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FILE NO OPA-PA: 13-006

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**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

IN THE APPEAL OF)
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)
DFS Guam L.P., Appellant of the Decision)
of the A.B. Won Pat International Airport)
Authority, Guam)
_____)

DOCKET NO. OPA-PA-13-006

**LOTTE'S OBJECTION AND
OPPOSITION TO DFS GUAM L.P.'S
REQUEST TO LIFT STAY**

INTRODUCTION

Defendant Lotte Duty Free Guam, LLC (hereinafter "Lotte"), through its undersigned counsel, respectfully submits this Objection and Opposition to the Appellant's Request to Lift Stay filed on November 22, 2013. This Objection and Opposition is filed pursuant to the Guam Administrative Rules and Regulations ("GARR"), Title 2, Division 4, §§ 12109(d) and 12104(c)(9), and is based on the following grounds: (1) the Public Auditor is required to decline to hear this matter pursuant to 2 GARR § 12103(b) and a lift of the currently imposed stay would result in competing determinations and a duplication of effort; and (2) the Office of Public Accountability (hereinafter "OPA" or "Public Auditor") lacks jurisdiction over this appeal because there was no underlying protest lodged in accordance with the GARR and the Guam Code Annotated ("GCA").

BACKGROUND

On July 19, 2012, the A.B. Won Pat International Airport Authority, Guam (hereinafter "GIAA") issued RFP No. GIAA010-FY12 (hereinafter "the RFP") for the development, construction, and operation of a high quality specialty retail concession at GIAA's Main Passenger Terminal.

On October 5, 2012, DFS submitted the first in a series of letters complaining about the RFP, but did not lodge a formal protest with GIAA at that time, which would have invoked the automatic stay of the procurement mandated under 5 GCA § 5425(g) and 2 GARR, Div. 4, § 9101(e). On October 30, 2012, DFS submitted its last letter of complaint, stating its "concerns," with no request that the procurement process be suspended. This informal complaint letter is already part of the OPA record, and is attached to DFS' Notice of Appeal filed in this case on May 30, 2013.

On April 12, 2013, GIAA selected Lotte as the most qualified proposer to operate the specialty retail concession at the Guam International Airport.

On April 23, 2013, DFS finally lodged a formal protest with GIAA. This formal protest letter is also already part of the OPA record, and is attached to DFS' Notice of Appeal filed in this case on May 30, 2013.

On May 17, 2013, GIAA issued a decision denying the protest for multiple reasons, including the fact that the protest was untimely because it was filed well outside of the 14 days after DFS knew or should have known of the facts underlying the protest, under 5 GCA § 5425(a) and 2 GARR, Div. 4, § 9109. This GIAA Decision on Protest is also already part of the OPA record, and is attached to DFS' Notice of Appeal filed in this case on May 30, 2013.

On May 30, 2013, after GIAA issued its decision denying DFS' protest of the award of the RFP, Appellant DFS Guam L.P. (hereinafter "DFS") filed this appeal before the OPA, and only two hours later, also filed a complaint in the Superior Court of Guam.

The civil complaint filed in the Guam Superior Court on May 30, 2013, as Civil Action No. CV0685-13, required the Public Auditor to decline to hear this OPA appeal pursuant to 2 GAR § 12103(b). On June 5, 2013, in accordance with this rule, the OPA declined to hear the matter, and the matter is currently still stayed. Recently, on November 8, and 12, 2013, Lotte and GIAA filed their respective appeals of CV0685-13 in the Supreme Court of Guam. These appeals were filed *prior* to DFS' current Request to Lift Stay filed in this matter.

As discussed in more detail below, Lotte contends that court action remains pending, including two appeals of the Superior Court action that have been timely filed with the Supreme Court of Guam, and thus, Lotte's time to file an objection in the instant matter has never been triggered. However in the interest of preserving Lotte's jurisdictional arguments, and in recognition of the strictures of 2 GAR §12104(c)(9), which require that any objection or motion addressed to the jurisdiction of the Public Auditor shall be promptly filed, Lotte also sets forth an objection to the OPA's jurisdiction over this Appeal.

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ARGUMENT

1) The Stay Cannot be Lifted Because There are Pending Judicial Proceedings in Court

Under 2 GARR, Div. 4, § 12104, Appendix A, in filing its appeal before the OPA, DFS was required to certify to the Public Auditor that "to the best of [its] knowledge, no case or action concerning the subject of this Appeal has been commenced *in court*." *Id.* (emphasis added). In originally filing this OPA appeal, DFS specifically declared that no court action had been commenced; yet, less than two hours after certifying to the Public Auditor that no case in the Superior Court was pending, DFS commenced a case in the Superior Court.

DFS was aware that the commencement of its case in the Superior Court would immediately divest the Public Auditor of any ability to act on the Appeal before the OPA, under 2 GARR, Div. 4, § 12103(b).

In fact, DFS cited to this rule in filing its Complaint in the Superior Court of Guam, reporting to the Superior Court that an appeal had been filed with the OPA, but that "DFS expects that the OPA will indefinitely stay that administrative appeal in light of the now-pending judicial review of this controversy." Superior Court of Guam Civil Case No. CV0685-13, Complaint Seeking Judicial Review of Denial of RFP Proposal Protest and Award of Operating Contract, Pursuant to 5 GCA § 5480(a), p. 1, lines 25–26 (filed May 31, 2013).

Having full knowledge of its intent to effectively tie the hands of the OPA with respect to the Notice of Appeal filed as OPA-PA-13-006, DFS proceeded to make several requests of the OPA. Among these requests, DFS asked that "Lotte's proposal

should be placed on hold," that "Lotte should not be deemed a responsible proposer," that "Lotte's proposal should be disqualified," and finally, that "the RFP award process [] be suspended" OPA-PA-13-006, Notice of Appeal, Sections IV–V.

By immediately filing a Superior Court case based on facts identical to those presented in OPA-PA-13-006, it is clear that DFS' intent was to prevent the OPA from determining the merits of this appeal.

DFS suddenly seeks to have the OPA begin to hear this matter. Nevertheless, Civil Action No. CV0685-13 is still pending by way of two appeals of the Superior Court case which have been filed with the Supreme Court of Guam, one by Lotte on November 8, 2013, and the other by GIAA on November 12, 2013.

2 GARR, Division 4, Chapter 12, § 12103(b) states:

(b) *Effect of Judicial Proceedings.* If an action concerning the procurement under Appeal has commenced *in court*, the Public Auditor shall not act on the Appeal except to notify the parties and decline the matter due to *Judicial involvement*. This Section shall not apply where a court requests the decision of the Public Auditor. Parties are required to notify and provide copies to the Public Auditor within 24 hours of *any action in court* concerning the procurement under Appeal.

2 Guam Admin. R. Regs., Division 4, Chapter 12, § 12103(b) (2013) (emphases added).

2 GARR, Div. 4, § 12103(b) specifically prohibits the Public Auditor from taking any action on an OPA appeal upon notification of any pending "judicial proceedings," "except to notify the parties and decline the matter due to Judicial involvement." *Id.*

The plain language of the rule prohibits the OPA from taking any action on an OPA appeal while *any* judicial proceeding is pending in *any* court concerning the identical subject matter.

The Guam Administrative Rules do not differentiate between the Supreme Court of Guam and the Superior Court of Guam. They refer only to "court" action and "judicial proceedings." "Where [a rule-making body] includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that [the rule-making body] acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

These rules do not specify the court before which a judicial action must be brought in order to require a stay. The drafters specifically omitted any reference to a particular court. Thus, the rules do not merely prohibit the OPA from acting when a case has been filed in the Superior Court of Guam, but also prohibit the OPA from acting when a case has been filed in the Supreme Court of Guam. Accordingly, the OPA is still prohibited from taking any action in this case, and cannot lift its previously imposed stay in the matter.

The United States Supreme Court has further held that the purpose of rule and statutory construction is to avoid absurd results. *United States v. Turkette*, 452 U.S. 576, 580 (1981) ("[A]uthoritative....constructions should be given the deference to which they are entitled, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with.").

The Supreme Court of Guam has consistently and repeatedly adopted this policy against the absurd interpretation of rules. See, e.g., *Sumitomo Const. Co. Ltd. v. Government of Guam*, 2001 Guam 23 ¶¶ 17; *People v. Flores*, 2004 Guam 18 ¶¶ 16–20; *Benavente v. Taitano II*, 2006 Guam 16 ¶¶ 18, 19; and *Guam Resorts, Inc. v. G.C.Corp.*, 2012 Guam 13 ¶¶ 7, 14.

To construe the rules as DFS urges, would require the OPA to stay its action when the action is pending before the Superior Court of Guam, but permit the OPA to proceed while the case is now pending before the Supreme Court of Guam. Such a reading would render the provisions of 2 GARR, Div. 4, § 12103(b), requiring a stay of the action pending the outcome of "judicial proceedings" meaningless or absurd as expressly prohibited by the Supreme Court of Guam. See *Benavente v. Taitano II*, 2006 Guam 16 ¶¶ 18, 19.

In addition to the specific rule-based prohibitions described above, the OPA should abstain from any proceedings in this matter in consideration of administrative economy and the avoidance of competing determinations. DFS elected to pursue its remedies in the Guam judicial system. Now that the judicial remedy has made its way to the Supreme Court of Guam, DFS seeks to subvert the process by requesting that the OPA take immediate action, perhaps in the hope that the OPA will provide a more favorable result than DFS has already received from the courts. DFS' request to lift the stay imposed by the OPA smacks of forum shopping. It would constitute a misuse of resources, both administrative and judicial, for DFS to be allowed to simultaneously pursue this action before the OPA while the Supreme Court of Guam is still considering the matter. Indeed, the sole purpose of 2 GARR § 12103(b) is to prevent such simultaneous proceedings and possible competing determinations from the OPA and the courts of Guam.

The plain interpretation of the GARR and the obvious intent of the plain language of the rules is to require the Public Auditor to refrain from taking any action in a procurement appeal upon the filing of any judicial proceedings concerning the same

facts, including any appeals to the Supreme Court. 2 GARR, Div. 4, § 12103(b), became applicable to this OPA appeal because of DFS' purposeful decision to file a simultaneous action in the Superior Court of Guam. That action is now on appeal to the Supreme Court of Guam and therefore, Lotte respectfully requests that the Public Auditor refrain from taking any of the actions suggested and requested by DFS in its Request to Lift Stay and its Notice of Appeal in OPA-PA-13-006, including issuing any orders or issuing any stay of the RFP process, unless the OPA is requested to do so by the Superior Court or the Supreme Court of Guam, as contemplated under 2 GARR, Div. 4, § 12103(b). See also, John Thos Brown's Guam Procurement Process Primer Ver 2.0, at p. 254 ("It must also be remembered, should any part of the Appeal to OPA be taken up in a court action (for instance, an injunction action), the OPA matter will be, at best, put on hold, if not entirely removed to the court, until or unless the court returns the matter to the Public Auditor.")

2) The OPA Does Not Have Jurisdiction Over This Matter

5 GCA 5425(e) gives only a proper "protestant" the right to appeal to the OPA within fifteen (15) days after receipt of the protestant of the adverse decision of the agency. 5 GCA § 5425(e) (2013).

Lotte hereby objects to any further proceedings in this matter based on lack of jurisdiction. Pursuant to 2 GARR, Div. 4, § 12104(c)(9), "the Public Auditor *shall have the right at any time* and on her or his own motion *to raise the issue of its jurisdiction to proceed with an Appeal* and shall do so by an appropriate order." *Id.* (emphases added).

2 GARR § 9101(c)(1) provides that formal protests shall be made in writing to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, and shall be filed in duplicate within fourteen days after the protestor knows or should have known of the facts giving rise thereto. *Id.*

Section 5425(a) of Title 5 GCA states that an actual or prospective bidder who may be aggrieved in connection with the method of source selection, solicitation or award of a contract may protest within fourteen days after the bidder knows or should know of the facts giving rise to the protest. In the OPA appeal of *In the Appeal of ASC Trust Corporation*, OPA-PA-09-010, the OPA ruled that the fourteen-day clock begins when the Appellant becomes aware of facts giving rise to the protest.

Under the holding of this case, the Guam code, and the GARR, DFS was never a "protestant" over which the OPA could obtain jurisdiction, because DFS failed to file a timely agency protest within the time frame provided by the Guam procurement rules and laws. Because DFS did not file a protest within the 14 days, GIAA could not consider the protest and was required to deny it. See 2 GARR, Div. 4, § 9101: "Protests filed after the 14 day period shall not be considered."

A) DFS Knew About the Facts Underlying OPA-PA-13-006 in October of 2012

The protest at issue in this OPA appeal was filed on April 23, 2013. However, well before this protest was filed, on October 5, 2012, DFS submitted the first in a series of letters to GIAA complaining about the RFP. In this series of letters, DFS alleged several facts that it believed were irregularities in the procurement process, including events which occurred during a trip to Korea attended by members of the Guam Visitors

Bureau. Despite its alleged concerns, at the time of its letters DFS did not lodge a formal protest which would have invoked an automatic stay of the procurement process under the Guam Procurement Act.

Following receipt of the last of DFS' complaint letters on October 30, 2013, GIAA conducted an investigation into DFS' allegations, which delayed the procurement process. The conclusion of GIAA's investigation was that none of the parties involved with the Korea trip had violated Guam law. The GIAA incorporated these findings into its initial decision on DFS' protest. GIAA Protest Decision at p. 5.

Four proposers ultimately submitted proposals for the RFP on or before the October 17, 2012 deadline. Between March 25 and March 27, 2013, the Evaluation Committee scored each of the four proposals (each of which had been randomly assigned a letter designation) and following the tabulation of the rankings the Evaluation Committee ranked Proposer A (Lotte) the number one proposer. GIAA Protest Decision at p. 7.

On April 23, 2013, DFS finally lodged a formal protest, after GIAA had already announced Lotte as the winning proposer earlier that month. DFS attempted to style this April 23, 2013, protest as a continuation of some earlier protest and submitted 12 "Alleged Facts" that provided the basis for the protest. GIAA Protest Decision at p. 12.

As recited by GIAA's decision on the April 23, 2013 protest, it is undisputed that DFS was aware of the underlying conduct giving rise to Alleged Facts 1–9 no later than October 1, 2012. Alleged Facts 10–12 concern the anonymous letter designation procedure used to present the ranking results to the Board. It is undisputed that DFS

was aware that GIAA intended to use the anonymous letter designation procedure no later than March 28, 2013. GIAA Protest Decision at p. 12.

Following the receipt of the April 23, 2013 protest, GIAA conducted an exhaustive investigation of the allegations contained therein.

On May 17, 2013, GIAA issued a decision on the protest which found that the April 23, 2013 protest was prohibited as untimely because it was filed more than fourteen days after DFS knew or should have known of the facts underlying the protest, as required by 5 GCA § 5425(a) and 2 GARR, Div. 4, § 9109.

According to the GIAA decision, DFS knew about the GIAA selection procedures as of March 28, 2013; DFS clearly knew about the gratuities issue on or before October 1, 2012, and at least by October 30, 2012, the date of their last letter; DFS knew about the alleged conflicts of interest on or before October 1, 2012, and at least by October 30, 2012, the date of their last letter.

B) DFS Never Filed a Protest Until April 23, 2013

The Guam statutes and Guam Administrative Rules and Regulations provide two initial options for an aggrieved bidder to make objections to the bid selection process: 1) filing an informal complaint with the agency; and 2) filing a formal protest with the agency within 14 days of the date the bidder knew or should have known of the protested action.

Before a contract is awarded, a bidder who is unhappy with a particular agency action in connection with a bid may choose to pursue informal remedies by lodging a "complaint" with the agency, as defined in 2 GARR § 9101(b), which states, "[c]omplaint to Procurement Officer. Complainants should seek resolution of their complaints initially

with the Procurement Officer or the office that issued the solicitation. Such complaints may be made verbally or in writing." *Id.*

However, an aggrieved bidder is not required to file an informal complaint, and may choose to directly and immediately file a formal protest under 2 GARR §§ 9101(b) and (c). A "protest" is not a mere complaint: it is formal; it should be labeled as a "protest;" it must be in writing; and shall include, at a minimum: 1) the name and address of the protestor; 2) appropriate identification of the procurement, and, if a contract has been awarded, its number; 3) a statement of reasons for the protest; and 4) supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time in which case the expected availability date shall be indicated. 2 GARR § 9101(c)(3) (2013).

In stark contrast to the numerous formal requirements of a "protest," there are no formal requirements for a "complaint." More importantly, there are significant differences in the effect of filing a "complaint" rather than a "protest." In particular, while the law requires an agency to respond and issue a formal decision and "notice of decision" to protests under 2 GARR § 9101(g) and 5 GCA § 5425(c) and (d), the law does not require an agency to issue a "notice of decision" or even respond to complaints. An agency may simply ignore an informal complaint, if it so chooses. More significantly, there is no statute or rule that grants the right to appeal from a complaint. An appeal to the Public Auditor may only be taken from a properly filed protest.

DFS' October 2012 letters did not comply with the procedural requirements of 2 GARR, Div. 4, §9109(c), (e), and (f) because DFS failed to label its complaints as a

"protest," failed to include any evidence to support the protest, and failed to request an automatic stay of the proceedings, as required when a proper protest has been filed.

The protest letter issued by DFS on April 23, 2013 alleges that the April 23 protest is a "continued protest" of the process leading up to the April 12, 2013 decision (and the decision itself) of GIAA to approve the recommendations of the GIAA evaluation committee ranking Lotte Duty Free Guam as the "most qualified proposer" pursuant to RFP No. GIAA 010-FY12. DFS April 23, 2013 Protest at p. 1.

DFS' April 23, 2013 protest states: "as you are aware, we have been protesting the actions relating to the selection of Lotte since our October 30, 2012, letter..." and "[y]our failure to respond to our October 30 letter, as well as a follow up letter on April 11, 2013 letter [sic], culminates in this correspondence." DFS April 23, 2013 Protest at p.1.

The April 23, 2013 Protest attempts to retroactively re-characterize the October 30, 2012 letter of complaint as a properly made formal protest. However, the October 30, 2012 letter of concern was not labeled as a protest and no mention is made that DFS had been aggrieved. The word "protest" is conspicuously absent from the letter, and in fact, the letter requests that the RFP process continue unabated, despite the complaints listed in the letter.

There is no provision under 2 GARR § 9101(c)(1) or 5 GCA § 5425 that provides for renewed or "continued protests" which could be utilized by bidders to indefinitely stall the procurement process and contract awards, based on an unfavorable outcome to such a bidder. Indeed, such a provision would be absurd, and would work a severe

detriment to the best interests of the Territory in efficiently and timely obtaining goods and services.

Moreover, there is no provision in law which would allow an aggrieved bidder to retroactively transform its informal complaint into a formal protest, and again, the existence of such a provision would be entirely unreasonable and irrational, because its effect would create such a gray area of law as to make the application of time limitation of 2 GARR § 9101(c)(1) "meaningless and absurd."

The series of October letters issued by DFS are, at best, informal complaints, which do not fulfill the requirements of a timely filed protest, and which do not carry with them the right to file an appeal to the OPA. By its own admission, DFS believed that they were an aggrieved party on the date of the October 30, 2012, letter. Despite believing that it was aggrieved as of October, DFS failed to file formal protest until six months later. For this reason, DFS' April 23, 2013, protest is untimely, was appropriately rejected by GIAA and must be dismissed by OPA.

C) The Untimeliness of the April 23, 2013 Protest Deprived the OPA of Jurisdiction Over OPA-PA-13-006

The OPA lacks jurisdiction over agency action in the absence of a legitimate and timely filed protest:

"Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication."

Ada v. Guam Telephone Authority, et al., 1999 Guam 10 ¶¶ 11–13.

The OPA does not have jurisdiction to hear this matter and it must be dismissed.

If a protest is not filed within the time required, an objecting party cannot appeal to the Public Auditor. *In the Appeal of IBSS*, OPA-PA-08-011, p. 6. It is apparent that in this case, DFS made a strategic decision not to lodge a timely formal protest which would have invoked the automatic stay and prevented the award from proceeding, because DFS, as the incumbent holder of the lucrative specialty retail concession for over 30 years, was confident that it would eventually win the RFP. DFS adopted a "wait and see" approach to protesting the RFP, which is specifically prohibited by the Guam Procurement Act and the Guam Procurement Rules and Regulations.

DFS' purposeful delay has been harmful to the Territory of Guam, undermined the ability of GIAA to competitively procure a new retail contract within a timely manner, and has been unfair to the other proposers. More importantly, DFS' failure to lodge a timely protest foreclosed it from pursuing any other administrative remedies otherwise available, including the right to file an appeal to the OPA. *See In the Matter of Kim Brothers Construction Corporation*, Appeal No. OPA-PA-11-017, Decision and Order Re Purchasing Agency's Motion to Dismiss, p. 3 (February 22, 2012). DFS' own delay deprived the OPA of jurisdiction to determine the appeal of its untimely protest, and this matter must now be dismissed by the OPA for lack of subject matter jurisdiction.

CONCLUSION

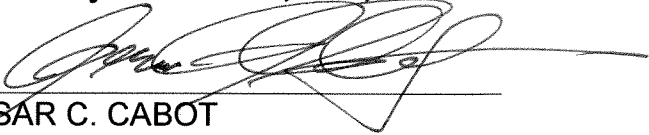
In view of the foregoing authorities and the facts, Lotte respectfully requests either that: 1) the OPA dismiss this matter in its entirety because the OPA lacks jurisdiction to consider the instant appeal; or 2) the OPA retain the stay previously

imposed in this matter because of the pendency of current judicial proceedings, as required by 2 GARR, Div. 4, § 12103(b), and take no action in OPA-PA 13-006, except to decline to hear the matter and notify the parties that the matter will not be heard.

Dated: December 3, 2013

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By:



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