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OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

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6 **BEFORE THE OFFICE OF THE PUBLIC AUDITOR**
PROCUREMENT APPEAL

7 In The Appeal of Latte Treatment Center, Inc.) Docket No. OPA-PA-08-008
8 Procurement Appeal No. OPA-AP-06-003)
9 OPA-PA-08-008)

10) **APPELLANT'S SUPPLEMENTAL**
11) **COMMENTS ON AGENCY REPORT**
12)

13 **PLEASE NOTE THAT** these supplemental comments upon an Agency Report are made
14 pursuant to a Hearing Officer's order of 31 July 2008.

15 **COMMENTS**

16 As a matter of law, the Public Auditor must void the award of the contract which is the
17 subject of this appeal. The Department of Mental Health and Social Services, hereinafter the
18 Agency, has been ordered to produce a procurement record, the same record it was required to
19 maintain pursuant to law. It has neither produced nor preserved the record. As also required
20 by law, the Agency was prohibited from awarding a contract without a certification from the
21 procurement officer that the record has been maintained.

22
23 5 Guam Code Ann. §5250 states that "No procurement award shall be made unless
24 the responsible procurement officer certifies in writing under penalty of perjury that he has
25 maintained the record required by § 5249 of this Chapter and that it is complete and available

1 for public inspection. The certificate is itself apart of the record.” This law is not permissive,
2 it is mandatory. Therefore, without the certification, and the performance of the duty, the
3 agency could not award the contract. The Agency action therefore is a nullity.

4 To date, the Agency has produced the following;

- 5 1. Notice of Appeal
- 6 2. Letter to Public Auditor dated May 8th, 2008
- 7 3. Letter to Marc Zackheim dated December 14th, 2007
- 8 4. Letter to Carlos Perez dated December 14th, 2007
- 9 5. Memorandum dated December 13th, 2007
- 10 6. Letter to Request Number for a RFP dated November 8th, 2007
- 11 7. Various documents submitted by offerors
- 12 8. “Abstract” of Bids
- 13 9. An audio recording of very poor quality, undated, unidentified.

14
15 In contrast to this wholly inadequate “record”, Guam law requires that

16 Each procurement officer shall maintain a complete record of each procurement. The
17 record shall include the following:


- 18 (a) the date, time, subject matter and names of participants at any meeting including
19 government employees that is in any way related to a particular procurement;
- 20 (b) a log of all communications between government employees and any member of the
21 public, potential bidder, vendor or manufacturer which is in any way related to the
22 procurement;
- 23 (c) sound recordings of all pre-bid conferences; negotiations arising from a request for
24 proposals and discussions with vendors concerning small purchase procurement;
- 25 (d) brochures and submittals of potential vendors, manufacturers or contractors, and all
drafts, signed and dated by the draftsman, and other papers or materials used in the
development of specifications; and
- (e) the requesting agency's determination of need.

24 *5 Guam Code Ann. §5249*

1 Additionally, "When bids or proposals are rejected, or a solicitation cancelled after bids or
2 proposals are received, the bids or proposals which have been opened shall be retained in the
3 procurement file." 2 GAR §3115 and "[t]he reasons for cancellation or rejection shall be made
4 part of the procurement file and shall be available for public inspection." *Id.*

5 To date, the Agency simply has not complied. It has produced no logs, no
6 determination of need, no certification of compliance, no record of pre-bid conference and
7 particularly, no record of why three previous requests for proposal were cancelled. When an
8 agency engages in procurement of goods and services, it must follow the law and procurement
9 regulations. These are the agency's regulations. To state a maxim so familiar that reiteration
10 barely seems necessary, agencies must follow their own rules. "We begin with the initial
11 premise that an agency is bound by its own regulations." *Wagner v. U.S.*, 365 F.3d 1358,
12 1361 (Fed. Cir., 2004). The Public Auditor recognizes the fact that the agency is bound to
13 follow regulations and does not hesitate, in maintaining the integrity of the procurement
14 process, to require adherence to the same. *See In the Appeal of TownHouse Department*
15 *Stores, Decision*, OPA-PA-08-003.

16
17 **WHEREFORE** Appellant respectfully prays the Public Auditor void the procurement award
18 in this matter.

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20
21 By: 
22 Mr. Thomas J. Fisher, Esq.
23 Attorney for Latte Treatment Center, Inc.
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