------|------------------|--------------------|
|               |              |           |  |                  |            |        | Yes/No   |   |                 | Name      | Date to reviewer | Date from reviewer |
| 155.001-06    | 15501-0000   | 1/12/2015 | Construction Preliminary Network Analysis Schedule (NAS) | 1/20/2015        | 8          | EAN    | No       | 0 | H. Boussembante | 1/12/2015 | 1/16/2015        |                    |
| 155.001-07    | 15501-0000   | 2/10/2015 | Construction Preliminary Network Analysis Schedule (NAS) | SUBMITTAL VOIDED |            |        |          |   |                 |           |                  |                    |
| 155.001-08    | 15501-0000   | 2/24/2015 | Construction Preliminary Network Analysis Schedule (NAS) | SUBMITTAL VOIDED |            |        |          |   |                 |           |                  |                    |
| 155.002-01    | 15501-0000   | 3/2/2015  | Progress Schedule as of January 31, 2015                 | 3/9/2015         | 7          | EAN    | No       | 0 | R. Senegal      | 3/2/2015  | 3/9/2015         |                    |
| 155.003-01    | 15501-0000   | 3/9/2015  | Revised Baseline Network Analysis Schedule (NAS)         | SUBMITTAL VOIDED |            |        |          |   |                 |           |                  |                    |
| 155.003-01    | 15501-0000   | 3/10/2015 | Progress Schedule as of February 28, 2015                | 3/17/2015        | 7          | EAN    | No       | 0 | R. Senegal      | 3/10/2015 | 3/13/2015        |                    |

See Exhibit H, 7/7/15 Submittal Log, Tang Dec.

Notably missing from DPW’s Motion are declarations from Stanley employees (Mr. Marlowe and Mr. Senegal) explaining why the critical submittals were deleted. No one except Stanley can tell the Public Auditor why Stanley deleted the submittals from the logs. DPW, therefore, has not rebutted Korando’s argument that the deletion of the submittals in the submittal logs was improper and created an inaccurate record regarding Korando’s activities and progress on the Project. Absent direct evidence to the contrary, the OPA should find that it is undisputed that Stanley’s deletion of the submittals resulted in altering the log, and that Stanley breached its duty as a construction manager to maintain records accurately.

DPW also claims that Korando was aware of corrections and updates to the Submittal Logs and did not object. Again, while Korando was aware that the submittal logs were being updated when presented at the weekly meetings, Korando had no reason to think that Stanley was deleting previously approved submittals. See §2, Declaration of Francisco Palma (“Palma Dec.”). There’s no evidence that Stanley disclosed to Korando or advertised the fact it was deleting submittal. In many fraud cases, the fraud is usually discovered not while it is being

committed, but much later when there is a loss. Similarly, Korando discovered the deletions after it had been terminated. *Id.*, §3. Korando immediately notified DPW of Stanley's misconduct and the deletions when it requested that Stanley be debarred. See Korando Dec – See **Exhibit I** *Debarment Letter, Tang Dec.* To say that Korando was aware of the updates, but did not object, is akin to saying that one should have known that Stanley was committing a fraud, and should have objected at the time the fraudulent conduct was being committed.

Lastly, DPW's argument that Stanley's illegal alteration of the Submittal Logs is a red herring raised "for the sole purpose of diverting attention from the real issue" is off the mark. See Motion, 3. Stanley's illegal deletion of submittal records from the submittal logs is evidence of the bad faith that characterized DPW's and Stanley's actions towards Korando. DPW has failed to provide any evidence whatsoever that Stanley's deletion of submittals is proper. Accordingly, DPW's motion for summary judgment on this issue should be denied, and Korando's Motion for Partial Summary on the same issue should be granted.

**C. The OPA Should Deny DPW's Request for Summary Judgment on the Issue of Whether DPW Acted In Bad Faith.**

DPW makes the puzzling argument that it is entitled to summary judgment on the issue of whether DPW acted in good faith when it terminated Korando based on its unsupported list of reasons for termination and its assertion that Korando defaulted. See Motion at 14. Without addressing the dubious merit of DPW's list of reasons for termination, the law on termination of government construction contracts is clear: Courts have found that "even in cases where the contractor has technically defaulted on its contractual obligations, the court will not uphold a default termination where the agency has acted in bad faith in administering the contract." *Keeter Trading Co., Inc. v. United States*, 79 Fed.Cl. 243, 252. In other words, even if Korando defaulted—which it did not—the termination for default will be overturned if the OPA

determines that DPW acted in bad faith. Thus, the list of reasons for technical default is irrelevant to establishing good faith. DPW has provided no evidence or support to counter Korando's evidence that DPW acted in bad faith.

The law is also clear that DPW has the burden of proof to first establish the termination for default was justified. To prove this, DPW must prove that it reasonably believed there was "no reasonable likelihood that the contractor could perform the entire contract effort within the time remaining for contract performance." *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1016 (Fed. Cir. 2003) (quoting *Lisbon Contractors*, 828 F.2d at 765). See also Exhibit J 5/7/15 Email Exchange, Tang Dec.

**1. Korando Could Have Completed the Project Within the Contract Period.**

Korando could have completed the Project had it not been for DPW's acceptance, then rejection of the 10/27 APP. As discussed above, the delay caused by Stanley in first approving the 10/27APP, and later revising and requesting resubmission on March 1, 2015, caused a delay to the Project. Korando was notified that the review status was changed to "Revise/Resubmit. The submittal of detailed plans based on the concept plans is required." Exhibit K 3/1/15 *Review of Submittal 562.001-02* at 2, Tang Dec. In changing the status on 10/27/2015 of "EAN" to "Revise/Resubmit" on March 1, 2015, Stanley was instructing Korando to stop all work on the phasing work – the primary driver of the work on the project at that time, unless and until the 13 items comments were fully addressed and approved by Stanley. §9, Farrell Dec.; §9, Gillham Dec. The four (4) month delay in review and notification to Korando was unreasonable, and exceeds the required review period allowed under the Contract to the CM. *Id.* The delay in review of the 10/27 Phasing Plan was caused by Stanley, DPW's consultants and should be treated as change under Section 109.06 of the Special Contract Requirements

(Modifications to FP-03) Contract, which gives Korando additional time to complete the project as a result of DPW delay. §10, *Farrell Dec.*

The June 8-9<sup>th</sup> email (**Exhibit C**, *Tang Dec.*) is also evidence that the DPW consultants did not have concrete landings on issues relating to the ability of the existing bridges to support the load of heavy equipment, and the crane swing striking the power lines, as late as June 2015. See **Exhibit C** *6/8-9/15 Email Exchange, Tang Dec.* These issues directly impact the constructability of the Original Phasing Plan, and support Korando's proposed 10/27 APP. §10, *Farrell Dec.*; §11, *Gillham Dec.* These delays in review and the subsequent change in status of the 10/27 Alternate Phasing Plan submittal by Stanley caused at least a four month delay to the Project. §10, *Farrell Dec.*

Despite the delays caused by DPW and Stanley, Korando was prepared to complete the Project on time. At an April 15, 2015 meeting, Korando submitted a Catch-up (Recovery) Schedule, which DPW ignored. Korando again submitted the Recovery Schedule on April 27, 2015. See **Exhibit L** *4/27/15 Letter from Korando to DPW, Tang Dec.* On May 28, 2015, Stanley accepted this submittal with EAN status. See **Exhibit M** *Cover Letter Sheet of Submittal 155.005-02, Tang Dec.*

The evidence also shows that DPW had good reason to believe that Korando still had a reasonable likelihood of completing its contract on time. On April 27, 2015, Jack Marlowe advised DPW not to terminate "at this time," acknowledging that Korando could still complete its work within the contract period. See **Exhibit N** *4/27/15 Letter from Marlowe to Pecht, Tang Dec.* On May 6, 2015, there was a meeting of what DPW has called the Guam Transportation Group ("GTG"), which included DPW's director, Tom Keeler, and representatives of Parsons and Stanley Consultants. At this meeting, the GTG agreed to terminate Korando if the group

was unsatisfied with Korando's response to its questions. See Exhibit J 5/7/15 Email Exchange, Tang Dec.. At the meeting, Jack Marlowe once again cautioned that DPW could not yet justify termination. In a subsequent email exchange, he stated for a third time that Korando could not justifiably be terminated for default, but that they could look for other reasons to terminate

Korando:

Korando has 327 days remaining in their time for completion. As I stated at the meeting yesterday, I do not believe that we can say that there is no reasonable likelihood that the contractor could perform the entire contract effort within the remaining time. The surety will have considerable financial incentive to pursue a claim of termination for owner convenience rather than contractor default. I am reviewing the contract terms for potential breach of contract in other areas. I will summarize and forward when done for your consideration. DPW may be able to include breach of contract in the grounds for termination. A breach [sic] may be more supportable than failure to complete within the contract period.

*Id.* at 2.

None of the documents DPW has provided to Korando to date reflect further discussion among the GTG of Mr. Marlowe's concerns. Instead, the GTG continued drafting documents in preparation for Korando's termination. DPW's Director had stated that he was considering termination in early March 2015—only two months after the issuance of the NTP. See *DPW's Agency Report* at 2. Bridge projects require significant mobilization before commencing work at the project site.<sup>3</sup> That DPW had begun considering termination in early March, made the decision to terminate in May, and ignored Marlowe's warnings not to terminate, is evidence of DPW's bad faith.

Further evidence of bad faith is found in Korando's termination documents. Drafting of termination documents began on June 5, 2015, when Jack Marlowe drew up a termination letter,

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<sup>3</sup> On October 5, 2015, Korando filed a Sunshine Act Request with DPW for records relating to other projects, and on November 2, 2015, at DPW's request, Korando modified the list of documents it was seeking. Korando believes the requested documents will be useful in demonstrating the typical timeline of highway projects in general and bridge construction projects in particular. To date DPW has withheld these documents.

which would later be split into two documents: the termination letter itself and a so-called “Contractor Performance Analysis.” See **Exhibit O** 6/5/2015 Emails from Jack Marlowe, Tang Dec. Both the termination letter and the Performance Analysis underwent several revisions, and the Performance Analysis was not finalized until July 31, 2015 – twenty-one days after Korando’s termination. See **Exhibit P** 7/31/15 Transmittal and cover letter of Contractor’s Performance Report, Tang Dec. This was a transparent attempt to make it look like Korando was terminated after an objective analysis of its performance, when in fact the termination had been predetermined in early March 2015. See DPW’s Supplemental Agency Report.

### CONCLUSION

The record as presented by DPW is replete with misstatements and inconsistencies, and more importantly, there are material facts in dispute. DPW’s Motion should be denied.

Dated: November 6, 2015

By:



**JOYCE C.H. TANG**  
Attorneys for Appellant  
Korando Corporation