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1 JOYCE C.H. TANG
2 LESLIE A. TRAVIS
3 **CIVILLE & TANG PLLC**
4 330 Hernan Cortez Avenue Ste. 200
5 Hagatna, Guam 96910
6 Tel: (671) 472-8868/9
7 Fax: (671) 477-2511

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8 **PROCUREMENT APPEAL**
9 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

10 In the Appeal of
11
12 Core Tech International Corp.,
13 Appellant.

CONSOLIDATED DOCKET NOS.
OPA-PA-16-007 & OPA-PA-16-011

**MOTION FOR ORDER UNSEALING TAPE
RECORDINGS FILED ON SEPTEMBER 6, 2016**

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18 Appellant Core Tech International Corp. (“Core Tech”) seeks an order unsealing five tapes
19 containing recordings of evaluations sessions related to the contract at issue on this appeal. The
20 existence of these tapes was only disclosed two days ago, on the day before the hearing began. They
21 were filed under seal and are part of a demonstrably incomplete Procurement Record. Unsealing of
22 the tapes is appropriate given the Government’s prior disclosures of portions of the Procurement
23 Record containing aspects of the evaluation sessions, and serious questions about the material the
24 evaluators had before them. When Core Tech requested these tape recordings during the first day of
25 hearings, the Public Auditor asked for a memorandum in support of the request. Core Tech moves
26 that the Public Auditor unseal the five tape recordings.

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MEMORANDUM OF POINTS AND AUTHORITIES

Core Tech seeks an order unsealing the tape recordings filed under seal on September 6, 2016. Although portions of a Procurement Record, such as proposals submitted by offerors in response to the RFP, are generally not open to public inspection pre-award, the privilege against disclosure is waived where, as here, the government “discloses documents with similar information” and “places a portion of privileged material at issue while self-servingly retaining the rest.” *Sikorsky Aircraft Corp. v. U.S.*, 106 Fed. Cl. 571, 580 (2012).

I. RELEVANT FACTS AND PROCEDURAL BACKGROUND

On June 15, 2015, DPW issued the RFP for the Lease Financing for Design, Renovation, Rehabilitation, Construction and Maintenance of Public Schools (Beginning with Simon Sanchez High School), Project No. 730-5-1055-L-YIG. The resulting contract would last for five (5) years and include services for thirty-five (35) different Guam Department of Education (“GDOE”) facilities. Three companies submitted proposals, including Core Tech and GEF. Felix Benavente, the Deputy Director of DPW is the Chief Procurement Officer who in charge of this solicitation, and was a member of the evaluation team and negotiation team that ranked the proposals and decided to issue a notice of intent to award the contract to GEF. Mr. Benavente testified on September 7, 2016, and disclosed for the first time that: (1) the sealed price proposals of bidders were opened, including the sealed price proposals of Core Tech and Pernix, whose proposals were ranked second and third; and (2) the price proposals were given to GEDA; and (3) he did not recall specifically when the sealed price proposals of Core Tech and Pernix were opened, but he believes they were opened after the evaluation team ranked the technical proposals. Mr. Benavente confirmed there are no logs or minutes of meetings for the evaluation meetings that took place between July 2015 and December 24, 2015, when the notice of ranking was issued.

1 In an internal memorandum dated April 19, 2016, prepared by the Department of Education
 2 (“DOE Internal Memo”), discussing the evaluation and negotiation process states as follows:

	Simon Sanchez Proposal		Costs not included	Simon Sanchez Total	CCIP	RFP Total	Proposed SSHS SF
4 GEFF	\$ 73,218,078.00 *	\$	16,104,180.00	\$ 89,322,258.00	\$ 400,000.00	\$ 89,722,258.00	278,850
5 CTI	\$ 61,598,362.00 **	\$	1,684,867.00	\$ 63,283,229.00	\$ 536,279.00	\$ 63,819,508.00	Not indicated
6 Purnex	\$ 82,400,000.00 ***					\$ 82,400,000.00	Not indicated

7 * additional project costs not included or identified in proposal submission.

8 ** equipment not included but offered as optional.

9 *** Purnex cost proposal was in a separate sealed envelope which was not opened by the evaluation committee.
 The CCIP and other costs associated with their proposal is not known.

9 GEFF Vs. CTI	\$ 25,902,750.00	Difference
10 GEFF Vs. Purnex	\$ 7,322,258.00	Difference

11 See, CT Ex. 9 attached hereto (emphasis added).

12 The chart discloses Core Tech’s and Pernix’s price contained in its sealed price proposals.
 13 From the notation “Purnex [*sic*] cost proposal was in a separate sealed envelope which was not
 14 opened by the evaluation committee,” leads to the inescapable conclusion that Core Tech’s sealed
 15 price proposal was opened by the evaluation committee.

16 The Negotiation Memorandum dated May 13, 2016 (*see*, CT Ex. 12 attached hereto) is
 17 incomplete and does not provide any information regarding the evaluation as required by 2 G.A.R.,
 18 Div. 4, Chap 3, §3114(m). Because a log was not maintained, we also do not know who authored
 19 and participated in the drafting and revision of the Negotiation Memorandum.

20 There is a huge information gap regarding what happened during the evaluations and how the
 21 sealed price proposals were handled, who had access, who opened them, when they were opened,
 22 and why they were opened. No Procurement Log was kept and there are no minutes of any meetings
 23 of the evaluators. This information should have been in the procurement log and required minutes,
 24 neither of which was maintained. Other than the recordings, and the testimony of Mr. Benavente’s
 25 testimony regarding the disclosure of proposals, we don’t know what happened to the sealed
 26 proposals. The sealed price proposals are indisputably a part of the Procurement Record. The
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1 evaluation tapes should be released to determine whether the evaluators had improperly opened the
2 sealed price proposals and considered the pricing information of each of the offerors at the time of
3 their evaluations. Furthermore, the agencies should be ordered by the Public Auditor to deliver the
4 original and seven (7) copies of the sealed price proposals to the Public Auditor forthwith. Core Tech
5 also requests the Public Auditor order that each Evaluator and other recipients of any the seven
6 copies and one original sealed price proposals deliver a separate *declaration under penalty of perjury*:
7 (1) attaching a log for each of the copies indicating where he/she kept the price proposals and who
8 had access to the proposals; and stating, (2) if the sealed proposals were opened, a statement as to
9 when sealed proposal were opened and whether the sealed proposals were copied or shared with any
10 person, party or entity.
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12 II. ARGUMENT

13 A. The Government Violated the Guam Procurement Regulations When 14 It Opened Core Tech's and Pernix's Sealed Price Proposals During 15 Evaluation.

16 Proposals submitted in response to an RFP are not opened publicly or disclosed to
17 unauthorized persons. 2 G.A.R., Div. 4, Chap 3, §3114(h)(1)¹. While the Proposal submitted by the
18 offeror awarded the contract is generally opened to public inspection, such inspection is barred during
19 the deliberative process, and is only permissible after award of the contract is made. 2 G.A.R., Div.
20 4, Chap 3, §3114(i)(2). Proposals submitted by offerors who are not awarded the contract *are not*
21 opened to public inspection. 2 G.A.R., Div. 4, Chap 3, §3114(h)(1). These exceptions to the general
22 rule of public disclosure during the deliberative process are “necessary to preserve the integrity of the
23 procurement process.” 2 G.A.R., Div. 4, Chap 3, §3132; *In the Appeal of Guam Community*
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27 ¹ While Section 3114 of the procurement regulations explicitly applies to procurement “of the services of
28 accountants, physicians, lawyers, dentists, and other professionals,” 2 G.A.R., Div. 4, Chap 3, §3114 (a), the OPA
has in past decisions applied its provisions to procurement for finance, demolition, design, build, maintenance and
leaseback of the John F. Kennedy High School in OPA Appeal No. OPA-PA-09-005.

1 *Improvement Foundation, Inc.*, Office of Public Auditor Appeal No.: OPA-PA-09-005 (Decision and
2 Order, October 21, 2009).

3 The DOE Internal Memo confirms that Core Tech's and Pernix's sealed price proposals were
4 opened. Contrary to Mr. Benavente's testimony that they were opened after the evaluation (even that
5 is not permissible), there is a strong indication that these price proposals were opened and discussed
6 during the evaluation and ranking. The negotiation memorandum setting forth the basis for the award,
7 including application of evaluation factors to proposals submitted by qualified offerors and principle
8 elements of the evaluation and negotiations. 2 G.A.R., Div. 4, Chap 3, §3114(m). The evaluation and
9 negotiation memorandum is included in the contract file, and ultimately made available for public
10 inspection. There is no provision in procurement regulations that allows for disclosure of a
11 negotiation memorandum or the privileged information contained therein during the deliberative
12 process, prior to awarding of the contract.
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15 Notably, 2 G.A.R., Div. 4, Chap. 3, §3129, requires the Director of DPW (chief procurement
16 officer) to maintain a complete record of each procurement that includes: (1) the date, time, subject
17 matter and names of participant at any meeting related to a procurement; (2) a log of all
18 communications between government employees and the public, potential bidders, vendors or
19 manufacturers related to the procurement; (3) recordings of all pre-bid conferences, negotiations of
20 RFPs and discussions with vendors for small purchase procurement; (4) brochures and submittals of
21 vendors, manufacturers or contractors, and drafts and other papers used in the development of
22 specifications; and (5) the requesting department's determination of need. 2 G.A.R., Div. 4, Chap. 3,
23 §3129. A procurement record is a public record, and, generally, any person may inspect and copy any
24 portion thereof, subject to existing laws and regulations. 5 G.C.A. §5249 and §5251; 2 G.A.R., Div.
25 4, Chap. 3, §3129 and §3131.
26

27 The concerns about improper disclosure of sealed price proposals and the complete lack of
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1 records for the evaluation process require that the tape recordings be disclosed to the public.

2 **B. The OPA Should Allow Inspection of the Tape Recordings Because the**
3 **Need for Disclosure Outweighs the Government's Interest in Non-**
4 **Disclosure.**

5 The government is ordinarily entitled to assert that disclosure of a Procurement Record
6 pursuant to a Freedom of Information Act (FOIA) request is subject to the deliberative process
7 privilege, which exempts from disclosure “documents that reflect advisory opinions,
8 recommendations, and deliberations comprising part of a process by which governmental decisions
9 and policies are formulated.” *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150, 95 S. Ct. 1504,
10 1516, 44 L. Ed. 2d 29 (1975). The privilege applies where (1) the document is “pre-decisional” or
11 generated prior to an agency’s adoption of a policy or decision, and (2) the document must be
12 deliberative – it must “contain opinions, recommendations, or advice about agency policies.” *Coastal*
13 *States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

14
15 The deliberative process privilege is qualified:

16 A litigant may obtain deliberative materials if his or her need for the materials and the
17 need for accurate fact-finding override the government's interest in non-disclosure.
18 Among the factors to be considered in making this determination are: 1) the relevance
19 of the evidence; 2) the availability of other evidence; 3) the government's role in the
litigation; and 4) the extent to which disclosure would hinder frank and independent
discussion regarding contemplated policies and decisions.

20 *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (citations omitted). A fifth
21 element, the “seriousness” of the litigation and the issues involved, is also applied in some
22 jurisdictions. *In re Subpoena Served Upon Comptroller of Currency, & Sec'y of Bd. of Governors of*
23 *Fed. Reserve Sys.*, 967 F.2d 630, 634 (D.C. Cir. 1992)

24 Here, the first and second factors weigh in favor of disclosure. The tape recordings in this
25 matter are clearly relevant; they contain information regarding the date and times of the evaluators’
26 meetings and those in attendance, whether price proposals of Core Tech and Pernix were revealed
27 and discussed, none of which can be verified given the lack of a properly prepared and maintained
28 procurement record. They would also show whether or not the evaluators had the pricing information

1 before them.

2 The third and fourth factors likewise weigh in favor of disclosure. The Government is a party
3 to this action. As described at length above and in Core Tech's Notice of Appeal, the record is replete
4 with evidence of DPW's questionable conduct in this procurement. "Where there is reason to believe
5 the documents sought may shed light on government misconduct, 'the privilege is routinely denied,'
6 on the grounds that shielding internal government deliberations in this context does not serve 'the
7 public's interest in honest, effective government.'" *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir.
8 1997). It is unlikely that disclosure of the tape recordings would hinder frank and independent
9 discussion regarding the evaluators' decisions because the basis for the appeal and the request for
10 information is the procedural irregularities in the procurement process, and not the ultimate decision
11 awarding the contract to GEF. Included in the irregularities would be the disclosure to the
12 evaluators of the pricing information of the offerors.

13 Finally, in addition to the large sum of government funds expected to be expended in the
14 Simon Sanchez high school project, which the Government improperly may allow to exceed the \$100
15 Million cap in the RFP, the issues involved in this litigation embrace the very integrity of the
16 procurement process, and the propriety of government action which is susceptible to repetition and
17 abuse. Given the extent of the Government's misconduct in violation of Guam Procurement
18 Regulations, including its failure to maintain a proper Procurement Record, Core Tech's and the
19 public's need for accurate fact-finding override the Government's interest in non-disclosure.

20 **C. The OPA Should Allow Inspection of the Tape Recordings**
21 **Because the Government has Waived the Deliberative Process**
22 **Privilege.**

23 To the extent the tapes might otherwise be subject to some claim of privilege, the Government
24 has waived the deliberative process privilege by having already made a partial disclosure of the
25 privileged information, and by disclosing the DOE Internal Memorandum and the Negotiating
26 Memorandum.

27 The Government waives the deliberative process privilege "by placing a portion of privileged
28 material at issue while self-servingly retaining the rest," *Sikorsky Aircraft Corp. v. United States*, 106

1 Fed. Cl. 571, 580 (2012) (citing *Rupert v. United States*, 225 F.R.D. 154, 156 (M.D.Pa.2004); *In Re*
2 *Keeper of Records*, 348 F.3d at 24). “[T]he courts have identified a common denominator in waiver
3 by implication: in each case, the party asserting the privilege placed protected information in issue for
4 personal benefit through some affirmative act, and the court found that to allow the privilege to
5 protect against disclosure of that information would have been unfair to the opposing party.” *In re*
6 *Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.*, 348 F.3d 16, 24 (1st Cir. 2003).

8 Inspection of the tape recordings is necessary for accurate fact-finding given the distinctive
9 issues in this case. Production of this material is necessary to provide context for the DOE Internal
10 Memo and the Negotiation Memorandum, and Core Tech is entitled to discovery of information
11 which should, in fairness, be considered with the information in the DOE Internal Memorandum, the
12 Negotiation Memorandum, and DPW’s contention that price played no role in the evaluators’
13 consideration of the proposals. “When one party takes advantage of another by selectively disclosing
14 otherwise privileged communications, courts broaden the waiver as necessary to eliminate the
15 advantage.” *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 361 (3d Cir. 2007), *as amended* (Oct.
16 12, 2007) (citing *Zirn v. VLI Corp.*, 621 A.2d 773, 781-82 (Del.1993) (“The purpose underlying the
17 rule of partial disclosure is one of fairness to discourage the use of the privilege as a litigation
18 weapon”)); *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 260 (Del. 1995) (“In the usual
19 situation, the opposing party will have no alternative source for obtaining the concealed information
20 if the privilege is upheld. Disclosure is thus required in order to promote the rationale which underlies
21 waiver: “fairness and discouraging use of the [] privilege as a litigation weapon”).
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24 It is clear that the Government has waived whatever privilege may exist with respect to the
25 tape recordings of the evaluation committee. *See, e.g., CACI Field Services, Inc. v. United States*, 12
26 Cl. Ct. 680, 687-88 (Cl. Ct. 1987) (plaintiff had received copies of all written comments and
27 summaries prepared by members of the technical review panel and a copy of virtually the entire
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1 Source Selection Plan, court noting that “[a]lthough the government has not waived any objection to
2 production of specific numbers, it has certainly waived an objection based on the argument that all
3 details as to weighting and ranking are somehow privileged. From the court’s perspective, providing
4 the numbers is a difference in degree of specificity but not in the kind of information already
5 produced. This substantially attenuates the privilege argument.”).

7 Because DPW disclosed the DOE Internal Memorandum, the Negotiation Memorandum and
8 attached GEFf communication and proposals, and because DPW maintains that price was not before
9 the evaluators, DPW has waived whatever privilege might exist against disclosure of pre-decisional
10 and deliberative information, and the OPA should order disclosure of the entire tape recordings in
11 this matter.

13 III. CONCLUSION

14 For the foregoing reasons, Core Tech requests that:

- 15 1. The Public Auditor unseal the five tape recordings filed under seal on September 6,
16 2016; and
- 17 2. Order each of the recipient (evaluator and chief procurement officer) of the original
18 and seven (7) copies of the sealed price proposals for Core Tech and Pernix to the Public Auditor;
19 and
- 20 3. Order that each Evaluator, chief procurement officer, and/or recipient of the seven
21 copies and one original sealed price proposals attach to each of the sealed price proposals a separate
22 *declaration under penalty of perjury* with the following: (a) a log for each of the copies indicating
23 where he/she kept the price proposals and who had access; and (b) if the sealed proposals were
24 opened, a statement regarding when sealed proposal were opened, who was present, and whether the
25 sealed proposals were copied or shared with any person, party or entity.

27 Dated: September 8, 2016

28 By: 

Joyce C.H. Tang

Attorneys for Core Tech International Corp.