



Office of the Attorney General
Elizabeth Barrett-Anderson
 Attorney General of Guam
Solicitor Division
 590 S. Marine Corps Drive
 ITC Bldg., Ste. 802
 Tamuning, Guam 96913 • USA
 Tel. (671) 475-3324 Fax. (671) 472-2493
 www.guamag.org
Attorneys for the Government of Guam

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 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS
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 FILE NO OPA-PA: 17-010

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

| | | |
|---------------------------------------|---|-------------------------------------|
| IN THE APPEAL OF: |) | DOCKET NO. OPA-PA-17-010 |
| |) | |
| CORE TECH INTERNATIONAL CORP., |) | |
| |) | |
| Appellant, |) | PURCHASING AGENCY'S RESPONSE |
| |) | TO APPELLANT'S MOTION TO |
| AND |) | DISQUALIFY APPELLEE |
| |) | DEPARTMENT OF PUBLIC WORK'S |
| DEPARTMENT OF PUBLIC WORKS, |) | COUNSEL THOMAS P. KEELER |
| |) | |
| Purchasing Agency. |) | |

Comes Now, Department of Public Works ("DPW"), by and through its undersigned counsel, Assistant Attorney General Thomas P. Keeler ("AAG Keeler"), who submit the following memorandum opposing Appellant Corp Tech International Corp.'s ("CTI") Motion to Disqualify AAG Keeler from representing DPW in these proceeding.

I. STATEMENT OF FACTS

CTI's Notice of Appeal asserts, among other things, that DPW wrongfully terminated the parties September 30, 2011, DPW and CTI Design-Build contract, in which CTI agreed to design and build improvements to the Route 1 and Route 8 intersections, and replacement of two (2)

ORIGINAL

bridges over the Hagatna River (DPW Project No. GU-DAR-T101(001)), (“Project”). The basis of CTI’s allegation is that DPW’s August 23, 2017 Notice of Termination/Default (“Termination”) was in retaliation for CTI’s prosecution of appeals *In the Appeal of Core Tech International Corp.*, OPA-PA-16-007/OPA-PA-16-11 and *In the Appeal of Core Tech International Corp.*, OPA-PA-17-001 (“SSHS Appeals”).

Appellant seeks to disqualify AAG Keeler from representing DPW. Appellant argues that this disqualification is necessary because AAG Keeler gave legal advice to DPW and its consultants regarding the deadline for the department to terminate CTI on the Project in order to make a timely claim on the Project’s Performance and Payment Bonds No. 9060033 (“Bonds”). Therefore, Appellant argues, AAG Keeler will be a witness and also cannot serve as trial counsel in the OPA proceedings. Appellant also argues that any other attorney in the Office of the Attorney General who assisted or participated in rendering advice to DPW are disqualified from acting as trial counsel in this appeal.

AAG Keeler will not be testifying as a witness on behalf of DPW. What advice AAG Keeler provided relating to the time of its Termination of CTI is obtainable from a number of individuals.

II. ISSUES

- A. Whether Appellant lacks standing to bring its motion to disqualify AAG Keeler and other attorneys in the Office of the Attorney General?**
- B. Assuming *arguendo*, Appellant has standing to bring its motion, whether it has failed to meet its heavy burden of showing continued representation by opposing counsel is impermissible?**
- C. Whether DPW will suffer substantial harm if AAG Keeler is disqualified?**
- D. Assuming *arguendo*, Appellant has standing to bring its motion, whether any other attorney in the Office of the Attorney General should be disqualified?**

III. DISCUSSION

A. Appellant lacks standing to bring this motion

Appellant filing of this motion is an attempt to subvert the rules of Professional Conduct into a tactical advantage in these proceedings. Appellant lacks standing to make such a challenge. Appellant has failed to show that it had any prior attorney/client relationship or other relationship imposing a duty of confidentiality by the Attorney General's office which could be used by Appellee against Appellant. Without such a relationship imposing a duty of confidentiality, Appellant lacks standing to seek disqualification.

In *Guerrero v. Moylan*, 2002 Guam 18, ¶49 (Guam Sup. Ct. 2002) the territorial court noted, in dicta that, “[s]ome jurisdictions find that without an attorney-client relationship or some other relationship imposing a duty of confidentiality, a party has no standing to bring a motion to disqualify based on a conflict of interest.” *See also, DCH Health Services Corp. v. Waite*, 115 Cal. Rptr.2d 847, 850 (Cal. App. 2002) (noting absent the existence of a lawyer-client relationship or other relationship imposing a duty of confidentiality, Plaintiffs were not entitled to seek opposing counsel's disqualification); *Johnson v. Prime Bank*, 464 S.E. 2d 24, 26 (Ga. Ct. App. 1995) (finding that Plaintiff has no standing to bring a motion to disqualify opposing counsel since she has no attorney-client relationship with defendants' counsel). *See also, Kasza v. Browner*, 113 F.3d 1159, 1171 (9th Cir. 1998) (noting “[a]s a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification.” *quoting United States v. Rogers*, 9 F.3d 1025, 1031 (2d Cir. 1993)).

Consistent with the foregoing, the Rules of Professional Conduct provide:

Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is just a basis for a

lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

Scope ¶20 (emphasis added).

Appellant has no standing to move to disqualify Appellee's attorneys. Appellant should not be allowed to subvert the rules of Professional Conduct by using the OPA as a tool to disrupt or destroy the confidential attorney/client relationship between Appellee and its attorneys. Appellant's motion should be denied.

B. Assuming *arguendo*, Appellant has standing to bring its motion, whether it has failed to meet its heavy burden of showing continued representation by opposing counsel is impermissible?

The drafters of the ABA Code have cautioned that the ethical rules “[were] not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel.” ABA Code, Canon 5, n. 31; *Optyl Eyewear Fashion Int’l Corp. v. Style Cos., Ltd.*, 760 F.3d 1045, 1050 (9th Cir. 1985). The cost and inconvenience to clients and the judicial system from misuse of the rules for tactical purposes is significant. *Id.* Because of this potential for abuse, disqualification motions should be subjected to “particularly strict judicial scrutiny.” *Id.* Motions to disqualify the attorney of the opposing party are not favored. *Commonwealth Ins. C. v. Graphix Hot Line, Inc.*, 808 F.Supp. 1200, 1203 (E. D. Pa. 1992).

Appellant correctly cites the standard whether a lawyer is a “necessary” witness if his or her testimony is relevant, material and unobtainable elsewhere. *Carta ex rel. Estate of Carta v. Lumbermens Mut. Cas. Co.*, 419 F. Supp. 2d 23 (D. Mass. 2006); *World Youth Day, Inc. v. Famous Artists Merchandising Exchange, Inc.*, F. Supp. 1297, 1302 (D. Colo. 1994). Merely cumulative testimony does not make a lawyer a necessary witness. *Laforest v. Ameriquest Mortgage, Co.*, 2006

WL 2228871 3 (D. Mass.).

The Guam Transportation Group (“GTG”) provides policy direction and overall guidance to the goals and objectives of the DPW’s 2030 Guam Transportation Program concerning the planning, design, construction and repair of Guam’s routed roads that are funded by the Federal Highway Administration (“FHWA”). The GTG is currently composed of DPW’s Director, Glenn Leon Guerrero, its Deputy Director, Andrew Leon Guerrero; DPW’s Acting Highway Administrator, Joaquin Blaz; FHWA’s regional representative, Richelle Takara, Parsons Transportation Group’s (“PTG”) Michael Lanning and John Moretto, WSP’s, fna Parsons Brinkerhoff, Brady Nadell and Lynden Kobayahsi and Assistant Attorney General, Thomas Keeler.

Appellant’s bases its false assertion that the government terminated CTI in retaliation for the SSHS Appeals on argument only. Its argument is unfounded speculation. Appellant provides no affidavits, declaration or document to support its false allegation. For this reason alone Appellant’s motion should be denied.

GTG members are readily available to testify as to AAG Keeler’s advice as to the timing of DPW’s termination of Core Tech. Former DPW Deputy Director, and former member of the GTG, Felix Benavente, is familiar with both the Project and SSHS Appeals. Mr. Benavente can testify that the basis of DPW’s Termination was due to CTI’s breach of Contract, violation of the American with Disabilities Act. He also states that Appellant’s false allegation that the Termination was in retaliation for the SSHS Appeals is “patently false”. Mr. Benavente can also confirm that timing of CTI’s Termination was out of a concern that the Bonds might not be enforceable if DPW failed to terminate prior to the one year anniversary (i.e., August 25, 2016) of CTI achieving “substantial completion”. *See, Ex. A, Decl. of Benavente.*

DPW’s Joaquin Blaz mirrors the testimony of Mr. Benavente. He states that the timing of

DPW's Termination was based on counsel's advice that the "Route 1/8 Project's Surety's Bond might not be enforceable if DPW failed to terminate prior to the one year anniversary of Substantial Completion (i.e., August 25, 2016)." He also states that he is not aware of any animosity between DPW and CTI. *See*, Ex. B, Decl. of Blaz (the original of which was filed in DOCKET NO. **OPA-PA-17-09**). PTG's John Moretto and other GTG members are also able to testify as to the timing of the Termination and that the termination had no relationship whatsoever to the SSHS Appeals. Accordingly, Appellant cannot show that the information it seeks is not unobtainable elsewhere.

C. DPW will suffer substantial hardship if forced to use other trial counsel

DPW will suffer substantial hardship if it is forced to assign another assistant attorney general to serve as trial counsel at such a late date. AAG Keeler is the only attorney from this office that is familiar with the voluminous documents, exhibits, witnesses and other Project details. Ex. C, Decl. Keeler. If DPW is forced to have another AAG substituted in at this late date, CTI will have an unfair advantage in prosecuting its appeal.

D. For the past three (3) years AAG Keeler is the only attorney from the Office of the Attorney General who assisted or participated in rendering advice to DPW on the Project

While AAG provided status memos on the Project to Deputy Attorney General's Karl Espaldon, Ken Orcutt and Fred Nishihara, he is the only attorney from the Office of the Attorney General of Guam to advise DPW issues related to DPW's issuance of an August 23, 2017 Notice of Termination/Default to the Project's contractor, CTI, as such relates to the August 25, 2016 Substantial Completion date. *Id.* Accordingly, no other attorney from the Attorney General's Office need be considered for disqualification.

IV. CONCLUSION

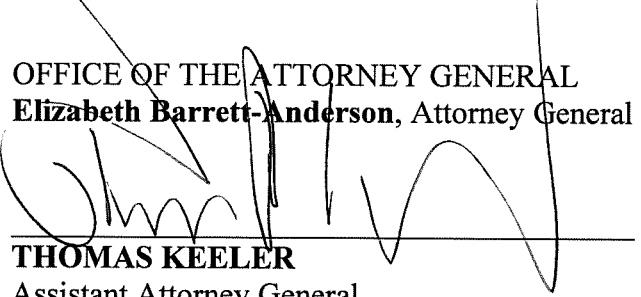
Appellant has filed a motion to disqualify opposing counsel in a transparent attempt to gain a

tactical advantage in these OPA proceedings. The factual basis for CTI's claim of retaliation is nonexistent. Also, Appellant lacks a legal basis for the motion. In addition, the information Appellant seeks is obtainable from other sources. Appellant's motion should be denied.

Submitted this 6th day of December, 2017.

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

By:



THOMAS KEELER
Assistant Attorney General

In the Appeal of: Core Tech International Corp. and DPW

Docket No. OPA-PA-17-010

EXHIBIT A



Office of the Attorney General
Elizabeth Barrett-Anderson
 Attorney General of Guam
Solicitor Division
 590 S. Marine Corps Drive
 ITC Bldg., Ste. 706
 Tamuning, Guam 96913 • USA
 Tel. (671) 475-3324 Fax. (671) 472-2493
 www.guamag.org

Attorneys for the Government of Guam

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

| | | |
|---------------------------------------|---|---------------------------|
| IN THE APPEAL OF: |) | DOCKET NO. OPA-PA-17-10 |
| |) | |
| |) | |
| CORE TECH INTERNATIONAL CORP., |) | DECLARATION OF |
| |) | FELIX C. BENAVENTE |
| Appellant. |) | |
| |) | |

FELIX C. BENAVENTE makes this declaration under penalty of perjury under the laws of Guam and states:

1. I am retired from the Government of Guam.
2. From the period of February 2, 2015 to September 30, 2017, I was employed by Guam Department of Public Works (“DPW”) as its Deputy Director.
3. During my employ with DPW I served as the procurement officer for the DPW and CTI’s Design-Build Contract, dated September 30, 2011, (the “Contract”), pursuant to which Core Tech International Corp. (“Core Tech”) agreed to build and perform construction work on the Route 1/8 Intersections Improvements and Agana Bridges Replacement Project No. GU-DAR-T101(001) (the “Route 1/8 Project”).

4. During this same period I served as the Procurement Officer for two (2) separate procurements for the Simon Sanchez High School Project (“SSHS Project”), both of which resulted in appeals by Core Tech International Corp. (“Core Tech”) to the Office of Public Accountability (“OPA”). These appeals were *In the Appeal of Core Tech International Corp.*, OPA-16-007/OPA-PA-16-011 and *In the Appeal of Core Tech International Corp.*, OPA-PA-17-001.

5. I also served as a member of the Guam Transportation Group (“GTG”), which serves to provide policy direction and overall guidance related to the vision, goals and objectives of Guam’s 2030 Guam Transportation Plan (“GTP”). The GTP defines Guam’s long-term transportation improvement strategy, including the Route 1/ 8 Project.

6. The GTG regularly meets on Friday’s to review and discuss, among other items, the status of proposed and existing or open Federal Highway Administration (“FHWA”) funded projects, such as the Route 1/8 Project.

7. Core Tech achieved substantial completion on the Route 1/8 Project on August 25, 2016 (“Substantial Completion”).

8. Following Substantial Completion Core Tech regularly promised to complete the Route 1/8 Project.

9. Notwithstanding Core Tech’s numerous promises to complete the Route 1/8 Project, on August 23, 2017 DPW issued a Notice of Termination/Default (“Termination”) to Core Tech on said project.

10. As of the date of Termination a number of items need to complete the Route 1/8 Project were outstanding, including but not limited to, the need to correct project sidewalk panels that Core Tech itself agreed were at least 58.2% non-compliant with the American with Disabilities Act (“ADA”), the parties Contract and the Plans and Specifications.

11. The timing of DPW’s Termination was based on Core Tech’s breach of Contract, violation of the ADA and the advice of counsel who informed the GTG and me that the Route 1/8 Project’s Surety’s Performance and Payment Bonds might not be enforceable if DPW failed to terminate prior to the one year anniversary of Substantial Completion (i.e., August 25, 2016). DPW’s counsel provided this advice as early as June, 2017.

12. I recall discussing the Substantial Completion deadline with Assistant Attorney General Thomas Keeler any number of times.

13. The GTG is not responsible for, nor is it involved with, the SSSH Project.

14. I do not recall any GTG discussions involving the SSSH Project. Certainly the SSSH Project was never discussed with regards to discussions concerning Core Tech's ongoing default and possible termination on the Route 1/8 Project.

15. I am advised that Core Tech alleges that DPW's decision to terminate it on the Route 1/8 Project was in retaliation to its appeals to the OPA on the SSSH Project.

16. In addition to being offensive, Core Tech's allegation of retaliation is patently false.

I declare under penalty of perjury that the aforementioned is true.

Submitted this 6th day of December, 2017.

By: 
FELIX C. BENAVENTE

In the Appeal of: Core Tech International Corp. and DPW

Docket No. OPA-PA-17-010

EXHIBIT B

Project, as I understand, is governed by representatives of the Guam Department of Education, Department of Land Management, Guam Economic Development Authority, Guam Environmental Protection Agency and DPW, under the Division of Capital Improvements Projects (CIP).

4. I am not involved in the daily operations of CIP nor am I aware of any of their procurement projects.

5. I am not aware of any animosity between DPW and Core Tech Internal Corp. ("Core Tech"). The numerous time extensions granted Core Tech on the Route 1/8 Project contradict any such belief.

6. Substantial Completion on the Route 1/8 Project was achieved on August 25, 2016.

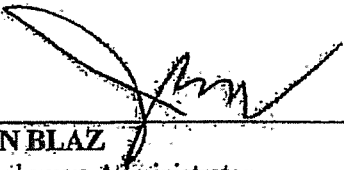
7. Notwithstanding numerous promises to complete the Route 1/8 Project, as of August 23, 2017, Core Tech failed to complete outstanding items, including but not limited to the need to correct sidewalks that Core Tech itself agree failed to comply with the American with Disabilities Act (ADA), the parties Contract and the Plans and Specifications.

8. The timing of DPW August 23, 2017 Notice of Termination/Default was based on the advice of counsel who informed DPW that the Route 1/8 Project's Surety's Bond might not be enforceable if DPW failed to terminate prior to the one year anniversary of Substantial Completion (i.e., August 25, 2016). DPW's counsel provided this advice as early as June, 2017.

I declare under penalty of perjury that the aforementioned is true.

Submitted this 30th day of October, 2017.

By: _____


JOAQUIN BLAZ
Acting Highways Administrator
Department of Public Works

In the Appeal of: Core Tech International Corp. and DPW

Docket No. OPA-PA-17-010

EXHIBIT C



Office of the Attorney General

Elizabeth Barrett-Anderson

Attorney General of Guam

Civil Litigation Division

590 S. Marine Corps Drive

Tamuning, Guam 96913 • USA

(671) 475-3324 • (671) 472-2493 (Fax)

www.guamag.org

Attorneys for the Government of Guam

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

In the Appeal of:

Core Tech International Corp.,

Appellant,

and

GUAM DEPARTMENT OF
PUBLIC WORKS

Purchasing Agency

DOCKET NO. OPA-PA-17-10

**DECLARATION OF
THOMAS P. KEELER**

THOMAS P. KEELER makes this declaration under penalty of perjury under the laws of Guam and states:

1. I am employed as an Assistant Attorney General by the Office of the Attorney General of Guam.

2. As part of my responsibilities with the Office of the Attorney General I am tasked with counseling the Guam Department of Public Works (“DPW”) Highway Division on

procurement matters and legal issues on existing construction projects Guam's routed roads that are funded by the Federal Highway Administration ("FHWA").

3. In performing my responsibilities on FHWA funded Projects I regularly meet and communicate with DPW's Director Glenn Leon Guerrero, who is recused on this Appeal, its Deputy Director, Andrew Leon Guerrero, and DPW's Acting Highway Administrator, Joaquin Blaz, Parsons Transportation Group ("PTG") and WSP USA, Inc. f/k/a Parsons Brinkerhoff ("WSP"). PTG and WSP are consultants to DPW. I also meet with other DPW staff members throughout the work day and week. Further, it is standard business for the Director and DPW Management to meet with and consult with me before making any major decisions on Guam's FHWA funded roadway projects.

4. I regularly participate in weekly meetings of the Guam Transportation Group ("GTG"), which provides policy direction and overall guidance to the goals and objectives of the department's 2030 Guam Transportation Program. The GTG members include DPW's Director and Deputy Director, DPW's Acting Highway Administrator, representatives from PTG and WSP, and FHWA's regional representative Ms. Richelle M. Takara, P.E.

5. The GTG reviews the status of current FHWA funded roadway projects on a weekly basis.

6. I am familiar with DPW and CTI's Design-Build Contract, dated September 30th, 2011, pursuant to which CTI agreed to design and perform construction work on the Route 1/8 Intersection Improvements and Agana Bridges Replacement Project No. GU-DAR-T101(001) (the "Project").

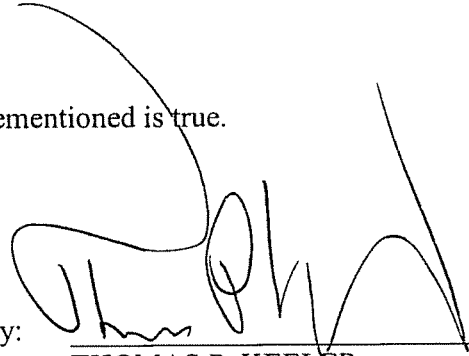
6. I am also familiar with issues related to DPW's issuance of an August 23, 2017 Notice of Termination/Default to the Project's contractor, Core Tech International Corp., as such relates to the August 25, 2016 Substantial Completion date.

7. While I periodically provide Deputy Attorney General's Karl Espaldon, Ken Orcutt and Fred Nishihara status memos on the Project, I am the only attorney in the Attorney General's office familiar with the voluminous Project materials, scheduled witnesses and exhibits.

I declare under penalty of perjury that the aforementioned is true.

Submitted this 6th day of December, 2017.

By:

A handwritten signature in black ink, appearing to read 'Thomas P. Keeler', written over a horizontal line.

THOMAS P. KEELER