

# BAUMANN, KONDAS AND XU, LLC

ATTORNEYS AT LAW

SUITE 903, DNA BUILDING  
238 ARCHBISHOP FLORES STREET  
HAGÅTÑA, GUAM 96910

LADD A. BAUMANN  
MARK E. KONDAS  
NELSON J. XU  
SHANE F.T. BLACK

TELEPHONE  
(671) 477-9084  
TELECOPIER  
(671) 477-9087

E-MAIL  
Ladd.Baumann@baumannguam.com

May 30, 2013

Mr. Charles H. Ada, II  
Executive Manager  
Guam International Airport Authority  
Administration Office, 3<sup>rd</sup> Floor  
355 Chalan Pasajeru  
Tamuning, Guam 96913  
**VIA E-MAIL: [chuck.ada@guamairport.net](mailto:chuck.ada@guamairport.net)**  
**VIA HAND DELIVERY**

**RE: NOTICE OF PROTEST OF AWARD OF CONTRACT  
RFP NO. GIAA010-FY12 (the "RFP")**

Dear Mr. Ada:

In deciding to propose for the specialty retail concession at Guam International Airport (GIA), James Richardson (Guam) LLC (JR/Duty Free) placed an enormous amount of trust in the Guam International Airport Authority (GIAA) and its processes. Based on this trust JR/Duty Free fully respected and adhered to the RFP rules as issued by the GIAA and the Laws of Guam. It is therefore with sincere regret that JR/Duty Free are compelled to hereby give notice that it protests process and activities leading up to and the apparent award of the Specialty Retail Concession Agreement (the "Agreement") to Lotte Duty Free Guam, LLC ("Lotte") pursuant to the above referenced RFP.<sup>1</sup> This protest asserts a basis for disqualifying Lotte and nullifying the Agreement between the GIAA and Lotte. Please be advised that due to the significant nature of the allegations made by this protest, we reserve JR/Duty Free's right to administrative and judicial review.

<sup>1</sup> It is unclear to JR/Duty Free if the award to Lotte is final in as much as the terms and conditions of the Agreement negotiated by GIAA management have not yet been approved by the GIAA Board of Directors. At its April 12, 2013 meeting the GIAA board approved the award of the Agreement to Lotte "subject to the negotiation" of the terms and conditions of the Agreement. It is not apparent that this authorization was self executing or that GIAA management was free to negotiate any final terms without further board approval

## First

JR/Duty Free contend that Lotte's proposal should be deemed non responsive to the RFP and that Lotte should not be deemed a responsible proposer, given its conduct in influencing or attempting to influence the award of the contract. Moreover the facts indicate that Lotte has given false affidavits in support of its proposal relating to compliance with Guam ethical rules and laws.

JR/Duty Free acknowledge that earlier this year it became aware of various press reports alleging Lotte had provided a Government of Guam Delegation, which included GIAA Directors, with gift bags. We also note that subsequent reports stated that the gifts were of "nominal value" and were subsequently returned by GIAA Chairman Santos and by Director Tolan. At the time JR/Duty Free had no reason but to accept these reports at face value and therefore had no reason to pursue a protest on these points. On obtaining a copy of your letter of May 17, 2013 to Mr William Blair (DFS Attorney) it became apparent to JR/Duty Free that significant detail and new facts have emerged from your investigation. It is now revealed in your letter that your investigation revealed that the gifts offered by Lotte were in fact of significant value.

You state that "Only Director Tolan received a gift bag from GVB, and Director Tolan returned it upon learning that Lotte was the source of the gift bag. An inventory of the gift bag indicates that the value of the contents is around \$200."

JR/Duty Free finds it incredulous that these facts can be dismissed so casually. The facts in your letter acknowledge that Director Tolan accepted the Lotte gift bag after being made fully aware on a number of occasions during the tour that Lotte was a candidate for the RFP.

Regarding the alleged gift selected by Chairman Santos in the Coach Boutique of the Lotte Downtown Store:

Your investigation does not fully answer the allegations around this gift / purchase.

However, the facts revealed by your investigation are:

1. On September 26, 2013 Chairman Santos was in the Coach section of the Lotte Department Store.
2. Chairman Santos offered to pay for the purse.
3. Chairman Santos did not pay for the purse and did not receive the purse at the store.
4. When he arrived at Incheon Airport, Chairman Santos did receive a Coach purse, for which he had not paid.

5. On October 24, 2013 Mr Martinez (the GIA Deputy Executive Manager) reminded Chairman Santos of the pending RFP. At some point thereafter Chairman Santos returned the Coach purse to Mr Mesa.

Your investigation acknowledges that "*Chairman Santos returned the purse to Mr. Mesa and Chairman Santos likewise abstained from participating in the discussion and voting on the RFP. Mr Mesa informed GIAA that he attempted to return the purse to Lotte for a refund*"

A proper investigation would easily verify credit card records proving payment of the alleged gift to Chairman Santos of a Coach purse. As you have not provided confirmation of this purchase and the subsequent refund, a reasonable person might deduce that the Coach purse was indeed a gift. As we are not aware of any Coach purse under \$25 we can deduct that the value of the purse is significantly higher than the nominal \$25 value.

Moreover, JR/Duty Free and we assume all other proposers, were required to sign a series of Affidavits, in our case in front of US Government Consular Officials, clearly testifying under penalty of perjury that neither it nor any of its Officers or Employees would knowingly influence any Government of Guam employee. The disclosure in your May 17 letter confirms that these gifts were in fact "valuable". Lotte's provision (via GVB) of a gift bag for Director Tolan is a clear violation of ethical standards and the rules of the RFP and indicate that Lotte's sworn affidavit was false.

## **Second**

Lotte has gained an unfair advantage not afforded to JR/Duty Free or to our knowledge other proposers to the RFP.

On September 26, 2013 as confirmed by your investigation the Governor and the Guam Delegation, including Chairman Santos and Director Tolan, knowingly visited and toured the Lotte Department Store and met with the Lotte Chairman.

The facts revealed in your May 17 letter:

1. Mr Denight suggested that the Delegation go to Lotte Department Store.
2. The Delegation, minus Mr Lee, arrived at the Lotte Hotel and Department Store by bus.
3. Mr Denight called "one of his contacts at Lotte" and told him that the Governor and his Delegation would be coming to the Lotte Hotel and Department Store.
4. You state that "it appears" that the President of Lotte did at some point greet the Governor and the Delegation (as you do not exclude Chairman Santos and Director Tolan from the Delegation we deduce that they were in fact part of that Delegation). It matters not if they were personally introduced or not.

It is not relevant if there were any discussions regarding the RFP or not. The fact that a high level Government Delegation, including the Governor of Guam and GIAA

Directors were greeted by the Lotte President and toured the Lotte Department Store, we allege is a clear violation by Lotte of the sworn affidavit and process where all proposers agreed to communicate directly and exclusively with the GIAA nominated single point of contact.

JR/Duty Free was not afforded the opportunity of touring the Delegation or any Government of Guam and GIAA officials through any of our stores and therefore were severely disadvantaged by this activity. Furthermore JR/Duty Free adhered strictly to all commitments required by GIAA and Guam procurement law.

### **Third**

Based on statements made by the Guam International Airport Authority (the "GIAA") in the press release issued on May 20, 2013 announcing that the Agreement had been signed, the Agreement with Lotte and public statements that were made by you, including those made in your interviews with Ray Gibson and Travis Coffman of K-57 radio on May 20, 2103, it is apparent that Lotte included in its proposal or was subsequently given the opportunity to offer to the GIAA additional items of value to the GIAA that were considered by it in its decision to award the Agreement to Lotte or which influenced that decision.

JR/Duty Free and we assume the other proposers did not include such additional items of value in their proposal because they were not included in the evaluation criteria established by the GIAA in the RFP and thus not permitted. Neither was JR/Duty Free offered the opportunity to supplement its proposal, as Lotte apparently was.

More specifically, as stated in the GIAA's May 20, 2013 press release, the GIAA "was able to negotiate additional revenue of 1% of non-Airport sales made by Lotte on Guam". There are only two possibilities. Lotte either included an offer to pay this additional amount to the GIAA in its proposal (which JR/Duty Free has not yet had the opportunity to review) or offered to do so after its proposal was submitted. If the former, it was not permitted by the express terms of the RFP, which set forth the only criteria on which proposals were to be evaluated. If the latter, then Lotte was allowed to change the terms of its proposal after it was submitted, which also would have been unlawful. It is inconceivable to JR/Duty Free that Lotte, after having already been selected as the most qualified proposer, would have unilaterally and for no consideration, agreed to pay more money for the same rights. One can only infer and conclude therefore, that Lotte's commitment to provide this additional benefit to the GIAA was made sometime during the evaluation period prior to Lotte's selection as the most qualified proposer and thus influenced that selection.

### **Fourth**

According to the GIAA's press release "Lotte also committed to make additional renovations to the Airport food court and restroom facilities at no additional cost to the Airport." Again, making such "additional renovations" was not included in the RFP

evaluation criteria. The commitment to make them should not have been considered or otherwise allowed to influence the RFP selection process, which it obviously did.

In your interview with Mr Coffman, you confirmed that Lotte had offered to perform these additional matters - i.e. to pay a percentage of non-Airport revenues to the GIAA and to pay for additional capital improvements at the Airport, which, according to you, included a "playroom for kids". You stated that these additional capital improvements promised by Lotte provided "another added value" "at no cost to the Airport." In your earlier interview with Mr. Gibson, you characterized these additional benefits as being "huge."

JR/Duty Free was not provided the opportunity to offer other "added values" to the Airport and the RFP did not indicate that they could be offered or, even if offered, would be considered in the evaluations. To the contrary, the RFP specifically prohibited "multiple proposals." RFP Section II.D.2. Guam law required the proposals to be evaluated only by the criteria set forth in the RFP, not other "added values" or other consideration offered by proposers after their proposals were submitted or later "negotiated" by the GIAA, however "huge" they might have been. To our knowledge, none of the proposers was provided this opportunity, except Lotte.

2 GAR, Div. 4, §3114(f)(2) of Guam Procurement Law provides that: "Proposals shall be evaluated **only on the basis of evaluation factors stated in the Request for Proposals.**" The RFP did not ask proposers to offer to make capital improvements to or "renovate" facilities at the Airport other than "the retail space." See, RFP Part V. "...The [Evaluation] Committee will evaluate the physical design and construction of the retail space[s]..." No mention is made in the RFP of desired renovations to the Airport's food court or restrooms or the construction of a childrens' play area. If the GIAA wanted proposers to include those additional items in their proposals, it needed to have said so in the RFP, not secretly (and exclusively) entertained offers from just one of the proposers - Lotte.

The improper inclusion of these items in Lotte's proposal or subsequent revisions to its proposal or in commitments to undertake additional tasks also violated the RFP's Proposal Due Date, the RFP's prohibition on "multiple proposals from a single Proposer" at RFP Section II.D.2, the RFP's provision that "Proposals may be modified or withdrawn at any time *prior to the Proposal Due Date*" (emphasis added) at RFP Section II.D.3, and the RFP's provision that "late proposals will not be accepted and will automatically be disqualified from further consideration" (emphasis in original) at RFPSection II.D.4.

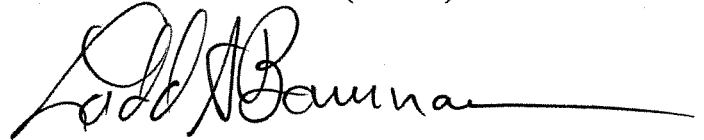
Guam's public policy is clear. One of the "underlying purposes and policies" of Guam's procurement laws is "to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory." 5 GCA § 5001(b)(1). The foregoing facts establish that JR/Duty Free and the other proposers were not afforded fair and equitable treatment by the GIAA. Rather, the RFP process was altered to favor Lotte and Lotte only.

JR/Duty Free expressly reserves the right to supplement this protest as additional facts are discovered. JR/Duty Free has Sunshine Act requests currently pending with the GIAA which are intended to help us understand what transpired in the later stages of the RFP process.

JR/Duty Free is obliged however, to make this protest at this time, lest the GIAA assert that JR/Duty Free "knew or should have known" of the facts giving rise to this protest. After its receipt and review of the documents already requested from the GIAA, JR/Duty Free may supplement this protest letter with more specific facts.

JR/Duty Free thanks you in advance for your due consideration and subsequent findings resulting from your further investigations.

Yours truly,  
JAMES RICHARDSON (GUAM) LLC

A handwritten signature in black ink, appearing to read "Ladd A. Baumann", with a long horizontal line extending to the right.

By: Ladd A. Baumann  
Attorney and Resident Agent