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 OFFICE OF THE PUBLIC AUDITOR
 PROCUREMENT APPEALS

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Attorneys for the Department of Public Works

BEFORE THE GUAM PUBLIC AUDITOR
Procurement Appeal

IN THE APPEAL OF:)	DOCKET NO. OPA-PA 09-005
)	
)	
)	
GUAM COMMUNITY IMPROVEMENT)	<u>HEARING BRIEF</u>
FOUNDATION, INC.)	
)	
Appellant.)	
)	

Standard of Review

The Public Auditor reviews procurement appeals *de novo*. 5 GCA § 5703. However, *de novo* review cannot be a review without standards by which a procurement process will be overturned. Although no case can be found wherein the Supreme Court of Guam has enunciated the standard by which the Public Auditor can overturn procurement, there is relevant Guam law that is helpful to the Public Auditor in this regard.

Pacific Data Systems, Inc. v. Superior Court of Guam, 1990 WL 320357 (D. Guam A.D.) October 24, 1990, is an appeal of a procurement case from the Superior Court of Guam to the Appellate Division of the District Court of Guam. Pacific Data involved the procurement by the Department of Education of computers, and the Appellate Division of the District Court was asked to review a

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decision by the Superior Court of Guam overturning a declaration of substantial interest by the Director of Education that allowed a procurement to proceed during the resolution of a protest. The Appellate Division did overturn the Superior Court, holding that the Superior Court should have confirmed the substantial interest declaration. In doing so, the Court stated, at 1990 WL 320357 *2, that *it is appropriate to interfere and substitute a court's judgment for the administrator's only when there appears no rational basis for the procurement decision. See Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, (1984), where, discussing government procurement in general, at 844, the Supreme Court said, we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.*"

At the time of Pacific Data, there was no appeal of a procurement decision at the agency level to the Office of Public Accountability, or any other administrative body. The Procurement Appeals Board, provided for in the procurement law as the first level of administrative appeal, was a non-functioning entity and procurement appeals went directly to the Superior Court after a protest was denied by the procuring agency. Therefore, the Superior Court in Pacific Data, was the first level of appeal after an agency decision to deny a protest. The Superior Court, in Pacific Data, was in the position of determining matters on appeal, much as the Public Auditor is in the instant case.

The Superior Court of Guam has ruled on the proper standard of review for the Public Auditor. In TRC Environmental Corporation v. Office of the Public Auditor, Spec. Proc. Case No. SP160-07, in its Decision and Order on Petition for Writ of Mandate ("D&O") (Guam Super. Ct., Nov. 21, 2008) "a procurement decision can be set aside if it lacked a rational basis or if the agency's decision-making involved a violation of regulation or procedure. D&O at 8, citing Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d. 1324, 1332 (Fed. Cir. 2001), and The Ravens Group, Inc. v. United States, 79 Fed. Cl. 100, 112 (Fed. Cl. 2007). Further, the Superior Court held that while the

administrative agency has discretion in how it proceeds, the discretion is not unfettered. TRC Environmental Corp., D&O, at p. 2.

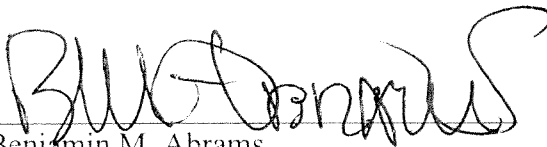
Finally, in Fleet Services, Inc. v. Department of Administration and Kloppenburg Enterprises, Inc. 2006 Guam 6, the Supreme Court of Guam based its decision to overturn procurement, and to rule that the procurement had to be redone, only after it found that the Department of Administration had violated Guam procurement law and failed to follow statutory procurement process. For these reasons, the Department of Public Works urges the Public Auditor to adopt as the proper standard of review that unless an appellant can show a clear violation of procurement law, or a lack of a rational basis for its decision, and show that the protestant is prejudiced as a result, then the procurement must be upheld.

The 11 September 2009 Agency Report is hereby incorporated herein by reference.

Dated this 16th day of October 2009.

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