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 OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEALS

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**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEAL**

IN THE APPEAL OF	)	DOCKET NO. OPA-PA-11-009
	)	
HUBTEC INTERNATIONAL CORP.	)	
	)	
Appellant.	)	<b>DPW'S HEARING BRIEF</b>
	)	
	)	

Pursuant to the SCHEDULING ORDER dated July 22, 2011, Appellee DEPARTMENT OF PUBLIC WORKS, GOVERNMENT OF GUAM (DPW or Government) respectfully submits the instant Hearing Brief summarizing its arguments concerning the issues contested in this matter.

**FACTUAL BACKGROUND**

This appeal involves a contract dispute over a road construction project located on Route 2 in Umatac. DPW originally put the project out for bid between April to July, 2009 [PROCUREMENT RECORD at p.0250]. At all times, the Route 2 project was, and is, funded fully by the U.S. Federal Government pursuant to the AMERICAN RECOVERY AND REINVESTMENT



ACT OF 2009 ("ARRA"), and administered by Federal Highway Administration ("FHWA"). Accordingly, federal road construction standards and other requirements are applicable to the project.

On October 5, 2009, a bid opening was held and Hubtec's low bid \$1,835,040.00 was determined to be responsive and reasonable. [PROCUREMENT RECORD at p. 0008]. Accordingly, DPW awarded Hubtec the contract for the Route 2 construction project. [PROCUREMENT RECORD at pp. 0036-0043].

The terms and conditions of Hubtec's contract provided that the construction project would be completed within 240 calendar days from the contract commencement date (which is the date that a Notice to Proceed (NTP) is issued). [PROCUREMENT RECORD at p. 0037]. For the Route 2 project, the contract completion date was determined to be December 31, 2010.

On January 25, 2011, the Government advised Hubtec that it was in serious breach of its contractual obligations due to numerous environmental and safety violations and that fact that the deadline of December 31 had passed and only 28% of the project had been completed, while over 100% of the contract time had elapsed. [PROCUREMENT RECORD at p. 588]. The Government ordered Hubtec to submit a request for time extension as required by Section SCR 108-01 of the contract between the parties. [PROCUREMENT RECORD at pp. 588, 0165].

Hubtec failed to submit the request for time extension. Thereafter on February 22, 2011, the Government terminated the Route 2 contract with Hubtec. [PROCUREMENT RECORD at pp. 0589-0590]. On the same date, the Government also notified Hubtec's surety of the contract termination. [PROCUREMENT RECORD at pp. 0591-0593].

Hubtec thereafter filed this appeal on June 24, 2011.

## LIST OF ISSUES PRESENTED BY THE PARTIES

To a certain extent, there is an overlap and similarity of the issues presented by DPW and Hubtec in their respective LIST OF ISSUES.<sup>1</sup> When the two LISTS are combined, the issues presented by both parties are essentially as follows:

- (A) Whether DPW acted in good faith in its performance of the contract with Hubtec. [*Hubtec Issue No. 1*];
- (B) Whether DPW breached the contract between the parties. [*Hubtec Issue No. 2*];
- (C) Whether Hubtec breached the contract between the parties. [*DPW Issue No. 2*];
- (D) Whether DPW wrongfully terminated Hubtec from performing work under the Contract. [*Hubtec Issue No. 5 and DPW Issue No. 1*];
- (E) Whether DPW ignored the dangerous environmental conditions and, in effect, caused Hubtec to fail to meet its contractual obligations. [*Hubtec Issue No. 3*];
- (F) Whether the design for the job was defective. [*Hubtec Issue No. 4*];
- (G) Whether DPW is liable for the loss of the bonding on the job. [*Hubtec Issue No. 7*];
- (H) Whether Hubtec is owed compensation for change orders, loss of time and effort expended in the performance of the Contract. [*Hubtec Issue No. 6 and DPW Issue No. 3*]; and
- (I) Whether DPW is entitled to an offset of any amounts allegedly owed to Hubtec against the additional liabilities caused to DPW by the breaches, negligence, and fraudulent actions of Hubtec. [*DPW Issue No. 4*].

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<sup>1</sup> See DPW's Witness List and List of Issues filed on August 12, 2011; and Appellant's List of Issues filed on August 17, 2011.

## LEGAL DISCUSSION

### I.

#### A. WHETHER DPW ACTED IN GOOD FAITH IN ITS PERFORMANCE OF THE CONTRACT WITH HUBTEC. [HUBTEC ISSUE NO. 1].

Hubtec alleges as its first issue that DPW failed to act in good faith with respect to Hubtec's performance of the contract. On this point, it is well settled that an implied covenant of fair dealing and good faith is implicitly contained within every government contract, including the Route 2 contract. Travelers Indem. Co. v. U.S., 16 Cl.Ct. 142, 149 (Cl.Ct. 1988) (implied obligation of good faith is present in all contracts, including government construction contracts, *citing* 5 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 670 (3d ed. 1961)).

To this end, however, it is similarly well settled that government officials are presumed to act conscientiously and in good faith in the discharge of their duties, and courts will not lightly depart from the presumption of good faith so to conclude that a particular government action was made in bad faith. Kalvar Corp. v. United States, 543 F.2d 1298, 1301-1302 (Cl. Ct. 1976) ("Any analysis of a question of Governmental bad faith must begin with the presumption that public officials act conscientiously in the discharge of their duties. . . . The court has always been 'loath to find to the contrary,' and it requires 'well-nigh irrefragable proof' to induce the court to abandon the presumption of good faith dealing." (Citations omitted)); *see also*, Am-Pro Protective Agency, Inc. v. U.S., 281 F.3d 1224, 1238 (Fed. Cir. 2002); T&M Distributors, Inc. v. U.S., 185 F.3d 1279, 1285 (Fed. Cir. 1999); Spezzaferro v. Federal Aviation Administration, 807 F.2d 169, 173 (Fed. Cir. 1986); Tornecello v. U.S., 681 F.2d 756, 770 (Cl. Ct. 1982).

Thus in order to overcome the presumption of good faith, and as the appellant and contractor, it is Hubtec's burden to present "*clear and convincing evidence*" of the alleged bad

faith. Am-Pro Protective Agency, 281 F.3d at 1234. Moreover, proof of the alleged bad faith must involve more than allegations of miscommunication or contract misunderstandings. Rather, Hubtec must establish by **clear and convincing evidence** that there was some sort of malice or conspiracy against it, and that that DPW had a specific intent to injure Hubtec. Kalvar Corp., 543 F.2d at 1302 (finding that there was no bad faith in the absence of "some proof of malice or conspiracy").

DPW asserts that at all times, Hubtec was treated reasonably, fairly, and given every accommodation. Indeed, Hubtec has not and cannot put forward any evidence (much less clear and convincing evidence) that DPW terminated the Route 2 contract maliciously for no legitimate business reason or with the specific intent to injure Hubtec.

The only evidence that Hubtec appears to rely upon for its bad faith claim is that DPW allegedly did not respond to certain Hubtec inquiries in a timely manner. While delayed communications with DPW, if proven, may be grounds for supporting an extension of the contract performance time or even an adjustment of costs, such allegations do not rise to the standards of malice or conspiracy necessary to justify a finding of bad faith.

And in this regard, Hubtec appears before OPA with unclean hands because the procurement record and the project itself evidences numerous delays that were caused by Hubtec and for which the DPW had no part. Under the terms of the contract, the deadline for completing Route 2 was December 31, 2010. Yet by that date, the project was only a mere 28% completed. As will be established at the Hearing, the 28% completion benchmark was substantially caused by environmental and OSHA violations that were solely within Hubtec's control. And, when it became obvious that Hubtec needed more time, DPW ordered Hubtec to

submit a request for a time extension pursuant to Section SCR 108-01 of the contract.<sup>2</sup> Hubtec failed to submit the request although it was its obligation and in its interest and benefit to do so.

Given all this, DPW submits that it is incorrect and incongruous for Hubtec to now argue that DPW was the sole or primary cause of its delayed performance when the evidence at the Hearing will show that the delays were actually caused by Hubtec's technical inability to perform the work and by its own failure to take action when necessary.

## II.

**B. WHETHER DPW BREACHED THE CONTRACT BETWEEN THE PARTIES. [HUBTEC ISSUE NO. 2].**

**C. WHETHER HUBTEC BREACHED THE CONTRACT BETWEEN THE PARTIES. [DPW ISSUE NO. 2].**

**D. WHETHER DPW WRONGFULLY TERMINATED HUBTEC FROM PERFORMING WORK UNDER THE CONTRACT. [HUBTEC ISSUE NO. 5 AND DPW ISSUE NO. 1].**

To the extent that it is Hubtec's allegation that DPW breached the contract by wrongfully terminating the Route 2 contract, Hubtec has yet to identify any evidence even remotely establishing what specific actions or inactions DPW did which would justify a claim of wrongful termination.

In contrast, DPW has produced much evidence, and is discovering more evidence every day, that the contract with Hubtec was properly terminated for default because not only did Hubtec fail to complete the job satisfactorily within the prescribed time, but also that the

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<sup>2</sup> See PROCLAMMENT RECORD at pp. 588, 0165

quality of the relatively small amount of work that was done was extremely poor and not up to the specified standards. There is also evidence that Hubtee knowingly made misrepresentations to DPW about the type and quality of the materials it used on the project, and that it made misrepresentations on aspects involving the extent of the type or scope of work that was performed. As previously outlined in DPW's AGENCY REPORT that was filed on July 19, 2011, this evidence includes:

- Hubtee's admitted substitution and installation of foreign steel imported from Korea, a direct violation of the express terms of the Contract (SCR 105.1) and the federal "Buy American Act." [*AGENCY REPORT, Tab B at p. 0001*];
- Intentional and willful falsification of payment invoices so as to fraudulently misrepresent the Korean steel as being U.S. steel, in violation of the express terms of the Contract (RCP-14 at § IX);
- Intentional and willful creation of false invoices in order to receive double payment for certain Undistributed Materials (received from DPW Construction Manager and supplier requesting payment under the "Payment Bond). [*AGENCY REPORT, Tab B at pp. 0009-0027*];
- Failure to pay subcontractors. [*AGENCY REPORT, Tab B at pp. 0009-0027*];
- Failing to engage adequate erosion control measures, resulting in the issuance of a non-conformance report and a Notice of Violation by the Guam Environmental Protection Agency (GEPA);
- Numerous traffic and OSHA workplace safety violations;
- Numerous unauthorized deviations from the particulars and specifications set forth in the design plans; and
- Overall defective and substandard workmanship.

At the Hearing on this matter, DPW will present witness and documentary evidence to substantiate that the Route 2 contract with Hubtec was properly terminated for cause, and that any faults encountered during the project were the direct result of Hubtec's actions and inactions.

### III.

**E. WHETHER DPW IGNORED THE DANGEROUS ENVIRONMENTAL CONDITIONS AND, IN EFFECT, CAUSED HUBTEC TO FAIL TO MEET ITS CONTRACTUAL OBLIGATIONS. [HUBTEC ISSUE NO. 3].**

**F. WHETHER THE DESIGN FOR THE JOB WAS DEFECTIVE. [HUBTEC ISSUE NO. 4].**

DPW formally objects to the presentation of any evidence or testimony related to Hubtec allegations that DPW ignored dangerous environmental conditions at the Route 2 project site, or that the design of the job was defective.

Whether the environmental conditions at the project site were "dangerous" or whether the design of the job was "defective" are subjects for which considerable expert engineering testimony is necessary. It is the position of DPW that neither it nor Hubtec possesses the scientific, technical, or other specialized knowledge required to make any conclusions on these issues.

Nevertheless, it goes without saying that every construction project, particularly a road construction project, has elements of danger. Because Route 2 involved the construction of culverts and stormwater drainage, environmental hazards are necessarily present. As a contractor, Hubtec knew of these hazards and represented to DPW that it could handle them. And, at no time did Hubtec complain that the design of the job was defective. Instead, what Hubtec did was continue to represent to DPW that it could finish the job, but for more money



than its original \$1.8 million bid. As was its legal right, DPW advised Hubtec that the conditions and scope of work were clearly set forth prior to bidding, and that it was Hubtec's responsibility to frame its bid in a responsible manner. For Hubtec to now allege that the job design was defective when previously the design was not defective (just more expensive) is simply not an actionable cause.

#### IV.

##### **G. WHETHER DPW IS LIABLE FOR THE LOSS OF THE BONDING ON THE JOB. [HUBTEC ISSUE NO. 7]:**

This claim is without merit. Upon Hubtec's default, DPW filed a claim with the surety who held Hubtec's Performance and Payment Bond. After retaining its own expert and examining the project site, the surety agreed with DPW that Hubtec had defaulted on the contract. The surety further agreed to pay over to DPW the entire bond amount of \$1.8 million.

Since the surety agreed with DPW's assessment of Hubtec's performance on the project, it cannot be said that DPW is liable for the alleged loss of the bond. The bond was not lost. The bond secured Hubtec's performance, Hubtec failed to perform, and the surety paid DPW's claim.

V.

H. WHETHER HUBTEC IS OWED COMPENSATION FOR CHANGE ORDERS, LOSS OF TIME AND EFFORT EXPENDED IN THE PERFORMANCE OF THE CONTRACT. [HUBTEC ISSUE NO. 6 AND DPW ISSUE NO. 3].

I. WHETHER DPW IS ENTITLED TO AN OFFSET OF ANY AMOUNTS ALLEGEDLY OWED TO HUBTEC AGAINST THE ADDITIONAL LIABILITIES CAUSED TO DPW BY THE BREACHES, NEGLIGENCE, AND FRAUDULENT ACTIONS OF HUBTEC. [DPW ISSUE NO. 4].

It is Hubtec's claim that even assuming the contract termination was not wrongful, it is nevertheless entitled to receive payment for approximately \$500,000 in work performed but not yet paid.

In order to assess properly Hubtec's payment claim, for the past several weeks DPW has been reviewing the claim amounts and is in the process of finalizing its analysis. The review has been lengthy and arduous due to on-going materials testing and analysis of the slide wall that was constructed by Hubtec using the foreign steel, as well the gathering of additional documentation from the involved construction management firm and subsequent quantity verifications and calculations.

Preliminary analysis indicates that several items claimed for payment are "Lump Sum" items. Under the contract at Section of FP-03, subsection 152.06, "*Payment for Lump Sum items will be prorated based on the total work completed.*" Thus, assuming the claim is meritorious, these and some of the unit price items will require pro-ration, the amounts of which are still being determined. Other items claimed by Hubtec are for payments that Hubtec owed to its various subcontractors. The subcontractor claims have been paid for directly by the surety, and therefore no payment for these is owed to Hubtec.

DPW expects to finalize its analysis of the Hubtec's claim for unpaid change orders and other items within the next day or so. The findings will be presented to Hubtec for review, so that if permitted by the OPA, both parties can submit supplemental briefing on these two issues.

### CONCLUSION


Hubtec comes before the OPA with unclean hands and seeks to blame DPW for its own negligence and incompetence. At the hearing, Hubtec will have the burden of establishing with clear and convincing evidence that DPW acted in bad faith and that the contract was terminated with malice or with a specific intent to injure Hubtec.

However, even with all ambiguities resolved in Hubtec's favor, the overwhelming evidence supports that Hubtec committed numerous breaches of its own, including repeated delays, poor performance, defective and substandard work, negligence, and misrepresentation. Absent evidence of malice or a designedly oppressive course of government conduct, and absent evidence of any wrongdoing otherwise by DPW, it is submitted herein that this contract dispute by Hubtec for alleged bad faith termination of the Route 2 contract and failure to pay outstanding change orders must fail.

Respectfully submitted this 19th day of August, 2011.

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By:



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