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12 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**
13 **PROCUREMENT APPEAL**

14 In the Appeal of
15 DFS GUAM L.P.,
16 Appellant.

Docket No. OPA-PA-13-006

**A.B. WON PAT INTERNATIONAL
AIRPORT AUTHORITY, GUAM'S
NOTICE OF ONGOING JUDICIAL
INVOLVEMENT**

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24 **RECEIVED**

OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

25 DATE: 9-16-14

26 TIME: 3:19 AM PM BY: JBH

27 FILE NO OPA-PA: 13-004

1 The A.B. Won Pat International Airport Authority, Guam (“GIAA” or “the Airport”)
2 hereby files this Notice of Ongoing Judicial Involvement to apprise the Office of Public
3 Accountability (“OPA”) of the status of the judicial action between the parties.

4 Yesterday, on September 15, 2014, DFS Guam, L.P. (“DFS”) filed with the OPA a
5 Motion to Declare Automatic Stay in Effect; a Response to A.B. Won Pat International Airport
6 Authority, Guam’s Objection to the Office of Public Accountability Hearing Appeal; a Notice of
7 Non-Opposition to A.B. Won Pat International Airport Authority, Guam’s Objection to the
8 Appointment of Peter C. Perez; and a Request for (1) Scheduling Order and (2) Status Conference
9 and Hearing (collectively, “DFS’s Filings”). DFS’s Filings were premature, because there is still
10 ongoing judicial involvement over this proceeding. Specifically, the Superior Court of Guam has
11 not yet entered a judgment in the action related to this proceeding. Until said judgment is entered,
12 the OPA’s prior stay order – which held that “the Public Auditor is precluded by its rules from
13 proceeding at this time with the DFS appeal” – must remain in effect.

14 Pursuant to 2 GAR, Div. 4 § 12103(b), “If an action concerning the procurement under
15 Appeal has commenced in court, the Public Auditor shall not act on the Appeal except to notify
16 the parties and decline the matter due to Judicial involvement.” On May 30, 2013, DFS filed its
17 Notice of Appeal with the OPA (“OPA Appeal”) and, two hours later, filed an action in the
18 Superior Court of Guam entitled *DFS Guam L.P. v. The A.B. Won Pat International Airport*
19 *Authority, Guam, Lotte Duty Free Guam LLC*, CV0685-13 (the “Judicial Action”). Recognizing
20 that the Judicial Action concerned the same procurement as the OPA Appeal, the OPA issued an
21 Order Staying Appellant’s Appeal on June 5, 2013 (“First Stay Order”). In the First Stay Order,
22 the OPA expressly stated, “[T]he Public Auditor shall not take any further action on this appeal
23 and hereby declines taking any further action due to the aforementioned judicial involvement.”
24 (First Stay Order at pp. 2-3.)

25 On July 19, 2013, the Superior Court dismissed the Judicial Action on grounds that DFS
26 had failed to exhaust its administrative remedies before filing suit. (Decision & Order, filed July
27 19, 2013.) In its Decision & Order, the Superior Court correctly found that DFS had failed to
28 exhaust its administrative remedies before going to court; however, in the course of rendering that

1 decision, the Superior Court made certain findings that were in excess of its jurisdiction and other
2 findings that were not supported by the record. When the Superior Court declined to correct these
3 errors itself, the Airport on November 12, 2013 filed its Notice of Appeal of the Superior Court's
4 Decision & Order to the Guam Supreme Court. (The Airport's co-defendant in the Judicial
5 Action, Lotte Duty Free Guam LLC ("Lotte"), filed its Notice of Appeal on November 8, 2012.)
6 While the Supreme Court appeals were pending, DFS filed its Request to Lift Stay with the OPA
7 on November 22, 2013.

8 The OPA issued its Order Denying DFS' Request to Lift Stay on December 26, 2013
9 ("Second Stay Order"). Citing GAR, Div. 4 § 12103(b), the OPA explained that "if an action
10 concerning the procurement under appeal has commenced in court, the Public Auditor shall not
11 act on the Appeal except to notify the parties and decline the matter due to judicial involvement."
12 (Second Stay Order at 3.) The OPA rejected DFS's position that the ongoing Judicial Action and
13 Supreme Court Appeals did not relate to the OPA Appeal and instead found "that OPA-PA-13-
14 006 is still 'in court' and as a result, the Public Auditor is precluded by its rules from proceeding
15 at this time with the DFS appeal." (*Id.* at 4.)

16 On June 2, 2014, the Guam Supreme Court issued an order granting most of the relief
17 sought by the Airport and Lotte: namely, that the Superior Court be ordered to delete certain
18 extra-jurisdictional statements from its Decision & Order.¹ Pursuant to the Supreme Court's
19 instructions, the Superior Court issued its Amended on Remand Decision and Order on
20 September 10, 2014 ("Amended on Remand D&O"). However, the Superior Court has not yet
21 entered a judgment. Until a judgment has been entered, a civil proceeding is not deemed final.
22 *See* Guam R. Civ. P. 58(a)(1).

23 DFS's Filings yesterday are yet another example of its willingness to disregard statutory
24 procedures and judicial orders that it does not like. Since the "judicial involvement" (initiated by
25 DFS) that caused the OPA to issue its First and Second Stay Orders is still ongoing, DFS's Filings
26 were premature and in violation of the First and Second Stay Orders. Accordingly, consistent

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28 ¹ The Supreme Court denied the Airport's request that the Superior Court be ordered to reconsider the issue of
sanctions, which the Airport contended should have been awarded in this case. The Airport subsequently filed a
petition for rehearing with the Supreme Court regarding the sanctions issue, which was denied on August 1, 2014.

1 with its prior orders and 2 GAR, Div. 4 § 12103(b), the OPA should not take any action at this
2 time to address DFS's Filings. Instead, DFS (and the OPA) should wait until a judgment has been
3 entered in the Judicial Action.

4 The Airport does not believe that it can respond to the substance of DFS's Filings until the
5 Superior Court has entered a judgment in the Judicial Action and it is jurisdictionally appropriate
6 to do so. At that time, the Airport intends (1) to file motions to maintain the existing stay and to
7 disqualify the OPA; (2) to resume its review and consideration of DFS's pending protests; and (3)
8 to take other appropriate steps so that the underlying dispute can proceed.

9
10 Respectfully submitted this 16th day of September, 2014.

11 **CALVO FISHER & JACOB LLP**
12 Attorneys for A.B. Won Pat International
13 Airport Authority, Guam

14 By: 
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