

1 William M. Fitzgerald
2 **LAW OFFICES OF WILLIAM M. FITZGERALD**
3 Post Office Box 500909
4 Saipan, MP 96950

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: April 6, 2018

TIME: 4:21 AM PM BY: FDJ

FILE NO OPA-PA: 18-002

6
7 **PROCUREMENT APPEAL**
8 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

9 In the Appeal of

10 Korando Corporation,

11
12 Appellant.

DOCKET NO. OPA-PA-18-002

**APPELLANT KORANDO CORPORATION'S
REPLY MEMORANDUM IN SUPPORT OF
ITS MOTION TO COMPEL, EXTEND THE
TIME TO FILE COMMENTS TO AGENCY
REPORT AND OTHER DATES AND FOR
SANCTIONS**

13
14
15
16
17
18 **I. INTRODUCTION**

19
20 In its March 30, 2018 Response to Korando Corporation's ("Korando") Motion to Compel,
21 Extend the Time to File Agency Report and Other Dates and for Sanctions ("Opposition"), the
22 Department of Public Works ("DPW") states that following explanation for the fact that the
23 procurement record it has produced in this matter, which consists of over twenty-four thousand
24 (24,000) pages of material, does not contain a single document or email communication discussing,
25 proposing or summarizing written analyses and recommendations on each item Korando requested in
26 its 10/18/2016 Change Order:
27
28

1 Korando's Motion assumes that a detailed analysis and
2 recommendation did not take place because DPW has not produced
3 emails, a written analysis and similar documents. Korando's
assumption is incorrect.

4
5 On receipt of each of the 3 Change Orders DPW's Director, Glenn
6 Leon Guerrero, tasked Mr. John Moretto of DPW's consultant Parsons
7 Transportation Group ("PTG") with reviewing Korando's claims and
8 preparing a draft response to each claim.

9
10 PTG provided draft responses for DPW's Director and others involved
11 with the Project consideration following all 3 of Korando's claims.
12 Following Mr. Moretto's preparation of draft responses, copies of
13 which are on file with the Office of Public Accountability and have
14 been provided to Korando, DPW's Director and upper management,
15 John Moretto and other PTG staff members and [the U.S. Department
16 of Transportation Federal Highway Administration's ("FHWA")]
17 regional representative, Ms. Richelle Takara, discussed and analyzed
18 each claim through a series of meetings and telephone
19 conversations...DPW's analysis of Korando's 3 claims was done
20 person to person and not via emails or written analysis.

21 Opposition at 2-3. In support of this argument, DPW has submitted declarations from DPW Director
22 Glenn Leon Guerrero and PTG Construction Manager John Moretto. Mr. Leon Guerrero states as
23 follows:

24 10. During the course of DPW, PTG and FHWA's review and analysis
25 of Korando's 10/18/16 Change Order, 1/24/17 Corrected Claim and its
26 10/17/17 Change Order, I do not recall having ever been provided a
27 written analysis by PTG's John Moretto or anyone else. While
28 Korando's three (3) claims were thoroughly reviewed and discussed
any number of times, it is my recollection that all such discussions took
place in person, or via telephone. I also don't recall making any written
notes or memos during any of these meetings or telephone calls.

29 Declaration of Glenn Leon Guerrero ("Leon Guerrero Decl.") at ¶10.

30 Mr. Moretto further states that:

31 7. I was asked by DPW to review Korando's 10/19/16 Change Order.
32 I reviewed the 10/18/16 Change Order and prepared a draft response
33 for DPW's approval to request that Korando provide backup documents
34 and/or clarifications for certain items needed for the department to
35 complete its review. DPW responded to Korando via a December 28,
36 2016 letter.

1
2
3 9. I prepared a number of draft responses for DPW's review to
4 Korando's 01/24/17 Corrected Claim. The draft responses, copies of
5 which were provided to DPW for approval prior to filing with the OPA
6 as part of the Procurement Record, were discussed and analyzed by
7 PTG personnel, DPW management and the FHWA's representative,
8 and Ms. Richelle Takara, through a series of telephone conversations
9 and meetings. These calls and meetings took place over a number of
10 months.

11
12 10. On or about October 17, 2017 Korando provided DPW an
13 updated Change Order (Korando's 10/17/17 Change Order"). Again I
14 was asked by DPW to review Korando's 10/17/17 Change Order for
15 final review and approval by DPW. DPW's Director signed the
16 department's response on November 15, 2017.

17
18 13. PTG, DPW and FHWA reviewed and analyzed Korando's three
19 (3) claims discussed herein extensively in numerous telephone calls and
20 meetings. Any PTG materials related to these meetings are contained in
21 the materials provided to DPW for filing with the OPA. The vast
22 majority of PTG's involvement with the analysis of Korando's
23 10/18/16 Change Order, 1/24/17 Corrected Claim and its 10/17/17
24 Change Order was verbal, and not written.

25 Declaration of John Moretto ("Moretto Decl.") at ¶¶ 7, 9, 10, and 13.

26 DPW's claim that it did not create or receive documents analyzing the merits of Korando's
27 Change Order, let alone a single email communication, including administrative emails, related to
28 Korando's Change Order is not credible, and as discussed below, demonstrably false.

29 **II. ARGUMENT**

30 *A. DPW's required by Guam Procurement Law to preserve the integrity of the
31 procurement process and any failure of DPW to document its processes or
32 maintain such records violates Guam Procurement Law*

33 It is unbelievable that DPW would argue that it does not have a single email communication
34 regarding the December 16, 2015 Stipulation ("12/16/2015 Order") and Order and Korando's Change
35 Order, including basic internal administrative emails acknowledging receipt of and circulating draft

1 of the 12/16/2015 Order and the Change Order, and formatting or editing DPW's responses. If true,
2 DPW's failure to document its processes would undermine the very purpose of Guam Procurement
3 Law, which includes the following enumerated policies:

4 §5001. Purposes, Rules of Construction.

5 (b) Purposes and Policies. The underlying purposes and policies of this
6 Chapter are:

7

8 (3) to provide for increased public confidence in the procedures
9 followed in public procurement;

10 (4) to ensure the fair and equitable treatment of all persons who deal
11 with the procurement system of this Territory;

12

13 (7) to provide safeguards for the maintenance of a procurement system
14 of quality and integrity; and

15 (8) **to require public access to all aspects of procurement consistent**
16 **with the sealed bid procedure and the integrity of the procurement**
process.

17 5 GCA §5001 (emphasis added. Guam Procurement Law further requires retention of "all
18 procurement records," 5 GCA §5247, and specifically requires retention of email communications:

19 § 5247.1. Retention of Electronic Mail Correspondences. All incoming
20 and outgoing electronic mail (email) correspondences pertaining to
21 matters related to the procurement of goods and services as governed
22 by this Chapter shall be retained for a period of not less than five (5)
23 years. Such electronic mail (email) correspondences may be used for
evidentiary purposes in the appellate procedures contained in this
Chapter.

24 5 GCA §5247.1.

25 Guam Procurement Law requires not only that DPW *maintain* records, as described
26 above, but also that DPW *produce* these records in this appeal. 2 GAR Div 4 §12104(c)(3)
27 provides in relevant part as follows:
28

1 (3) The Chief Procurement Officer, the Director of Public Works, or
2 the head of a Purchasing Agency shall submit to the Public Auditor a
3 complete copy of the procurement record *relevant to the appeal* within
4 five (5) working days of receiving notice of an Appeal, in
chronological order where practicable, numbered sequentially, tabbed,
and indexed to identify the contents.

5 2 GAR Div 4 §12104(c)(3) (emphasis added). Further, Section 12105(e) requires that DPW
6 submit as part of its Agency Report, *if not already submitted as part of the procurement*
7 *record required by §12104(c)(3)*, the following:

8
9 (e) Any other documents which are relevant to the protest; including
10 the contract, if one has been awarded, pertinent amendments, and plans
and drawings[.]

11 2 GAR Div 4 §12105(e). To the extent DPW claims that analysis of Korando's Change Order was
12 performed strictly in telephone calls and meetings over a period of months, DPW has failed to
13 produced any record of "the date, time, subject matter and names of participants at any meeting
14 including government employees that is in any way related to a particular procurement" in the
15 procurement record related to Korando's Change Order or the 12/16/2015 Order as required in 5
16 GCA §5249(a).

17
18
19 *B. DPW Has Failed to Produce Relevant Documents in Its Possession.*

20 Despite DPW's claims to the contrary, DPW's consultant, PTG *did* in fact perform written
21 analyses of Korando's Change Order and emails *were* in fact exchanged between DPW, PTG and
22 FHWA. This fact is evident since Richelle Takara, the FHWA region representative does not live in
23 Guam (notably, DPW has not even attempted to explain how drafts of DPW's response to Korando's
24 Change Order for Ms. Takara's approval were transmitted). On January 26, 2018, Korando, through
25 counsel, issued a Request pursuant to the Freedom of Information Act ("FOIA"), 5 USC §6103, to
26 the FHWA central FOIA office in Washington, DC. On February 1, 2018, FHWA produced Thirty-
27
28

1 One (31) emails between FHWA and Tom Keeler (OAG), Mr. Leon Guerrero (DPW), Joaquin Blaz
2 (DPW), Rob Weinberg (OAG), Linda Hernandez (OAG), Buster Anderson (PTG), Tom Sterling,
3 Felix Benavente (DPW), Michael Lanning (PTG), Jeff Wilson, Derrick Lehman (PTG), Gene
4 Niemasz (PTG), David Yao (PTG), Jeff Miller (TG Engineers), Isidro Duarosan (DPW), Crispin
5 Bensen (DPW), Jolyn Aquiningoc (DPW), Taralyn Santos, and Mr. Moretto (PTG), all of which were
6 related to either the 12/16/2015 Order, Korando's Change Order or DPW's Denial of Korando's
7 Change Order, and none of which were submitted as part of the procurement record in this matter.
8 *See* Declaration of William M. Fitzgerald ("Fitzgerald Decl."), submitted contemporaneously
9 herewith, at ¶ 3, 4 and 5. At least six (6) of the addressees identified above worked at DPW. There
10 can be no question that DPW, including Mr. Leon Guerrero himself, has in its possession email
11 communications related to the identified documents. Mr. Leon Guerrero's Declaration was false.
12

13
14 DPW's acknowledges that "PTG Provided DPW all of its Project related documents for filing
15 with the OPA in this matter." Moretto Decl. at ¶12. At least Five (5) of the individuals included in the
16 email communications the FHWA produced worked at PTG, and not a single one of these emails was
17 produced in the Procurement Records. Further, Mr. Moretto acknowledges in his Declaration that he
18 provided draft responses to Korando's Change Order to DPW. Moretto Decl. at ¶9. No such drafts
19 have been provided to Korando. Notably, the FHWA FOIA Responses attach earlier written analyses
20 of Korando's Change Orders that recommended approval of greater amounts than DPW ultimately
21 approved. Particularly noteworthy is the June 11, 2017 email from Michael Lanning (PTG) to John
22 Moretto (PTG) and Richelle Takara (FHWA), which states as follows:
23

24 //

25 //

1 The overall philosophy we took was to only pay for
2 demobilization/remobilization costs. We were provided direction as to
3 what other expenses should be reasonably included. From your
4 questions below, it seems to me there's a need to go over Korando's
5 claim items again. Quite possibly Glenn/Kin/Tom may want to take a
6 different approach on potentially allowable costs as related to "other
7 expenses" in the stipulation and order.

8 Fitzgerald Decl., Ex. A.

9 This excerpt underscores how critical it is to this Appeal that DPW be required to comply
10 with its obligation to provide a complete procurement record. It is evident that DPW breached the
11 Implied Covenant of Good Faith and Fair Dealing in the execution of its obligations under the
12 12/15/2015 Order, in which it agreed to conduct reviews on the merits and process Change Orders
13 including not only for demobilization and remobilization costs but also "materials previously ordered
14 or in store, which cannot be used on the Project due to the delay of the Project, and any other
15 expenses related to the termination and delay of the Project." Notice of Appeal, Ex. C at 2-3. Further,
16 if DPW stipulated to the 12/15/2015 Order with the intention of violating the Change Order
17 provisions of the order, without which Korando would not have agreed to stipulate to the Order, it is
18 potential evidence of fraud in the inducement.

19 As requested in Korando's Motion to Compel, DPW should be ordered to comply with the
20 OPA's February 26, 2018 Order, instructing DPW to produce emails, correspondence and other
21 documents related to the 12/16/2015 Order, Korando's Change Order, and DPW's Denial of
22 Korando's Change Order, and in light of the Mssrs. Leon Guerrero and Moretto's respective
23 declarations, a log of any and all meetings conducted regarding these documents with the information
24 required by 5 GCA §5249(a). Further, because Mr. Lanning states in his email that PTG was
25 "provided direction as to what other expenses should be reasonably included," Fitzgerald Decl, Ex.
26 A, and because DPW has materially misrepresented the very existence of documents critical to
27 Korando's prosecution of this Appeal, Korando respectfully requests that the OPA allow Korando to
28


1 take the depositions of Mr. Leon Guerrero, Ms. Takara and DPW consultants for further investigation
2 into the extent of the misrepresentations.

3 Further, as requested in Korando's Motion, pursuant to 2 GAR Div. 4 §12109(h), the Hearing
4 Officer may refuse to allow a party to support or oppose claims and defenses in a procurement
5 appeal, or prohibit a party from introducing designated matters in evidence. Because DPW has failed
6 to comply with Guam Procurement Law and the OPA's Order, Korando requests that DPW be barred
7 from introducing any evidence in support of its defenses in this case, and required to pay Korando's
8 reasonable attorneys fees in this Motion to Compel.

9
10 Finally, Korando is severely prejudiced by DPW's refusal to produce a timely and complete
11 Procurement Record even though DPW agreed to do so and was ordered by the OPA to do so.
12 Because DPW has failed to comply with Guam Procurement Law requiring it to produce a complete
13 procurement record and Agency Report, Korando cannot fully respond to DPW's Agency Report, or
14 assess whether further motions are necessary. For this reason, Korando requests that it be granted
15 additional time to respond to the Agency Report, and to file additional motions as necessary. Korando
16 anticipates that the email communications produced by the FHWA are a mere fraction of the email
17 communications exchanged between DPW and its consultants related to this Appeal. Until such time
18 as DPW produces a complete procurement record, Korando cannot anticipate the volume of the
19 pending material, and cannot determine what length of time would be appropriate for Korando to
20 submit its Comments to Agency Report or further motions. For this reason, Korando requests a status
21 hearing to determine whether DPW has complied with its obligations to produce a full procurement
22 record, the volume of such record, the length of time necessary for Korando to review such record,
23 and the appropriate length of time for Korando to file its Comments to Agency Report and further
24 motions.
25
26
27
28

1 Dated this 6th day of April, 2018.

2 **LAW OFFICES OF WILLIAM M. FITZGERALD**

3 
4 WILLIAM M. FITZGERALD
5 *Attorneys for Appellant Korando Corporation*

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28