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BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM

IN THE APPEAL OF CORE TECH INTERNATIONAL CORP., Appellant.	Docket No. OPA PA-17-10 **APPELLANT CORE TECH INTERNATIONAL CORP.'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISQUALIFY**

Appellant Core Tech International Corp. ("CTI") files this memorandum in reply to the Response to Motion to Disqualify filed by Department of Public Works ("DPW"). DPW incorrectly asserts that CTI has no standing to file a motion to disqualify, citing cases relating to conflicts of interest. CTI's motion is not based on a conflict of interest claim, it is based on the prohibition under Rule 3.7 against a lawyer acting as advocate-witness in the same matter. DPW's authorities are irrelevant and inapposite and its standing argument is without merit.

DPW also contends that "AAG Keeler will not be testifying as a witness on behalf of DPW." DPW Response at 2. However, CTI intends to call Mr. Keeler as a witness, given DPW's assertion of the advice of counsel defense and is filing today an Amended Witness List identifying him as a witness. DPW does not provide any written evidence of the advice purportedly given by

Mr. Keeler – there is no email, letter, memorandum, correspondence – nothing to indicate that the advice was in fact given or that it was in fact relied upon. The lack of any written evidence raises issues of credibility and what exact advice was given, when it was given, the facts and law relied upon by Mr. Keeler in giving the advice – all of these are factual issues which render Mr. Keeler a necessary fact witness. Further, allowing Mr. Keeler to act as advocate in the case renders him an unsworn witness, where he and DPW will have an unfair advantage in giving his first-hand knowledge of events and facts through his client-witnesses while not being sworn as a witness himself.

Finally, DPW will not suffer substantial hardship if Mr. Keeler is disqualified. Mr. Keeler initially informed CTI's counsel that he agreed he was disqualified and he requested a delay in the proceedings until DPW could obtain substitute counsel to get caught up to speed on the case. A. Arriola Decl. CTI's counsel readily agreed. *Id.* Although Mr. Keeler later changed his mind, CTI is still agreeable to a reasonable delay in order for DPW to obtain substitute counsel. *Id.*

DPW's opposition to the Motion to Disqualify is therefore without merit. The motion should be granted.

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ARGUMENT

I. CTI HAS STANDING TO FILE A RULE 3.7 MOTION TO DISQUALIFY.

DPW cites some cases holding that only a client or former client has standing to file a disqualification motion where a conflict of interest is alleged. Here, CTI does not complain of a conflict of interest. CTI's motion is based upon Rule 3.7, the prohibition against a lawyer acting as both advocate and necessary witness in the same matter. DPW's authorities are therefore irrelevant and inapplicable here.

Comment [2} to Rule 3.7 of the Model Rules of Professional Conduct provides: "The

opposing party has proper objection where the combination of [advocate and witness] roles may prejudice that party's rights in the litigation." (Emphasis added). This Comment makes clear that an opposing party, such as CTI, may file a motion to disqualify where a lawyer is both advocate and necessary witness in a proceeding. *All* of the cases cited by CTI in its original motion and in this Reply concerning disqualification motions were filed by opposing parties, and the courts' decisions clearly recognize the standing of opposing parties to file such motions under Rule 3.7.

In addition, Comment [2] provides that "[t]he *tribunal* has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness." (Emphasis added). The OPA should also be concerned about DPW's counsel serving as advocate and witness in the case and has an obligation to ensure the fairness and integrity of the proceedings.

II. DPW'S COUNSEL IS A NECESSARY WITNESS.

In its Response, DPW attached the declarations of Felix Benavente and Joaquin Blaz. Mr. Benavente avers:

> 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.*

(Emphasis added).

Mr. Blaz declares:

> 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.*

(Emphasis added). The Benavente and Blaz declarations are suspiciously virtually identical and

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they raise the question of whether these were their own words or the words of their attorney Mr. Keeler.

Attached to DPW's Hearing Brief is the Declaration of John Moretto, which states:

> In late May or early June 2017, I recall Assistant Attorney General Thomas Keeler *verbally advising* the GTG that *it was possible* that the Project's Performance and Payment Bonds *may not be enforceable* if [sic] did not terminate Core Tech prior to the one year anniversary of Substantial Completion. I recall Assistant Attorney General Thomas Keeler providing this advice during one of the GTG's weekly Friday meetings.

(Emphasis added).

According to DPW, Benavente, Blaz and Moretto can testify about the advice of counsel defense and therefore Mr. Keeler is not a "necessary" witness. There is a glaring problem with this argument. DPW and Mr. Keeler do not provide a single shred of written evidence of the advice purportedly given by Mr. Keeler – there is no email, letter, memorandum, correspondence – nothing to indicate that the advice was in fact given or that it was in fact relied upon. Surely something as important and critical as whether a surety bond "might" be enforceable and the deadline for enforcing it would have been reduced to writing and begs the question of whether such advice was actually given. In all of the documents provided by DPW, CTI has found no documents concerning or even referencing advice.[1]

Therefore, what exact advice was given, when it was given, the facts and law relied upon by Mr. Keeler in giving the advice – all of these are factual issues which render Mr. Keeler a fact

[1] It is long established that where a party asserts the defense of reliance on advice of counsel, it puts the substance of that advice squarely at issue and waives the attorney-client privilege concerning the communications about that advice. *Hunt v. Blackburn,* 128 U.S. 464, 470 (1888). CTI sent Sunshine Act requests to DPW, Mr. Keeler and the Office of the Attorney General requesting all documents relating to Mr. Keeler's advice and relating to the Bond. As of the filing of this Reply, no documents have been provided. If these entities and Mr. Keeler refuse to provide these documents, CTI will be forced to file an action in court to compel their production.

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witness. This evidence is unobtainable elsewhere. Mr. Keeler is the only person who can testify about why he gave the advice and the substance of the advice he gave. For example, did Mr. Keeler give a written legal opinion? If not, why not? If he gave the advice in "May or June" did he advise DPW to give the termination notice immediately? Why not? If, as the above individuals aver in their declarations, Mr. Keeler advised that the bond "might not be enforceable", did he take any steps (such as doing legal research, contacting the surety's agent or counsel, etc.) to determine whether the one-year period was applicable in this case? Did he participate in the drafting of the Final Demand for Completion of Project, the Notice of Termination/Default, the DPW letter rejecting CTI's Time Extension Requests, or Addendum 6? If yes, where are those drafts and what was the timing of those drafts? What advice did he give regarding those documents and why did he give such advice? The answers to these questions are solely within the personal knowledge of Mr. Keeler. CTI cannot effectively counter the advice of counsel defense without calling Mr. Keeler as a witness.

The lack of any written evidence also raises issues of credibility and impeachment. CTI is entitled to cross-examine Mr. Keeler about any possible divergence between the advice given and the actions taken by DPW. Did Mr. Keeler advise DPW to give the termination notice in May or June rather than August? If yes, why didn't DPW follow that advice? The Performance and Payment Bond ("the Bond") in this case is similar or virtually identical to bonds given in other Government of Guam projects. The plain language of the Bond indicates that the one-year claim period does not apply to DPW as Obligee. Has Mr. Keeler previously given the same advice to DPW concerning the same or a similar type of Performance and Payment Bond? In what other instances?

Benavente, Blaz, and Moretto cannot answer the foregoing questions. Only Mr. Keeler can.

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In ruling on the disqualification motion, the OPA must balance DPW's interests, those of the OPA, and CTI's interests. "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." Comment [4] to Rule 3.7. A balancing of all the interests here compels disqualification of Mr. Keeler, as he is a necessary witness in the case because the evidence is unobtainable elsewhere.

III. CTI'S INABILITY TO EXAMINE MR. KEELER ABOUT THE ADVICE ALLEGEDLY GIVEN WOULD BE EXTREMELY PREJUDICIAL.

If CTI is not allowed to call Mr. Keeler to testify, in explaining events in which he was personally involved, Mr. Keeler will become an "unsworn witness" not subject to cross-examination, thereby hampering CTI's ability to counter the advice of counsel defense. *See U.S. v. Matsa,* 2010 WL 4117548 *2 (S.D. Ohio) (if not called to testify, defendant's trial counsel could explain events he was personally involved in as advocate, thereby becoming unsworn witness not subject to cross-examination). An attorney acts as an unsworn witness when the attorney has acquired, through his relationship with his client, firsthand knowledge of facts that will be presented at trial. *United States v. Locascio,* 6 F.3d 924, 933 (2d Cir.1993). As the *Locascio* court explained:

> Even if the attorney is not called, however, he can still be disqualified, since his performance as an advocate can be impaired by his relationship to the events in question. For example, the attorney may be constrained from making certain arguments on behalf of his client because of his own involvement, or may be tempted to minimize his own conduct at the expense of his client. Moreover, his role as advocate may give his client an unfair advantage, because the attorney can subtly impart to the [fact-finder] his first-hand knowledge of the events without having to swear an oath or be subject to cross examination.

Locascio, 6 F.3d at 933; *see also United States v. McKeon,* 738 F.2d 26, 34–35 (2d Cir.1984)

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(disqualification required where attorney would serve dual role as both an advocate and a witness); *United States v. Morris*, 714 F.2d 669 (7th Cir. 1983) (discussing concern that lawyer-witness may distort the truth for the sake of the client); *United States v. Cunningham,* 672 F.2d 1064, 1075 (2d Cir.1982) (disqualification warranted where attorney's role as advocate would allow him to act as unsworn witness for defendant); *United States v. Castellano,* 610 F.Supp. 1151, 1167 (S.D.N.Y.1993) (disqualification from representation at trial stage warranted given that mere appearance of testifying attorney at counsel's table was sufficient to distort factfinding process). An attorney providing unsworn testimony is not at odds with his client, and there is no conflict of interest, rather, the detriment is to the opposing party, since the client gains an unfair advantage, and to the tribunal, since the fact-finding process is impaired. *See United States v. Evanson*, 584 F.3d 904, 909 (2009) (disqualifying lawyer because he had personal knowledge of the merits of the advice of counsel defense that would be explored at trial).

Fairness requires that CTI be able to examine Mr. Keeler about his knowledge of facts and the law governing his advice. Otherwise, CTI will be unfairly disadvantaged by Mr. Keeler's role as advocate and unsworn witness.

IV. DPW WILL NOT SUFFER SUBSTANTIAL HARDSHIP IF MR. KEELER IS DISQUALIFIED.

DPW urges the OPA to deny the disqualification motion because it will suffer substantial hardship: "AAG Keeler is the only attorney from this office that is familiar with the voluminous documents, exhibits, witnesses and other Project details." DPW Response at 6. But there is nothing precluding Mr. Keeler from conveying his knowledge to DPW's new counsel or otherwise assisting new counsel in the handling of the case outside of the OPA hearing room, since Rule 3.7 applies only to representation at trial. *See* Rule 3.7(a) ("A lawyer shall not act as advocate *at a trial* in which the lawyer is likely to be a necessary witness . . .") (emphasis added); *U.S. v. Matsa,*

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2010 WL 4117548 *2 (S.D. Ohio) (finding no substantial hardship where lawyer-witness could assist new counsel with the case): *Main Events Prods., LLC v. Lacy*, 220 F. Supp. 2d 353 (D.N.J. 2002) (lawyer likely to testify at trial need not be disqualified from pretrial matters); *United States v. Fassett*, 185 F. Supp. 3d 507 (2015) (finding no substantial hardship even where lawyer had represented client for extended period of time).

Comment [4] of Rule 3.7 provides in relevant part: "It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness." If DPW knew that it would assert an advice of counsel defense in this matter, it was incumbent upon Mr. Keeler to disqualify himself from representing DPW since he was "likely" a "necessary" witness. *See Klupt v. Krongard*, 728 A.2d 727 (Md. Ct. Spec. App. 1999) (lawyer who represented patent licensee in dispute with licensor should not have undertaken representation of licensor when he knew he would be called as a witness). In a discussion with Mr. Keeler on the subject of the disqualification motion, he initially agreed that he was disqualified, and he requested a delay of the proceedings in order for DPW to find substitute counsel. A. Arriola Decl. CTI's counsel readily agreed. *Id.* However, Mr. Keeler changed his mind due to instructions from the Office of the Attorney General. *Id.* While a change in counsel may be inconvenient, such a change does not work a substantial hardship, as CTI would be agreeable to a reasonable delay to allow DPW's substitute counsel to familiarize himself or herself with the case. *Id.*

Finally, contrary to DPW's Response, CTI is not seeking to disqualify the entire Office of the Attorney General, only those attorneys in the office who may have participated or assisted Mr. Keeler in providing the advice that DPW now relies upon as an affirmative defense.

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CONCLUSION

For all the foregoing reasons, Appellant Core Tech International Corp. respectfully requests that the Office of Public Auditor grant is Motion to Disqualify Department of Public Work's Counsel Thomas Keeler.

Dated this 11th day of December, 2017.

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