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

12  
13 In the Appeal of:  
14 DFS Guam L.P.,  
15 Appellant.

**APPEAL NO. OPA-PA-13-006**

**APPELLANT DFS GUAM L.P.'S MOTION  
TO DECLARE AUTOMATIC STAY IN  
EFFECT; MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
THEREOF**

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

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**ORIGINAL**

1 **MOTION**

2 DFS Guam L.P. (“DFS”) respectfully moves the Office of Public Accountability (“OPA”) for  
3 an immediate order finding that the mandatory statutory stay required be imposed by 5 G.C.A. §  
4 5425(g) should have been imposed from the date DFS submitted its initial protest, on October 30,  
5 2012, to the A.B. Won Pat International Airport Authority, Guam (“GIAA”) regarding Request for  
6 Proposal No. GIAA 010-FY12 (“RFP”) for “the development, construction, and operation of a high  
7 quality specialty retail concession at [the A.B. Won Pat International Airport’s] Main Passenger  
8 Terminal” (“Airport Concession”) through the present. DFS further moves the OPA for an order  
9 compelling GIAA to abide by the stay by: (1) refraining from taking any action with regard to the  
10 RFP such that no further rights, obligations, or agreements between GIAA and Lotte Duty Free Guam  
11 LLC (“Lotte”) are altered; and (2) acknowledging that Lotte has no legal right to occupy the Airport  
12 Concession space.<sup>1</sup>

13 Subject of course to the OPA’s schedule, DFS respectfully requests the OPA hold a hearing  
14 on this Motion on October 29, 2014 and order the following briefing schedule in connection with  
15 this Motion: (1) that GIAA and Lotte file any briefs in opposition to this Motion by October 10,  
16 2014; and (2) that DFS file any replies in support of this Motion by October 21, 2014.<sup>2</sup>

17 This Motion is supported by the record currently before the OPA, the appended Memorandum  
18 of Points and Authorities, the Declaration of Maurice M. Suh submitted concurrently with this  
19 Motion, and any oral argument before the OPA on this matter.

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23 <sup>1</sup> Although the record plainly shows that GIAA should not have executed the Airport Concession  
24 contract with Lotte in June 2013 in the first instance and Lotte should not have taken possession  
25 of and begun operations in the Airport Concession in July 2013, DFS is not requesting in this  
Motion that the OPA enjoin Lotte’s existing operations at the Airport out of consideration for the  
best interests of Guam, its citizens, and its visitors.

26 <sup>2</sup> In a separate request concurrently filed with this Motion, DFS respectfully requests that the OPA  
27 hold a hearing on this Motion on or around October 29, 2014. Of course, if the OPA determines  
28 to hold that hearing on a later date, the deadlines for GIAA’s and Lotte’s opposition briefs and for  
DFS’s reply brief should be scheduled accordingly.

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1 I. INTRODUCTION

2 The relevant considerations for this Motion are few and uncomplicated. Under 5 G.C.A.  
3 § 5425(g), an agency shall “not proceed further with the solicitation or with the award of [a] contract  
4 prior to final resolution of [a protest].” The statute is not discretionary. An agency must impose the  
5 mandatory stay required by this statute if any bidder files a protest with respect to a procurement that  
6 meets the following few criteria: (a) the protest was timely made; (b) the protest was filed before the  
7 agency entered into a lawful contract relating to the procurement; and (c) the protest has not been  
8 finally resolved where such finality includes resolution of all appeals relating to the protest. 5 G.C.A.  
9 § 5425(g). Here, the A.B. Won Pat International Airport, Guam’s (“GIAA”) received four protests—  
10 three from appellant DFS Guam L.P. (“DFS”) and one from JR/Duty Free—with respect to GIAA’s  
11 Request for Proposal No. GIAA 010-FY12 (“RFP”) for “the development, construction, and  
12 operation of a high quality specialty retail concession at [the A.B. Won Pat Guam International  
13 Airport’s] Main Passenger Terminal” (the “Airport Concession”), each of which should have  
14 compelled GIAA to impose the automatic stay. As set forth below, GIAA failed to impose the  
15 mandatory stay in response to each of these four triggering protests in violation of the law.

16 Indeed, the central facts governing this Motion also are few and uncomplicated:

- 17 • DFS filed three protests regarding the Airport Concession, which respectively were  
18 initiated on October 30, 2012 (Protest No. 1), May 29, 2013 (Protest No. 2), and June 7,  
19 2013 (Protest No. 3). In addition, JR/Duty Free, filed a protest regarding the RFP on May  
20 30, 2013.
- 21 • GIAA’s Board of Directors—the only entity authorized to enter into contracts on GIAA’s  
22 behalf—did not authorize such a contract for the Airport Concession with Lotte Duty Free  
23 Guam LLC (“Lotte”) until June 11, 2013.
- 24 • Three of the protests—two of DFS’s and JR/Duty Free’s protest—have not been acted  
25 upon by GIAA and the fourth protest is the subject of this Appeal. Thus, none have  
26 obviously been finally resolved.

27 Thus, all four protests (a) were timely, (b) occurred before the contract was awarded, and (c)  
28 have not been finally resolved. As such, by the plain terms of the controlling statute, 5 G.C.A.  
§ 5425(g), and the recent decisions by the Office of Public Accountability (the “OPA”), GIAA was  
required as a matter of law to stay any activity on the RFP until the protests were resolved. Instead,  
GIAA did the opposite: It *accelerated* its efforts to install Lotte at the Airport Concession,

1 committed overt acts of bad faith, and repeatedly obstructed DFS's efforts to have the merits of its  
2 protests expeditiously considered and resolved.

3 Accordingly, the OPA immediately should enter an order finding that GIAA should have  
4 imposed the statutory stay mandated by 5 G.C.A. § 5425(g) when DFS submitted Protest No. 1 and  
5 held it in place through the present. Further, the OPA should compel GIAA to abide by the stay  
6 going forward by: (1) refraining from taking any action with regard to the RFP such that no further  
7 rights, obligations, or agreements between GIAA and Lotte are altered, and (2) acknowledging that  
8 Lotte has no legal right to occupy the Airport Concession space.<sup>1</sup>

## 9 II. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

### 10 A. All Of DFS's Procurement Protests Were Filed On Or Before June 7, 2013, The Date On 11 Which GIAA's Board Approved The Award Of The Contract To Lotte.

12 GIAA issued the RFP for the Airport Concession on July 19, 2012. (Declaration of Maurice  
13 Suh ("Suh Decl."), Ex. 1 at p. 1.) GIAA imposed a bid submission deadline of October 17, 2012, and  
14 DFS, Lotte, The Shilla Duty Free, and JR/Duty Free submitted timely proposals in response to the  
15 RFP. (*Id.*, Ex. 2 at p. 2.) On April 12, 2013, GIAA's Board of Directors met and voted to approve  
16 the rankings of the proposals made by GIAA's evaluation committee, which ranked Lotte as the  
17 highest qualified proposer. (*Id.*, Ex. 3, Minutes at p. 2.) Based on that determination, the Board of  
18 Directors authorized GIAA management to *negotiate* the terms and conditions of the contract for the  
19 Airport Concession with Lotte, but they did not authorize GIAA management to enter into any  
20 agreement with Lotte. (*Id.*, Ex. 3, Minutes at p. 2; *see also id.*, Ex. 4 at p. 1.) GIAA's Board did not  
21 delegate, and lacked the power to delegate, to GIAA's management the Board of Director's exclusive  
22 authority to approve any contract on behalf of GIAA for the Airport Concession. (*See id.*, Ex. 3,  
23 Minutes at p. 2.)  
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25  
26 <sup>1</sup> Although the record plainly shows that GIAA should not have executed the Airport Concession  
27 contract with Lotte in June 2013 in the first instance and Lotte should not have taken possession  
28 of and begun operations in the Airport Concession in July 2013, DFS is not requesting in this  
Motion that the OPA enjoin Lotte's existing operations at the Airport out of consideration for the  
best interests of Guam, its citizens, and its visitors.

1           **1. DFS’s Protest No. 1**

2           On October 30, 2012, DFS filed with GIAA its first RFP protest (“Protest No. 1”) (Exhibit 5  
3 to the Suh Declaration), which challenged conduct by GIAA and Lotte that violated the terms of the  
4 of the RFP and Guam procurement law and regulations. DFS’s Protest No. 1 focused on a trip made  
5 by a Guam Visitors Bureau (“GVB”) delegation, which included two GIAA Board members  
6 (Chairman Francisco Santos and Director Rosalinda Tolan), to Seoul, Korea, on September 26-27,  
7 2012 (“Korea Trip”). (*Id.*) During the Korea Trip, the following unlawful and improper contacts  
8 between GIAA and Lotte occurred: (1) Lotte arranged for the GVB delegation, which Lotte knew  
9 included GIAA and other Guam officials, to tour Lotte’s main downtown store; (2) the GVB  
10 delegation was met at the Lotte store by Lotte executives, including Lotte’s president; (3) Lotte  
11 provided the GVB delegation shopping cards and GVB Chairman Monte Mesa told the delegation to  
12 “choose whatever you want”; (4) Lotte provided to GIAA Board Chairman Santos a Coach handbag;  
13 (5) Lotte also delivered bags of cosmetics (with contents valued at approximately \$200) to the female  
14 delegates, including GIAA Board member Tolan; and (6) when the GVB delegation arrived at the  
15 airport in Seoul to return to Guam, they again were met by Lotte staff who accompanied them as they  
16 checked in and then took them to the Lotte airport duty free store, where they were given gifts. (*See*  
17 *generally* Ex. 2 & Exs. 6 to 16.)

18           After GIAA failed to respond to the October 30, 2012 Protest No. 1, DFS followed up with  
19 additional letters to GIAA on April 11, 2013, April 23, 2013, and May 2, 2013, reiterating the  
20 original bases for the protest and asserting additional ones. (*Id.*, Ex. 17 at pp. 2-4, Ex. 18 at pp. 1-9,  
21 Ex. 19 at pp. 1-6.)

22           **2. DFS’s Protest No. 2**

23           On May 29, 2013, DFS sent GIAA its second protest (“Protest No. 2”) (Exhibit 20 to the Suh  
24 Declaration), which had been prompted by additional misconduct related to the RFP that DFS learned  
25 by virtue of public comments made by GIAA on May 20, 2013. After submission of Protest No. 2,  
26 DFS learned additional information from a June 3, 2013 production of documents by GIAA in  
27 response to one of several Sunshine Act requests (*id.*, Ex. 21 at p. 1), which resulted in DFS  
28 supplementing Protest No. 2 four days later on June 7, 2013 (*id.*, Ex. 22 at pp. 1-8).

1 Protest No. 2 challenges GIAA’s putative award of the contract to Lotte on the grounds that  
2 GIAA improperly permitted Lotte to include in its proposal additional “items of value” not permitted  
3 by the terms of the RFP (which additional items of value affected the consideration and ranking of  
4 Lotte’s proposal)<sup>2</sup> and, subsequently, to make material changes to its proposal—including increasing  
5 its guaranteed annual rent, among the most, if not the most, important component of its proposal—  
6 after the October 17, 2012 proposal deadline passed, giving Lotte an unlawful and unfair advantage  
7 over the competing bidders. (*Id.*, Ex. 20 at pp. 1-5.) The record plainly shows that Lotte submitted  
8 its original proposal on October 17, 2012 (“October 17 Proposal”), but thereafter provided a  
9 substantially and materially different “updated” proposal during its November 29, 2012 interview  
10 with GIAA’s Evaluation Committee (“November 29 Proposal”). (*Compare id.*, Ex. 26, with *id.*, Ex.  
11 27.)

12 For example, the RFP required Lotte (1) to provide a “Proposed Amount” for the minimal  
13 annual guaranteed (“MAG”) Rent for the main concession space, and (2) if proposing additional  
14 concession space in accordance with the RFP, to provide a “Proposed Amount” for MAG Rent for  
15 that Additional Concession Space. (*Id.*, Ex. 1 at pp. 1, 17-18, Ex. 28 at p. 1.) In its October 17  
16 Proposal, Lotte identified (1) “US\$13,000,000” as the “MAG Rent” amount for the main concession  
17 space, and (2) “US\$240,000” as the “MAG Rent” amount for additional concession space. (*Id.*, Ex.  
18 26 at p. 389 [GIAABSJM300387].) However, in its November 29 Proposal, Lotte drastically  
19 increased its MAG Rent for the main concession space—to “15,400,000 USD”—while the MAG  
20 Rent for the additional concession space remained the same at “240,000 USD.” (*Id.*, Ex. 27 at p. 98  
21 [GIAABSJM300547].)<sup>3</sup> Significantly, Lotte’s new “updated” \$15,400,000 MAG rent for the main  
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24 <sup>2</sup> These additional items of value, which were touted by GIAA’s Executive Manager during his  
25 May 20, 2013 media appearances and in GIAA’s press release, included, among other things, a  
children’s play room, smoking lounge, restroom improvements, and food court improvements.  
(*E.g.*, Suh Decl., Ex. 23 at p. 19, Ex. 24 at pp. 9-10, Ex. 25 at pp. 1-2.)

26 <sup>3</sup> In its November 29 Proposal Lotte also increased its offered Percentage Rent Rate for the main  
27 concession area to 33%. (Suh Decl., Ex. 27 at p. 98 [GIAABSJM300547].) In its original  
28 October 17 Proposal, Lotte’s Percentage Rent Rate for the main concession area was only 30.1%.  
(*Id.*, Ex. 26 at p. 389 [GIAABSJM300387].)



1 concession space in its November 29 Proposal just barely edged out the \$15,250,000 MAG Rent that  
2 DFS had included in its one and only timely proposal. (*Id.*, Ex. 29 at p. 1.)

3 **3. DFS's Protest No. 3 And JR/Duty Free's Protest**

4 On May 30, 2013, JR/Duty Free submitted its own protest challenging GIAA's and Lotte's  
5 unlawful and improper conduct in connection with the RFP ("JR/Duty Free Protest"). (Suh Decl.,  
6 Ex. 30 at pp. 1-6.)

7 Finally, on June 7, 2013, based on GIAA's response to another DFS Sunshine Act request,  
8 DFS filed with GIAA yet another protest letter ("Protest No. 3") (Exhibit 31 to the Suh Declaration)  
9 relating to the RFP, challenging additional actions by GIAA that violated GIAA's enabling  
10 legislation.

11 **B. GIAA Did Not Approve The Contract With Lotte Until June 11, 2013, After DFS Filed  
12 Its Three Procurement Protests And JR/Duty Free Filed Its Protest.**

13 GIAA waited more than six months to deny DFS's Protest No. 1, which was filed on October  
14 30, 2012, but then rushed to deliver its denial decision by email to DFS after the close of business on  
15 a Friday evening (May 17, 2013). (Suh Decl., Ex. 2 at p. 1, Ex. 32 at p. 1, Ex. 33 at p. 1.) This  
16 curious timing was explained the following Monday morning (May 20, 2013), when GIAA issued a  
17 press release ("May 20 Press Release") (*id.*, Ex. 25 at pp. 1-2), and GIAA's Executive Manager  
18 appeared on various broadcast media proclaiming that GIAA management and Lotte had signed a  
19 contract regarding the Airport Concession over the preceding weekend (*id.*, Ex. 23 at p. 2). The May  
20 Press Release makes clear that GIAA's Board of Directors had not yet approved or signed off on  
21 the purported contract—only that GIAA's Executive Manager purported to sign it on GIAA's behalf.  
22 (*Id.*, Ex. 25 at pp. 1-2.)

23 On May 23, 2013, DFS sent a letter to GIAA stating that because DFS submitted a timely  
24 protest, GIAA was required to "not proceed further with the solicitation or with the award of the  
25 contract prior to final resolution of such protest, and any such further action is void" under 5 G.C.A.  
26 § 5425(g). (*Id.*, Ex. 34 at p. 2.) DFS further informed GIAA that GIAA's management's and Lotte's  
27 purported signing of a contract for the Airport Concession "constitutes a particularly egregious  
28 violation of 5 G.C.A. § 5425(g)" and demanded that GIAA "immediately cease and desist any and all

1 actions taken under, or in furtherance of, this putative contract with Lotte (which was void *ab initio*),”  
2 including that GIAA “not submit any putative contract for required GIAA Board approval until a  
3 final resolution of the proposal protest process is reached.” (*Id.* at pp. 2-4.)

4 On May 30, 2013, DFS again wrote to GIAA, requesting that GIAA “immediately cease and  
5 desist from any and all actions taken under, or in furtherance, of the putative contract entered into by  
6 GIAA and Lotte on May 18, 2013, which was void as a matter of law.” (*Id.*, Ex. 35 at p. 2.)

7 On June 11, 2013—despite multiple, pending, unresolved protests by DFS and JR/Duty Free,  
8 and DFS’s direct requests for GIAA to maintain the stay required by law—GIAA convened a special  
9 meeting of its Board of Directors, at which the Board voted to approve the award of the contract to  
10 Lotte, after which the Board’s Chairman signed the contract. (*Id.*, Ex. 36, Minutes at pp. 1-2.) Thus,  
11 all three of DFS’s protests and the JR/Duty Free Protest had been filed but remained unresolved when  
12 the contract was approved by GIAA’s Board and was executed by the Board representative in plain  
13 violation of the mandatory stay provision.

### 14 III. ARGUMENT

#### 15 A. The OPA Has The Authority To Enforce The Mandatory Stay Provision.

16 Guam procurement law explicitly states that an agency shall “not proceed further with the  
17 solicitation or with the award of [a] contract prior to final resolution of [a protest].” *See* 5 G.C.A.  
18 § 5425(g). Only three elements are required for the imposition of this mandatory stay on an agency:  
19 (a) a timely protest; (b) that is not yet finally resolved (including resolution of any appeal of the  
20 protest); and (c) that was filed before the agency entered into a contract relating to the procurement.<sup>4</sup>  
21 5 G.C.A. § 5425(g). This scheme preserves the status quo “by operation of law” and prevents  
22 “further action on the procurement under appeal” until “resolution of the appeal.” *In the Appeal of*  
23 *JMI Edison*, OPA-PA-13-009, Decision at 5 (Nov. 27, 2013). Any agency actions taken in violation  
24 of the stay are “void.” *See* 5 G.C.A. § 5425(g).

25 The Public Auditor has “the power to review and determine *de novo* any matter properly  
26 submitted” to her. 2 G.A.R., Div. 4, Chap. 12, § 12103(a) (“No prior determination shall be final or

27  
28 <sup>4</sup> The statute goes on to list an exception that is not relevant to the instant Appeal.

1 conclusive on the Public Auditor.”). Where, as here, an agency fails to stay its proceedings as  
2 required by 5 G.C.A. § 5425(g), the OPA has the authority to declare that the automatic stay is in  
3 effect and to order the agency to take, refrain from, or rescind certain actions in furtherance of the  
4 stay. *See, e.g., In the Appeal of/Town House Department Stores, Inc., dba Island Business Systems*  
5 *and Supplies*, OPA-PA-08-012, Decision at 9-10 (Feb. 10, 2009) (ordering the Guam General  
6 Services Agency to cancel a multi-step bid); *JMI Edison*, OPA-PA-13-009, Decision at 1-2  
7 (prohibiting the Guam Department of Education from “proceed[ing] further with the solicitation [or]  
8 with the award of the contract until final resolution of JMI’s appeal to the OPA and if subsequently  
9 timely filed, to the Superior Court of Guam”). The OPA should take such action here.

10 **B. DFS And JR/Duty Free Collectively Filed Four Timely Procurement Protests, Each Of**  
11 **Which Triggered The Automatic Stay.**

12 Any one of DFS’s three procurement protests or JR/Duty Free’s single procurement protest  
13 was and remains sufficient in its own right to trigger the automatic stay because, as set forth below,  
14 each satisfies the three elements in Section 5425(g) for the imposition of the automatic stay. That  
15 said, the OPA need only agree that any one of the protests triggered the automatic stay to grant the  
16 relief sought by DFS in this Motion.

17 **1. DFS’s Protests Were Timely Filed.**

18 Guam law does not require that a protester immediately file a protest based on mere suspicion  
19 of misconduct, before it has a good faith basis to believe that a protest is justified. Instead, a protest  
20 must “be submitted in writing within fourteen (14) days after such aggrieved person knows or should  
21 know of the facts giving rise” to the misconduct. 5 G.C.A. § 5425(a); *see also* 2 G.A.R., Div. 4,  
22 Chap. 9, § 9101(c)(1). Indeed, GIAA has asserted that a protest should not be filed until there is  
23 “justification” for the protest. (Suh Decl., Ex. 2 at p. 34.)

24 a. Protest No. 1 was timely.

25 DFS’s Protest No. 1, which was filed on October 30, 2012 (Suh Decl., Ex. 5 at p. 1), was  
26 timely, for two reasons. First, DFS filed it well within 14 days of developing a good faith belief that  
27 the grounds for this protest were justified. *See* 5 G.C.A. § 5425(a). After the GVB delegation  
28 returned to Guam, DFS received anecdotal reports that GIAA and Lotte may have engaged in

1 transactions and contacts during the Korea Trip that were unlawful and violated the terms of the RFP.  
2 DFS began to investigate the reports, rumors and innuendo about the GVB delegation's Seoul trip  
3 after it returned and continued to do so in the ensuing weeks. However, the details of the trip and the  
4 nature of Lotte's willful contact with GIAA remained uncertain well into October 2012.<sup>5</sup> Although  
5 DFS did not have access to GIAA's Board members or Lotte's executives to confirm that misconduct  
6 had occurred in connection with the Korea Trip, by late October 2012, DFS had formed a good faith  
7 belief that, the conflicting information notwithstanding, Lotte and GIAA had violated the terms of the  
8 RFP and Guam procurement law in connection with the Korea Trip. As such, DFS timely submitted  
9 its Protest No. 1 on October 30, 2012. (Suh Decl., Ex. 5 at p. 1.)<sup>6</sup>

10 Second, DFS's Protest No. 1 was timely for the independent reason that DFS filed it well in  
11 advance of 14 days from learning on April 12, 2013, that GIAA ranked Lotte the highest qualified

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12  
13 <sup>5</sup> DFS's uncertainty is only confirmed by GIAA's own investigation, which was stalled by  
14 conflicting accounts about what happened during the Korea Trip well into October 2012.  
15 Specifically, GIAA has stated that, on October 9, "GVB's then-General Manager, Joann  
16 Camacho, informed Airport Deputy Executive Manager Peter Roy Martinez that two GIAA  
17 Directors received gifts from Lotte while in Korea," but when Mr. Martinez later "telephoned  
18 Chairman Santos to ask about the alleged gifts," "Chairman Francisco Santos stated that he had  
19 not received any gifts from Lotte." (Suh Decl., Ex. 2 at pp. 4-5.) Chairman Santos' denial was  
20 not determined to be false by GIAA until months later when he admitted that he in fact had  
21 received "a gift from Lotte." (*Id.*, Ex. 15 at p. 2.)

18 <sup>6</sup> The OPA should reject any argument by GIAA that DFS's October 30, 2012 letter (DFS's Protest  
19 No. 1) was not a "protest." In *In the Appeal of Eons Enterprises Corp.*, OPA-PA-10-003,  
20 Decision at 3-5 (July 20, 2010), the OPA ruled that a letter constituted a valid procurement  
21 protest even though it was not marked "protest" but requested "re-evaluation of the bids  
22 submitted in response to the IFB." *Id.* at 4. Similarly, DFS's October 30 letter was not labeled a  
23 "protest," but nonetheless asserted that it was "rais[ing] concerns" about GIAA's and Lotte's  
24 conduct that "may have been in contravention [of] the procedures stipulated under the RFP as  
25 well as violative of the spirit of the Guam procurement laws." (Suh Decl., Ex. 5 at p. 1.) Further,  
26 GIAA has admitted that the contents of this letter are "nearly identical" to DFS's April 23, 2013  
27 letter, which GIAA has conceded is a protest. (*Id.*, Ex. 2 at p. 4.)

23 Moreover, GIAA internally treated DFS's October 30, 2012 letter as a protest. GIAA has  
24 admitted that, "[a]fter receiving DFS's October 30 letter, GIAA conducted an investigation of the  
25 events that transpired during the Korea trip to determine whether a violation of the procurement  
26 law had occurred," including interviewing witnesses and reviewing documents. (Suh Decl., Ex. 2  
27 at p. 5.) Thus, GIAA "suffered no prejudice" from the absence of the term "protest" in DFS's  
28 October 30 letter because it treated the letter as a protest, conducted an investigation, and  
ultimately issued a response to DFS's Protest No. 1. *See Eons Enterprises*, OPA-PA-10-003,  
Decision at 5 ("Despite this, the record indicates that GCC suffered no prejudice by there being  
no envelope marked 'Protest,' because GCC expeditiously responded to the Appellant's May 3,  
2010 Letter only seven (7) days after GCC received it.").

1 proposer (versus disqualifying it). (*See id.*, Ex. 3, Minutes at p. 2, Ex. 4 at p. 1.) The OPA in *JMI*  
2 *Edison* held that, in certain circumstances, a protest is not ripe and the 14-day time period does not  
3 begin to accrue until the agency selects the proposer who engaged in the wrongful conduct. *See In*  
4 *the Appeal of JMI Edison*, OPA-PA-13-009, Decision at 4. In *JMI Edison*, the OPA held that even  
5 though JMI Edison did not file its protest until 14 days after learning its proposal was rejected, JMI  
6 Edison’s protest nevertheless was timely because it was filed within 14 days of the announcement  
7 that the allegedly deficient proposer’s bid was selected. *Id.* The OPA reasoned that because the  
8 principal basis for JMI Edison’s protest was that MedPharm, the competing proposer, and its  
9 proposal were deficient, JMI Edison’s protest was not ripe until JMI learned that MedPharm’s  
10 deficient bid had been selected. *Id.*

11 Here, DFS’s Protest No. 1 focused entirely on Lotte’s and GIAA’s misconduct in connection  
12 with the Korea Trip. (Suh Decl., Ex. 5 at pp. 1-2.) Later, with the emergence of facts related to  
13 GIAA’s efforts to devise an unprecedented and what one board member described as a “magical”  
14 procedure to cleanse or whitewash the consequences of that misconduct, DFS supplemented its  
15 protest to the RFP process. (*Id.*, Ex. 17 at pp. 3-4, Ex. 18 at pp. 1-9, Ex. 19 at pp. 1-6.) Thus, DFS’s  
16 protest was not ripe until April 12, 2013, when GIAA’s Board of Directors followed this “magical”  
17 procedure, ignored the misconduct and approved the ranking of Lotte as the highest ranked proposal.  
18 (*See id.*, Ex. 3, Minutes at p. 2, Ex. 4 at p. 1.) As a result, DFS had until April 26, 2013 to file its  
19 Protest No. 1, a deadline with which DFS plainly complied: Not only was DFS’s initial October 30,  
20 2012 Protest No. 1 letter filed almost six months before this deadline, two of DFS’s follow-up letters  
21 preceded the April 26, 2013 deadline. *See also Eons Enterprises*, OPA-PA-10-003, Decision at 3  
22 (protester complied with the procedural requirements for a protest—including the fourteen-day time  
23 period—“by delivering its May 3, 2010 letter [to] GCC only seven (7) days after the Appellant  
24 received GCC’s April 26, 2010 notice that GCC awarded the contract to another bidder.”); *id.* (“[T]he  
25 Appellant had the right to protest because it was an actual bidder and because the Appellant was  
26 aggrieved by GCC’s selection of another bidder for the” procurement.).

27 Further, the OPA should reject any argument by GIAA as to the timeliness of Protest No. 1,  
28 because the finding of whether a protest was timely under 5 G.C.A. § 5425(a)—including the

1 determination of when the protester “knows or should have known of the facts giving rise” to the  
2 misconduct—is reviewed *de novo* by the OPA on appeal. *See* 5 G.C.A. § 5703; 2 G.A.R., Div. 4,  
3 Chap. 12, § 12103(a). The OPA’s *de novo* review is particularly important in circumstances where,  
4 as here, the protests accuse the reviewing agency itself of misconduct. In these cases, the agency has  
5 every incentive to find that, in its subjective view and regardless of the facts, the protester knew or  
6 should have known of facts giving rise to the misconduct more than 14 days before it filed the protest,  
7 thereby avoiding the mandate of a stay in every instance and regardless of the merits. Thus, when  
8 there is a colorable dispute about the timeliness of a protest, the automatic stay should be triggered  
9 until the OPA can exercise its *de novo* review of the timeliness of the protest.

10 b. Protest No. 2 was timely.

11 There is no dispute about the timeliness of DFS’s Protest No. 2. The bidders’ respective  
12 proposals submitted in response to the RFP were required to be kept confidential during the RFP  
13 process. (Suh Decl., Ex. 1 at p. 5.) Thus, DFS did not know and could not have known the contents  
14 of Lotte’s original October 17 Proposal or its “updated” November 29 Proposal during the RFP  
15 process. GIAA did not publicly disclose Lotte’s MAG Rent figure until the May 20 Press Release  
16 announcing that GIAA purportedly had signed an Airport Concession contract with Lotte requiring  
17 Lotte to pay “\$15.4 million in minimum annual guaranteed rent.” (*Id.*, Ex. 25 at p. 1.) Immediately  
18 following this press release and radio interviews given by GIAA’s Executive Manager about Lotte’s  
19 bid proposal (*e.g.*, *id.*, Exs. 23, 24), DFS began submitting to GIAA Sunshine Act requests to  
20 determine the details of Lotte’s proposal and whether GIAA had considered Lotte inducements that  
21 were outside the scope of the RFP (*id.*, Exs. 37-46), as had been suggested by GIAA’s public  
22 comments on May 20, 2013 (*id.*, Ex. 23 at p. 19, Ex. 24 at pp. 9-10, Ex. 25 at pp. 1-2).

23 DFS subsequently filed Protest No. 2 with GIAA on May 29, 2013, based solely on GIAA’s  
24 public statements regarding the additional items of value, well within the 14-day time period allotted  
25 by 5 G.C.A. § 5425(a). (*See id.*, Ex. 20 at pp. 1-5.) Later, on June 7, 2013, after receiving copies of  
26 Lotte’s October 17 and November 29 Proposals in response to its Sunshine Act requests (*id.*, Ex. 21  
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1 at p. 1), and learning that Lotte had materially changed its proposal, DFS supplemented Protest No. 2  
2 asserting these new and independent grounds (*id.*, Ex. 22 at pp. 1-8).<sup>7</sup>

3 Given the compressed nature of these events, starting with GIAA's May 20, 2013, public  
4 comments and continuing with GIAA's production of Lotte's original and updated proposals on  
5 June 3, 2013, there is no room for GIAA or Lotte to argue that DFS's Protest No. 2, filed on May 29,  
6 2013, and supplemented on June 7, 2013, is untimely.

7 c. Protest No. 3 was timely.

8 As part of its investigation into GIAA's purported contract with Lotte, DFS sent GIAA a  
9 Sunshine Act request seeking the production of several categories of documents, including, among  
10 other things, all documents relating to "[t]he [GIAA]'s Non-Airline and Concession Lease Policies"  
11 referred to in Section 6.1.2 of the putative contract that GIAA management and Lotte signed on May  
12 18, 2013, as well as "[a]ll documents reflecting any operational criteria adopted by GIAA as required  
13 by 12 GCA § 1203.1(a)(ii)." (Suh Decl., Ex. 42 at p. 1.) 12 G.C.A. § 1203.1 is the provision of  
14 GIAA's enabling legislation authorizing GIAA to enter into concession agreements at the Airport and  
15 prescribing the procedures that GIAA is obligated by law to follow in awarding such concessions.

16 On June 3, 2013, GIAA sent DFS a letter stating that it had "found no documents responsive"  
17 to DFS's Sunshine Act request. (Suh. Decl., Ex. 47 at p. 1.) Given GIAA's response, it necessarily  
18 follows that either GIAA never adopted any operational criteria as required by 12 G.C.A. §  
19 1203.1(a)(ii) or GIAA could not locate, and therefore could not have followed, the applicable  
20 operational criteria it was required to have adopted.<sup>8</sup> DFS promptly filed its Protest No. 3 on June 7,  
21 2013 (Suh Decl., Ex. 31 at p. 1)—only four days after GIAA's response to DFS's May 24 Sunshine  
22 Act request and within the 14-day time period of 5 G.C.A. § 5424(a).

23 \_\_\_\_\_  
24 <sup>7</sup> GIAA did not respond to DFS's Sunshine Act requests with responsive documents, including  
25 Lotte's October 17 Proposal and its "updated" November 29 Proposal, until June 3, 2013. (Suh  
26 Decl., Ex. 21 at p. 1.) DFS promptly filed a supplement to its Protest No. 2 on June 7—just four  
days after GIAA finally provided DFS with a copy of Lotte's proposals and, again, well within  
the 14-day time period of 5 G.C.A. § 5425(a). (*Id.*, Ex. 22 at p. 1.)

27 <sup>8</sup> The only other possibility is that GIAA deliberately chose to ignore any criteria it had adopted—  
28 which would have also violated the legislative directives in its enabling legislation.

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Accordingly, Protest Nos. 1, 2 and 3 were all timely filed.

**2. Protest Nos. 1, 2 And 3 Were Filed Before GIAA Approved The Award Of The Contract To Lotte.**

Section 5425(g) states that a timely protest stays a procurement where the agency has not yet awarded the contract. Here, GIAA did not approve the award of the contract to Lotte until June 11, 2013, when GIAA’s Board of Directors voted to approve the terms of the contract with Lotte that had previously been negotiated. (See Suh Decl., Ex. 36, Minutes at pp. 1-2.) Because Protest No. 1 (filed on October 30, 2012), Protest No. 2 (filed on May 29, 2013) and Protest No. 3 (filed on June 7, 2013) were all filed before June 11, 2013, they all satisfy this element for triggering the automatic stay.

The OPA should reject any argument by GIAA that the contract was awarded to Lotte on Saturday, May 18, 2013, when GIAA’s management purported to execute a contract with Lotte despite its lack of authority to do so. (See *id.*, Ex. 48 at p. 1.) GIAA’s enabling legislation, 11 G.C.A. § 1106(a), states that the authority to take action on behalf of or bind the agency resides exclusively with GIAA’s Board of Directors. See also 12 G.C.A. § 1106(a) (“All powers vested in the [Airport] Authority,” other than certain non-applicable exceptions, “shall be exercised by the Board.”). Thus, GIAA’s Board of Directors has the exclusive authority to approve the execution of any agreement on behalf of GIAA; any agreement without such approval is not binding on GIAA and is not legally recognized.

Further, the GIAA Board’s April 12, 2013 resolution selecting Lotte as the highest ranked proposer under the RFP confirms that June 11, 2013, constitutes the award of the contract. That resolution authorized GIAA management merely to “negotiat[e]” an agreement with Lotte—it did not, and statutorily could not, grant GIAA management the authority to enter into or execute an agreement with Lotte, without further action by GIAA’s Board of Directors. (See Suh Decl., Ex. 3, Minutes at p. 2.) All GIAA management could have done on May 18, 2013 is conclude contract negotiations with Lotte and submit the negotiated contract terms to GIAA’s Board of Directors for its approval—not award a contract. Accordingly, it is the date on which GIAA’s Board of Directors approves the contract that constitutes the date the contract is awarded.



1           Nevertheless, even if May 18, 2013 constitutes the award of the contract—which it does  
2 not—Protest No. 1 was filed long before May 18, 2013. Specifically, Protest No. 1, including the  
3 initial May 18, 2013 letter and the follow-up letters, were filed well in advance of May 18, 2013.  
4 (*See id.*, Exs. 5, 17, 18, 19.)

5           Accordingly, Protest Nos. 1, 2 and 3 were filed before the approval of the award of the  
6 contract to Lotte.

7           **3. Protest Nos. 1, 2 And 3 Have Not Reached A Final Resolution**

8           As made clear by two recent OPA decisions, a procurement protest does not reach “final  
9 resolution” until all appeals have been exhausted or the time to file an appeal has expired. *In the*  
10 *Appeal of JMI Edison*, OPA-PA-13-009, Decision at 4-5 (finding that the “[f]inal resolution of a  
11 protest includes the time period of an appeal after protest”) (citing *In the Appeal of IBSS*, OPA-PA-  
12 08-012, pp. 9-10); *In the Appeal of K Cleaning Services*, OPA-PA-13-004, Decision at 7 (Oct. 25,  
13 2013) (finding that a “[f]inal resolution includes the time period of an appeal after protest”). None of  
14 DFS’s protests has reached a final resolution.

15           In particular, while GIAA denied Protest No. 1, DFS timely appealed this denial. Thus, under  
16 the OPA’s *JMI Edison* and *K Cleaning* decisions, there has been no final resolution of this protest.  
17 As to Protest Nos. 2 and 3, there can be no dispute that there has not been a final resolution on these  
18 protests, because GIAA has not even issued any decision on them.

19           **4. The JR/Duty Free Protest Triggered The Automatic Stay.**

20           On May 30, 2013, JR/Duty Free filed a timely protest of the award of the procurement to  
21 Lotte. (Suh Decl., Ex. 30 at p. 1.) This protest triggered the automatic stay because it was timely  
22 filed before GIAA’s Board of Directors awarded the contract to Lotte on June 11, 2013, and it has not  
23 yet reached final resolution given that GIAA has not issued its initial decision regarding this protest.  
24 Thus, even if the OPA were to ignore (which it should not) DFS’s various protests, the automatic stay  
25 of this procurement was triggered on May 30, 2013 due to the JR/Duty Free Protest.

26           **IV. CONCLUSION**

27           For the foregoing reasons, the OPA should issue an order declaring that the automatic stay  
28 should have been imposed since the filing of Protest No. 1. Further, because GIAA continues to take

1 actions in contravention of the stay, the OPA also should issue an order compelling GIAA to abide by  
2 the stay by (1) refraining from taking any action with regard to the RFP such that no further rights,  
3 obligations, or agreements between GIAA and Lotte are altered, and (2) acknowledging that Lotte  
4 has no legal right to occupy the Airport Concession space.

5  
6 Dated: September 15, 2014

Respectfully submitted,

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8 

9 By: \_\_\_\_\_

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