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1 **SHIMIZU CANTO & FISHER**  
ATTORNEYS AT LAW  
2 De La Corte Building, Suite 101  
167 East Marine Corps Drive  
Hagåtña, Guam 96910  
3 Phone (671) 472-1131  
Fax (671) 472-2886  
4 Attorneys for Latte Treatment Center, Inc.

5  
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 )  
9 Procurement Appeal No. OPA-AP-06-003 )  
10 OPA-PA-08-008 ) **APPELLANT'S COMMENTS ON**  
11 ) **AGENCY REPORT**  
12 )

13 **PLEASE NOTE THAT** these comments upon an Agency Report are made without benefit of  
14 review of the procurement record. Although required to submit this record, see 2 GAR  
15 §12104(c)(3), the Agency (hereinafter DMHSA) has not yet done so. Accordingly, Appellant  
16 will seek to supplement these comments if and when DMHSA complies with Guam  
17 Administrative regulations.

18 **COMMENTS**

19 Pursuant to 2 GAR §12105(g), DMHSA was to submit "a statement answering the  
20 allegation of the appeal . . . setting forth findings, actions and recommendations in the matter .  
21 . . . The statement shall be fully responsive to the allegations of the appeal." *Id.* DMHSA has  
22 failed to answer or refute the allegations.  
23

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**ORIGINAL**

1 I. Jurisdiction

2 As a preliminary matter, DMHSA alleges that this administrative body lacks  
3 jurisdiction. *See Agency Report at p. 2.* This prayer is without merit since DMHSA waived  
4 any jurisdictional defect or challenge by its failure to comply with administrative rules. “Any  
5 objection or motion addressed to the jurisdiction of the Public Auditor shall be promptly filed.  
6 Objection to the Public Auditor hearing the Appeal shall be filed within seven (7) days after  
7 the notice of Appeal is filed.” 2 GAR §12104(c)(9). In substance, this challenge to  
8 jurisdiction is equally thin. Appellant protested the procurement decision to the head of the  
9 Agency no later than 21 December 2007 and the Attorney General responded for the Agency  
10 on 15 May 2008. This appeal was then timely filed with the Public Auditor on 30 May 2008.  
11 It should be noted that DMHSA failed to follow the procurement law in its response and did  
12 not inform Appellant of its right to administrative review as is required. *See 5 Guam Code*  
13 *Ann. §5425(c)(2).*

15 II. Appellant’s Protest

16 In substance, Appellant alleges in its protest that;

17 1. DMHSA failed to provide notice of reasons for cancellation of the multiple requests  
18 for proposals (RFP) as required by 2 GAR §3115 (d)(1)(D) and (d)(2)(B). *See Protest at p. 2,*  
19 ¶¶ 6, 7.

20 2. DMHSA has breached, or created the appearance of a breach of ethics in public  
21 contracting, by accepting a gratuity from the Awardee of the contract in violation of 5 Guam  
22 Code Ann. §5625, 5630, 5651(a), (b)(2)(3) and 2 GAR §11107, 11112(2)(4). *See Protest at*  
23 *p.2, ¶¶ 8, 9.*

1           3. DMHSA violated procurement regulations by including in its RFP language  
2 designed to exclude and disqualify Appellant to the advantage of the Awardee in violation of  
3 5 Guam Code Ann. §5001(b). *See Protest, attachment 1 at p.2, ¶¶ 10, 11, 12.*

4           4. DMHSA violated procurement regulations by failing to notice Appellant of a  
5 rejection of an offer in violation of 2 GAR §3115(e)(4). *See Protest, attachment 1 at p. 1, ¶*  
6 *5.*

7           5. DMHSA violated procurement law by awarding a contract to a non-responsible  
8 offeror in violation of 2 GAR §3116. *See Protest, attachment 1 at p.2, ¶¶ 8, 10.*

9           6. DMHSA violated its duty to procure services for the Territory in a competitive,  
10 equitable fashion by determining the Awardee would gain the contract prior to actually  
11 beginning the procurement process in violation Title 5, Chapter 5 of the Guam Code  
12 Annotated. *See Protest at passim.*

13           7. DMHSA violated its duty to seek local service providers by awarding the contract  
14 to an off-island provider. *See Protest, attachment 1 at p. 3, ¶4 and p. 4*

15  
16 III. The Agency Response

17           Appellant will address the Agency Response as it is presented.

18           *Agency's Response 1.* This response is essentially directed at a question of standing.  
19 There is no requirement in the procurement law that a protestor show it should have been  
20 awarded a contract or that its offer was "better" or "cheaper". Appellant need only have been  
21 a prospective or actual offeror who may have been aggrieved. *See 5 Guam Code Ann.*  
22 *§5425(a).* It is evident that the denial of the right to participate in the procurement process  
23 unhampered by agency imposed barriers would aggrieve an offeror.  
24  
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1           *Agency's Response 2.* It is irrelevant to the protest that the party awarded the contract  
2 can perform at a lower price. The purpose of the procurement regulations is to ensure the fair  
3 and equitable treatment of all persons who deal with the procurement system of Guam. *See 5*  
4 *Guam Code Ann. §5001(b)(4).* Though the best offeror is awarded the contract, if he obtained  
5 it unlawfully the procurement laws have nevertheless been breached. It is equally non sequitur  
6 to state that Appellant's costs have been questioned in the past. DMHSA has never before  
7 cited any questions of "costs" as a reason or factor for not awarding Appellant the contract  
8 and, in any case, the allegation is irrelevant to the question of procurement integrity. It must  
9 be noted that Appellant never presented a cost proposal to DMHSA. Appellee cannot,  
10 therefore, represent that the awardee could perform "more cheaply". At best this Agency  
11 Response is evidence of a sham procurement process in which awardee was pre-selected as  
12 the winning vendor.

14           *Agency's Response 3.* It is false and misleading to state that Dr. Valdes cannot perform  
15 under the contract. If, as required, DMHSA had provided the Public Auditor with a copy of  
16 the RFP, it would be noted that the offeror is required to have a business license on Guam and  
17 be licensed for a clinical practice. *See RFP, November 14<sup>th</sup>, 2008 at p. 11.* The Appellant (an  
18 entity incorporated on Guam) employs a licensed clinical practitioner and has a Guam  
19 business license. There is no requirement that every corporate officer be a licensed clinical  
20 psychologist. Additionally, DMHSA has never disqualified the Appellant as a non-  
21 responsible or non-responsive offeror and it is too late for post hoc justifications.

23           *Agency's Response 4.* Appellant has protested the award of a contract to a non-  
24 responsible offeror. The awardee has been implicated in fraudulent and deceptive practices  
25 and indicted on charges of battery of young children. See <http://en.wikipedia.org/wiki/>

1 Anthony\_Godby\_Jones and <http://www.kuam.com/news/24449.aspx> “Mental health bidder’s  
2 background drew national ire”. It is entirely proper for Appellant to comment on an offeror’s  
3 responsibility. *See 2 GAR §3116(b)(2)*. What is most curious, considering the awardee’s  
4 colorful background, is the ardency with which the Agency has embraced him. This is  
5 particularly true in light of Appellant’s record of successful performance under the prior  
6 contract.

7 *Agency’s Response 5.* On December 21<sup>st</sup>, 2007 Appellant asked DMHSA for all  
8 documents and data related to this RFP process. *See Appeal, attachment 1, ¶1*. Significantly,  
9 that request was made pursuant to “all applicable Guam laws”. *Id.* This includes the  
10 Sunshine Reform Act of 1999, 5 Guam Code Ann. §10101 et seq. Predictably, DMHSA has  
11 not complied with the request. Thus DMHSA creates the condition which makes  
12 completeness difficult. They should not be heard to complain about the natural consequences  
13 of their own actions. *See Bender v. New York City Health & Hospitals Corp., 38 N.Y.2d 662,*  
14 *668, 345 N.E.2d 561, 564 (N.Y. 1976)*. “We believe that where a governmental subdivision  
15 acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled  
16 to rely and who changes his position to his detriment or prejudice, that subdivision should be  
17 estopped from asserting a right or defense which it otherwise could have raised.”  
18

19 *Agency’s Response 6.* This Agency response addresses no salient issue. Appellant  
20 neither asserts a right to a contract nor is it “confused”. Appellant does point out through the  
21 substance of its protest that where there is no discernable, articulated reason not to renew a  
22 multi-year contract and the agency immediately publishes a RFP to procure the same service,  
23 and the recipient of the award may not be responsible and is certainly unknown on Guam, any  
24 irregularity in the procurement process deserves a heightened level of scrutiny. That this is  
25

1 merited is borne out by evidence to be presented to the hearing officer in this matter, i.e. Dr.  
2 Zackheim stated he was working on a RFP to provide residential treatment when such a RFP  
3 was not yet in existence.

4 *Agency's Response 7.* Complaints regarding non-renewal and non-payment for  
5 improper reasons, or as they relate to impropriety in the procurement process, are within the  
6 purview of the Public Auditor. *See 2 GAR §12103(a)* "The Public Auditor shall have the  
7 power to review and determine de novo any matter properly submitted to her or him." In any  
8 case, DMHSA has waived a jurisdictional argument by waiting to raise it. "Any objection or  
9 motion addressed to the jurisdiction of the Public Auditor shall be promptly filed. Objection  
10 to the Public Auditor hearing the Appeal shall be filed within seven (7) days after the notice of  
11 Appeal is filed." *2 GAR §12104(c)(9)*.

12  
13 *Agency's Response 8.* DMHSA has failed to present any evidence that another offeror  
14 is more qualified than Appellant. If such evidence exists, it will be in the suppressed  
15 procurement record. In any case, it is clear that DMHSA did not choose a qualified local  
16 service provider. 5 Guam Code Ann. §5008 provides that all "procurement of supplies and  
17 services shall be made from among businesses licensed to do business on Guam and that  
18 maintain an office or other facility on Guam, whenever a business that is willing to be a  
19 contractor is: (d) A service business actually in business, doing a substantial portion of its  
20 business on Guam, and hiring at least 95% U. S. Citizens, lawfully admitted permanent  
21 residents or nationals of the United States, or persons who are lawfully admitted to the United  
22 States to work, based on their citizenship in any of the nations previously comprising the Trust  
23 Territory of the Pacific Islands." *Id, emphasis added.* The simple truth is that the Appellant is  
24 qualified, meets the requirements of this section, and the awardee does not. This section is  
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1 mandatory, not permissive, and on this basis alone the Public Auditor can terminate the  
2 contract. *See Decision, OPA-PA-06-003, In the Appeal of L.P. Ganacias Enterprises, Inc.,*  
3 *dba RadioCom Security at 14* “The Public Auditor finds that the purchase from an off-island  
4 vendor without assessing the price or availability of any other local vendors was inconsistent  
5 with 5 GCA §5008 under these circumstances.”

6 *Agency’s Response 9.* The awardee of this contract has publicly stated he underwrote  
7 part of a trip taken by an agency employee while that employee was investigating therapeutic  
8 homes. This is a violation of 5 Guam Code Ann. §5630(a) which states “It shall be a breach of  
9 ethical standards for any person to offer, give or agree to give any employee or former  
10 employee, or for any employee or former employee to solicit, demand, accept or agree to  
11 accept from another person, a gratuity or an offer of employment in connection with any  
12 decision, approval, disapproval, recommendation, preparation of any part of a program  
13 requirement or a purchase request . . . .” It is not surprising that the recipient employee denies  
14 receipt of the gift since she could be terminated, 5 *Guam* §5650(b)(3), and she may be subject  
15 to criminal sanction. *See 9 Guam Code Ann. §49.90.* What is most significant is that the very  
16 person one would expect to deny wrongdoing has admitted it. *See attachment A .*

17  
18 *Agency’s Response 10.* Appellant agrees that there were criminal allegations made  
19 against Marc Zackheim and that they involved allegations of fondling young boys. Appellant  
20 believes Zackheim was tried concerning these charges and that he may have been acquitted.  
21 Appellant notes that an acquittal does not equate to a finding of innocence, it merely means the  
22 state did not carry its burden beyond a reasonable doubt. In any case DMHSA and the Public  
23 Auditor are free to explore the allegations de novo. If Zackheim is a criminal, this is an issue  
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1 of integrity bearing upon his responsibility as a contractor. *See Agency Response 4, supra,*  
2 *and 2 GAR §3116.*

3 *Agency's Response 11.* DMHSA complains that the Appellant does not meet a  
4 standard which the agency itself ignores;

5 DMHSA has failed to abide by agency duty to divulge documents

6 DMHSA has failed to abide by procurement regulations and provide a procurement  
7 record

8 DMHSA has failed to abide by procurement regulations and file a timely agency report

9 DMHSA has failed to abide by procurement regulations and provide reasons for  
10 cancelling a RFP

11 DMHSA has failed to abide by procurement regulations and provide reasons for  
12 rejection of an offer

13 DMHSA has failed to abide by procurement regulations and has accepted gratuities  
14 from an offeror

15 DMHSA has awarded a contract to a non-responsible offeror

16 DMHSA has failed to abide by procurement regulations and seek a local service  
17 provider

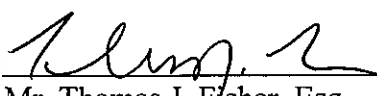
18 DMHSA has engineered the RFP process in order to award a contract to a pre-selected  
19 offeror.

20 The procurement procedures employed by DMHSA were, and are, deeply flawed.  
21 Appellant was successfully performing under a multi-year contract which was not renewed.  
22 Appellant understands that this decision, if properly arrived at, is within the discretion of the  
23 agency. What actually happened though suggests a collusive relationship between the Agency  
24  
25



1 and the awardee. What else explains the decision to abandon a performing vendor, repeatedly  
2 expend territorial funds on a series of published and then inexplicably withdrawn requests for  
3 proposals and finally, the embrace of an untried, unknown new vendor of dubious integrity?  
4 The procurement laws “[require] all parties involved in the negotiation, performance, or  
5 administration of territorial contracts to act in good faith.” 5 Guam Code Ann. §5003. “The  
6 underlying purposes and policies of [the procurement laws] are: . . .(3) to provide for increased  
7 public confidence in the procedures followed in public procurement; (4) to ensure the fair and  
8 equitable treatment of all persons who deal with the procurement system of this Territory.” 5  
9 *Guam Code Ann. § 5001*. This is not what happened in this case. Accordingly, the contract  
10 should be declared null and void pursuant to 5 Guam Code Ann. §5452(a)(2)(i) or terminated  
11 under (a)(1)(ii).  
12

13 **WHEREFORE** Appellant respectfully prays the Public Auditor provide relief in accordance  
14 with 5 Guam Code Ann. §5452.  
15

16 By:   
17 Mr. Thomas J. Fisher, Esq.  
18 Attorney for Latte Treatment Center, Inc.  
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## Is third time a charm for Mental Health?

by Mindy Aguon, KUAM News  
Wednesday, September 12, 2007

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The Department of Mental Health has put another request for proposal for therapeutic group home management and services. Initially today marked the deadline for the agency to award a new bid for the program, but a third RFP has been issued and you'd be surprised at what we've uncovered about one of the potential bidders.

For the last two years Latte Treatment Center has been providing services for children with behavioral and emotional challenges, but earlier this year Mental Health decided it had to redo the procurement, despite the fact the original contract was not set to expire until 2009. Latte's physician, Luis Valdez, was unavailable for a phone interview, but released this statement to KUAM News:

*"Latte Treatment Center is here to support and serve the families of Guam. With the efforts of many good people on the island these services were brought to Guam two years ago after 15 years of sending children off island. The staff at Latte have served well. We love the children and families that we serve. We are disheartened by the recent decisions by DMH not to exercise the renewal option on the existing contract. We do not know why. The procurement process has been difficult and is ongoing."*

In late August Mental Health received two bids for the therapeutic group home, one from Latte and another from Illinois-based child psychologist Dr. Marc Zackheim. "To bring hospital quality care of service to the group homes but to do it in a way in which is a very easy transition for the children so that no one gets upset," he said. Zackheim - who has yet to obtain a business license on Guam - runs the Associates in Clinical Psychology, a therapeutic home for troubled teen boys based in Indiana.

Last year the psychologist was arrested and charged with practicing without a license and battery for allegedly touching the genitalia of boys who stayed at the group home. The charges were thrown out and Zackheim continues to run his business blaming the allegations on a disgruntled employee.

On Tuesday KUAM News spoke with Zackheim, who says he learned about Guam five years ago and even invited personnel from Mental Health and the Project I Famaguonta organization to visit his group homes in the mainland. "They liked them very much," he recalled, "particularly the concept of the transitional home...they told me that they might be interested in group home development and if there's an RFP, I should look for them in the papers." He added, "I paid for the differences in what it would be for them to detour to Indiana."

But that trip could be a violation of the law.

Attachment "A"

Guam public auditor Doris Flores Brooks says the law clearly prohibits government employees from accepting gifts, which includes travel. She clarified, "On its face value, now not knowing all of the facts, that would be contrary to law because if the trip was paid by the vendor the vendor's purpose is to influence the individual and how can we be insured that those individuals would not be influenced by what may have happened on that trip?"

That question can't be answered now, as acting Mental Health director Dr. Andrea Leitheiser is currently off-island.

In the meantime, a third RFP has been issued for the therapeutic group home. "I don't understand how these things work, I just do what I'm told," responded Zackheim, who, like Latte Treatment Center, intends to try his luck a third time. But he indicated a preference not to provide details or interviews until the RFP is decided.

In the meantime parents of children in the therapeutic group home have contacted KUAM, concerned about who will provide services until a new contract is awarded. Healthcare Committee chairman Senator Frank Blas, Jr. said, "I have been assured by OCI, Mental Health and the Lieutenant Governor's Office they've made an arrangement with the current providers to continue on with the services until the new RFP, the new contract is in place."

Or at least it is until September 30.

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