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May 30, 2013

VIA EMAIL (msuh@gibsondunn.com)

Maurice M. Suh, Esq.
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
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Re: DFS Guam L.P. v. The A.B. Won Pat Int'l Airport Auth., Guam
Guam Superior Court Case No. CV 0685-13

In the Appeal of DFS Guam L.P
Office of Public Accountability Docket No. OPA-PA 13-0006

Dear Mr. Suh:

I am writing in response to your letter dated May 30, 2013 regarding the above-captioned Superior Court action (the "Complaint") and putative appeal (the "Appeal") commenced by your client DFS Guam L.P. ("DFS") against the A.B. Won Pat International Airport Authority, Guam ("GIAA" or "the Airport") and others.

GIAA is grateful that DFS recognizes that for many years it has been underpaying for its duty free concession at the Airport and it shows the value of a competitive bidding process that DFS will now increase its rent by over \$10.4 million per year as of July 14, 2013. The Airport does not concede, however, that DFS is entitled to holdover after July 14, because its concession agreement is wholly separate from the RFP process and the Airport has a contractual right to require DFS to vacate the premises. And while this long-overdue increase in DFS's rent might mitigate the Airport's damages due to DFS's anticipated delay in vacating the premises, it is not true as you assert that "there will be no financial harm to the government" pending DFS's legal delaying tactics. To the contrary, DFS is tortuously interfering with GIAA's prospective economic advantage and its contract with Lotte. By continuing to occupy the Airport terminal, DFS will cause the Airport to lose the benefit of immediately implementing Lotte's concession and Lotte's commitment to make capital improvements in the Airport that will enhance travelers' retail shopping experience, including renovated bathrooms, a play area for children, free WiFi, a renovated food court, the opening of the East and West Concourse Wing retail areas, a renovated smoking room and Internet kiosks. With these improvements will come increased sales and increased rental income to the Airport. The uncertainty created by DFS's appeal might also

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adversely affect GIAA's credit ratings and, therefore, its ability to borrow funds at favorable interest rates to make much-needed improvements at the main terminal. The Airport will hold DFS responsible for all of damages caused by DFS's unreasonable and bad faith conduct.

The Airport is disappointed that DFS has filed the Complaint and noticed its Appeal, because our review of the facts and law indicate that DFS has no grounds to bring these proceedings. To our knowledge, apart from interviewing a single witness -- Felix Reyes -- DFS has not conducted interviews of any of the other witnesses; nor has it conducted any thorough investigation of the facts it alleges in the Complaint or the Appeal. Instead, DFS continues to rely on rumor and innuendo regarding the vast majority of its allegations, which the Airport refuted after a thorough investigation in its May 17, 2013 letter denying DFS's putative protest. (A copy of this denial letter is enclosed.) GIAA expects DFS to cooperate fully in the smooth and timely transition from its concession to the Lotte Duty Free Guam LLC ("Lotte") concession on or before July 14, 2013, when DFS's leases for the Main terminal and "Mama Bear" terminate.

The gaping hole in all of DFS's arguments is clear: there is absolutely no connection between the events allegedly occurring on the September 2012 trip to Seoul, Korea to celebrate the inaugural flight of Jeju Air and the evaluation committee's ranking of the proposals. GIAA appointed an independent and neutral evaluation committee to review and rank the proposals. The evaluation committee retained the services of an independent consultant, Leigh | Fisher, to compare the financial benefits of each proposal. With the help of the financial analysis of this consultant and the evaluation committee's own independent review, Lotte was unanimously chosen as the most qualified proposer.

There was nothing "unlawful" about the process GIAA used to evaluate the proposals or for the GIAA Board to vote to award the duty free concession to Lotte. The RFP process was neutral, fair, independent and resulted in the award of a contract to the proposal that offers the greatest financial benefits to the Airport and the people of Guam. GIAA's Board demonstrated the highest ethical conduct when Chairman Santos and Director Tolan abstained from any participation in the vote on the RFP and the rankings were presented blind, which prevented charges of favoritism based upon the identity of the proposers.

We reiterate that DFS does not have standing to protest GIAA's award of the contract to Lotte. DFS lacked standing because it was not an "aggrieved" party under 5 GCA § 5425(a) since it was not selected as the second most qualified proposer and therefore did not have a "substantial chance" of securing the concession contract but for Lotte's alleged conduct. *See e.g. I.C.S. Illinois, Inc. v. Waste Mgmt. of Illinois, Inc.*, 403 Ill. App. 3d 211, 225 (2010); *Stiegelard, Inc. v. Janssen*, 171 Cal. App. 3d 79, 93 (1985); *Three S Consulting v. U.S.*, 104 Fed. Cl. 510, 519 (2012).

We have reviewed DFS's Appeal, in which it argues that all of the proposers have standing because of "GIAA's wholly improper RFP process, which relied on a flawed selection

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methodology” because “the underlying evaluation criteria and board approval process was tainted as a result of Lotte’s attempts to improperly influence the RFP process by giving items of value to GIAA board members.” (Appeal at p.11.) As stated above, DFS has failed to make any connection between Lotte’s gifts to delegates on the Korea trip and the evaluation committee’s rankings. DFS’s allegation that all of the disappointed proposers have standing is frivolous.

We have also reviewed your contention in your Complaint and Appeal that DFS’s putative protest was “timely.” It was not. DFS failed to submit its protest within fourteen (14) days of when it knew or should have known of the facts underlying its protest. 5 GCA § 5425(a). DFS knew the facts underlying its April 23 protest no later than October 1, 2012, but waited over six months to file a formal protest. DFS’s October 30, 2012 letter was not a “protest” of the procurement process and, in any event, would have been untimely as well.

DFS’s contention that GIAA’s agreement with Lotte was “void *ab initio*” because it was entered into while a stay was in place is plainly wrong. The automatic stay imposed by Section 5425(g) is only triggered upon the filing of a *timely* protest. (See Section 5425(g) (“In the event of a timely protest under Subsection (a) of this Section...”) [emphasis added].) Because DFS did not file a timely protest, there was no stay in place at the time GIAA and Lotte signed an agreement. No stay would be triggered under Section 5425(g) because the agreement with Lotte was signed before DFS filed an appeal. See *In the Appeal of Guam Publications, Inc.*, Appeal No. OPA-PA-08-007. (“These automatic stay provisions are triggered when a protest is timely and the protest is filed before the award was made....The Public Auditor finds that the automatic stay provisions were not triggered as a result of this appeal because GSA completed its award to Marianas Variety between GSA’s denial of PDN’s April 7, 2008 protest and PDN’s appeal.”) The concession agreement is valid and enforceable.

In DFS’s Complaint, it continues to make the allegation that GIAA’s investigation was “flawed” and “compromised” by an alleged conflict of interest on the part of Executive Manager Charles Ada. As the Executive Manager of GIAA, Mr. Ada was responsible for issuing a decision on behalf of GIAA concerning DFS’s protest. (See 5 GCA § 5425(c) (“[T]he head of a purchasing agency, or a designee of one of those officers, shall promptly issue a decision in writing.”)) Therefore, it was critical that Mr. Ada be involved in the fact-finding process in order to assure himself that he was making an informed and correct decision. DFS has made no connection between the facts found by Mr. Ada and any prejudice to DFS resulting from his involvement in the investigation.

GIAA management had authority to finalize a contract with Lotte after the vote by the Board that Lotte was the best qualified proposer. Proposers were advised in the RFP that “[t]he concession agreement will be similar to the Sample Form Agreement attached [to the RFP] (Attachment B), but modified to incorporate provisions from this RFP, the selected Proposer’s proposal, and other terms and conditions that may be mutually agreed upon by GIAA and the selected Proposer. If negotiations are successful and all contract terms are agreed upon with the

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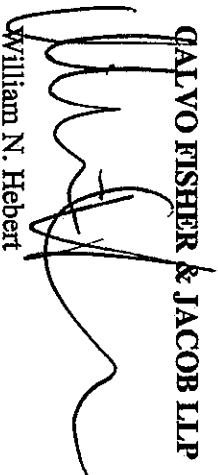
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best qualified Proposer, award will be made to that Proposer.” (Pages 11 and 12 of the RFP (emphasis added).) The Executive Summary of the April 12, 2013 meeting provides, in relevant part, “Subject to successful negotiations and legal review, a concession agreement will be entered into with the highest ranking proposer. If negotiations are unsuccessful, GIAA may commence negotiations with the next highest ranked proposer.” (Emphasis added.) The vote by the Board contemplated GIAA management negotiating and executing a contract with Lotte.

DFS is again put on notice that if it continues pursuing its frivolous Appeal, then GIAA fully intends to recover its attorneys’ fees and costs from DFS pursuant to 5 GCA § 5425(l)(1) for both its Appeal and its Complaint. DFS’s Complaint also gives rise to its liability under Rule 11 of the Guam Rules of Civil Procedure. Like DFS’s Appeal, DFS has filed its Complaint without making a reasonable inquiry that its allegations have evidentiary support and DFS has solely filed its complaint for improper purposes, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If DFS continues to pursue its meritless Complaint, the Airport will seek Rule 11 sanctions, including the Airport’s costs and attorney’s fees incurred in defending this action.

Very truly yours,

CALVO FISHER & JACOB LLP



William N. Hebert

Encl.

WNH:cn

cc: Governor Eddie Baza Calvo (w/encl.)

Speaker Judith Won-Pat (w/encl.)

Vice Speaker Benjamin Cruz (w/encl.)

Senator Mike San Nicolas (w/encl.)

William J. Blair, Esq. (w/encl.)

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VIA HAND DELIVERY AND E-MAIL

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Attorneys for the A.B. Won Pat International Airport Authority, Guam

Re: Appeal to the Office of Public Accountability and Action in Guam Superior Court
Dear Mr. Hebert:

As you are already aware, DFS Guam, L.P. (“DFS”) has filed today an appeal with the Office of Public Accountability (“OPA”) of the Guam International Airport Authority’s (“GIAA”) decision on May 17, 2013 to deny DFS’ proposal protest in connection with RFP No. GIAA 010-FY12 (“RFP”). Subsequent to the filing of the appeal to the OPA, DFS also filed an action in Guam Superior Court, naming as defendants the GIAA, Lotte Duty-Free Guam, LLC, and the Territory of Guam. We have served you with copies of the filed OPA appeal and the Superior Court complaint, which include the legal and factual bases for each of those respective actions.

Through the OPA appeal and the Superior Court action, DFS continues to protest the GIAA’s and Lotte’s conduct during the RFP process, which we believe violated the laws of Guam, government ethics regulations, and the specific requirements established for the RFP. As a result, the international reputation of Guam as an investment destination is being compromised.

DFS is only seeking full transparency, through fair and impartial administrative and judicial review, with respect to the RFP process in order to provide full accounting of the actual events and identities of the beneficiaries of this unlawful process. DFS believes that competition in the world of airport retailing is beneficial, and that the natural outcome of bid processes like the one enacted by the GIAA may be a change of duty free operators. Moreover, with its Galleria business in Guam, and as one of the largest private employers on the island, DFS welcomes all improvements that can be brought to the airport and overall tourism in Guam. However, this should always happen through a fair, transparent and neutral process, governed by the strictest standards of Guam’s procurement laws and regulations

In order to demonstrate its commitment to the people of Guam, DFS is unilaterally committing to pay the higher guaranteed fees that the GIAA announced it would receive under a new contract, from the end of its current tenancy until a new lease is validly enacted

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in accordance with applicable law. Currently, DFS operates the airport at a fee which is substantially lower than the new fees that were proposed by DFS and its industry competitors for the new lease of the airport retail space. Substantially increased fees are a natural outcome of most competitive airport tenders, particularly at the end of a long-term contract. We are pleased to see that the new contract will provide the funds necessary to carry out much needed improvements at the airport, and we are acting to ensure that the people of Guam receive the benefits of a higher fee immediately while administrative and judicial review of the GIAA's and Lotte's conduct is ongoing.

We again direct your attention to 5 GCA § 5425(g), as we did in our correspondence dated May 23, 2013, which provides, in part, that "[i]n the event of a timely protest [of a contract award], the Territory *shall not proceed further* with the solicitation or with the award of the contract prior to final resolution of such protest, and any such further action is *void*."¹ (Emphasis added.) We respectfully request that you immediately cease and desist from any and all actions taken under, or in furtherance, of the putative contract entered into by the GIAA and Lotte on May 18, 2013, which was void as a matter of law.² In particular, we request that the GIAA and Lotte do not submit any putative contract for required GIAA Board approval until all legal actions related to the RFP, including the OPA appeal and the Superior Court action, are fully and finally resolved. To the extent that the GIAA chooses to proceed under or in furtherance of the putative contract with Lotte, DFS reserves the right to pursue any and all further administrative or judicial relief, in addition to the OPA appeal and Superior Court action filed today, which may expose the GIAA to additional liability and administrative and judicial proceedings and further delay the valid award of the contract in accordance with applicable law.

We finally emphasize that, due to DFS' unilateral commitment to pay the higher guaranteed fees that the GIAA announced it would receive under a new contract, from the end of its current tenancy until a new lease is validly enacted in accordance with applicable law, the government and people of Guam will not be deprived of the additional revenue that was anticipated from the RFP process. Thus, there will be no financial harm to the government

¹ DFS vigorously disputes any assertion that DFS either did not have standing to bring its protest or that it did bring a timely protest, which the GIAA has asserted would prevent the initiation of an automatic suspension of RFP proceedings under 5 GCA § 5425(g).

² DFS vigorously disputes any assertion the award of the RFP has already been made due to the denial of DFS' due process right to appeal the GIAA's decision to deny DFS' proposal protest on Friday, May 17, 2013. DFS was notified after the close of business on Friday, and the putative contract was signed on Saturday, May 18, 2013, providing no opportunity whatsoever for DFS to file an appeal. Further, we understand that the putative contract has not received GIAA Board approval, which is required for an award of the RFP.

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or people of Guam during the full and fair resolution of the allegations against Lotte and the GIAA.

We hope that this matter will be resolved soon through a full, open and impartial review of the facts. DFS remains fully committed to continuing its unwavering support and investments in the Guam tourism industry and our local community, as it has done for the last 30 years.

Sincerely,



Maurice M. Suh

cc: Governor Eddie Baza Calvo

Speaker Judith Won-Pat

Vice Speaker Benjamin Cruz

Senator Mike San Nicolas

Michael Pangelinan, Calvo Fisher & Jacob LLP, Attorneys for GIAA

William J. Blair, Esq., Attorney for DFS

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