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PROCUREMENT APPEAL IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of
DFS Guam L.P., Appellant
of the Decision of the
A.B. Won Pat International Airport Authority,
Guam

NOTICE OF APPEAL
Office of Public Accountability
DOCKET NO. OPA-PA _____

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I. APPELLANT INFORMATION

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II. APPEAL INFORMATION

Purchasing Agency: A.B. Won Pat International Airport Authority, Guam
Identification/Number of Procurement, Solicitation, or Contract: GIAA 010-FY12

The decision being appealed was made on May 17, 2013 by the Head of the Purchasing Agency.

The appeal is made from a Decision on Protest of Method, Solicitation or Award. The May 17, 2013 decision is attached.

Names of Competing Bidders, Offerors, or Contractors known to Appellant:

1. Lotte Duty Free Guam, LLC
2. The Shilla Duty Free
3. James Richardson (Guam), LLC

III. INTRODUCTION

DFS Guam, L.P. (“DFS”) brings this appeal of the A.B. Won Pat International Airport Authority, Guam’s (“GIAA”) decision of May 17, 2013 to deny DFS’ proposal protest (“Proposal Protest”) of the GIAA’s conduct in connection with its April 12, 2013 decision to approve the recommendations of the GIAA evaluation committee ranking Lotte Duty Free Guam LLC and its relevant subsidiaries and affiliates (collectively, “Lotte”) as the “most qualified proposer” pursuant to the RFP No. GIAA 010-FY12 (“RFP”).

DFS began its proposal protest on October 30, 2012, when it first wrote to the GIAA to

1 request an investigation into allegations that Lotte attempted to improperly influence the RFP process
2 in connection with a trip to Seoul, South Korea by a Guam Visitors Bureau (“GVB”) delegation that
3 included two GIAA board members. DFS continued its proposal protest with correspondence on
4 April 11, 2013, and April 23, 2013. On May 17, 2013, the GIAA notified DFS that the Proposal
5 Protest had been denied. DFS now brings this timely appeal of that decision pursuant to 5 GCA
6 § 5425(e), within the 15-day statutory period for appeal.

7 This Notice of Appeal, together with this statement of grounds for appeal, statement of the
8 ruling requested, the petition for discovery, and the evidence and documents attached, collectively
9 constitute DFS’ appeal (“Appeal”) of the GIAA’s May 17, 2013 denial of the Proposal Protest.

10 IV. STATEMENT OF GROUNDS FOR APPEAL

11 A. Issues Subject to Appeal

12 At the outset, DFS notes the GIAA’s response to DFS’ Proposal Protest was compromised by
13 a fatal conflict of interest, and its subsequent conduct demonstrates the GIAA’s bad faith.
14 Specifically, DFS believes that that GIAA’s “investigation” into the Proposal Protest was
15 compromised when it responded to (and denied) DFS’ protest, in part, by fully ratifying all of the
16 actions undertaken by various GIAA Board Members, GIAA employees and staff members and by
17 making numerous affirmative findings to the effect that the GIAA Board of Directors had not
18 engaged in any wrongdoing whatsoever. In effect, the GIAA’s investigation took the additional and
19 unwarranted step of affirmatively exonerating GIAA board members and GIAA staff on the road to
20 denying DFS’ protest. In addition, the fact that it was GIAA staff members who were charged with
21 investigating serious allegations that implicated their own supervisors (the GIAA Board of Directors)
22 raises troubling questions about the impartiality and fairness of the “investigative” process that
23 underpins the GIAA’s findings, which further illustrates the existence of a conflict of interest here.

24 Furthermore, the highly expedited timeline surrounding the execution and announcement of
25 the GIAA’s putative operating contract with Lotte—DFS’ Proposal Protest was denied on Friday,
26 May 17; the contract with Lotte was signed on Saturday, May 18; and the GIAA issued a public press
27 release announcing the putative award on Monday, May 20—strongly suggests that the GIAA failed
28 to observe the requirement that it “not proceed further with the solicitation or with the award of [a]

1 contract prior to final resolution of [a pending protest].” 5 GCA § 5425(g). The timing of the
2 GIAA’s actions also provided no opportunity for DFS to appeal the GIAA’s denial of the Proposal
3 Protest because DFS received the denial of the Proposal Protest after the close of business on Friday,
4 May 17, and GIAA and Lotte executed the putative contract on Saturday, May 18. Thus, DFS’ due
5 process under Guam law was violated.

6 In addition, as detailed below, throughout the proposal period Lotte repeatedly engaged in
7 behavior that was violative of both the terms of the RFP and numerous provisions within the Guam
8 Procurement Code (“GPC”). Contrary to the GIAA’s finding that Lotte was the “most qualified”
9 proposer, *Lotte is not even a responsible proposer*, much less the most qualified one, and its proposal
10 should accordingly be deemed non-responsive to the RFP.

11 DFS’ Proposal Protest and this Appeal are based on the following independent bases:

- 12 1. Lotte should not be deemed to be a responsible proposer, and accordingly Lotte’s
13 proposal should be deemed non-responsive to the RFP, given its improper conduct and
14 attempts to unduly influence the award of the contract during the proposal period (whether
15 that influence in fact occurred or not).
- 16 2. Lotte’s should also not be deemed to be a responsible proposer, and accordingly Lotte’s
17 proposal should be deemed non-responsive to the RFP, because the facts indicate that it
18 supplied false affidavits under oath in support of its proposal relating to compliance with
19 Guam ethical rules and laws.
- 20 3. Public policy arguments support reversing the GIAA’s determination that Lotte is the
21 “best qualified proposer” due to the provision of, or attempted provision of, gifts and other
22 items of value from Lotte to GIAA officials. The acknowledged provision of gifts, as well
23 as other irregularities, irrevocably compromised the integrity of the proposal process and
24 thus requires invalidating the GIAA’s determination with respect to Lotte;
25 notwithstanding any subsequent recusals, the occurrence of non-transparent events failed
26 to assure compliance with the public policy set forth in GPC Section 5625, which
27 mandates that public employees “should conduct themselves in such a manner as to foster
28 public confidence in the integrity of the territorial procurement organization.”

- 1 4. Lotte's proposal should be placed on hold so as to permit the United States Attorneys'
2 Office and any other relevant agencies to conduct an investigation into potential violations
3 of U.S. federal and Guam territorial law, as DFS believes may be appropriate here.
- 4 5. Lotte's proposal should be placed on hold so that the provisions of GPC Section 5425 *et*
5 *seq.* may be followed, which specifically permit DFS to appeal any initial determination
6 that Lotte should not be disqualified from the proposal process.
- 7 6. Lotte's proposal should be disqualified because any putative contract between Lotte and
8 the GIAA shall be voidable under Section 15207 of 4 GCA, Ch. 15, because the contract
9 would have been entered into in violation of the laws of Guam.
- 10 7. Lotte's proposal should be disqualified because the procedure that the GIAA Board of
11 Directors instituted to select Lotte after the foregoing issues were reported publicly was a
12 disingenuous attempt to "paper over" serious ethical concerns. These procedures were
13 improper and unauthorized under Guam law. Rather than conduct an investigation and
14 follow the proposal protest rules, the GIAA designed an *ad hoc* procedure that is not
15 authorized in Guam procurement law and regulations. Further, in any event, as even the
16 GIAA "investigation" acknowledged, the procedure that the GIAA adopted was not truly
17 blind and thus *could not* have effectively addressed the pressing bias concerns that it was
18 ostensibly designed to remedy: "[T]he non-abstaining GIAA Board members were given
19 an opportunity prior to the March 28, 2013 Board meeting to review all proposals *with*
20 *identities of the proposers fully disclosed therein.*" (Emphasis added). The GIAA's
21 "evaluation process" was thus rife with conflicts of interest, and it appears to have been
22 adopted by GIAA Directors to disguise their own bias in favor of Lotte rather than to
23 actually protect the integrity of the RFP process.
- 24 8. The conduct of various GIAA Board Members throughout the bidding period casts serious
25 doubt on the fundamental impartiality of the GIAA in awarding this bid, as well as the
26 integrity of the GIAA's ultimate finding that Lotte was the "best qualified proposer."
- 27 9. The GIAA's decision to respond to DFS' Proposal Protest by unilaterally conducting a
28 wholly unmonitored investigation into itself also created a troubling and inherent conflict

1 of interest. The alleged impropriety on the part of GIAA Board Members casts serious
2 doubt on the fullness and fairness of this ostensible “investigative” process, which
3 ultimately resulted in the full ratification of the GIAA’s previous findings and the
4 affirmative exoneration of all GIAA Board Members of any wrongdoing in connection
5 with this RFP.

6 **B. Supporting Facts**

7 The following facts support the Proposal Protest and this Appeal, and are believed to be true
8 upon information and belief:

9 1. As was reported in media accounts, two members of the GIAA board of directors—
10 Chairman Francisco Santos and member Rosalynda Tolan—were part of a delegation sponsored by
11 the Guam Visitors’ Bureau (“GVB”) that participated in the inaugural Guam flight of Jeju Air, which
12 took place on September 27, 2012. The delegation included a number of other persons who were,
13 and remain, highly influential in the Guam tourism industry. The date of this flight is significant
14 given that Lotte’s proposal in response to the RFP was due just a few weeks later, on October 17,
15 2012.

16 2. During their stay in Seoul (on September 26 and 27, 2012), arrangements were made
17 for the GVB delegation to tour the main downtown store of Lotte, where they were personally
18 greeted by the President of Lotte. This tour was not on the published agenda of the delegation but
19 was instead a last-minute addition, added at the instruction of GVB Deputy General Manager Nathan
20 Denight. The meeting was suggested because John Calvo, brother of GVB Board member Eduardo
21 “Champ” Calvo, had “connections” with Lotte, and he sought to “set up a meeting” with the Lotte
22 group. GVB staff, including GVB Korea Marketing Officer Felixberto S. Reyes, expressed concern
23 about the propriety of the meeting in light of the fact that the GIAA had put out the RFP and Lotte
24 was known to be an interested proposer.¹ Notwithstanding these concerns, the meeting went ahead.

25 3. During one of the “free” periods on the delegation’s agenda, they were driven to the
26

27 ¹ DFS is also aware of facts indicating that GVB Board Chairman Monte Mesa was assisting Lotte
28 in obtaining consulting services from third parties in connection with the RFP.

1 Lotte department store, where they were met by Lotte staff and escorted to the duty free area on the
2 top floors of the store building. They were personally greeted there by the President of Lotte. The
3 GIAA's assertions that this meeting was unconnected to earlier attempts to arrange a meeting and
4 was merely a spontaneous decision are not credible. It strains credulity to believe that Lotte
5 employees—including the President of Lotte himself—were coincidentally available to greet and
6 escort the GVB delegation for an impromptu shopping trip which was allegedly “added [to the
7 Delegation's itinerary] on the afternoon of September 26.” Shopping cards were also provided by
8 Lotte to the members of the delegation, including the GIAA directors, and *it is uncontested* that while
9 the Delegates were in the Lotte store, Chairman Mesa told his fellow delegates something to the
10 effect of “choose whatever you want.”

11 4. As the GIAA “investigation” itself revealed: “[W]hile in the Coach section of the
12 [Seoul store], [GIAA] Chairman Santos attempted to purchase a purse for his wife. Upon handing his
13 credit card to the Lotte cashier, he was informed by the cashier that Mr. Mesa ‘will take care of it.’ . .
14 . According to Mr. Mesa, he informed Chairman Santos that he would pay for the purse . . . Mr.
15 Mesa arranged with Lotte to have the purchased item delivered to the Incheon Airport at the time of
16 the Delegates' departure . . . According to Mr. Mesa, he delivered the purchased purse to Chairman
17 Santos prior to boarding the return flight to Guam On October 24, 2012, after . . . being
18 reminded about the pending RFP, Chairman Santos returned the bag with the purse to Mr. Mesa who,
19 in turn, attempted to return the purse to Lotte for a refund.” While damaging, even these facts do not
20 appear to constitute a full and accurate accounting of the relevant events.

21 5. As the GIAA “investigation” also revealed: “When Mr. Mesa returned to the hotel, he
22 received a message that gift bags were being delivered by Lotte for the female members of the
23 Delegation Later that evening . . . Director Tolan encountered Mr. Mesa, who told her he had a
24 gift bag for her, which he would have delivered to her room . . . [and Director Tolan] later found a
25 gift bag of lotions and face creams in her hotel room.” Again, while damaging, even these facts do
26 not appear to constitute a full and accurate accounting of the relevant events.

27 6. On September 27, when the delegation arrived at Incheon Airport to return to Guam,
28 they were again met by Lotte staff who accompanied them to the Lotte airport duty free store, where

1 they were given additional gifts. Merchandise that they had selected the previous day at the Seoul
2 store was also delivered to them at the airport.

3 7. After the fact of these gifts became public, Chairman Santos and Director Tolan, each
4 recognizing the improper appearance their respective acceptance of the gifts from Lotte had created,
5 reportedly returned the gifts to GVB. They each thereafter recused themselves from participating in
6 the approval of the recommendations of the GIAA's evaluation committee as to the ranking of the
7 proposers. To date, however, there has still not been a full accounting for these gifts.

8 8. It has been suggested that the value of the gifts Lotte provided to the GIAA board
9 members was nominal, but DFS disputes that. "Nominal value" means actual worth or actual value
10 not exceeding \$25, pursuant to 2 GAR 11101(6). It is DFS' understanding that the value of the gifts
11 provided to the GIAA directors by Lotte greatly exceeded \$25—indeed, even the GIAA
12 "investigation" revealed that the value of Director Tolan's gift bag alone "is [worth] around \$200."

13 9 Following the GIAA meeting at which Chairman Santos and Director Tolan
14 announced their decisions to recuse themselves, Lotte's Guam legal counsel, Cesar Cabot, publicly
15 admitted that Lotte provided gifts to the GVB delegation, but claimed that Lotte was not aware of the
16 fact that GIAA board members were part of the GVB delegation. Given the circumstances of the
17 meeting, and the aforementioned objections, these statements lack credibility. In particular, it strains
18 credulity that neither GVB Chairman Mesa, who assisted Lotte with engaging consultants in
19 connection with the RFP, nor Champ Calvo, whose brother was connected to Lotte, were unaware
20 that their fellow delegation members include high-ranking officials of the GIAA.

21 10. As part of its proposal, Lotte was required to submit various affidavits. One of those
22 affidavits required Lotte to attest, under penalty of perjury, that neither it, nor any of its officers,
23 representatives, agents, subcontractors or employees had offered, given, or agreed to give any
24 Government of Guam employee any payment, gift, or other gratuity in connection with its proposal.
25 The giving of gifts by Lotte, and the circumstances surrounding those gifts, indicate that Lotte's
26 sworn affidavit was false.

27 11. Similarly, Lotte was required to swear, under penalty of perjury, that neither it nor any
28 of its officers, representatives, agents, subcontractors or employees had knowingly influenced any

1 government of Guam employee to breach any of the ethical standards set forth in 5 GCA, Chapter 5,
2 Article 11. 5 GCA 5630(d) provides that:

3 *It shall be a breach of ethical standards for any person who is or may become a contractor, a*
4 *subcontractor under a contract to the prime contractor or higher tier contractor, or any*
5 *person associated therewith, to offer, give or agree to give any employee or agent of the*
6 *Territory or for any employee or agent of the Territory to solicit or accept from any such*
7 *person or entity or agent thereof, a favor or gratuity on behalf of the Territory whether or not*
8 *such favor or gratuity may be considered a reimbursable expense of the Territory, during the*
9 *pendency of any matter related to procurement, including contract performance warranty*
10 *periods.*

11 (Emphasis added.) The giving of valuable gifts and other gratuities to government officials during the
12 pendency of the RFP falls squarely within the proscription of Section 5630(d), notwithstanding
13 Lotte's sworn affidavit to the contrary.

14 12. At the GIAA's April 12, 2013 board meeting, the GIAA ignored the public facts
15 regarding Lotte's conduct and instead declared that Lotte was found to be a responsive and
16 responsible proposer within the meaning of the RFP. However, the procedure followed by the GIAA
17 board to approve the recommendations of the evaluation committee as to the ranking of the four
18 proposers was unprecedented, not authorized in the Guam procurement law or regulations, and not
19 disclosed in the RFP. Rather, it appears that the procedure was an *ad hoc* one devised by the GIAA's
20 legal counsel as a means to superficially sanitize this procurement in order to deal with the taint
21 caused by Lotte's improper actions and the inevitable fallout.

22 13. Ostensibly in order to protect the confidentiality of the contents of the various
23 proposals, the identities of the proposers in the rankings recommended by the evaluation committee
24 were not disclosed. Consequently, the remaining GIAA directors who did not recuse themselves
25 were required to approve the rankings on an apparently anonymous basis. At the March 28, 2013
26 GIAA board meeting, however, Director Ed Untalan stated that he had personally reviewed each of
27 the four proposals and commented on them in very general terms. Indeed, each of the GIAA
28 directors was apparently given the opportunity to review the proposals themselves and form their

1 own views as to their relative merits—as the GIAA “investigation” itself noted, “the non-abstaining
2 GIAA Board members were given an opportunity prior to the March 28, 2013 Board meeting to
3 review all proposals *with identities of the proposers fully disclosed therein.*” (Emphasis added).

4 14. Similarly, the *ad hoc* procedure appears to have been aimed at avoiding the possible
5 disqualification of one or more of the remaining three directors who voted to approve the evaluation
6 committee’s rankings.² DFS has, for example, received information that the sister of one of those
7 three directors, Director Martin Gerber, reportedly has a business relationship with Lotte.³ If the
8 identity of Lotte had been revealed, as it would have under normal circumstances, Director Gerber
9 would presumably have been obliged to recuse himself,⁴ which would have left the GIAA board
10 without a quorum. The *ad hoc* procedure may have been designed to assure the preservation of a
11 quorum, notwithstanding the existence of serious conflicts of interest.

12 15. In response to DFS’ ongoing Proposal Protest, the GIAA conducted an “investigation”
13 into the serious allegations raised therein (and reiterated herein). DFS believes that that GIAA’s
14 “investigation” into the Protest was compromised by a fatal conflict of interest—in responding to
15 (and denying) DFS’ protest, and in fully ratifying all of the actions undertaken by various GIAA
16 Board Members, GIAA employees and staff members, the GIAA made numerous affirmative
17 findings to the effect that the GIAA Board of Directors had not engaged in any wrongdoing
18 whatsoever. In effect, the GIAA’s investigation took the additional and unwarranted step of
19 affirmatively exonerating GIAA board members and GIAA staff on the road to denying DFS’ protest.

21 ² DFS reiterates that it has not yet been provided the opportunity to review the Lotte proposal or the
22 memorandum which the GIAA will be required to prepare in accordance with 2 GAR 3114(m),
23 explaining the basis of any putative award of the contract to Lotte, notwithstanding this protest.

24 ³ Director Gerber’s sister is also married to John Calvo, the person with “connections to Lotte”
25 who first suggested setting up a meeting with the Lotte group. John Calvo’s brother, Champ
26 Calvo, is the senior named partner of Calvo Fisher Jacob, the law firm which serves as GIAA’s
27 legal counsel and which devised the *ad hoc* process in an effort to guide the board through the
28 ethical shoals created by Lotte’s improper actions.

⁴ DFS has also learned that Director Gerber was seen having lunch with Anthony Sgro on Monday,
April 15, 2013, at the Chili’s Restaurant in Tamuning. Mr. Sgro is known to be connected with
Lotte. The award of the concession contract is still pending, so such a contact was potentially
improper.

1 The fact that it was GIAA staff members who were charged with investigating serious allegations that
2 implicated their own supervisors (the GIAA Board of Directors) raises troubling questions about the
3 impartiality and fairness of the “investigative” process that underpins the GIAA’s findings.

4 16. Furthermore, the highly expedited timeline surrounding the execution and
5 announcement of its putative operating contract with Lotte—DFS’ Proposal Protest was denied on
6 Friday, May 17; the contract was signed on Saturday, May 18; and the GIAA issued a public press
7 release announcing the putative award on Monday, May 20—strongly suggests that the GIAA also
8 failed to observe the requirement under 5 GCA § 5425(g) that it “not proceed further with the
9 solicitation or with the award of [a] contract prior to final resolution of [a pending protest].” The
10 timing of the GIAA’s actions also provided no opportunity for DFS to appeal the GIAA’s denial of
11 the Proposal Protest because DFS received the denial of the Proposal Protest after the close of
12 business on Friday, May 17, and GIAA and Lotte executed the putative contract on Saturday, May
13 18, before the start of the next business day (Monday, May 20).

14 17. On May 23, DFS sent the GIAA a cease-and-desist letter requesting that the GIAA
15 refrain from proceeding with any actions taken under or in furtherance of the putative operating
16 contract with Lotte, pending a final resolution of the Proposal Protest pursuant to 5 GCA § 5425(g).
17 In this letter, DFS also pointed out that the GIAA’s failure to give DFS *even a single business day* to
18 appeal its denial of the Proposal Protest—instead notifying DFS of this denial on a Friday after the
19 close of business, and then signing a putative contract with Lotte *on Saturday*—constituted a
20 particularly egregious violation of 5 GCA § 5425(g). DFS also noted that because GIAA Board had
21 not given final approval to the putative contract signed with Lotte, this putative award was not yet a
22 final award in any event.

23 **C. DFS’ Legal Grounds for Appeal**

24 DFS has standing to bring this Appeal, despite the GIAA’s assertions to the contrary.

25 **1. DFS Has Standing as an “Aggrieved Person” under Guam law.**

26 The GIAA argues that DFS is not an “aggrieved person” and therefore has no standing to
27 bring a proposal protest pursuant to 5 GCA § 5425(a). That argument fails because each of the three
28 non-Lotte RFP proposers are aggrieved persons under these circumstances. The Proposal Protest is

1 based on the GIAA's wholly improper RFP process, which relied on a flawed selection methodology.
2 The Proposal Protest alleges that the underlying evaluation criteria and board approval process was
3 tainted as a result of Lotte's attempts to improperly influence the RFP process by giving items of
4 value to GIAA board members. Under such circumstances, the proposals must be, at the very least,
5 re-evaluated under fair and transparent criteria, and the proposer rankings that were generated by the
6 flawed methodology must be thrown out. This is reflected in the relief that DFS requests. The
7 Proposal Protest requires that the proposal scoring mechanisms used by the GIAA and the GIAA
8 board vote approving the ranking of the proposals be nullified. Thus, each of the three non-Lotte
9 RFP proposers, *including DFS*, is an "aggrieved person" with standing to bring a protest because the
10 fair and transparent criteria that should be used to rank the RFP proposals may result in a completely
11 different ranking of the various proposals.

12 2. DFS' Proposal Protest Was Timely

13 The GIAA also attempts to characterize the Proposal Protest as untimely, but that assertion is
14 incorrect. The Proposal Protest was submitted and supplemented promptly after DFS established a
15 sufficient legal and factual basis to bring a proposal protest, within the statutory 14-day period for the
16 initiation of timely protests. 5 GCA § 5425 provides, in part, that "the protest shall be submitted in
17 writing within fourteen (14) days after such aggrieved person *knows or should know of the facts*
18 *giving rise thereto.*" (Emphasis added.) Although the GIAA asserts that DFS was aware of *some* of
19 the underlying conduct giving rise to the Proposal Protest more than 14 days prior to its October 30,
20 2013 letter (and seemingly argues that DFS should therefore be held to account for constructive
21 knowledge of everything from the earliest possible date), in fact, on the date that the GIAA cites,
22 DFS was only aware of vague speculation and rumors of uncertain veracity. Upon learning of these
23 rumors, DFS promptly undertook its own investigation into the facts—but DFS was in no position to
24 protest the decision before DFS knew or should have known "*the facts*" what would support such a
25 protest. Accordingly, DFS acted quickly to establish whether "*the facts*" supporting these rumors
26 rose to a level of credibility that merited a protest, and following a diligent and speedy investigation,
27 DFS did, in fact, uncover credible facts and formally filed a Proposal Protest on the strength of those
28 facts.

1 Admittedly, the record remains far from complete in this matter. Undoubtedly, additional
2 evidence remains to be uncovered. However, the GIAA is incorrect in suggesting that as a result of
3 this limited fact development, DFS has failed to meet a “burden of proof” with regard to its
4 allegations—it is illogical to suggest that an administrative proceeding in which an aggrieved party
5 has no right to mandatory discovery, and enjoys a window for private investigation that the GIAA
6 would suggest remains open for *only fourteen days from the first whiff of wrongdoing to the deadline*
7 *for filing*, nevertheless imposes the same stringent standards of proof as a civil trial before a judicial
8 body that affords a party ample time to engage in exhaustive court-ordered discovery. Administrative
9 proposal protests are justified whenever there are credible facts suggesting that a procurement process
10 was flawed and further investigation is merited, and an aggrieved person is not legally required to
11 fully prove up his or her case to any degree of legal certainty within the 14-day statutory period
12 establishing for appealing from the underlying agency decision. There is no legal basis in Guam law
13 for imposing a more stringent requirement here, and there was no reasonable opportunity for DFS to
14 meet any such heightened “burden of proof” in connection with these allegations, given the absence
15 of any discovery mechanism and the extremely short window of time open for private investigation.

16 V. STATEMENT OF THE RULING REQUESTED

17 DFS notes that, upon the filing of this Appeal, the RFP award process must be suspended
18 pursuant to 5 GCA § 5425(g), which provides, in part, that “[i]n the event of a timely protest under
19 Subsection (a) of this Section or under Subsection (a) of § 5480 of this Chapter, the Territory shall
20 not proceed further with the solicitation or with the award of the contract prior to final resolution of
21 such protest” subject to administrative determinations that have not been made. DFS understands
22 that the putative contract signed by Lotte and the GIAA has not received final GIAA board approval.

23 DFS also requests the following rulings from the OPA: that Lotte is a non-responsible
24 proposer; that Lotte’s RFP proposal is non-responsive; that a new RFP process be instituted and (as a
25 non-responsible proposer in this matter) that Lotte be barred from participating in additional bidding;
26 that an independent monitor be appointed to supervise the GIAA’s future conduct in connection with
27 this new RFP process; and that DFS is awarded reasonable costs incurred in connection with the
28 solicitation and protest.

1 **A. Lotte Is a Non-Responsible Proposer.**

2 The foregoing facts establish that Lotte is a non-responsible proposer because its conduct
3 violated the terms of the RFP, its submission of inaccurate affidavits in support of its proposal, and its
4 conduct may also constitute independent violations of law. Specifically, Lotte’s conduct failed to
5 comply with the following RFP requirements:

6 **1. Lotte Violated the Single Point of Contact Provision.**

7 Section II.C of the RFP (“Single Point of Contact”) restricts proposers from communicating
8 with any GIAA Staff, board members, or officials regarding the RFP, except for a designated single
9 point of contact—in this case, Franklin Taitano. As the foregoing facts establish, Lotte flagrantly and
10 repeatedly violated this provision at numerous points throughout the bidding period.

11 **2. Lotte Violated the Prohibition Against Improper Influence.**

12 Along with its bid proposal, Lotte submitted a sworn affidavit attesting, under penalty of
13 perjury, that neither Lotte, nor any of its officers, representatives, agents, subcontractors, or
14 employees, had offered, given, or agreed to give any Government of Guam employee any payment,
15 gift, or other gratuity in connection with its bid proposal. As the foregoing facts establish, this
16 supporting affidavit was false.

17 **3. Lotte Submitted an Inaccurate Affidavit that it Did Not Attempt to Give or Give**
18 **any Gifts.**

19 Lotte also submitted an additional sworn affidavit attesting, under penalty of perjury, that
20 neither it nor any of its officers, representatives, agents, subcontractors, or employees had knowingly
21 influenced any Government of Guam employee to breach any of the ethical standards set forth in 5
22 GCA, Chapter 5, Article 11, which reads in relevant part: “It shall be a breach of ethical standards for
23 any person who is or may become a contractor, a subcontractor under a contract to the prime
24 contractor or higher tier contractor, or any person associated therewith, to offer, give, or agree to give
25 any employee or agent of the Territory . . . a favor or gratuity on behalf of the Territory whether or
26 not such favor or gratuity may be considered a reimbursable expense of the Territory, during the
27 pendency of any matter related to procurement” As the foregoing facts establish, this supporting
28 affidavit was also false.

1 **B. Lotte's RFP Proposal Is Non-Responsive.**

2 Because Lotte is a non-responsible proposer, and Section II.I of the RFP requires that bidders
3 be affirmatively determined to be responsible as a pre-condition of a contract award, it follows that
4 Lotte's RFP proposal is therefore non-responsive and must be disqualified.

5 **C. A New RFP Process Should Be Instituted, and (as a Non-Responsible Proposer in this
6 Matter) Lotte Be Barred from Participating Further in the RFP Process.**

7 Because all of the foregoing facts establish that, as it now stands, this RFP process has been
8 irrevocably tarnished by a litany of fatal flaws (certainly in appearance, even if—as GIAA
9 contends—not in substance), DFS requests that the OPA hereby mandate that the results which were
10 obtained through this flawed process be voided in their entirety, and that a new RFP process be
11 pursued in a timely fashion. Because Lotte is a non-responsible proposer *and the source of many of*
12 *these fatal flaws*, it should be barred from further participation in the RFP.

13 **D. An Independent Monitor Should Be Appointed to Supervise the GIAA's Future
14 Conduct in Connection with this New RFP Process.**

15 As discussed above, the GIAA's conduct throughout the course of the current RFP process,
16 including its response to DFS' proposal protest, has been characterized by bad faith, prejudice against
17 DFS, and a clear bias in favor of Lotte. The appropriate remedy to ensure that future proceedings in
18 connection with a new RFP process are conducted fairly and transparently is to appoint a truly
19 independent monitor, selected by an independent administrative or judicial officer, and to empower
20 that monitor to supervise and oversee the GIAA in relation to this matter. Such an independent
21 monitor should supervise, among other things, the procedures by which proposals are solicited; the
22 methods of communication between the GIAA and proposals; the criteria used by the GIAA
23 evaluation committee to evaluate the proposals; the procedures used by the GIAA board to adopt or
24 reject the recommendation of the evaluation committee; the negotiations of any contract pursuant to
25 the RFP; and the GIAA board's ultimate approval of any contract pursuant to the RFP. Absent an
26 independent monitor with broad authority to supervise the GIAA's conduct, there can be no
27 assurance that the GIAA will not simply repeat its pattern of bad faith conduct in violation of the
28 terms of a new RFP and applicable Guam laws.

1 **E. DFS Should Be Awarded Its Reasonable Costs.**

2 Pursuant to 5 GCA § 5425(h), if this proposal protest is sustained by the OPA, DFS is
3 “entitled to the reasonable costs incurred in connection with the solicitation and protest, including bid
4 preparation costs, excluding attorney’s fees, if . . . there is a reasonable likelihood that the protestant
5 may have been awarded the contract but for the breach of any ethical obligation imposed by Part B of
6 Article 11 of this Chapter or the willful or reckless violation of any applicable procurement law or
7 regulation.” The foregoing facts establish that the GIAA’s proposer ranking methodology was
8 flawed. As one of the three RFP responsible proposers after Lotte is properly disqualified, DFS had a
9 reasonable likelihood that it would have been awarded the contract but for the wrongful conduct of
10 Lotte and the GIAA. Further, the repeated conduct of Lotte and the GIAA constituted willful or
11 reckless violations of applicable procurement laws and regulations.

12 **VI. DISCOVERY**

13 DFS also petitions the OPA to grant substantial discovery in connection with this appeal.
14 Pursuant to 4 GAR §12109(c) and 4 GAR §12109(i), the OPA has the power to compel the
15 attendance and testimony of witnesses and the production of documents. DFS petitions the OPA to
16 subpoena following entities or individuals for depositions and testimony at the OPA’s hearing, if
17 necessary (collectively, “Subpoenaed Parties”):

- 18 1. Charles Ada
- 19 2. Francisco Santos
- 20 3. Rosalynda Tolan
- 21 4. Martin Gerber
- 22 5. Ed Untalan
- 23 6. Jesse Torres
- 24 7. Nathan Denight
- 25 8. Eduardo “Champ” Calvo
- 26 9. John Calvo
- 27 10. Janet Calvo
- 28 11. Anthony Sgro

- 1 12. Joseph L. Cruz
- 2 13. Danny Leon Guerrero
- 3 14. Monte Mesa
- 4 15. Felixberto Reyes

5 Further, DFS petitions the OPA to subpoena the following documents from each of the
6 Subpoenaed Parties, for the time period from January 1, 2012 to the present:

- 7 1. Any and all documents that constitute communications between the Subpoenaed Parties
8 and Lotte or Lotte's agents and consultants.
- 9 2. Any and all documents in connection with or referring to the GVB delegation's trip to
10 Seoul, South Korea on or around September 26, 2012.
- 11 3. Any and all documents related to or referring to any items of value received by any GIAA
12 board members from Lotte, Monte Mesa, any director or employee of the GVB, or any
13 director or employee of the GIAA.
- 14 4. Any and all documents related to or referring to the April 12, 2013 GIAA board decision
15 that Lotte was the "best qualified proposer."
- 16 5. Any and all documents related to or referring to the GIAA board decision that Lotte was a
17 responsible proposer.
- 18 6. Any and all documents regarding the procedures used by the GIAA's RFP evaluation
19 committee to evaluate the RFP proposals.
- 20 7. Any and all documents related to the Leigh Fisher report, including the report itself.
- 21 8. Any and all documents regarding the procedures used by the GIAA board to evaluate or
22 act on the recommendations of the GIAA's RFP evaluation committee.
- 23 9. Any and all documents that constitute communications between the Subpoenaed Parties
24 and Eduardo "Champ" Calvo.
- 25 10. Any and all documents that constitute communications between the Subpoenaed Parties
26 and John Calvo.
- 27 11. Any and all documents that constitute communications between the Subpoenaed Parties
28 and Anthony Sgro.

- 1 12. Any and all documents that constitute communications between the Subpoenaed Parties
2 and Danny Leon Guerrero.
- 3 13. Any and all documents in connection with any modification of Lotte's RFP proposal after
4 the date of the RFP.
- 5 14. Any and all documents related to or referring to any disclosure of the terms of any other
6 proposers' RFP proposals to Lotte.
- 7 15. Any and all documents in connection with the lease of a Lotte Hotel involving Janet
8 Calvo.
- 9 16. Any and all documents in connection with any contingency fee payments promised by
10 Lotte.
- 11 17. Any and all documents related to the GIAA's internal investigations in response to the
12 correspondence from DFS, including its initial investigation in response to DFS'
13 correspondence dated October 30, 2012, and its investigation in response to DFS'
14 correspondence dated April 23, 2013, or any other investigations.
- 15 18. Any and all documents related to negotiations between GIAA and Lotte in connection
16 with the putative contract signed on May 18, 2013 in connection with the RFP, including
17 draft contracts.

18 **VII. SUPPORTING EXHIBITS, EVIDENCE, AND/OR DOCUMENTS**

19 Attached below are supporting documents and evidence to substantiate the foregoing claims
20 and grounds for appeal. DFS anticipates that further supporting documents and evidence will become
21 available within two weeks of this filing—by June 14, 2013—as DFS receives and reviews the
22 GIAA's responses to outstanding Sunshine Act requests.

23 **VIII. CONCLUSION**

24 For all the foregoing reasons, DFS appeals the adverse decision of the GIAA (triggering an
25 automatic stay of the RFP process), and hereby requests a ruling that (i) Lotte be deemed a non-
26 responsible bidder; (ii) that Lotte's bid was non-responsive; (iii) that a new RFP process be instituted
27 and (as a non-responsible proposer in this matter) that Lotte be barred from participating in additional
28 bidding; (iv) that an independent monitor be appointed to supervise the GIAA's future conduct in

1 connection with this new RFP process; and (v) that DFS is awarded its reasonable costs pursuant to 5
2 GCA § 5425(h).

3 **IX. DECLARATION RE COURT ACTION**

4 Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses
5 interest in a decision by the Public Auditor, the Office of Public Accountability will not take action
6 on any appeal where action concerning the protest or appeal has commenced in any court.

7 The undersigned party does hereby confirm that to the best of his or her knowledge, no case
8 or action concerning the subject of this Appeal has been commenced in court. All parties are
9 required to and the undersigned party agrees to notify the Office of Public Accountability within 24
10 hours if court action commences regarding this Appeal or the underlying procurement action.

11
12
13 Dated: May 30, 2013

By: 

Maurice M. Suh

Attorneys for Appellant
DFS Guam, L.P.

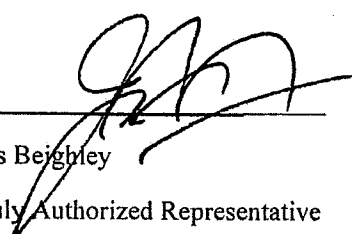
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VERIFICATION

I, Lamonte James Beighley, am Appellant's duly authorized representative and am authorized to make this verification. I have read the foregoing Appeal and, based on information and belief and to the best of my knowledge, the facts stated therein are true and correct. I declare under penalty of perjury under the laws of Guam that the foregoing is true and correct. This verification was executed on this 30th day of May, 2013.

Dated: May 30, 2013

By: 
Lamonte James Beighley
Appellant's Duly Authorized Representative