

May 31, 2013

VIA HAND DELIVERY

The Office of Public Accountability – Guam
 Suite 401 DNA Building
 238 Archbishop Flores Street
 Hagatna, Guam 96910

RECEIVED
 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS

DATE: 5/31/13
 TIME: 4:50 AM PM BY: [Signature]
 FILE NO OPA-PA: 13-000

Re: NOTICE OF PENDING JUDICIAL PROCEEDING
APPEAL NO: OPA-PA-13-0006

Dear Ms. Brooks:

This office represents the A.B. Won Pat International Airport Authority, Guam (“GIAA”) in connection with the above-referenced appeal filed by DFS Guam L.P. (“DFS”) on May 30, 2013 at 12:40 p.m. (the “Appeal”). At the time DFS filed its Appeal it certified and declared that no court action was then currently pending.

However, less than two hours after DFS filed the Appeal, at 2:15 p.m., DFS filed in Guam Superior Court a 15-page complaint against GIAA and others (the “Complaint”) arising out of the same facts alleged in its Appeal. A copy of the Complaint is enclosed.

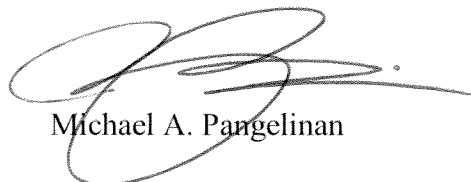
Both the Complaint and the Appeal relate to GIAA’s decision to deny DFS’s protest after GIAA concluded in a 36-page written decision that DFS’s protest was frivolous and without merit and that Lotte Duty Free Guam, LLC remains the most qualified proposer that responded to Request for Proposal No. GIAA010-FY12.

Pursuant to 2 G.A.R. § 12103(b), GIAA hereby notifies you that the Complaint, and thus an action concerning the subject of the Appeal, has been filed in court. Based on the filing of the Complaint, DFS contends that the Public Auditor must immediately stay the Appeal pending resolution of the Complaint: “In accordance with 2 GAR, Div. 4. Chap. 12 § 12103(b) . . . DFS expects that the OPA will indefinitely stay [the Appeal] in light of the now-pending judicial review of this controversy.” (Complaint, ¶ 3.)

In light of the DFS Complaint, GIAA respectfully requests that the Public Auditor issue an order regarding whether it will or will not stay the Appeal.

Very sincerely,

CALVO FISHER & JACOB, LLP


 Michael A. Pangelinan

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THOMAS C. STERLING
tcsterling@kbsjlaw.com
WILLIAM J. BLAIR
wjblair@kbsjlaw.com
**BLAIR STERLING JOHNSON &
MARTINEZ, PC**
1008 DNA Building
238 Archbishop F.C. Flores St.
Hagatna, GU 96910
Tel: (671) 477-4857
Fax: (671) 472-4290

G. PATRICK CIVILLE
pciville@guamattorneys.com
JOYCE C.H. TANG
jtang@guamattorneys.com
CIVILLE & TANG, PLLC
Suite 200, 330 Hernan Cortez Ave.
Hagatna, GU 96910
Tel: (671) 472-8868
Fax: (671) 477-2511

Attorneys for Plaintiff
DFS Guam L.P.

FILED
SUPERIOR COURT
OF GUAM

MAY 30 PM 2:15

CLERK OF COURT

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 5/31/13

TIME: 4:50 AM PM BY: [Signature]

FILE NO OPA-PA: 13-006

SUPERIOR COURT OF GUAM

HAGATNA, GUAM

CIVIL CASE NO. 0685-13

DFS GUAM L.P.,

Plaintiff,

v.

THE A.B. WON PAT INTERNATIONAL
AIRPORT AUTHORITY, GUAM, and LOTTE
DUTY FREE GUAM LLC, and THE
TERRITORY OF GUAM, and DOES 1-10,
INCLUSIVE.

Defendants.

COMPLAINT SEEKING JUDICIAL REVIEW
OF DENIAL OF RFP PROPOSAL PROTEST
AND AWARD OF OPERATING
CONTRACT, PURSUANT TO 5 GCA
§5480(a)

1 Plaintiff DFS Guam L.P. (“DFS” or “Plaintiff”) hereby files this Complaint against The A.B.
2 Won Pat International Airport Authority, Guam (“GIAA”), Lotte Duty Free Guam LLC (“Lotte”),
3 and the Territory of Guam, raising the following allegations:

4 **I. NATURE OF THE ACTION AND JURISDICTION**

5 1. DFS brings this civil action seeking judicial review of Defendant GIAA’s denial of a
6 Proposal Protest which was filed by DFS in response to Defendant GIAA’s unlawful award of an
7 operating contract to Defendant Lotte under RFP No. GIAA010-FY12. As required by *Town House*
8 *Dep’t Stores, Inc. v. Dep’t of Educ.*, 2012 Guam 25, at *31-35 (Guam Sup. Ct. 2012), DFS also herein
9 names the Territory of Guam as a Defendant. The Territory of Guam has waived its sovereign
10 immunity under 5 GCA §5480(a).

11 2. The Guam Superior Court has jurisdiction to exercise judicial review over Defendant
12 GIAA’s denial of DFS’ Proposal Protest under 5 GCA §5480(a), which states:

13 “Solicitation and Award of Contracts. The Superior Court of Guam *shall have jurisdiction*
14 over an action between the Territory and a bidder, offeror, or contractor, either actual or
15 prospective, to determine whether a solicitation or award of a contract is in accordance with
16 the statutes, regulations, and the terms and conditions of the solicitation. The Superior Court
17 *shall have such jurisdiction* in actions at law or in equity, and whether the actions are for
18 monetary damages or for declaratory, or other equitable relief.” (Emphasis added.)

19 3. While 5 GCA §5480(a) vests this Court with jurisdiction to *immediately* exercise full
20 judicial review over Defendants’ denial of DFS’ Proposal Protest, out of an abundance of caution
21 DFS has also lodged a timely administrative appeal of this denial with the Guam Office of Public
22 Accountability (“OPA”). In accordance with 2 GAR, Div. 4. Chap. 12, §12103(b)—which mandates
23 that “[i]f an action concerning the procurement under [administrative a]ppeal has commenced in
24 court, the Public Auditor shall not act on the [administrative a]ppeal except to notify the parties and
25 decline the matter due to Judicial involvement”—DFS expects that the OPA will indefinitely stay
26 that administrative appeal in light of the now-pending judicial review of this controversy. *See also,*
27 *e.g., Harbor Centre Guam Co., Ltd. etc. vs. Doris Flores Brooks, as Public Auditor, Office of Public*
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1 *Accountability*, SP0226-10, Decision and Order at 4-5 (Guam Super. Ct. April 20, 2011) (holding that
2 the OPA should stay an administrative appeal when a judicial proceeding dealing with the same
3 controversy is pending). However, in the event that the OPA were to either dismiss the
4 administrative appeal or issue a final ruling on the merits of the administrative appeal, this Court
5 would *additionally* have jurisdiction to exercise judicial review of this matter under 5 GCA §5707(a),
6 which states:

7 “Any person receiving an adverse decision, the government or any autonomous agency or
8 public corporation, or both, may appeal from a decision by the Public Auditor to the Superior
9 Court of Guam as provided in [5 GCA §5480(a)].”

10 **II. PARTIES TO THE ACTION**

11 4. Plaintiff DFS Guam L.P. is a limited partnership organized and existing under the laws
12 of Guam, with its principal place of business in Tumon, Guam.

13 5. Defendant Lotte Duty Free Guam, LLC is a limited liability company organized and
14 existing under the laws of Guam, with its principal place of business in Guam.

15 6. Defendant GIAA is a public corporation and autonomous instrumentality of the
16 Government of Guam, organized and existing under the laws of Guam, which (among other duties)
17 solicits proposals and awards contracts to the various vendors who operate within the A.B. Won Pat
18 International Airport.

19 7. As required by *Town House Dep't Stores, Inc. v. Dep't of Educ.*, 2012 Guam 25, at
20 *31-35 (Guam Sup. Ct. 2012), The Territory of Guam is also named herein as a Defendant. The
21 Territory of Guam has waived its sovereign immunity under 5 GCA §5480(a).

22 8. Defendant Does 1-10 are various as-yet-unidentified individuals (employees of
23 Defendant GIAA and/or third parties otherwise affiliated with Defendant Lotte and/or with
24 Defendant GIAA) who DFS alleges under information and belief may have participated in the
25 wrongful acts alleged herein. Once additional information has been obtained through further
26 discovery, DFS reserves the right to amend this Complaint to state the true names and capacities of
27 any such individual defendants.

1 **III. GENERAL ALLEGATIONS**

2 **Four Parties, Including DFS, Submitted Timely Proposals in Response to Defendant GIAA's**
3 **RFP.**

4 9. DFS has successfully operated the duty-free retail concession at A.B. Won Pat
5 International Airport for over three decades.

6 10. On July 19, 2012, Defendant GIAA issued a Request for Proposals (“RFP”) regarding
7 “the development, construction, and operation of a high quality specialty retail concession at [A.B.
8 Won Pat International Airport]’s Main Passenger Terminal.”

9 11. The issuance of this RFP was publicized in the *Pacific Daily News* on July 19, 23, and
10 25, 2012. It was also publicized in the *Marianas Variety* on July 19, 23, and 30, 2012.

11 12. Defendant GIAA originally set September 21, 2012 as the final deadline for
12 submitting proposals under this RFP. However, Defendant GIAA subsequently extended the final
13 deadline to October 17, 2012.

14 13. Out of the numerous parties who expressed an interest in the RFP at some stage of the
15 bidding process, four proposers—DFS, Defendant Lotte, The Shilla Duty Free, and James
16 Richardson (Guam) LLC—ultimately submitted timely proposals on or before the October 17, 2012
17 final deadline.

18 **Along with Several GIAA Board Members, One of the Proposers—Defendant Lotte—Engaged**
19 **in Flagrant and Repeated Episodes of Inappropriate Behavior During the Bidding Period.**

20 14. As has been widely reported in subsequent media accounts, two members of the GIAA
21 Board of Directors—Chairman Francisco Santos and Member Rosalynda Tolan—were part of a
22 delegation sponsored by the Guam Visitors’ Bureau (“GVB”) that participated in the inaugural Guam
23 flight of Jeju Air, which took place on September 27, 2012. The GVB delegation included a number
24 of other persons who were, and remain, highly influential in the Guam tourism industry. The date of
25 this inaugural flight is significant, in light of Defendant GIAA’s extended bidding deadline, because
26 Defendant Lotte’s proposal in response to the RFP was due just a few weeks later on October 17,
27 2012.

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1 15. During their stay in Seoul (on September 26 and 27, 2012), arrangements were made
2 for the GVB delegation to tour Defendant Lotte’s main downtown store, where they were personally
3 greeted by the President of Lotte. This tour was not on the published agenda of the delegation, but
4 was a last minute addition added at the instruction of GVB Deputy General Manager Nathan Denight.
5 This tour was suggested because John Calvo—brother of GVB Board member Eduardo “Champ”
6 Calvo—had “connections” with Defendant Lotte and wanted to “set up a meeting” with the Lotte
7 group. GVB staff, including GVB Korea Marketing Officer Felixberto S. Reyes, expressed concern
8 about the propriety of this meeting, in light of the fact that Defendant GIAA had put out the RFP and
9 Defendant Lotte was known to be an interested proposer.¹ Notwithstanding these concerns, the
10 meeting went ahead.

11 16. During one of the “free” periods on the delegation’s agenda, the GVB delegates were
12 driven to Defendant Lotte’s downtown Seoul department store, where they were met by employees of
13 Defendant Lotte and escorted to the duty free area on the top floors of the store building. They were
14 also personally greeted there by the President of Lotte. Defendant GIAA’s subsequent assertions that
15 this meeting was unconnected to earlier attempts to arrange a meeting and was merely a spontaneous
16 event are not credible; indeed, it strains credulity to believe that employees of Defendant Lotte—
17 including the President of Lotte himself—were coincidentally available to greet and escort the GVB
18 delegation for an impromptu afternoon weekday shopping trip that was allegedly “added [to the
19 Delegation’s itinerary] on the afternoon of September 26.” Shopping cards were also provided by
20 Defendant Lotte to the members of the delegation, including the two GIAA directors, and it is
21 uncontested that while the Delegates were in Defendant Lotte’s main downtown store, GVB
22 Chairman Mesa told his fellow delegates something to the effect of “choose whatever you want.”

23 17. As Defendant GIAA admitted in correspondence to DFS after conducting an
24 “investigation” in response to DFS’ Proposal Protest: “[W]hile in the Coach section of the [Lotte
25 Seoul store], [GIAA] Chairman Santos attempted to purchase a purse for his wife. Upon handing his
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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 this RFP.

1 credit card to the Lotte cashier, he was informed by the cashier that ‘Mr. Mesa will take care of it . . .’
2 According to Mr. Mesa, he informed Chairman Santos that he would pay for the purse . . . Mr. Mesa
3 arranged with Lotte to have the purchased item delivered to the Incheon Airport at the time of the
4 Delegates’ departure . . . According to Mr. Mesa, he delivered the purchased purse to Chairman
5 Santos prior to boarding the return flight to Guam . . . On October 24, 2012, after . . . being reminded
6 about the pending RFP, Chairman Santos returned the bag with the purse to Mr. Mesa who, in turn,
7 attempted to return the purse to Lotte for a refund.” While damaging, even these facts do not appear
8 to constitute a full and accurate accounting of the relevant events.

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

15 19. On September 27, when the GVB delegation arrived at Incheon Airport to board the
16 inaugural flight back to Guam, they were again met employees of Defendant Lotte, who accompanied
17 them to Defendant Lotte’s airport duty free store. They were were given additional gifts at that time,
18 and merchandise that they had selected the previous day at the Seoul store was also delivered to them
19 at the airport.

20 20. After the fact of these gifts became public, Chairman Santos and Director Tolan,
21 recognizing the highly improper appearance their respective acceptance of gifts from Defendant Lotte
22 had created, each reportedly returned the gifts to GVB. They also recused themselves from
23 participating in the approval of the GIAA evaluation committee’s recommendations as to the ranking
24 of the proposers. To date, however, there has still not been a full accounting for these gifts.

25 21. Defendant GIAA has asserted that the value of the gifts given by Defendant Lotte to
26 the GIAA board members was “nominal.” DFS strongly disputes that assertion. “Nominal value”
27 means actual worth or actual value *not exceeding* \$25, pursuant to 2 GAR 11101(6). It is DFS’
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1 understanding that in fact, the value of these gifts greatly exceeded \$25—indeed, Defendant GIAA’s
2 “investigation” revealed that the value of Director Tolan’s gift bag *alone* “is around \$200.”

3 22. Following the GIAA meeting at which Chairman Santos and Director Tolan
4 announced their respective decisions to recuse themselves, Defendant Lotte’s Guam legal counsel,
5 Cesar Cabot, publicly admitted that Defendant Lotte had provided gifts to the GVB delegation. Mr.
6 Cabot claimed that Defendant Lotte was not aware of the fact that GIAA board members were part of
7 the GVB delegation—but given the circumstances of the meeting, and the aforementioned objections,
8 this qualification lacks credibility. In particular, it strains credulity that neither GVB Chairman Mesa
9 (who assisted Defendant Lotte with engaging consultants in connection with the RFP) nor Champ
10 Calvo (whose brother was connected to Defendant Lotte) were aware that their fellow delegation
11 members included high-ranking GIAA officials.

12 23. As part of its proposal, Defendant Lotte was required to submit various sworn
13 affidavits. One of those affidavits required Defendant Lotte to attest, under penalty of perjury, that
14 neither it nor any of its officers, representatives, agents, subcontractors or employees had offered,
15 given or agreed to give any Government of Guam employee any payment, gift, or other gratuity in
16 connection with its proposal. The giving of gifts by Defendant Lotte, and the circumstances
17 surrounding those gifts, indicate that this sworn supporting affidavit was false.

18 24. Similarly, Defendant Lotte was required to swear, under penalty of perjury, that
19 neither it nor any of its officers, representatives, agents, subcontractors or employees had knowingly
20 influenced any government of Guam employee to breach any of the ethical standards set forth in 5
21 GCA, Chapter 5, Article 11. 5 GCA §5630(d) provides that:

22 “It shall be a breach of ethical standards for any person who is or may become a contractor, a
23 subcontractor under a contract to the prime contractor or higher tier contractor, or any person
24 associated therewith, to offer, give or agree to give any employee or agent of the Territory or
25 for any employee or agent of the Territory to solicit or accept from any such person or entity
26 or agent thereof, a favor or gratuity on behalf of the Territory whether or not such favor or
27 gratuity may be considered a reimbursable expense of the Territory, during the pendency of
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1 any matter related to procurement, including contract performance warranty periods.”
2 The giving of valuable gifts and other gratuities to government officials during the pendency of the
3 RFP falls squarely within this proscription, notwithstanding Defendant Lotte’s sworn affidavit to the
4 contrary.

5 25. On information and belief, DFS is also aware that Defendant Lotte has engaged
6 several individuals as “consultants” who are to be compensated on a contingent basis in connection
7 with their efforts to secure this award for Defendant Lotte. Defendant Lotte reportedly hired Danny
8 Leon Guerrero—who was previously convicted of bribing an employee of a federally-funded agency
9 and wire fraud^[1]—as a consultant in this matter after Leon Guerrero promised Defendant Lotte that
10 he could help them win the award. On information and belief, Defendant Lotte has also committed to
11 pay a “success fee” to Anthony Sgro one month after the start of Defendant Lotte’s operations at
12 Guam Airport,² and Defendant Lotte has also reportedly committed to pay Joseph L. Cruz a similarly
13 structured “success fee” for his assistance in this matter as well.

14 **Notwithstanding These Well-Documented Episodes, Defendant GIAA First Found Defedant**
15 **Lotte to be a Responsible and Responsive Proposer, and then Selected Defendant Lotte as the**
16 **“Most Qualified Proposer” Under Highly Irregular Circumstances.**

17 26. Ostensibly to protect the confidentiality of the contents of the various proposals in
18 light of these widely publicized and highly troubling facts, the evaluation committee did not disclose
19 the identities of the four proposers when it ranked their proposals. Instead, the committee used the
20 designations “Proposer A” through “Proposer D.” Those remaining GIAA Board Members who did
21 not recuse themselves were thus supposed to approve these rankings on an “anonymous” basis. At
22 the March 28, 2013 board meeting, however, Director Ed Untalan stated that he had personally
23 reviewed each of the four proposals, *with the identities of the proposers included*, and proceeded to
24 comment on them in general terms. Indeed, as Defendant GIAA’s “investigation” itself noted, each

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26 ¹ *United States v. Danny Leon Guerrero*, 847 F.2d 1363 (9th Cir. 1988).

27 ² DFS is also aware that Anthony Sgro had a meeting with GIAA Director Gerber at a Chili’s
28 Restaurant in Tamuning, Guam on April 15, 2013.

1 of the remaining directors was apparently given the opportunity to review the proposals and form
2 their own views as to their relative merits—“the non-abstaining GIAA Board members were given an
3 opportunity prior to the March 28, 2013 Board meeting to review all proposals *with identities of the*
4 *proposers fully disclosed therein.*” (Emphasis added.) In reality, then, there was nothing
5 “anonymous” about the process by which the ranking recommendations were approved.

6 27. At the April 12, 2013 board meeting, Defendant GIAA officially declared that
7 Defendant Lotte was found to be a responsive and responsible proposer within the meaning of the
8 RFP, notwithstanding the highly troubling and widely publicized misconduct enumerated above. As
9 noted above, however, the procedure followed by Defendant GIAA in approving the
10 recommendations of the evaluation committee as to the ranking of the four proposers was nothing
11 more than an ad hoc process devised by Defendant GIAA’s legal counsel as a means to superficially
12 (but ineffectively) sanitize this procurement, in order to deal with the taint caused by Defendant
13 Lotte’s improper actions and the resulting fallout. The ad hoc procedure itself was unprecedented,
14 not authorized Guam procurement law or regulations, and not disclosed in the RFP.

15 28. This ad hoc procedure was also aimed at avoiding the possible disqualification of one
16 or more of the remaining three directors who voted to approve the evaluation committee’s rankings.³
17 DFS has, for example, received information that the sister of one of those three directors, GIAA
18 Director Martin Gerber, reportedly has a business relationship with Defendant Lotte.⁴ Had the
19 identity of Defendant Lotte been formally revealed when the recommended rankings were submitted
20 for approval—as it would have been under normal circumstances—Director Gerber would

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23 ³ DFS reiterates that it has not yet been provided the opportunity to review either Defendant Lotte’s
24 proposal or the memorandum which Defendant GIAA will be required to prepare in accordance
25 with 2 GAR §3114(m), explaining the basis of an award of the contract to Defendant Lotte
26 notwithstanding this protest.

27 ⁴ Director Gerber’s sister is also married to John Calvo, the person with “connections to Lotte”
28 who first suggested setting up a meeting with the Lotte group. John Calvo’s brother, Champ
Calvo, is the senior named partner of Calvo Fisher Jacob, the law firm which serves Defendant
GIAA’s legal counsel and which devised the ad hoc process in an effort to guide the board
through the ethical shoals created by Defendant Lotte’s improper actions.

1 presumably have been obliged to recuse himself,⁵ which would have left the GIAA board without a
2 quorum. The ad hoc procedure thus also appears to have been designed to insure the existence of a
3 quorum, notwithstanding apparent conflicts of interest.

4 **Defendant GIAA Subsequently Rejected DFS' Proposal Protest, and Took the Additional and**
5 **Unwarranted Step of Affirmatively Clearing All GIAA Board Members of Any Wrongdoing.**

6 29. In response to DFS' ongoing Proposal Protest, Defendant GIAA conducted an
7 "investigation" into the serious allegations raised therein (and reiterated herein). In a letter sent to
8 DFS on May 17, 2013, Defendant GIAA relayed the results of its "investigation" and denied DFS'
9 Proposal Protest on all grounds. DFS believes that that this "investigation" was neither full nor fair,
10 and was ultimately compromised by a fatal conflict of interest. In responding to (and denying) the
11 protest, and in fully ratifying all of the actions undertaken by various GIAA Board Members,
12 Defendant GIAA made numerous affirmative findings to the effect that the GIAA Board of Directors
13 had not engaged in any wrongdoing whatsoever; in effect, Defendant GIAA's investigation took the
14 additional and unwarranted step of affirmatively exonerating GIAA board members and GIAA staff
15 on the road to denying DFS' protest. The fact that it was *GIAA staff members* who were solely
16 charged with investigating serious allegations that implicated their own supervisors (the GIAA Board
17 of Directors) raises deeply troubling questions about the impartiality and fairness of the
18 "investigative" process that underpins Defendant GIAA's findings.

19 30. Furthermore, the highly expedited timeline surrounding the execution and
20 announcement of its putative operating contract with Defendant Lotte—DFS' Proposal Protest was
21 denied on Friday, May 17; the putative contract was signed on Saturday, May 18; and Defendant
22 GIAA issued a public press release announcing the putative award on Monday, May 20—strongly
23 suggests that Defendant GIAA also failed to observe the requirement under 5 GCA § 5425(g) that it
24 "not proceed further with the solicitation or with the award of [a] contract prior to final resolution of
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26 ⁵ As noted above, DFS has also learned that Director Gerber was seen having lunch with Anthony
27 Sgro on Monday, April 15, 2013 at the Chili's Restaurant in Tamuning. Mr. Sgro is known to be
28 connected with Lotte, and at that time the award of the concession contract was still pending, so
such contact was potentially improper.

1 [a pending protest].” The timing of Defendant GIAA’s actions also provided DFS with no
2 opportunity to appeal Defendant GIAA’s denial of the Proposal Protest, because DFS received notice
3 of the denial only after the close of business on Friday, May 17, and the signing of the putative
4 contract occurred on Saturday, May 18, before the start of the next business day (Monday, May 20).

5 31. On May 23, DFS sent Defendant GIAA a cease-and-desist letter requesting that
6 Defendant GIAA refrain from proceeding with any actions taken under or in furtherance of the
7 putative operating contract with Defendant Lotte, pending a final resolution of the Proposal Protest
8 pursuant to 5 GCA §5425(g). In this letter, DFS also pointed out that Defendant GIAA’s failure to
9 give DFS even a single business day to appeal its denial of the Proposal Protest—instead notifying
10 DFS of this denial very late on a Friday afternoon, and then signing a putative contract with
11 Defendant Lotte on Saturday—constituted a particularly egregious violation of 5 GCA §5425(g).
12 DFS also noted that because the GIAA Board of Directors had not given final approval to the putative
13 contract signed with Defendant Lotte, this putative award was not yet a final award in any event.

14 **FIRST CAUSE OF ACTION**

15 32. DFS hereby realleges, and incorporates by reference, each and every allegation set
16 forth in paragraphs 1 through 31, inclusive.

17 33. Declaratory relief is appropriate here because the rights and obligations accorded to
18 the four proposers—including DFS and Defendant Lotte—and Defendant GIAA under the RFP and
19 the Guam Procurement Code (“GPC”) are at issue.

20 34. An actual controversy has arisen and now exists between DFS and Defendants Lotte
21 and GIAA concerning their respective rights and obligations under the terms of the RFP and the
22 provisions of the GPC. Specifically, DFS alleges that Defendants Lotte and GIAA both violated
23 various provisions of the RFP and the GPC during the pendency of the RFP, and, in so doing, that
24 Defendants failed to discharge their obligations and duties and infringed upon the rights accorded to
25 *all* proposers (including DFS) under the RFP and the GPC.

26 35. DFS desires a judicial determination as to the parties’ rights and obligations under the
27 RFP and the GPC, and a declaration that Defendant Lotte is a non-responsible proposer under the
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1 terms of the current RFP; that Defendant Lotte’s operative current proposal is non-responsive to the
2 current RFP; that the putative operating contract between Defendant GIAA and Defendant Lotte was
3 void *ab initio* and remains void as a matter of law; that the validity of the current RFP process has
4 been fatally undermined—if not in substance, as Defendant GIAA asserts in correspondence, than
5 certainly in appearance—by the various improprieties and irregularities outlined above; that
6 Defendant GIAA must accordingly disregard the rankings which were assigned to the various
7 proposers under the current RFP; that in light of these fatal flaws in the current RFP, a new RFP
8 process must be instituted in an expeditious manner; that as a non-responsible proposer under the
9 current RFP (and as the source of many of these fatal flaws), Defendant Lotte cannot be a responsible
10 proposer under this new RFP; and that in light of Defendant GIAA’s clear and sustained bias against
11 DFS during the bidding period and in its inadequate response to DFS’ Proposal Protest, an
12 independent monitor must be appointed to supervise Defendant GIAA’s future conduct in connection
13 with this new RFP process.

14 36. A judicial determination is necessary and appropriate at this time in order for all
15 proposers—including DFS and Defendant Lotte—to ascertain their respective rights and obligations,
16 as well as the rights and obligations of Defendant GIAA, which are accorded under the RFP and the
17 GPC. The parties’ relationship is ongoing, and a judicial determination would inform the parties’
18 future conduct. In addition, a judicial determination is necessary and appropriate at this time in order
19 to eliminate uncertainties in the parties’ relationship with each other; to eliminate uncertainties in the
20 parties’ relationship with customers; and for the sake of vindicating the transparency and fairness of
21 the procurement process in both substance and appearance.

22 **SECOND CAUSE OF ACTION**

23 37. DFS hereby realleges, and incorporates by reference, each and every allegation set
24 forth in paragraphs 1 through 31, inclusive.

25 38. 5 GCA §5633 states that “[it] shall be a breach of ethical standards for a person to be
26 retained, or to retain a person, to solicit or secure a territorial contract upon an agreement or
27 understanding for a commission, percentage, brokerage or contingent fee, except for retention of
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1 bona fide employees or bona fide established commercial selling agencies for the purpose of securing
2 business.”

3 39. Upon information and belief, and as detailed above, DFS alleges that Defendant Lotte
4 retained third parties (who do not qualify as either “bona fide employees” or “bona fide established
5 commercial selling agents”) with the understanding that they would interface with the GIAA on
6 Defendant Lotte’s behalf in connection with this RFP, and receive remuneration for their services
7 contingent upon Defendant Lotte actually winning the contract. Violations include, but are not
8 necessarily limited to, Defendant Lotte’s promised contingency fee payments to Danny Leon
9 Guerrero, Joseph Cruz, and Anthony Sgro.

10 **THIRD CAUSE OF ACTION**

11 40. DFS hereby realleges, and incorporates by reference, each and every allegation set
12 forth in paragraphs 1 through 31, inclusive.

13 41. 5 GCA §5630 states that “[it] shall be a breach of ethical standards for any person to
14 offer, give, or agree to give any [GIAA] employee . . . or for any [GIAA] employee to solicit,
15 demand, accept, or agree to accept from another person, a gratuity . . . in connection with any
16 decision, approval, approval . . . [or] recommendation . . . pertaining to any . . . contract . . . or
17 solicitation or proposal therefor.”

18 42. As detailed above, Defendants GIAA and Lotte have repeatedly and flagrantly
19 violated this provision. Violations include, but are not necessarily limited to, the acceptance by
20 GIAA Board Members of various gifts and gratuities offered by Defendant Lotte during the GVB
21 delegation’s trip to Korea on September 26 and 27, 2012.

22 **FOURTH CAUSE OF ACTION**

23 43. DFS hereby realleges, and incorporates by reference, each and every allegation set
24 forth in paragraphs 1 through 31, inclusive.

25 44. 5 GCA §5625 mandates that in the interest of preserving “public trust,” “[p]ublic
26 employees much discharge their duties impartially so as to assure fair competitive access to
27 governmental procurement by responsible contracts. Moreover, they should conduct themselves in
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1 such a manner as to foster public confidence in the integrity of the territorial procurement
2 organization.”

3 45. As detailed above, Defendant GIAA has repeatedly and flagrantly violated this
4 provision—and in doing so, it has seriously undermined the “public trust” in the GIAA as a public
5 corporation and autonomous instrumentality of the Government of Guam. Violations include, but are
6 not necessarily limited to, GIAA Board Members’ acceptance of gifts and gratuities offered by
7 Defendant Lotte; the inappropriate, unauthorized, and ad hoc procedure adopted by the GIAA Board
8 in accepting the recommendations of the evaluation committee; and Defendant GIAA’s transparently
9 self-serving, fatally conflicted, and ultimately insufficient “investigation” in response to DFS’
10 Proposal Protest, which culminated in its wrongful denial of DFS’ Proposal Protest.

11 **FIFTH CAUSE OF ACTION**

12 46. DFS hereby realleges, and incorporates by reference, each and every allegation set
13 forth in paragraphs 1 through 31, inclusive.

14 47. Section 15207 of 4 GCA, Ch. 15, provides that “[i]n addition to any other penalty
15 provided by law, any contract entered into by the Territory in violation of this Chapter, is voidable by
16 the Territory.” (Emphasis added.)

17 48. As detailed above, Defendants GIAA and Lotte have signed a putative operating
18 contract under the RFP. Although the GIAA Board has not yet voted to approve this contract—a
19 state of affairs which independently renders this putative operating contract legally null—the contract
20 was in fact void *ab initio* on account of the numerous instances in which the Defendants violated
21 Guam law during the bidding period.

22 **IV. PRAYER FOR RELIEF**

23 WHEREFORE, DFS now respectfully requests that this Court grant judgment against
24 Defendants on the counts detailed above, and issue the following relief:

- 25 1. Find that Defendant Lotte is a non-responsible proposer under the terms of the current
26 RFP;
- 27 2. Find that Defendant Lotte’s operative current proposal is non-responsive to the current
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1 RFP;

2 3. Find that the putative operating contract between Defendant GIAA and Defendant
3 Lotte was void *ab initio* and remains void as a matter of law;

4 4. Issue a permanent injunction prohibiting Defendant GIAA and Defendant Lotte from
5 taking any steps under, or in furtherance of, this void putative operating contract;

6 5. Find that the validity of the current RFP process was fatally undermined—if not in
7 substance than, at a minimum, in outward appearance—by the various improprieties and irregularities
8 outlined above, and accordingly mandate that Defendant GIAA must disregard the rankings which
9 were assigned to the various proposers under the RFP;

10 6. Mandate that a new RFP process be instituted in an expeditious manner;

11 7. Issue a permanent injunction prohibiting Defendant Lotte (as a nonresponsible
12 proposer, and as the source of many of the fatal flaws with the current RFP) from responding to this
13 new RFP;

14 8. Appoint an independent monitor be appointed to supervise Defendant GIAA's future
15 conduct in connection with the new RFP process;

16 9. Award DFS reasonable costs and fees as provided for in 5 GCA §5425(h) (“In
17 addition to any other relief or remedy granted under . . . Subsection (a) §5480 of this Chapter . . .
18 when a protest is sustained, the protestant shall be entitled to the reasonable costs incurred in
19 connection with the solicitation and protest, including bid preparation costs . . . if . . . the protestant
20 should have been awarded the contract under the solicitation but was not, or there is a reasonable
21 likelihood that the protestant may have been awarded the contract but for the breach of any ethical
22 obligation imposed [under the GPC] or the willful or reckless violation of any applicable
23 procurement law or regulation.”); and

24 10. Any other and further relief as the case may require, and as this Court may deem to be
25 just and proper.

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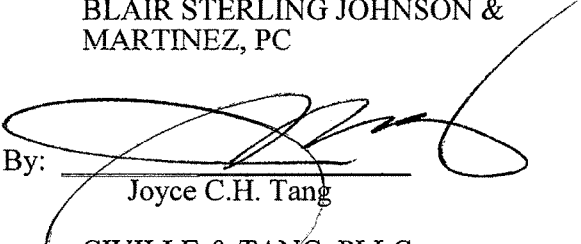
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Dated: May 30, 2013

Respectfully submitted,

By: 
William J. Blair

BLAIR STERLING JOHNSON &
MARTINEZ, PC

By: 
Joyce C.H. Tang

CIVILLE & TANG, PLLC

Attorneys for Plaintiff
DFS Guam L.P.