OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEALS

IN THE APPEAL OF, LATTE TREATMENT CENTER, INC, Appellant	**APPEAL NO: OPA-PA-08-008** **FINDING AND RECOMMENDATIONS OF HEARING OFFICER**

I. INTRODUCTION

This is the Finding of the Hearing Officer, ANTHONY R. CAMACHO, ESQ., for an appeal filed on May 30, 2008, by LATTE TREATMENT CENTER, INC., (Hereafter "LTC") regarding the DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE, Government of Guam's (Hereafter "DMHSA") May 15, 2008, denial of LTC's December 21, 2007, protest concerning DMHSA's solicitation of RFP/DMHSA-014-08 (Program Management and Operational Services for Therapeutic Group Home Child/Adolescent Residential Program) (Hereafter "RFP/DMHSA-014-08"). The Hearing Officer recommends that the Public Auditor hold that the DMHSA's solicitation of RFP/DMHSA-014-08 was not in accordance with Guam's Procurement Laws and Regulations. Accordingly, the Hearing Officer recommends that LTC's appeal be sustained in part and denied in part.

II. FINDINGS OF FACT

These findings are based on the Procurement Record and all documents submitted by the parties, as well as all testimony and arguments presented at the January 23, 2009, Hearing in this

Suite 401, DNA Building
238 Archbishop Flores Street, Hagåtña, Guam 96910
Tel (671) **475-0390** · Fax (671) **472-7951**
www.guamopa.org · Hotline: 47AUDIT (**472-8348**)

matter. Based on the aforementioned record in this matter the Hearing Officer recommends that the Public Auditor make the following findings of fact:

1. Prior to 2005, the Government of Guam had no residential treatment facility to house and treat children with severe emotional conditions and the DMHSA and the families of these children had to send them off-island for housing and treatment.[1] On or about May 28, 2004, in an effort to open such a residential treatment facility on Guam, DMHSA issued RFP No. 2004-10 for Careworker and Operational Services for Therapeutic Group Home.[2] However, on July 2, 2004, the closing date, no proposals were received.[3]

2. Sometime in November, 2004, Annie F.B. Unpingco (Ms. Unpingco), Administrator, Child-Adolescent Services Division, DMHSA, visited the Shiloh Residential Treatment Center, (SRTC) which is located in Manvel, Texas, for the purpose of determining what services the facility could provide and to observe what possible interventions work.[4] Although it is undisputed this visit took place, it is not clear whether DMHSA, Ms. Unpingco, or a third-party paid for this trip or portions of it.

3. On February 21, 2005, the Government of Guam entered into a Stipulation and Order in *In the Interest of A.M.O.*, JSP0191-02, to provide transitional care and treatment of children on

---

[1] DMHSA Response to Deloitte & Touche Questioned Costs dated June 2, 2006, attached as Exhibit 2, to Agency Report dated June 27, 2008.

[2] Public Advertisement dated 5/28/2004, Exhibit 2, Agency Report

[3] DMHSA Timeline RTF Contractual/RFP Process, Page 1, Appellant's Agency Report, Exhibit 1.

[4] E-Mail from Annie F.B. Unpingco to Dr. Andrea Leitheiser dated January 16, 2008, Attachment 8 to Agency Report / Letter from Annie F.B. Unpingco to Senator Frank Blas dated January 13, 2008, Attachment 7 to Agency Report / and Testimony of Annie F.B. Unpingco, January 23, 2009 Hearing on the Merits.

Guam at a residential treatment facility with staff trained for such purpose.[5] As a result of the Court's Order, the opening of a residential treatment facility on Guam became a high priority.

4. At the time the Court issued it's order, SRTC was the DMHSA's off-island provider of residential treatment services for Guam's children with severe emotional conditions. SRTC subsequently incorporated on Guam as LTC. On May 1, 2005, the DMHSA and LTC entered into a contract, through a sole source procurement, that required LTC to operate a therapeutic group home for a twelve (12) month term that expired on April 30, 2006. The contract had annual renewal options, to be exercised and approved at the discretion of DMHSA, to expire up until September 30, 2009.[6] The Public Auditor notes that this contract was awarded approximately six (6) months after Ms. Unpingco took a trip to SRTC in Manvel, Texas in November 2004, for the purpose of determining what services the SRTC facility could provide and to observe what possible interventions would work for DMHSA.

5. From 2005, to present, as a result of the contract between DMHSA and LTC, the DMHSA Child-Adolescent Services Division (CASD), has been operating a therapeutic group home located at 306 Father Duenas Memorial Drive, Tamuning, Guam. This facility serves children and youth enrolled in Project I Famagu'on-ta, who have severe emotional conditions and who require out of home placement where they can receive mental health services required for their stabilization and personal growth. These children and youths use the therapeutic group home as part of a plan to eventually return them home or be placed in a more permanent setting if required. The Rays of Hope Program is also conducted at the therapeutic group home. This

---

[5] Stipulation and Order dated February 21, 2005 in *In the Interest of A.M.O.*, JSP0191-02 (Superior Court of Guam) DMHSA Response to Deloitte & Touche Questioned Costs dated June 2, 2006, attached as Exhibit 2, to Agency Report dated June 27, 2008.

[6] Contract Agreement between the Government of Guam and LTC dated May 1, 2005 Attachment 4, to Notice of Appeal dated May 30, 2008, and DMHSA Response to Deloitte & Touche Questioned Costs dated June 2, 2006, attached as Exhibit 2, to Agency Report dated June 27, 2008.

program consists of an educational instruction operated by the Special Education Division of the Guam Public School System (GPSS) and is conducted from 8:00 a.m. thru 12:00 p.m. every Monday thru Friday in accordance with GPSS' school calendar year. This program also includes respite care at the therapeutic group home for youth enrolled in Project I Famagu'on-ta for a few hours to three (3) days of overnight care. The therapeutic group home is a twenty-four (24) hour, seven (7) day per week operation.[7]

6. On May 1, 2006, the contract between DMHSA and LTC expired.[8] However, LTC continued operating the therapeutic group home and DMHSA continued paying the costs of such services on a month to month basis.[9]

7. Sometime in September, 2006, Ms. Unpingco visited Dr. Marc Zackheim's (Dr. Zackheim) Group Home located in Indiana.[10] The Public Auditor notes that written statements made by Ms. Unpingco about her September 2006, travel conflict with the testimony she gave on January 23, 2009. Despite this, it can be discerned that in September, 2006, Ms. Unpingco was traveling to a meeting in Maryland and while enroute to Maryland, Ms. Unpingco visited Dr. Zackheim's Group Home located in Indiana. The purpose of this visit was to see what services this facility could provide and what best practices were working for children with severe emotional conditions. While visiting this facility she stayed at a hotel paid for by Dr. Zackheim's Group Home. Ms. Unpingco testified that she used her personal funds to reimburse Dr. Zackheim for the hotel accommodations paid, but only after news of her trip to Indiana and

---

[7] Interagency Memorandum dated March 11, 2005, from Annie F.B. Unpingco, LCSW, Exhibit B, Petition for Writ of Mandate or in the Alternative for Judicial Review, *In The Interest of a Child with S.E.D. v. J. Peter Roberto,* SP0048-05, (Superior Court of Guam, March 22, 2005), DMHSA Response to Deloitte & Touche Questioned Costs dated June 2, 2006, attached as Exhibit 2, to Agency Report dated June 27, 2008.

[8] DMHSA Timeline RTF Contractual/RFP Process, Page 1, Appellant's Agency Report Exhibit No. 1.

[9] Testimony of Dr. Andrea M. Leitheiser, Hearing on the Merits, January 23, 2009.

[10] E-Mail from Annie F.B. Unpingco to Dr. Andrea Leitheiser dated January 16, 2008, Attachment 8 to Agency Report.

Dr. Zackheim's payments were publicized by local news media. In her testimony, Ms. Unpingco could not recall the amount reimbursed to Dr. Zackheim.

8. On May 17, 2007, DMHSA issued RFP/DMHSA-023-07 (Care-Worker and Operational Services for Therapeutic Group Home Child/Adolescent Residential Program. However, on September 7, 2007 DMHSA cancelled this RFP because it did not receive proposals from any qualified offerors.[11]

9. On September 10, 2007, DMHSA issued RFP/DMHSA-044-07 (Program Management and Operational Services for Therapeutic Group Home Child/Adolescent Residential Program).[12] On October 5, 2007 DMHSA cancelled this RFP because it did not receive proposals from any qualified offerors.[13]

10. On November 14, 2007, DMHSA issued RFP/DMHSA-014-08 (Program Management and Operational Services for Therapeutic Group Home Child/Adolescent Residential Program.[14]

11. On December 14, 2007, DMHSA issued a Notice of Intent to Award RFP/DMHSA-014-08 to Dr. Zackheim, Associates in Clinical Psychology, P.C. (Hereafter "ACP"), which was received by LTC.[15]

---

[11] August 14, 2008, Second Parcel of Supplemental Documents, Attachment No. 4, and DMHSA Timeline RTF Contractual/RFP Process, Page 1 and Appellant's Agency Report Exhibit No. 1.

[12] August 14, 2008, Second Parcel of Supplemental Documents, Attachment No. 4 and DMHSA Timeline RTF Contractual/RFP Process, Page 2, Appellant's Agency Report Exhibit No 1.

[13] DMHSA Timeline RTF Contractual/RFP Process, Page 2, Appellant's Agency Report Exhibit No. 1, and Letter from Dr. Andrea M. Leitheiser to Dr. Marc Zackheim dated October 5, 2007, LTC Exhibit 5.

[14] DMHSA Timeline RTF Contractual/RFP Process, Page 2, Appellant's Hearing Exhibit No. 8, and Attachment 4, DMHSA's Second Parcel of Supplemental Documents dated August 14, 2008.

[15] DMHSA Timeline RTF Contractual/RFP Process, Page 1, Appellant's Hearing Exhibit No. 8, and Attachment 1 to DMHSA's Second Parcel of Supplemental Documents dated August 14, 2008.

12. Seven (7) days later, on December 21, 2007, LTC filed its protest.[16]

13. On May 15, 2008, DMHSA denied LTC's December 21, 2007 protest.[17]

14. Fifteen (15) days later, on May 30, 2008, LTC filed this appeal.[18]

III. ANALYSIS

LTC appeals DMHSA's denial of LTC's protest on the following grounds: (1) DMHSA failed to provide notice of reasons for cancellation of DMHSA RFP No. 2004-10, DMHSA/RFP-023-07, DMHSA/RFP-044-07; and; (2) LTC's contract was not renewed despite funding being available and the initiation of contract negotiations; (3) DMHSA failed to give LTC notice of rejection of LTC's offer; (4) DMHSA included language in its successive RFPs meant to exclude and disqualify LTC; (5) DMHSA improperly awarded DMHSA/RFP-014-08 to an off-island provider; (6) DMHSA pre-determined that ACP would be awarded the contract for DMHSA/RFP-014-08; (7) DMHSA breached or created the appearance of a breach of ethics in public contracting by accepting a gratuity from ACP; (8) DMHSA awarded RFP/DMHSA-014-08 to a non-responsible offeror; and (9) DMHSA failed to keep a procurement record for DMHSA/RFP-014-08 and it failed to certify that it maintained such a record prior to making the award to ACP. DMHSA argues that LTCs appeal should be denied because: (1) The OPA does not have subject matter jurisdiction over this matter because LTC is not an aggrieved bidder; (2) LTC is not properly licensed to practice psychology on Guam; (3) Matters relating to the non-

---

[16] Notice of Appeal, Attachment 1 and DMHSA Timeline RTF Contractual/RFP Process, Page 1, Appellant's Agency Report Exhibit No. 1.

[17] Letter from Assistant Attorney General David J. Highsmith to LTC dated May 15, 2008, Attachment 2, Notice of Appeal dated May 30, 2008.

[18] Notice of Appeal dated May 30, 2008.

renewal or non-payment of LTC's existing contract with DMHSA are not properly before the Public Auditor; (4) DMHSA did not violate procurement laws and regulations, or ethical standards of conduct. The threshold issue of whether the Public Auditor has subject matter jurisdiction will be examined first.

A. The Public Auditor has Subject Matter Jurisdiction and LTC has Standing.

DMHSA argues that the Public Auditor lacks subject matter jurisdiction because LTC is not an aggrieved bidder because LTC is unable to show that it could have been awarded the contract. This argument is not supported by law. Generally, any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation, or award of the contract, may protest to the Chief Procurement Officer, the Director of the Department of Public Works, or the head of a purchasing agency. 5 G.C.A. §5425(a). An actual bidder is a bidder who submits a bid. *ITI Power Savers v. Guam Waterworks Authority,* CV2120-03, Line 10, Page 4, Decision and Order dated July 26, 2004 (Superior Court of Guam). Further, a losing bidder is an aggrieved bidder. *Tumon Corporation v. Guam Memorial Hospital Authority,* CV1420-01, Line 13, Page 3, Decision and Order dated October 22, 2001 (Superior Court of Guam). Here, LTC is an actual offeror because there is no dispute that it submitted a proposal in response to DMHSA/RFP-014-08. Further, LTC is an aggrieved offeror because it was not selected for the award of DMHSA/RFP-014-08. Finally, LTC's protest and its appeal of the denial of its protests alleges violations of Guam's Procurement Laws and Regulations relating to DMHSA's solicitation and award of DMHSA-RFP-014-08. Thus, the Hearing Officer recommends that the Public Auditor find that she has subject matter jurisdiction and that LTC has proper standing to file its protest and this appeal. The Hearing Officer will now review whether any issues are not properly before the Public Auditor.

B. Issues concerning LTC's Contract and the cancellation of prior RFPs are not properly before the Public Auditor.

DMHSA alleges that LTC's allegations concerning the non-renewal or non-payment of LTC's existing contract with DMHSA are not properly before the Public Auditor. Generally, the head of a purchasing agency has the authority to resolve a contract controversy with a contractor concerning a breach, modification, or rescission of a contract. 5 G.C.A. §5427(b). Further, if the head of a purchasing agency is unable to resolve the contract controversy by mutual agreement, the head of the purchasing agency must promptly issue a written decision. 5 G.C.A. §5427(c). A contractor can appeal such a decision within sixty (60) days to the Public Auditor, or it can file an appeal within sixty (60) days after the head of a purchasing agency fails to render a decision. 5 G.C.A. §5427(e) and §5706(b). Here, there is no dispute that the May 1, 2005, contract between DMHSA and LTC expired on or about May 1, 2006. Thus, the Hearing Officer recommends that the Public Auditor find that due to the passage of over two (2) years since the expiration of the contract and LTC's appeal, issues of whether DMHSA properly rescinded the contract or whether DMHSA breached the contract by failing to pay LTC are not timely and such issues are not properly before the Public Auditor and should not be considered here.

The issue of whether DMHSA properly closed or cancelled the prior RFPs for a therapeutic group home is not properly before the Public Auditor. Generally, the jurisdiction of the Public Auditor to review and decide matters is limited to matters that are properly submitted to her. 5 G.C.A. §5703. Generally, a procurement protest must be filed no later than fourteen (14) days after an aggrieved person knows or should know of the facts giving rise thereto. 5 G.C.A. §5425(a) and 2 G.A.R., Div. 4, Chap. 9, §9101(c)(1). Here, as stated above, RFP No. 2004-10 closed on July 2, 2004 after no proposals were submitted, RFP/DMHSA-023-07 was

cancelled on September 7, 2007, and RFP/DMHSA-044-07 was cancelled on October 5, 2007. Any offeror aggrieved by such closing or cancellations, was to have filed a protest within fourteen (14) days after learning of each closed or cancelled RFP. 5 G.C.A. §5425 However, in this case, LTC failed to file a protest within fourteen (14) days of any of the closing or cancellations of the aforementioned RFPs. Thus, the Hearing Officer recommends that the Public Auditor find that the issue of whether the aforementioned RFPs were properly closed or cancelled is not properly before her and should not be considered here.

The remaining issues must be reviewed to determine whether the solicitation or award of RFP/DMHSA-014-08 was made in accordance with Guam's Procurement Laws and Regulations.

C. LTC's allegations concerning the Notice of Rejection of LTC's offer, DMHSA's attempts to exclude and disqualify LTC, and that DMHSA pre-determined that ACP would receive the award, have no merit.

LTC's allegation that DMHSA failed to properly reject LTC's offer has no merit. Generally, when a purchasing agency rejects an individual bid or proposal in whole or in part, it must, upon request, advise the bidder or offeror of the reasons for such rejection. 2 G.A.R., Div. 4, Chap. 3, §3115(e)(4). Here, as stated above, LTC's proposal for RFP/DMHSA-014-08 was not rejected; rather LTC's proposal was not selected. LTC's proposal was reviewed by an evaluation committee along with ACP's, and DMHSA selected ACP over LTC. LTC was properly informed of DMHSA's intent to award RFP/DMHSA-014-08 to ACP on December 14, 2007. Further, if this allegation relates to the prior RFPs, as stated above, it is not properly before the Public Auditor because it is untimely. Therefore, the Hearing Officer recommends

that the Public Auditor find no merit to the allegation that DMHSA failed to notify LTC of the reasons why LTC's proposal was rejected.

LTC's allegations that DMHSA included language in its successive RFPs meant to exclude and disqualify LTC has no merit. Ms. Unpingco testified that the scope of services was amended in each successive RFP to include additional services.[19] A review of RFP/DMHSA-023-07, RFP/DMHSA-044-07, and RFP/DMHSA-014-08 corroborates her testimony.[20] Eddy J. Reyes, LTC Administrator, testified that the inclusion of language requiring the submission of documents regarding the non-existence of sexual misconduct and the requirements for a Guam licensed psychologist were prejudicial to LTC.[21] RFP/DMHSA-014-08 mandates that no applicants with a sexual offender record shall provide services or be employed at any time at any of the therapeutic group homes, and that offerors who have been charged must submit an affidavit outlining the charges and the dispositions to include statement of innocence and court clearance.[22] Further, RFP/DMHSA-014-08 also requires proposals to offer a Guam licensed psychologist and licensed psychiatrist.[23] Guam law requires that all Government of Guam Contracts must include warranties that no person convicted of a sex offense or who is listed on the Sex Offender Registry, will provide services under the contract, and that all requests for bids and proposals shall state this requirement. 5 G.C.A. §5253(b) and (c). Guam law also requires

---

[19] Testimony of Annie F.B. Unpingco, Hearing on the Merits, January 23, 2009.

[20] RFP/DMHSA-023-07, RFP/DMHSA-044-07, RFP/DMHSA-014-08, Attachment 4, DMHSA Second Parcel of Supplemental Documents dated August 14, 2008. Note: A copy of DMHSA RFP No. 2004-15 was not included in the record in this matter and was not reviewed as part of this Decision.

[21] Testimony of Eddy J. Reyes, Hearing on the Merits, January 23, 2009.

[22] Paragraph O and P, Scope of Services, RFP/DMHSA-014-08, Attachment 4, DMHSA Second Parcel of Supplemental Documents dated August 14, 2008.

[23] Paragraph I, Id.

that no person may practice clinical psychology on Guam who is not licensed as a clinical psychologist by the Guam Board of Allied Health Examiners. 10 G.C.A. §121204(a). Thus, the Hearing Officer recommends that the Public Auditor find that the sex offender provisions and the licensure provisions in RFP/DMHSA-014-08 are required by law and were not included to prejudice LTC.

DMHSA also argues that it will not be able to award RFP/DMHSA-014-08 due to the sole fact that Dr. Luis A. Valdes (Dr. Valdes) is not licensed as a psychologist on Guam. However, this is not supported by the facts in this case. As stated above, there is no evidence that DMHSA rejected LTC's proposal for RFP/DMHSA-014-08. Further, LTC's proposal does offer a psychiatrist and psychotherapist with licenses to practice on Guam, although, it is not clear from said proposal who these individuals are or will be.[24] Thus, the Hearing Officer recommends that the Public Auditor find no merit to DMHSA's claim that it will not be able to award RFP/DMHSA-014-08 because Dr. Valdes is not licensed as a psychologist on Guam.

LTC's allegation that DMHSA pre-determined that ACP would be awarded the contract for DMHSA/RFP-014-08 has no merit. As stated above, there is no evidence that DMHSA amended successive therapeutic group home RFPs to favor ACP and prejudice LTC. As stated above, LTC's contract with DMHSA expired pursuant to its own terms on or about May 1, 2006. Further, the testimony of Ms. Unpingco and Dr. Andrea M. Leitheiser (Dr. Leitheiser) revealed that the therapeutic group home RFPs were issued because DMHSA desperately needed a therapeutic group home to provide transitional residential services to Guam's children with serious emotional conditions and to comply with the various court orders to provide such

---

[24] Staff Qualifications, Paragraph 5b, LTC's Proposal for RFP/DMHSA-014-08, Attachment 3, DMHSA Second Parcel of Supplemental Documents dated August 14, 2008.

services on Guam.[25] Thus, the Hearing Officer recommends that the Public Auditor find no merit to the allegation that DMHSA pre-determined that it would award RFP/DMHSA-014-08 to ACP.

Annie F.B. Unpingco did not violate the Ethical Standards of Conduct.

LTC argues that Annie F.B. Unpingco accepted a gratuity from ACP in the form of plane tickets and hotel accommodations ACP paid for her for visit to ACP's Indiana facility in September, 2006. Generally, public employees must discharge their duties impartially to assure fair competitive access to governmental procurement by responsible contractors and they should conduct themselves in such a manner as to foster public confidence in the integrity of the Government of Guam procurement organization. 5 G.C.A. §5625 and 2 G.A.R., Div. 4, Chap. 11, §11102(a). It is a breach of ethical standards for any Government of Guam employee to accept from another a gratuity in connection with any decision, approval, preparation of any part of a program requirement, pertaining to any contract or solicitation or proposal thereof. 5 G.C.A. §5630(a) and 2 G.A.R., Div. 4, Chap. 11, §11107(1). A gratuity is defined as a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received, and a gratuity may include any tangible or intangible benefit in the nature of transportation, accommodation, and hospitality. 5 G.C.A. §5601(f) and 2 G.A.R., Div. 4, Chap. 11, §11101(6). Nominal Value means actual worth or actual cost, whichever is greater, which does not exceed $25 individually or cumulatively. 2 G.A.R. Div 4, Chap. 11, §11101(6). There is insufficient evidence showing that ACP paid the costs of Ms. Unpingco's airfare to Chicago. LTC provided hearsay evidence that Dr. Zackheim stated that he paid for the difference in cost for Ms.

[25] Testimony of Annie F.B. Unpingco and Dr. Andrea M. Leitheiser, Hearing on the Merits, January 23, 2009.

Unpingco's air fare to Chicago.[26] However, the Hearing Officer recommends that the Public Auditor should not find this uncorroborated evidence credible. Ms. Unipingco testified that she obtained her airline ticket via a travel request she made to the DMHSA.[27] Further, she previously stated that she personally paid for the trip to ACP's group home in Indiana.[28] Although conflicting, Ms. Unpingco's statements indicate that ACP did not pay for her air fare. Thus the Hearing Officer recommends that the Public Auditor find that Ms. Unpingco did not receive a gratuity in the form of air fare to Chicago during her 2006, visit to ACP's Indiana facility.

The next issue is whether Ms. Unpingco received a gratuity in the form of hotel accommodations. Ms. Unpingco testified that Dr. Zackheim, ACP's principal owner met her at the airport in Chicago, drove her to his transitional group home in Indiana, and paid for her hotel accommodations during her stay.[29] The Hearing Officer recommends that the Public Auditor find that the cumulative value of ACP's hospitality, ground transportation, and accommodations exceeds the nominal value amount of twenty-five dollars ($25). Although Ms. Unpingco testified that she did reimburse Dr. Zackheim with her personal funds, she also testified that she did not make this repayment until after her trip and Dr. Zackheim's payment were publicized by local news media.

---

[26] KUAM News Transcripts dated September 12, 2007 attached to Statement of Deanna C. Quitugua dated July 8, 2008, LTC Exhibit 6.

[27] Testimony of Annie F.B. Unpingco, Hearing on the Merits, January 23, 2009.

[28] Letter from Annie F.B. Unpingco to Senator Frank Blas dated January 13, 2008, Attachment 7 to Agency Report, and E-Mail from Annie F.B. Unpingco to Dr. Andrea Leitheiser dated January 16, 2008, Attachment 8 to Agency Report.

[29] Testimony of Annie F.B. Unpingco, Hearing on the Merits, January 23, 2009.

A breach of the Ethical Standard of Conduct in this matter requires a connection between Dr. Zackheim's payment and RFP/DMHSA-014-08. Ms. Unpingco stated that she visited ACP's group home to see what services and best practices are available for youth with complex mental health needs and who are transitioning into adulthood. Ms. Unpingco stated that these services are greatly needed and lacking on Guam and that her trip was within her responsibilities as the DMHSA Child-Adolescent Services Division Administrator.[30] She also testified that she was one of the principal drafters of RFP/DMHSA-014-08 and that she served as one of the evaluators and scorers for the proposals submitted in response to the RFP.[31] Ms. Unpingco asked DMHSA to be recused from reviewing the proposals submitted in response to RFP/DMHSA-014-08 but DMHSA denied the request because Ms. Unpingco was determined to be the most knowledgeable staff member of children's mental health services.[32] The Hearing Officer recommends that the Public Auditor find that DMHSA should have granted this request because Ms. Unpingco's impartiality, especially in evaluating and scoring ACP's proposal could reasonably be questioned due to the aforementioned payment by Dr. Zackheim.

Despite this high involvement, the Public Auditor finds that no breach of the Ethical Standards of Conduct resulted from Ms. Unpingco's participation because no connection was found between Ms. Unpingco's hotel payment, her visit to Dr. Zackheim's facility, and any of the terms or conditions of RFP/DMHSA-014-08. As stated above, none of the terms or conditions of RFP/DMHSA-014-08 clearly favor ACP over LTC. The Hearing Officer

---

[30] Letter from Annie F.B. Unpingco to Senator Frank Blas dated January 13, 2008, Attachment 7 to Agency Report, and E-Mail from Annie F.B. Unpingco to Dr. Andrea Leitheiser dated January 16, 2008, Attachment 8 to Agency Report.

[31] Testimony of Annie F.B. Unpingco, Hearing on the Merits, January 23, 2009.

[32] Id., and Letter from Annie F.B. Unpingco to Senator Frank Blas dated January 13, 2008, Attachment 7 to Agency Report, and E-Mail from Annie F.B. Unpingco to Dr. Andrea Leitheiser dated January 16, 2008, Attachment 8 to Agency Report.

recommends that the Public Auditor find that nothing is suspicious about said RFP's requirements concerning the sex offenders prohibitions and Guam licensure for psychologists because they are required by Guam law. These were the only two areas raised by LTC as creating a prejudice against them under the RFP. Thus, although Dr. Zackheim's payment of Ms. Unpingco's hotel accommodations were not proper and has created the appearance of impropriety, no breach of the Ethical Standards of Conduct is found.

Despite this, the Hearing Officer recommends that the Public Auditor does find that Ms. Unpingco's appearance of impropriety is a serious impairment to the public confidence and integrity of the solicitation process for RFP/DMHSA-014-08.

E. DMHSA failed to conduct a Responsibility Inquiry.

LTC alleges that DMHSA awarded RFP/DMHSA-014-08 to a non-responsible offeror. Generally, before awarding a contract, the procurement officer must be satisfied that the prospective contractor is responsible. 5 G.C.A. §5230(a) and 2 G.A.R., Div. 4, Chap. 3, Section 3116(b)(4). Here, items submitted with ACP's proposal for RFP/DMHSA-014-08 and other events should have resulted in a DMHSA inquiry as to whether ACP was a responsible offeror. ACP's proposal indicates that on June 14, 2006, Dr. Zackheim was found not guilty of Practicing Medicine without a License as Class C Felony, and he was found not guilty of three counts of Battery as a Class B Misdemeanor in Marshall County, Indiana.[33] Further, Dr. Zackheim's Indiana Psychologist License was suspended and subsequently reinstated on November 13, 2006 as a result of his being acquitted of the criminal charges against him.[34] Also, there are

---

[33] Order Entering Judgment dated June 14, 2006, in *State of Indiana, County of Marshall v. Marc A. Zackheim,* Cause No. 50D01-0410-FC-43 (Superior Court, Marshall County, Indiana), Exhibit A, APC Proposal for RFP/DMHSA-014-08, Attachment 3, DMHSA Second Parcel of Supplemental Documents dated August 14, 2008.

[34] Order Terminating Voluntary Summary Suspension dated November 13, 2006 in *State of Indiana v. Marc A. Zackheim,* Cause No. 2004 ISPB 0004 (Indiana State Psychology Board), Id.

allegations that ACP is under investigation for health insurance fraud and that Dr. Zackheim is suspected of literary fraud for a 1993 work entitled *A Rock and a Hard Place*, which is allegedly an autobiography of Anthony G. Johnson, Dr. Zackheim's stepson.[35] Instead, Dr. Leitheiser testified that she responded to these allegations by sending an e-mail to Dr. Zackheim and she testified that he responded by stating that he was acquitted of the criminal charges against him.[36] The Hearing Officer recommends that the Public Auditor finds that this testimony is not credible because DMHSA could not produce this e-mail or Dr. Zackheim's response and Hearing Officer recommends that the Public Auditor find that DMHSA did not conduct a responsibility inquiry prior to selecting ACP as the most qualified offeror.[37]

DMHSA's failure to conduct a responsibility inquiry on ACP prior to selecting it as the most qualified offeror is serious error considering the services being solicited in RFP/DMHSA-014-08. Deanna C. Quitugua, a direct care/educational provider for the children using DMHSA's therapeutic group home, and who interacts with these children on a near daily basis, gave compelling testimony that the children are extremely vulnerable and their emotional and mental conditions are highly dependent on the quality of treatment they receive at the therapeutic group home.[38] The Hearing Officer recommends that Public Auditor find that these children deserve nothing less than the DMHSA's best reasonable efforts to obtain a qualified, reliable, and safe therapeutic group home provider and that DMHSA's failure to conduct a responsibility

---

[35] Testimony of Deanna C. Quitugua, Hearing on the Merits, January 23, 2009, and Statement of Deanna C. Quitugua dated July 8, 2008, LTC Exhibit 6.

[36] Testimony of Andrea M. Leitheiser, Hearing on the Merits, January 23, 2009.

[37] DMHSA Certification dated January 27, 2009.

[38] Testimony of Deanna C. Quitugua, Hearing on the Merits, January 23, 2009, and Statement of Deanna C. Quitugua dated July 8, 2008, LTC Exhibit 6.

inquiry to definitively resolve the issues and allegations concerning ACP falls far short of this mark.

F. DMHSA failed to keep a Procurement Record and Certify that such record existed.

LTC alleges that DMHSA failed to keep a procurement record for DMHSA/RFP-014-08 and that DMHSA failed to certify that it maintained such a record prior to making the award to ACP. Each procurement officer shall maintain a complete record of each procurement and such record shall include: (a) the date, time, subject matter and names of participants at any meeting including government employees that are in any way related to the procurement; (b) a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer that is in any way related to the procurement; (c) sound recordings of all pre-bid conferences, negotiations arising from request for proposals; (d) brochures and submittals of potential vendors, and all drafts signed and dated by the draftsman, and other papers and materials used in the development of specifications; and (e) the requesting agency's determination of need. 5 G.C.A. §5249 and 2 G.A.R., Div. 4, Chap. 3, §3129. No procurement award shall be made unless the responsible procurement officer certifies in writing under penalty of perjury that the aforementioned procurement record was maintained and that it is complete and available for public inspection and this certification must be a part of the procurement record. 5 G.C.A. §5250 and 2 G.A.R., Div. 4, Chap. 3, §3130. Further, protecting the integrity of the procurement process is one of the reasons for the requirement to create and maintain a procurement record. 2 G.A.R., Div. 4, Chap. 3, §3132(1). Here, DMHSA failed to maintain a procurement record for RFP/DMHSA-014-08. Annie F.B. Unpingco testified that DMHSA held two (2) to three (3) meetings concerning the RFP and that no notes, agenda, or

minutes of the meetings were kept.[39] Dr. Leitheiser testified that she had difficulty finding documents related to RFP/DMHSA-014-08 and that she had to go through documents contained in different offices to respond to this appeal.[40] Further, DMHSA will not be able to make the required certification without the required procurement record. The Hearing Officer recommends that the Public Auditor finds that DMHSA failed to create and maintain the procurement record required by Guam's Procurement Laws and Regulations and that without a complete procurement record, DMHSA is incapable of making the certification required by law and the integrity of RFP/DMSA-014-08 is seriously impaired.

G. RFP/DMHSA-014-08 must be cancelled and DMHSA's improper award to an off-island provider will not be considered.

The Hearing Officer recommends that the Public Auditor find that RFP/DMHSA-014-08 must be cancelled. As a preliminary matter the Public Auditor must determine whether DMHSA made an award. In a request for proposals, award shall be made to the offeror determined in writing by the head of the purchasing agency to be the best qualified offeror based on evaluation factors set forth in the request for proposals, and the negotiation of compensation determined to be fair and reasonable. 5 G.C.A. §5216(e) and 2 G.A.R., Div. 4, Chap. 3, §3114(l). Here, although DMHSA issued a Notice of Award to ACP on December 14, 2007 for RFP/DMHSA-014-08, Dr. Leitheiser testified that she was unable to complete negotiations concerning compensation due to the LTC's protest.[41] The Hearing Officer recommends that the Public Auditor find that no award was made because DMHSA did not complete negotiations with ACP for fair and reasonable compensation as required for an award in a request for proposals. If prior to award it is determined that a solicitation of a contract is in violation of law, then the

---

[39] Testimony of Annie F.B. Unpingco, Hearing on the Merits, January 23, 2009.

[40] Testimony of Dr. Andrea M. Leitheiser, Hearing on the Merits, January 23, 2009.

[41] Notice of Award dated December 14, 2007, Attachment 2, DMHSA's Second Parcel of Supplemental Documents dated August 14, 2008 and Testimony of Dr. Andrea M. Leitheiser, Hearing on the Merits, January 23, 2009.

solicitation shall be cancelled or revised to comply with the law. 5 G.C.A. §5451 and 2 G.A.R., Div. 4, Chap. 9, §9104(2) and §9105. As set forth above, Hearing Officer recommends that the Public Auditor find that DMHSA violated Guam's Procurement Laws and Regulations by failing to, conduct an inquiry as to whether ACP was a responsible offeror, and by failing to maintain a procurement record for RFP/DMHSA-014-08. The Hearing Officer recommends that the Public Auditor finds that RFP/DMHSA-014-08 cannot be revised to comply with the law due to the fact that it would be difficult if not impossible to create an accurate and complete procurement record at this time.

Finally, LTC's allegation that DMHSA improperly awarded DMHSA/RFP-014-08 to an off-island provider will not be considered here. The Hearing Officer recommends that the Public Auditor find that since she may determine that DMHSA violated Guam's Procurement Laws and Regulations, based on two arguments raised by LTC, and may now require RFP/DMHSA-014-08 to be cancelled, the remaining issue of whether there is merit to support LTC's allegation that DMHSA improperly procured the supplies and services in RFP/DMHSA-014-08 from an off-island provider need not be addressed. Thus, the Hearing Officer recommends that the Public Auditor not consider the allegation.

IV. CONCLUSION

Based on the foregoing, the Hearing Officer recommends that the Public Auditor hereby determine the following:

1. The Public Auditor finds that it has subject matter jurisdiction and that LTC has proper standing to file its protest and this appeal.

2. The issues concerning LTC's Contract with DMHSA and the cancellation of prior DMHSA RFPs for a therapeutic group home are not properly before the Public Auditor.

3. LTC's allegations concerning the Notice of Rejection of LTC's offer, DMHSA's

attempts to exclude and disqualify LTC, DMHSA's improper award to an off-island provider, and that DMHSA pre-determined that ACP would receive the award have no merit.

4. Annie F.B. Unpingco created the appearance of impropriety in accepting Dr. Zackheim's payment of hotel accommodations but no breach of Ethical Standards of Conduct is found. Further, DMHSA erred by not granting Ms. Unpingco's request to recuse herself from participating in the evaluation and scoring of ACP's proposal it submitted in response to RFP/DMHSA-014-08.

5. DMHSA failed to conduct and inquiry into whether ACP was a responsible offeror.

6. DMHSA failed to keep a Procurement Record for RFP/DMHSA-014-08.

7. DMHSA shall cancel RFP/DMHSA-014-08, in accordance with Guam Procurement Laws and Regulations, no later than five (5) working days after DMHSA receives this Decision.

8. LTC's appeal is sustained on the grounds that DMHSA failed to conduct a responsibility inquiry prior to selecting ACP as the most qualified offeror, and for DMHSA's failure to create and maintain a procurement records as required by Guam's Procurement Laws and Regulations. All other grounds stated in LTC's appeal are hereby denied.

A copy of this Finding of Hearing Officer shall be provided to the parties and their respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website www.guamopa.org.

DATED this 26th day of February, 2009.

Anthony R. Camacho

ANTHONY R. CAMACHO, ESQ.
Hearing Officer, Office of the Public Auditor