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10 **OFFICE OF PUBLIC ACCOUNTABILITY**
11 **PROCUREMENT APPEALS**

13 In the Appeal of:
14 DFS Guam L.P.,
15 Appellant.

APPEAL NO. OPA-PA-13-006

**APPELLANT DFS GUAM L.P.'S
RESPONSE TO A.B. WON PAT
INTERNATIONAL AIRPORT
AUTHORITY, GUAM'S OBJECTION TO
THE OFFICE OF PUBLIC
ACCOUNTABILITY HEARING APPEAL**

**DECLARATION OF MAURICE M. SUH
SUBMITTED CONCURRENTLY**

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1 I. INTRODUCTION

2 On December 20, 2013, less than a week before the Office of Public Accountability (“OPA”)
3 issued its December 26, 2013 Order declining to lift its stay in the instant appeal, Respondent The
4 A.B. Won Pat International Airport, Guam (“GIAA”) filed an Objection to the OPA Hearing Appeal
5 (“Objection”). In that filing, GIAA objected to the Public Auditor hearing this appeal because,
6 among other reasons, the Public Auditor allegedly “reveal[ed] what appears to be a bias in favor of
7 DFS” and GIAA alleged various events “raise serious questions regarding the impartiality of these
8 proceedings.”¹ (Obj. at 1.) The OPA has not yet acted on the Objection. This is Appellant DFS
9 Guam, L.P.’s (“DFS”) first opportunity to respond to the Objection and DFS asserts that there are no
10 grounds to disqualify the Public Auditor.

11 GIAA’s arguments for why the Public Auditor should not hear this appeal are meritless.
12 Stripped of its rhetoric and unsupported but oft-stated conspiracy theories, GIAA identifies three
13 issues that it believes form the bases for why the OPA should not hear DFS’s Appeal: (1) that David
14 J. Lujan’s law firm, which employs the Public Auditor’s husband as a paralegal, has been “secretly”
15 working for DFS; (2) that DFS has an “inside track” with the Public Auditor because DFS sent Lotte
16 Duty Free Guam LLC (“Lotte”) a letter indicating that DFS would continue to pursue its claims; and
17 (3) that the Public Auditor has made certain public comments that relate to legal issues implicated in
18 DFS’s Appeal. GIAA’s allegations are groundless and are especially inappropriate because they are
19 based on sheer speculation. Indeed, GIAA admits in its Objection that it is operating on a limited
20 understanding of the facts. (See Obj. at 4.) This “shoot first, ask questions later” approach from any
21 party should not be accepted, but especially not from a government of Guam agency.²

22 The actual facts, as set forth in the accompanying Declaration of David J. Lujan, do not meet
23 the legal standard for disqualification under the governing statute, 5 G.C.A. § 5428(a), or any of the

24 _____
25 ¹ Because there is no provision in the OPA Rules or Guam Procurement Law to “object” to the
26 Public Auditor’s capacity to hear an appeal, DFS understands and treats GIAA’s motion as one
27 seeking to disqualify the Public Auditor.

28 ² It is also disappointing that a government agency would lash out at a private party, its counsel,
and a government official with no factual basis to do so.

1 relevant OPA decisions. GIAA does not even mention the relevant legal standard for
2 disqualification, much less apply it. GIAA’s motion and its repeated accusations of bias are clearly
3 an attempt to either intimidate the OPA into ruling in GIAA’s favor or lay the foundation for an
4 appeal on the grounds of bias, should the OPA rule against GIAA. GIAA’s contentions are without
5 merit.

6 II. STATEMENT OF FACTS

7 Since January 2003, James Brooks has been employed at Lujan, Aguiqui & Wolff, LLP (the
8 “Lujan Firm”) as a paralegal (Declaration of David J. Lujan³ (“Lujan Decl.”) at ¶ 5), not as an
9 “unlicensed research attorney,” as GIAA asserts (Obj. at 1). Mr. Brooks does not have an
10 employment contract with the Lujan Firm. Rather, he is a “strictly salaried employee.” (Lujan Decl.,
11 ¶¶ 5-6.) As such, Mr. Brooks’ compensation at the Lujan Firm “is not impacted in any way by the
12 outcome of any case or client relationship.” (*Id.*, ¶ 7.)

13 Additionally, the Lujan Firm established and continues to maintain an “ethical wall” that
14 “prohibits Mr. Brooks from having any access to any information that the Firm has regarding the
15 [DFS] matter whether it arises from [the instant appeal] or the Superior Court [action].” (*Id.*, ¶ 11.)
16 This wall was established because Mr. Lujan understood that “potential for a conflict might arise to
17 [the Public Auditor] if Mr. Brooks was in any way involved” in the DFS representation. (*Id.*, ¶ 9.)
18 Mr. Brooks has “abided by the ethical wall *and has had no involvement*” in the Lujan Firm’s
19 representation of DFS, “nor has he had access to any materials reviewed by Mr. Aguiqui or [Mr.
20 Lujan] in providing advice to DFS.” (*Id.*, ¶ 12 (emphasis added).)

21 Aside from submitting his declaration, Mr. Lujan has “not participated in any of the briefing
22 or the proceedings in Superior Court, nor [has he] participated in any of the briefing or proceedings
23 before the Public Auditor.” (*Id.*, ¶ 8.) Additionally, Mr. Lujan has not participated in any of the
24 proceedings before the Guam Supreme Court—his declaration pre-dated this activity. (Declaration of
25 Maurice M. Suh (“Suh Decl.”), ¶ 50.) Similarly, Ignacio Aguiqui, Mr. Lujan’s partner and the only

26
27 ³ David J. Lujan, the senior and founding partner of the law firm of Lujan, Aguiqui & Wolff, LLP.
28

1 other individual at the Lujan Firm who worked on the DFS representation, also “has not participated
2 in any of the briefing or the proceedings before the Superior Court, nor has he participated in any of
3 the briefing or proceedings before the Public Auditor” and has not participated in any of the activities
4 before the Guam Supreme Court. (Lujan Decl., ¶ 10; Suh Decl., ¶ 51.)

5 These *facts*, backed by testimony sworn under penalty of perjury, make plain that the Public
6 Auditor’s husband’s role at the Lujan Firm provides absolutely no grounds requiring her recusal.

7 III. ARGUMENT

8 A. There Is No Basis For The Disqualification Of The Public Auditor Under The Relevant 9 Legal Authorities.

10 Conspicuously absent from GIAA’s motion is any mention of the governing statute. That
11 statute, 5 G.C.A. § 5628, and the OPA decisions interpreting it, make clear that the current facts—as
12 opposed to the innuendo and speculation relied upon by GIAA—do not warrant disqualification. 5
13 G.C.A. § 5628 reads, in relevant part, as follows:

14 (a) Conflict of Interest. It shall be a breach of ethical standards for any employee to
participate directly or indirectly in a procurement when the employee knows that:

15 (1) the employee or any member of the employee’s immediate family has a financial
16 interest pertaining to the procurement;

17 (2) a business or organization in which the employee, or any member of the
employee’s immediate family, has a financial interest pertaining to the procurement;
18 or

19 (3) any other person, business or organization with whom the employee or any
20 member of the employee’s immediate family is negotiating or has an arrangement
concerning prospective employment is involved in the procurement.

21 Section 5628(e) defines the term “financial interest” in the following tri-partite manner:

22 (1) ownership of any interest or involvement in any relationship from which, or as a result of
23 which, a person within the past year has received, or is presently or in the future entitled to
receive, more than Two Thousand Five Hundred Dollars (\$2,500) per year, or its equivalent;

24 (2) ownership or such interest in any property or any business as may be specified by the
Ethics Commission; or

25 (3) holding a position in a business such as an officer, director, trustee, partner, employee, or
26 the like, or holding any position of management.

27 Here, the Public Auditor’s immediate family member in this case, her husband James Brooks,
28 has no financial stake in the outcome of the instant appeal. (Lujan Decl., ¶¶ 5-7.) Mr. Brooks, a

1 paralegal at the Lujan Firm, is paid a fixed salary regardless of how the Lujan Firm fares in any of its
2 representations, including its limited representation of DFS. (*Id.*, ¶¶ 6-7.) Finally, aside from simply
3 being told that the Lujan Firm is representing DFS in connection with the RFP (but not in any of the
4 litigation), Mr. Brooks has been “screened” from this representation, meaning that he has had no
5 involvement or communication regarding the Lujan Firm’s representation of DFS.

6 Further, neither Mr. Brooks nor anyone from the Lujan Firm will be appearing before the
7 Public Auditor in this appeal. The Lujan Firm, which was retained by DFS to provide general advice
8 with respect to the instant procurement, did not appear in the court proceedings between the parties,
9 has not appeared before the OPA, and is not expected to appear in these or any future proceedings
10 regarding the procurement at issue. (Lujan Decl., ¶ 8.)

11 On this factual record, recusal simply is not warranted under 5628(a) or by the few decisions
12 that have applied this statute or otherwise considered the recusal issue. *See also In the Appeal of*
13 *Pacific Data Systems, Inc.*, Appeal No. OPA-PA-12-011, Decision Re: Purchasing Agency’s Request
14 for Disqualification (OPA Jul. 9, 2012) (the Lujan Firm was disqualified from acting as the hearing
15 officer in the OPA proceedings, but the Public Auditor was not, where it was determined that the
16 Lujan Firm had represented a party with interests adverse to one of the parties in the OPA
17 proceedings).

18 While the Public Auditor previously has recused herself from hearing appeals involving her
19 husband and stepson, the facts of those cases stand in stark contrast to the facts here. In *In the Appeal*
20 *of Far East Equipment Company, LLC*, the Public Auditor’s husband had performed legal research
21 on the issues before the OPA. *See* Appeal No. OPA-PA-08-001, Order of Dismissal (OPA Jan. 31,
22 2008). In this case, Mr. Brooks has not, and will not, perform any legal research on issues before the
23 OPA.

24 Similarly, in *In the Appeal of Teleguam Holding, LLC dba GTA Telecom*, the Public
25 Auditor’s stepson, Terrence Brooks, was the General Counsel for GTA Telecom, although he was not
26 involved or associated with the appeal before the OPA. Appeal No. OPA-PA-10-002, Decision and
27 Order re Purchasing Agency’s Motion for the Public Auditor to Recuse Self (“D&O”) at 2-3. The
28

1 Public Auditor found that her stepson possessed a financial interest in the procurement because he
2 had “likely been paid more than two-thousand-five-hundred [dollars] (\$2,500) in the past year by
3 [GTA Telecom].” *Id.* at 3. As a result, she concluded that she “had the ethical duty not to participate
4 in the appeal because [her stepson], who is a member of her immediate family, has a financial interest
5 in this matter because he is one of the Appellant’s legal counsels.” *Id.* In contrast to her stepson in
6 *Teleguam Holdings* who was General Counsel for Teleguam Holding and had a financial interest in
7 the procurement at issue in that appeal, Mr. Brooks never has served as DFS’s counsel and has not
8 received any compensation from DFS in exchange for any legal services. Thus, unlike the Public
9 Auditor’s stepson in *Teleguam Holdings*, Mr. Brooks has no such financial interest in the
10 procurement at issue in this appeal that would justify recusal—Mr. Brooks’ salary as a paralegal at
11 the Lujan Firm is too remote to fall under the “financial interest” prohibition of § 5628(e). *See*
12 *Rodriguez-Vilanova v. Stryker Corp.*, 987 F. Supp. 2d 153, 155-57 (D. Puerto Rico 2013) (finding
13 that the judge was not required to recuse himself simply because his son was an associate at one of
14 the law firms appearing before him and listing cases in support of this finding).

15 That the plain language of the statute and various legal authorities all militate against the
16 Public Auditor recusing herself in this appeal only comports with common sense. It would lead to
17 considerable mischief if the Public Auditor were forced to disqualify herself solely because her
18 husband works at the Lujan Firm (as is the case here). Were this the rule, any party could avoid OPA
19 review and go directly to the Superior Court—the very practice GIAA and Lotte have decried in the
20 court proceedings—simply by hiring the Lujan Firm, citing the alleged “conflict,” and proceeding
21 directly to Superior Court. Obviously, such a rule does not exist, but is the inevitable result of the
22 course urged by GIAA.

23 While the attacks on DFS’s counsel are to be expected from the Calvo Firm as part of that
24 firm’s standard *modus operandi*, the intemperate remarks and innuendo against the Public Auditor
25 are surprising. Guam is a small jurisdiction and conflict issues no doubt arise more frequently here
26 than in larger jurisdictions. Given the Calvo Firm’s very liberal reading of conflict issues when it
27 comes to its own interests, one might have expected it at least to take a reasoned approach rather than
28

1 launch a blistering attack on the personal integrity of the Public Auditor. There is no small amount of
2 irony in GIAA's cries of indignation given GIAA's and the Calvo's Firm's cavalier approach to their
3 own conflicts. Indeed, GIAA was directly confronted with these conflict issues (*see* Suh Decl., Ex.
4 56), which did not deter its conduct. It therefore cannot sincerely believe that OPA is violating the
5 ethical standards notwithstanding its protestations. For example, the Calvo Firm was retained by and
6 has been advising GIAA in connection with RFP No. GIAA 010-FY12 ("RFP"), the procurement at
7 issue, and has been defending GIAA in the current appeal and related court proceedings. Critically,
8 the Calvo Firm advised GIAA in its administration of the RFP and its decision to award the bid to
9 Lotte. (*See generally* Suh Decl., Exs. 49 to 52.) The Calvo Firm also was advising GIAA regarding
10 its evaluation of DFS's procurement protests, including in the agency's denial of DFS's first protest.
11 (*Id.*, Ex. 53 at pp. 1-8; *see also id.*, Ex. 2 at pp. 31, 33-34.) The Calvo Firm has held itself out to
12 represent GIAA in connection with respect to DFS's second and third procurement protests as well.
13 (*Id.*, Ex. 54 at p. 1, Ex. 55 at p. 1.) In other words, the Calvo Firm has been advising GIAA
14 throughout this process, including in GIAA's determinations of DFS's and Lotte's respective rights
15 and the merits of DFS's procurement protests.

16 That the Calvo Firm itself has been hopelessly conflicted throughout this process only
17 became apparent because DFS issued various Sunshine Act requests, not because GIAA or the Calvo
18 Firm ever disclosed them.⁴ First, Champ Calvo's brother, John Calvo, appears to have a direct stake
19 in the Airport concession awarded to Lotte by virtue of a relationship or, at the very least, an
20 attempted relationship with Lotte regarding the beverage distribution and insurance aspects of the
21 Airport concession. (*Id.*, Ex. 2 at pp. 32-33.) Further, John Calvo was identified as an individual
22 who pushed for the Guam Visitors Bureau ("GVB") delegation, which included two members of the
23 GIAA board of directors, to meet with Lotte executives in direct violation of the terms of the RFP.
24 (*Id.*, Ex. 2 at p. 14, 16-17, Ex. 57 at p. 1.) John Calvo pushed for this visit even though he knew that

26 ⁴ On May 7, 2013, DFS sent GIAA a letter raising concerns about the Calvo Firm's various
27 conflicts of interest. A true and correct copy of that letter is attached as Exhibit 56 to the Suh
28 Declaration.

1 Lotte was a likely bidder for the RFP, upon which members of the GIAA board would be voting.
2 (*See id.*, Ex. 2 at p. 14, 16-17, Ex. 57 at pp. 1-2.) It was only after other GVB officials balked at this
3 plain violation of the clear terms of the RFP that John Calvo backed off this attempt. (*Id.*, Ex. 2 at p.
4 14, 16-17, Ex. 57 at pp. 2-3.) John Calvo’s conduct, which was evaluated by Champ Calvo and the
5 Calvo Firm, is at the core of DFS’s first procurement protest. Thus, the Calvo Firm was tasked with
6 advising on the propriety of the actions of its founding and managing partner’s brother, who appears
7 to have aligned himself with interests directly adverse to DFS. The Calvo Firm continued in its
8 representation of GIAA despite this obvious conflict, and neither the Calvo Firm nor GIAA disclosed
9 it.

10 Similarly, as part of its first procurement protest, DFS challenged the GIAA Board of
11 Directors’ attempt to paper over the fundamental defects in GIAA’s administration of the
12 procurement at issue by implementing certain “ad hoc” procedures that were ineffective and
13 amounted to little more than window dressing. (*Id.*, Ex. 18 at pp. 7-9.) One of the GIAA board
14 members involved in this flawed process was Martin Gerber, the brother of Janet Calvo, yet another
15 family member of Champ Calvo. (*Id.*, Ex. 2 at pp. 28-29.) Thus, the Calvo Firm again was tasked
16 with passing judgment on the conduct of yet another individual closely related to Champ Calvo.

17 Neither the Calvo Firm, nor GIAA ever indicated to DFS or the public that the Calvo Firm
18 was advising GIAA in its evaluation of Champ Calvo’s close relatives’ conduct. Although there is no
19 evidence of this in the record, one might charitably assume that the Calvo Firm and GIAA at least
20 considered the the conflicts posed by these familial relationships and questioned the propriety of
21 Champ Calvo or the Calvo Firm serving in a capacity that required them to evaluate the conduct of
22 Champ Calvo’s close family members’ conduct before concluding that there was nothing
23 inappropriate about this arrangement. It is not clear why the Calvo Firm and GIAA would not
24 assume the Public Auditor similarly has in good faith considered the disqualification issue with the
25 same care and diligence. As it stands, when viewed in the larger context of their own conduct, the
26 Calvo Firm’s and GIAA’s protestations about the Public Auditor’s alleged conflicts and motivations,
27 which are far more benign than GIAA’s actual conflicts, ring utterly hollow and should be viewed as
28

1 yet another litigation tactic by GIAA to avoid a hearing on the merits of its various misconduct before
2 a truly independent and un-conflicted tribunal.⁵

3 As set forth above, neither Section 5628 nor the relevant OPA decisional authority compels
4 the Public Auditor to recuse herself.

5 **B. The Speculation And Innuendo Advanced By GIAA Falls Far Short Of Legitimate**
6 **Grounds For Recusal.**

7 In addition to GIAA failing to satisfy the disqualification requirements, the three reasons
8 identified by GIAA for why the Public Auditor is biased should be rejected because they are each
9 based on speculation, lack factual basis and are otherwise without merit.

10 **1. There is nothing improper or “secret” about DFS’s retention of David Lujan.**

11 GIAA takes issue with the time and manner of DFS’s December 13, 2013 disclosure that it
12 had retained Mr. Lujan to generally advise it regarding the RFP at issue in this appeal. GIAA
13 suggests that its retention of the Lujan Firm is somehow inappropriate in light of the number of law
14 firms DFS already retained. This argument is silly. There is nothing inappropriate about DFS’s—or
15 any other party’s—decision to retain as many or as few lawyers as it desires to assist in its legal
16 matters.

17 GIAA also dramatically refers to DFS’s retention of Mr. Lujan as a “secret.”⁶ (Obj. at 5.)
18 But there was nothing “secret” about DFS’s retention of Mr. Lujan nor does his retention in this
19 matter mean that the Public Auditor must recuse herself. DFS retained Mr. Lujan in January 2013 to
20 generally advise it with regard to the RFP, after DFS’s initial October 30, 2012 procurement protest
21 (referred to as Protest No. 1). (Lujan Decl., ¶ 8.) Because no one at the Lujan Firm, including Mr.
22 Lujan himself, has been involved in the RFP protests or in any aspect of the legal proceedings, there

23 ⁵ To the extent GIAA attempts to minimize the Calvo Firm’s obviously substantial role in
24 navigating GIAA through its various procurement missteps and the follow-on legal disputes,
25 GIAA fares no better when considering that Governor Eddie Calvo, to whom GIAA ultimately is
accountable, is the first cousin of Champ Calvo and his siblings.

26 ⁶ As GIAA notes in its Objection, on December 18, 2013, GIAA wrote DFS a letter seeking more
27 information about its retention of Mr. Lujan and surrounding events. (*See* Obj. at 4.) But GIAA
28 did not wait for DFS’s response and filed its Objection instead, which suggests the agency is not
truly interested in a genuine understanding of the relevant events.

1 is no reason why GIAA was entitled to know that DFS had retained Mr. Lujan. As GIAA's counsel
2 should know, a party has no obligation to disclose the lawyers it has retained absent some affirmative
3 obligation to do so. Thus, contrary to GIAA's assertions—which GIAA makes without an
4 understanding of the relevant facts—there was nothing improper about DFS staying silent about its
5 retention of Mr. Lujan until December 13, 2013 in response to the OPA's December 3, 2013 order
6 soliciting objections to the appointment of Peter C. Perez as hearing officer. Indeed, GIAA's
7 Objection provides no such reason.

8 In addition to having no obligation to make a disclosure regarding its retention of the Lujan
9 Firm earlier than it did, DFS had no forum to do so. On May 30, 2013, within a few hours of filing
10 the instant appeal—which DFS did to preserve its rights if judicial proceedings were unsuccessful—
11 DFS filed an action in the Superior Court of Guam. (Suh Decl., Ex. 58 at p. 1.) Because DFS
12 understood that the filing of the Superior Court action would stay the OPA proceedings, DFS had no
13 opportunity, nor reason, to disclose to the OPA that it had retained Mr. Lujan. In other words, by the
14 time DFS's filing at the OPA had been processed, the OPA already was without jurisdiction due to
15 DFS's filing of the Superior Court action.

16 Indeed, GIAA repeatedly has contended that the OPA lacked jurisdiction to consider any
17 aspect of DFS's Appeal once DFS filed its Superior Court action. For instance, when DFS requested
18 the OPA to lift its stay on November 21, 2013, GIAA's unequivocal response was that the OPA lacks
19 jurisdiction to resume consideration of DFS's Appeal. (GIAA Opp'n to DFS Request to Lift Stay
20 (filed Nov. 27, 2013) at pp. 1-3.) GIAA even took the extreme position that the OPA did not have
21 jurisdiction to consider whether it had jurisdiction. (*Id.*) Thus, according to a GIAA submission on
22 November 27, 2013 (just weeks before it filed its Objection), DFS still did not yet have a forum to
23 make any disclosure about its retention of the Lujan Firm. The first opportunity for DFS to disclose
24 its retention of the Lujan Firm was not until the OPA issued a December 3, 2013 order asking the
25 parties to submit by December 13, 2013 any objections to the appointment of Peter C. Perez as
26 hearing officer in this appeal. (Notice of Appt. of Hearing Officer (issued Dec. 3, 2013) at p. 1.)

27 Accordingly, DFS's retention of the Lujan Firm was not improper or secret and it certainly
28

1 does not justify the Public Auditor recusing herself from this appeal.

2 **2. GIAA’s charges that DFS “threatened” Lotte and has “undue influence” over the**
3 **process are baseless and irrational.**

4 GIAA’s accusations reach an extreme when it claims that DFS somehow “threatened” Lotte,
5 and that DFS exerts “undue influence” over the process. (See Obj. at 5-6.) GIAA couples these
6 meritless claims against DFS with the suggestion that the Public Auditor also has not acted ethically.
7 (*Id.*) These charges are irresponsible, and demonstrably untrue.

8 First, GIAA’s accusation that DFS “threatened” Lotte is based on a December 4, 2013 letter
9 from DFS’s counsel to Lotte’s counsel setting forth DFS’s position that, among other things, if DFS
10 ultimately prevails in its procurement protests, Lotte must bear the risk of its unilateral decision to
11 expend its resources at the Airport before a final determination of the protests. (See Fabian
12 Declaration at Exhibit 8.) DFS cannot conceive how this three-paragraph letter, which is of the type
13 routinely exchanged between counsel, could be viewed as a threat by any lawyer, much less the
14 experienced attorneys at the Calvo Firm. If DFS’s letter is construed as a threat, then surely GIAA’s
15 June 4, 2013 letter to DFS that *literally* threatened it and its counsel with sanctions—sanctions that
16 later were rejected by the Superior Court and the Supreme Court—would far exceed GIAA’s
17 purported standard of what constitutes a threat. (Suh Decl., Ex. 59 at pp. 7-8, Ex. 60 at pp. 3, 14-18.)
18 The reality, of course, is that neither of these letters constitutes a “threat,” and it is not plausible that
19 GIAA’s routinely aggressive counsel could believe them to be. In any event, DFS’s December 4,
20 2013 letter to Lotte speaks for itself and its plain reading dispels GIAA’s baseless characterization of
21 it.

22 GIAA’s additional claim that DFS’s December 4, 2013 letter also evidences that DFS must
23 have some “undue influence” over the process simply is not coherent. DFS’s letter includes a
24 statement of DFS’s longstanding (and what should be obvious) position that Lotte has been
25 unlawfully installed at the Airport, and that a fair and lawful process will result in DFS being named
26 the successful bidder. The letter also references recent OPA decisions that make clear that GIAA did
27 not follow the law in the procurement at issue. These legal citations and DFS’s statement that it will
28 not bend to GIAA’s various dilatory tactics surely are dismaying to GIAA, but no rational person

1 could divine from these statements that DFS has “undue influence” over any aspect of the process.

2 GIAA’s Objection is short on details supporting its conspiracy theory. What is clear,
3 however, is that there is no evidence or logic supporting GIAA’s suggestion that the OPA and/or the
4 Guam courts acted improperly in any way.⁷

5 **3. There was nothing inappropriate about the Public Auditor’s solicited comments**
6 **about Guam Procurement Law.**

7 GIAA’s final objection is that the Public Auditor should not have made certain public
8 comments that GIAA mistakenly believes to be inappropriate. (Obj. at 6-8.) But there was nothing
9 wrong or even remarkable about what the Public Auditor said. GIAA’s complaints about the Public
10 Auditor’s public comments ring hollow for the threshold reason that these comments were made at a
11 public hearing to discuss changes to the Guam Procurement Law. The Public Auditor—who
12 arguably is the most central figure in disputes regarding Guam procurements—was solicited by the
13 Guam Legislature to provide comments on the proposed amendments and related Guam procurement
14 issues. It is, of course, inevitable for the Public Auditor to provide a variety of views on Guam
15 Procurement Law and related topics in such a forum. Further, the two innocuous excerpts that GIAA
16 cherry-picked from the Public Auditor’s wide-ranging comments evidence no bias whatsoever. That
17 these unobjectionable examples are the best GIAA could identify confirms that GIAA is intent on
18 manufacturing controversy (and delay) where there is absolutely no cause for it.

19 GIAA first focuses on the Public Auditor’s factual statement, which she made on December
20 13, 2013, that “the Superior Court rendered a decision and the [Appeal] is now back before me.”⁸
21 (Obj. at 6.) This innocuous statement, which merely acknowledged that *both* parties to this appeal—
22 DFS and GIAA—as well as Lotte, an interested party aligned with GIAA, had filed papers before the
23 OPA when the Public Auditor made those statements. The matter was undeniably “back before [the

24 ⁷ GIAA goes on to lecture the OPA about the importance of acting “with the highest degree of
25 ethical standards.” (Obj. at 5.) Because GIAA does not directly accuse the OPA (or the Guam
26 courts) of any unethical behavior, the point of this polemic is not clear.

27 ⁸ DFS has not verified the accuracy of GIAA’s transcription of the Public Auditor’s alleged
28 comments. For purposes of this Response, DFS assumes the accuracy of GIAA’s transcription
but reserves all rights to later object to or challenge it.

1 OPA]” because DFS had asked the OPA to lift its stay at that time. Furthermore, GIAA itself put
2 matters before the Public Auditor for her consideration; specifically, GIAA filed its Objection, asking
3 the Public Auditor to immediately investigate and evaluate her ability to preside over this appeal.
4 That GIAA would argue that even this simple statement by the OPA “reflect[s] a potential bias” (Obj.
5 at 6), establishes the unreasonable standard for bias that GIAA now advances. Finally, this argument
6 is completely eviscerated by the OPA’s subsequent decision that this appeal was not, in fact, yet ripe
7 to be before her in December 2013. (Order Denying DFS’ Request to Lift Stay (issued Dec. 26,
8 2013) at pp. 3-4.)

9 GIAA’s remaining example is a comment by the Public Auditor that GIAA characterizes as
10 her “stak[ing] out her position regarding the enforcement of an automatic stay between the issuance
11 of a decision on a protest and the award of a contract,” which GIAA correctly points out is a live
12 issue in this appeal. (Obj. at 7.) GIAA provides no reason and cites to no legal authority why it was
13 inappropriate for the Public Auditor to express her legal interpretation of the law governing when an
14 agency must impose its mandatory stay. Indeed, the Public Auditor’s comments are consistent with
15 what she previously held in the recent OPA decisions in *In the Appeal of JMI Edison* and *In the*
16 *Appeal of K Cleaning Services*, where the OPA expressed the same view. *In the Appeal of JMI*
17 *Edison*, OPA-PA-13-010, Decision at 4-5 (Nov. 27, 2013); *In the Appeal of K Cleaning Services*,
18 OPA-PA-13-004, Decision at 7 (Oct. 25, 2013).

19 DFS finds it difficult to believe that GIAA genuinely holds the view that public comment
20 made on a legal issue by the Public Auditor (or a member of the judiciary) constitute bias. Not
21 surprisingly, GIAA cites to no authority that the Public Auditor or a Guam judge or justice is
22 prevented from opining on matters of law. Indeed, it is routine for the Guam judiciary and
23 regulators—just like the judiciary and regulators in the rest of the United States—to speak about
24 matters of law.

25 CONCLUSION

26 GIAA has not carried its burden of showing that the Public Auditor should recuse herself
27 under the relevant standards—far from it, the undisputed evidence shows that the facts do not warrant
28

1 the Public Auditor's recusal. While DFS can only speculate as to GIAA's motives in filing its
2 Objection, it does not appear that GIAA is interested in an orderly and prompt consideration of the
3 merits of DFS's procurement protests.
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5 Dated: September 15, 2014

Respectfully submitted,

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