Joyce C.H. Tang
Leslie A. Travis
CIVILLE & TANG PLLC
330 Hernan Cortez Avenue Ste. 200
Hagatna, Guam 96910
Tel: (671) 472-8868/9
Fax: (671) 477-2511

PROCUREMENT APPEAL
IN THE OFFICE OF PUBLIC ACCOUNTABILITY

DOCKET NO. OPA-PA-17-009

In the Appeal of

Core Tech International Corp.,

Appellant.

and

Guam Department of Public Works,

Purchasing Agency.

CORE TECH INTERNATIONAL CORP.'S MOTION TO DISQUALIFY TOM KEELER; MEMORANDUM OF POINTS AND AUTHORITIES

MOTION

Appellant Core Tech International Corp. ("Core Tech"), by and through counsel, moves this Court for an order disqualifying Thomas P. Keeler, Assistant Attorney General, from participating in this Appeal on behalf of the Department of Public Works ("DPW"). This Motion is brought pursuant to Rules 1.7 and 3.7 of the Guam Rules of Professional Conduct, and is supported by the Memorandum of Points and Authorities below, all matters of record herein, and such other evidence as may be adduced at a hearing hereon.

ORIGINAL

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Core Tech has moved this Court for an order disqualifying Thomas P. Keeler, Assistant Attorney General, from participating on behalf of the DPW in this matter on the basis that he is a necessary witness to the issues before the OPA, and his continued appearance in this matter as counsel of record for the DPW violates Rule 3.7 of the Guam Rules of Professional Conduct.

The issue on appeal in this matter is DPW's new interpretation of a contractor's "Record of Default" to include a disputed "Notice of Default," which DPW issued concurrently with the issuance a Notice of Default/Termination against Core Tech in Route 1/Route 8 Intersection Improvements and Agana Bridges Replacement Project No. GU-DAR-T01(001) ("Agana Bridges Project"). Core Tech contends in this Appeal that the decision makers at DPW caused the issuance of the Notice of Default/Termination in retaliation against Core Tech. *See* Notice of Appeal at 3-6. Core Tech further asserts that the new interpretation of "Record of Default" was a deliberate effort on DPW's part to retaliate against and disqualify Core Tech from qualifying as a bidder on the latest SSHS IFB procurement. In response to Core Tech's claim of retaliation, DPW has asserted the defense that it relied on advice of its counsel, Assistant Attorney General Tom Keeler. *See* DPW's Agency Report at 7 (October 31, 2017) and Declaration of Joaquin Blaz at ¶ 8("Blaz Decl.") (October 31, 2017). Mr. Keeler is a necessary witness in this matter and is disqualified from representing DPW at the hearing in this matter. As discussed further below, because DPW has asserted the defense of reliance on counsel, it has waived the attorney-client privilege regarding all its communications with counsel and any attorney work product generated concerning this issue.

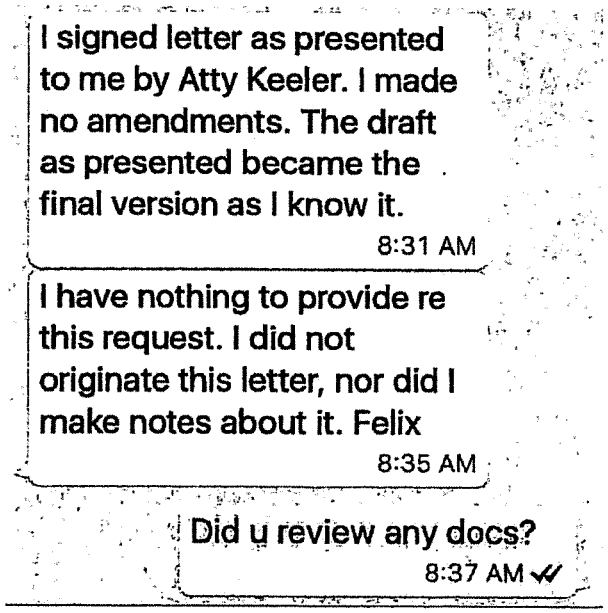
II. BACKGROUND

Core Tech filed its Notice of Appeal in this matter on October 16, 2017, asserting that DPW improperly interpreted a "Record of Default" to include a "Notice of Default" within twenty-four (24) hours of issuing a Notice of Default against Core Tech in the Agana Bridges Project, and that it did so in retaliation for Core Tech's previous successful protests in *In the Appeal of Core Tech International Corp.*, OPA-PA-16-007/OPA-PA-16-011 and *In the Appeal of Core Tech International Corp.*, OPA-PA-17-001. On October 31, 2017, DPW submitted its Agency Report in this matter, along with a supporting Declaration of Joaquin Blaz, Acting Highways Administrator for DPW. In his Declaration, Mr. Blaz states as follows:

> 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 1/9 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.

Blaz Decl. at ¶ 8.

Felix Benavente, the previous Director of DPW, when asked by Arlene Pierce about the Notice of Default/Termination, responded by Whatsapp text as follows:



See Notice of Appeal, Ex. C.

In response to Pierce's question about whether he reviewed and documents prior to signing the Notice of Default/Termination, Benavente responded:

> No. Just the final draft/letter. I held it for several days wanting to discuss it. Tom advised me that deadline for Surety closing within days. Has to be sent out or DPW/ GovGuam will lose opportunity for claims per agreement/contract.

See Notice of Appeal, Ex. C.

Both Mr. Blaz and and Mr. Benavente have stated that they relied on the Mr. Keeler in issuing the Notice of Default/Termination, and DPW has asserted an affirmative defense of reliance-on-advice of counsel. *See* Agency Report at 7, Blaz Decl. at ¶ 8. As discussed below, raising the advice-of-counsel defense waives the attorney client privilege and protected work product. Raising this defense places at issue the nature and substance of Mr. Keeler's advice to DPW, the underlying reasons for the advice given, and whether DPW relied on this advice in good faith – all of which go to the issue of whether the Notice of Default/Termination was issued in retaliation against Core Tore.

III. ARGUMENT

A. Tom Keeler Should Be Disqualified Because he is a Necessary Witness in this Case.

Rule 3.7 of the Guam Rules of Professional Responsibility provides in relevant part as follows:

Rule 3.7: Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

Guam R. Prof'l Conduct 3.7(a). This rule mirrors the corresponding American Bar Association's Model Rules of Professional Conduct, from which the rule was derived.[1] "Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client." ABA Model Rule 3.7, cmt. 1. The Comments to the ABA Rule 3.7(a)(3) further provide:

> [P]aragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

ABA Model Rule 3.7, cmt. 4.

"'The rule reflects the concern that an opposing party may be handicapped in challenging the credibility of a testifying attorney.'" *Portis International v. Cobblestone Square, Inc.*, et al, Superior Court of Guam Civil Case No. CV0058-07 at 17 (Decision and Order, April 8, 2008) (quoting *Aghili v. Banks*, 63 S.W.3d 812, 817 (Tex. App. 2001)) (citing *In re Down Corning Corp.*, 255 B.R. 445,

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[1] The Guam Rules of Professional Conduct were adopted on September 29, 2003 pursuant to Promulgation Order No. 04-002, from the 2002 American Bar Association Model Rules of Professional Conduct. Therefore, commentary, legislative history, and cases interpreting the ABA Model Rules of Professional Conduct constitute persuasive authority in Guam. *See e.g., People v. Diaz*, 2007 Guam 3, ¶ 14, n.4 (where a Guam rule is substantially similar to and derived from a federal rule, federal cases interpreting that rule are persuasive authority); and *Gibbs v. Holmes*, 2001 Guam 11, ¶ 15 (where the Guam statute is similar to a state or federal statute, the state or federal cases interpreting that statute are persuasive authority in Guam).

527 (E.D. Mich. 2000) ("An attorney's testimony who represents a party in a proceeding may be discounted because the attorney is an interested party and lacks credibility").

DPW must meet four requirements to establish a defense of good faith reliance on advice of counsel: (1) a request for advice of counsel on the legality of a proposed action, (2) full disclosure of the relevant facts to counsel, (3) receipt of advice from counsel that the action to be taken will be legal, and (4) reliance in good faith on counsel's advice. *C.E. Carlson v. SEC*, 859 F.2d 1429, 1436 (10th Cir. 1988). Because DPW has asserted the advice-of-counsel defense, Core Tech is entitled to discovery of all evidence in DPW's possession that is relevant to the elements of this defense, and to cross-examine Mr. Keeler about the advice he provided to DPW regarding, among other things, the issuance of the Notice of Default/Termination and interpretation of "Record of Default," and the circumstances surrounding the advice given. *See Miller v. Colorado Farms*, 2001 WL 629463 at *2 (D. Colo. 2001); *see also Randolph v. PowerComm Const., Inc.*, 309 F.R.D. 249, 367 (D. Md. 2015). This defense renders Mr. Keeler a "necessary witness" under GRPC 3.7(a). Accordingly, he cannot be permitted to continue as advocate for the Government in this case.

1. Mr. Keeler's testimony is relevant, material and unobtainable elsewhere

A lawyer is a necessary witness if his or her testimony is relevant, material and unobtainable elsewhere. *See 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.*, 866 F. Supp 1297, 1302 (D. Colo. 1994). Each of these elements is met in this case. Mr. Keeler's testimony is clearly relevant. Mr. Blaz states that is was merely a coincidence that DPW issued its interpretation of "Record of Default" the day after it issued a Notice of Default to Core Tech in the Agana Bridges project, and that the timing of its issuance of the Notice of Default was based on Mr. Keeler's advice regarding the enforceability of the bond one (1) year after DPW's assessed substantial completion

date. Blaz Decl. at ¶ 8. Felix Benavente, the former Director of DPW, confirmed that he sought Mr. Keeler's advice. *See,* Notice of Appeal, Ex. C.

Mr. Keeler's testimony is relevant and material to the defense DPW's assertion of the advice-of-counsel defense. Existing evidence, including Mr. Blaz's declaration, and the testimony of Mr. Benavente, cannot substitute for Mr. Keeler's testimony regarding the accuracy of their representations. *See DIC v. Isham,* 782 F. Supp. 524, 528 (D. Colo. 1992) (defendants' assertion of reliance upon advice of counsel defense required disqualification of lawyer and plaintiff's ability to discover information about the advice). Mr. Keeler can further testify to the basis for the advice given and the extent to which the basis for the advice may have itself involved nefarious intent on the Government's part, information to which Mr. Blaz and Mr. Benavente would not be privy and the possibility of which their testimony could not exclude. Further, as lay witnesses, Mr. Blaz and Mr. Benavente can only testify to their limited understanding of Mr. Keeler's advice, not to the basis or full extent of the advice given. *See U.S. v. Gouaz,* 2003 WL 22862653 at *3 (S.D. Fla. 2003) (disqualifying lawyer based on advice of counsel defense where substance of lawyer's advice and facts supporting such advice were material).

Finally, the advice-of-counsel defense requires that counsel's advice be sought in good faith. *Phillips v. Ceribo,* 1982 WL 30792 at *4 (App.Div.D.Guam 1982). Mr. Keeler's testimony regarding the full extent of the advice he gave DPW is necessary to ascertain whether it was reasonable for DPW to rely on the advice.

The exceptions to the Rule 3.7(a) prohibition against witness-advocates do not apply in this case. First, as described above, Mr. Keeler's testimony relates to the central dispute in this matter. *See People v. Pasillas-Sanchez,* 214 P.3d 520 (Colo. Ct. App. 2009) (exception does not apply to testimony regarding undisputed facts if testimony is offered in support of disputed

issue). Second, the testimony does not relate to the nature and value of legal services Mr. Keeler has rendered in the case. Finally, as discussed below, Mr. Keeler's disqualification from advocating in this matter would not result in a substantial hardship on the Government of Guam or DPW.

Rule 3.7(a)(3) requires "a balancing...between the interests of the client and those of the tribunal and the opposing party." ABA Model Rule 3.7, cmt. 4. The Comments to the corresponding ABA Rule 3.7(a) provide several factors to determine whether or not such disqualification would cause substantial hardship to the client: (1) the nature of the case, (2) the importance and probable tenor of the lawyer's testimony, (3) the probability that the lawyer's testimony will conflict with that of other witnesses, and (4) whether one or both parties could reasonably foresee that the lawyer would probably be a witness. *Id.*

First, the nature of the case is not complex to a degree the attorney general's office could not assign another attorney to the matter in light of Mr. Keeler's likely testimony. Furthermore, the Attorney General's office has conflict counsel who can step in when there are conflicts. Second, as described above, Mr. Keeler's testimony is important to the issues in this case because he rendered the precise advice that forms the basis for DPW's advice-of-counsel defense. Third, it is unknown whether Mr. Keeler would support DPW's version of events under oath. Finally, Mr. Keeler is an obvious witness in this dispute, given the contentious relationship between DPW and Core Tech at the time Mr. Keeler rendered the advice on which DPW purportedly relied.

The factors clearly require the disqualification of Mr. Keeler from further serving as DPW's advocate in this matter in light of the fact that he is a necessary witness to the central dispute in this matter.

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B. Tom Keeler Should Be Disqualified Because He Has a Conflict of Interest.

GRPC Rule 1.7 provides in relevant part:

> Rule 1.7: Conflict Of Interest: Current Clients.
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> ...
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by ... *a personal interest of the lawyer.*

Guam R. Prof'l Conduct 1.7 (emphasis supplied).

"Loyalty to a client is [] impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." *Times Fiber Commc'ns, Inc. v. Trilogy Commc'ns, Inc.*, No. CV 950552603S, 1996 WL 698016, at *3 (Conn. Super. Ct. Nov. 29, 1996). As the Comments to the ABA Rule 1.7 explain:

> The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.

ABA Model Rule 1.7, cmt. 10.

As described above, Mr. Keeler rendered the advice DPW claims it relied on in good faith in issuing its August 23, 2017 Notice of Default to Core Tech. Mr. Keeler's exposure creates a substantial risk that Mr. Keeler's representation of the Government may be materially limited by his interest in protecting himself and limiting his own liability for DPW's improper actions in terminating Core Tech's contract. Because of Mr. Keeler's direct involvement in decision to terminate Core Tech's contract, it would not be reasonable for Mr. Keeler to believe that he will be able to provide competent and diligent representation of the Government.

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C. Mr. Keeler's supporting attorneys should also be disqualified.

To the extent Mr. Keeler relied upon other attorneys within the Office of the Attorney general for research, assistance or advice in relation to the advice ultimately rendered to DPW, his disqualification should likewise apply to these other attorneys, who may also be necessary witnesses in this Appeal. Advice Mr. Keeler received from other attorneys is also discoverable because it "bears on the issue of their reasonable reliance." *In re Gaming Lottery Sec. Litig.*, No. 96 CIV. 5567, 2000 WL 340897 at *2 (S.D.N.Y. Mar. 30, 2000).

D. DPW has waived the attorney-client and attorney work product privileges

Where a party places in issue the decisions, conclusions, and mental state of its attorney who will be called as a witness to prove such matters, any privileged information goes to the heart of the claim, and "fundamental fairness requires that it be disclosed for the litigation to proceed." *Mitchell v. Superior Court*, 37 Cal. 3d 591, 605 (1984); *see also XYZ Corp. v. United States*, 348 F. 3d 16, 24 (1st Cir. 2003) (when a party asserts an advice of counsel defense, he waives the attorney-client privilege as to the entire subject matter of that defense); *Metropolitan Life Ins. Co. v. Aetna Casualty & Surety Co.*, 249 Conn. 36, 53 (1999) (party who put the substance of legal advice squarely at issue waived the attorney-client privilege concerning the communications that led to the initiation and continued pursuit of the case); *Cox v. Adm'r U.S. Steel & Carnegie,* 17 F.3d 1386, 1414 (11th Cir. 1994) (when a party affirmatively asserts a good faith belief that its conduct was lawful, "it injects the issue of its knowledge of the law into the case and thereby waives the attorney-client privilege."). A defendant who asserts an advice of counsel defense waives attorney-client privilege to all communications that occurred during the alleged misconduct, including privileged attorney work product, for the entire period of the misconduct up to trial. *See, United States ex rel. Lutz v. Berkeley Heartlab, Inc.*, 2017 BL 111755, No. 9:14-cv-230-RMG, 2017 WL 1282012 at *3 (D.S.C. April 5, 2017). DPW has

waived its privilege with regard to attorney-client communications and work product related to the advice given by Mr. Keeler, and it should be ordered to turn over all communications, documents, or other material concerning its asserted advice of counsel defense up to the date of the hearing in this matter, including all communications between DPW, Mr. Keeler and his supporting attorneys, and any third parties, as well as all work product generated by Mr. Keeler and his supporting attorneys, regardless of whether it was communicated to DPW.

DPW has also waived the attorney-client privilege with regard to the documents underlying its new interpretation of "Record of Default." As demonstrated in Core Tech's Trial Exhibit 7, the Attorney General's office supplied the interpretation of "Record of Default" that DPW ultimately adopted in Addendum 6. "[T]he attorney-client privilege may not be involved to protect a document adopted as, or incorporated by reference into, an agency's policy." *National Council of La Raza v. Department of Justice*, 411 F.3d 350,360 (2d Cir. 2005); *see also General Elec. Co. v. Johnson*, No. Civ.A.00-2855(JDB), 2006 WL 2616187, at *16 (D.D.C. Sept. 12, 2006); *Falcone v. IRS*, 479 F. Supp 985, 990 (E.D. Mich. 1979). To waive privilege, the agency need not explicitly mention the document in the public statement "so long as its conduct, considered as a whole, manifests an express adoption of the documents." *See New York Times Co. v. U.S. Department of Justice*, 138 F. Supp. 3d 462, 474 (S.D.N.Y. 2015). This express adoption doctrine applies to attorney-client communications adopted or incorporated into final agency actions or decisions such as an agency officer's statutorily required decision on disputes. *See United States v. BAE Systems Tactical Vehicle Systems, LP,* Case No. 15-12225, 2017 WL 1457493, at *6 (E.D. Mich. Apr. 25, 2017).

Based on Core Tech's Trial Exhibit 7, DPW wholesale adopted the Attorney General's interpretation of "Record of Default" as its official policy. Accordingly, the attorney-client privilege over any and all legal analyses performed by the Attorney General's office underlying the adopted

policy should be deemed waived, and DPW should be required to produce all documents related to such analyses.

IV. CONCLUSION

For the foregoing reasons, Core Tech requests that the Public Auditor and the Hearing officer issue an order finding that Tom Keeler and the Attorney General's office be disqualified from acting as trial counsel for DPW in this appeal, and ordering DPW, Mr. Keeler, and the Attorney General's office to immediately produce all communications, documents and other material concerning the advice of counsel defense up to the date of the hearing in this matter.

Respectfully submitted this 11th day of December, 2017.

CIVILLE & TANG, PLLC

By: _____

JOYCE C. TANG
LESLIE TRAVIS
Attorneys for Appellant
Core Tech International, Corp.