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

In the Appeal of

DFS Guam L.P., Appellant, of the Decision of
the A.B. Won Pat International Airport
Authority, Guam, Respondent.

DOCKET NO. OPA-PA-14
**NOTICE OF PROCUREMENT APPEAL;
PROCUREMENT APPEAL; AND
VERIFICATION**

1 DFS Guam L.P. ("DFS") hereby appeals a decision rendered by the A.B. Won Pat
2 International Airport Authority, Guam ("GIAA"), an agency of the Government of Guam, on
3 January 13, 2015, denying DFS's May 29, 2013 protest of GIAA's RFP No. GIAA 010-FY12
4 ("RFP"), which was later supplemented on June 7, 2013. This appeal concerns DFS's second protest
5 of the RFP; GIAA's denial of DFS's first protest was appealed on May 30, 2013 under Docket No.
6 OPA-PA 13-006, and was dismissed on September 30, 2014 when the Public Auditor recused herself
7 from hearing the matter after GIAA and Real-Party-in-Interest Lotte Duty Free Guam LLP ("Lotte")
8 alleged that she was biased. The bases for DFS's second protest, which are set forth fully herein, are
9 distinct from the bases for DFS's first protest.

10 I. APPELLANT'S INFORMATION

11 Name: DFS Guam, L.P.
12 Mailing Address: 1296 Pale San Vitores Road
13 Tumon, Guam 96913
14 Business Address: 1296 Pale San Vitores Road
15 Tumon, Guam 96913

16 For purposes of this appeal, please direct correspondence to DFS's counsel, G. Patrick Civile,
17 Esq. (pciville@civilletang.com), Civile & Tang, PLLC, 330 Hernan Cortez Ave. Ste. 200, Hagatna,
18 Guam 96910,.

19 II. SOLICITATION INFORMATION

20 Identification of Procurement/Solicitation: RFP No. GIAA 010-FY12
21 Procuring/Soliciting Agency: A.B. Won Pat International Airport Authority, Guam
22 Contract Number: No Contract Number is shown on the purported contract
23 Date of Contract: June 12, 2013 (but this purported contract was void *ab*
24 *initio* for reasons set forth below and in DFS's other
25 protests)

26 Names of Competing Bidders:

- 27 1. Lotte Duty Free Guam, LLC (bidder awarded the contract)
- 28 2. The Shilla Duty Free

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IV. STATEMENT OF GROUNDS FOR APPEAL

A. Issues Subject to Appeal

DFS's Protest No. 2 and this Appeal are based on the following independent bases (these bases are in addition to those set forth in DFS's other protests to the RFP at issue and DFS's previous appeal of its initial protest to this RFP):

1. Lotte's proposal was non-responsive to the RFP, given its improper conduct, its submission of a proposal that included inducements that were outside the scope of the RFP, and its attempt to submit unlawful modifications to its proposal after the submission deadline.
2. Public policy arguments support reversing GIAA's determination that Lotte is the "best qualified proposer" due to Lotte's submission of a proposal that included inducements outside the scope of the RFP and Lotte's attempt to submit unlawful modifications to its proposal after the submission deadline. GIAA's decision to award the RFP to Lotte—despite GIAA's acknowledgment that Lotte's proposal included inducements well outside the scope of the RFP and despite GIAA's knowledge that Lotte improperly attempted to change its proposal after the bid submission deadline—irrevocably compromised the integrity of the proposal process and thus requires invalidating GIAA's determination regarding Lotte and Lotte's proposal. Notwithstanding GIAA's ex-post attempt to sanitize Lotte's proposal by pretending that Lotte never changed its proposal after the bid submission deadline or that GIAA did not consider Lotte's altered proposal, GIAA's and Lotte's non-transparent conduct violated the public policy set forth in 5 G.C.A. § 5625, which mandates that public employees "should conduct themselves in such a manner as to foster public confidence in the integrity of the territorial procurement organization."
3. The contract effectuating the RFP that GIAA and Lotte purportedly entered on June 12, 2013 is void under Guam law because the contract was entered into in contravention of the mandatory automatic stay provided for by statute.
4. GIAA's conduct throughout the proposal submission and evaluation period, which was

1 focused more on covering up and, at times, abetting Lotte's various RFP violations rather
2 than policing them, casts serious doubt on the fundamental impartiality of GIAA in
3 accepting and evaluating proposals, as well as the integrity of GIAA's ultimate finding
4 that Lotte was the "best qualified proposer."

- 5 5. GIAA's decision to respond to DFS's Protest No. 2 by unilaterally conducting a wholly
6 unmonitored investigation into itself also created a troubling and inherent conflict of
7 interest. The alleged impropriety on the part of GIAA casts serious doubt on the fullness
8 and fairness of this ostensible "investigative" process, which ultimately resulted in the full
9 ratification of GIAA's previous findings and the affirmative exoneration of all GIAA
10 Board Members of any wrongdoing in connection with this RFP.

11 **B. Supporting Facts**

12 The following facts support DFS's Protest No. 2 and this Appeal:

13 1. On July 19, 2012, GIAA issued the RFP "to develop, construct, and operate a high
14 quality specialty retail concession at the [Airport's] Main Passenger Terminal." Under the RFP, the
15 proposed concession would permit, for a period of five years, the exclusive right to operate a retail
16 merchandise outlet in the Airport, with a non-exclusive right to continue to sell merchandise at the
17 Airport beginning in the sixth year. GIAA initially set a bid submission deadline of September 21,
18 2012, but thereafter extended the deadline to October 17, 2012.

19 2. The RFP rules provided: "Proposals must be received by GIAA no later than [the RFP
20 deadline]," and "[l]ate proposals will not be considered." RFP Notice Inviting Proposals (emphasis
21 in original); *see also* RFP Part III.D.4. The RFP rules also provided: "Multiple proposals from a
22 single Proposer will not be accepted." RFP Part III.D.2.

23 3. In addition, the RFP required "[t]he evaluation committee [to] review and score
24 written proposals based on the Evaluation Criteria identified in Part V." RFP Part III.F.3 (emphasis
25 added). Similarly, 2 GAR, Div. 4, § 3114(f) provides that "[p]roposals shall be evaluated only on the
26 basis of evaluation factors stated in the Request for Proposals." Part V of the RFP sets forth
27 evaluation factors, all of which relate only to "the retail space." RFP Part V; *see also id.* ("the
28 [Evaluation] Committee will evaluate the physical design and construction of the retail space(s)").

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**Attachment H-10
Proposed Annual Rent**

Acceptable Minimum Annual Guarantee Rent (the "MAG Rent") and Percentage Rent Rate ("Percentage Rent Rate") are described in Part IV of the RFP. List in the spaces provided below the proposed MAG Rent and proposed Percentage Rent Rate for the entire term, which must equal to or exceed the minimum acceptable amounts stated in the RFP.

Component of Annual Rent	Proposed Amount
MAG Rent	\$15,250,000
Percentage Rent Rate	30 %

If you are proposing Additional Space, please provide the proposed MAG Rent and proposed Percentage Rent Rate for the entire term for the Additional Space.

Component of Annual Rent	Proposed Amount
MAG Rent *	\$750,000
Percentage Rent Rate	30 %

* Additional space consists of 1 arrivals store and 2 proposed fashion boutiques.

Thus, as of October 17, 2012 or shortly thereafter, GIAA knew that DFS's MAG offer was much more attractive than Lotte's MAG offer.

7. On November 29, 2012, more than a month after the October 17, 2012 deadline, Lotte attempted to submit modifications to its proposal during its interview with GIAA's Evaluation Committee. In its presentation for the interview with GIAA, Lotte increased its MAG offer to \$15.4 million per year, which amounted to an annual increase of \$2.4 million. In addition, Lotte increased the proposed Percentage Rental Rate from 30.1% to 33%. The following chart appears in Lotte's November 29, 2012 presentation:

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THE UPDATED CONCESSION REVENUE PICTURE		
Average over 10-year concession - UPDATED FROM INITIAL SUBMISSION		
	Main Concession	Additional Concession
MAG Rent	15,400,000 USD	240,000 USD
Percentage Rent Rate	33.0%	25.0%
Capital Investment	US\$55 million (Third level, retail and non-retail facilities)	

8. That Lotte was offering a MAG of \$15.4 million is further confirmed by the audio recording of Lotte's interview during which, on behalf of Lotte, Joe Cruz offered a MAG of \$15.4 million.

9. In subsequent correspondence between GIAA and Lotte, it became clear that Lotte's \$15.4 million offer during its November 29, 2012 interview was a change from the \$13 million offer in Lotte's original, timely proposal submitted on October 17, 2012. For example, on February 26, 2013, GIAA Executive Manager Chuck Ada sent a letter to S.K. Lee, Chairman of Lotte, inviting Lotte to provide an explanation as to the different MAG numbers in Lotte's original October 17, 2012 proposal and its November 29, 2012 presentation. In its response letter dated March 15, 2013, Lotte effectively admitted to increasing its MAG offer, stating that it had submitted an "Additional MAG rental contribution" beyond the one originally provided.

10. Significantly, Lotte's new "updated" MAG just barely edged out (by less than 1%) the MAG of \$15.25 million that DFS had proposed for the Airport Concession. The minimal amount by which Lotte's new "updated" MAG edged out DFS's one and only MAG leads to the conclusion that

1 GIAA had improperly disclosed DFS's proposal or DFS's MAG amount to Lotte so as to allow Lotte
2 to improve its own MAG offer.

3 11. Lotte's November 29, 2012 modifications to its proposal were plainly impermissible.
4 The deadline for submitting proposals and any modifications to proposals was the RFP deadline,
5 which had long passed. *See* RFP Part III.D.3 (unambiguously specifying that "[p]roposals may be
6 modified . . . at any time prior to the Proposal Due Date") (emphasis added); RFP Part III.D.4
7 ("Late proposals will not be accepted and will automatically be disqualified from further
8 consideration.") (emphasis in original). Nor did the RFP permit proposers to circumvent this
9 limitation by submitting untimely multiple proposals—*see* RFP Part III.D.2 ("Multiple proposals
10 from a single Proposer will not be accepted.").

11 12. In addition to changing its MAG offer, Lotte's November 29, 2012 presentation also
12 improperly made offers to GIAA outside of the scope of the RFP, even though such offers were a
13 clear violation of the RFP rules, as set forth above in Paragraph 3. First, Lotte's original, October 17,
14 2012 proposal vaguely hinted at the establishment of a "potential" downtown store and the creation
15 of an unspecified "mechanism" to provide "incremental income" to the GIAA. Lotte admitted that
16 this offer was "not directly related to this RFP," which is a clear violation of the RFP rules.
17 Subsequently, in Lotte's illegal modifications to its proposal, Lotte made the straightforward offer
18 that, "subject to negotiation," it would pay GIAA a percentage of downtown sales as a "marketing
19 fee" with a minimum "fee" of \$2,000,000. This untimely and improper offer was grounds for Lotte
20 to be automatically disqualified.

21 13. Second, Lotte offered capital expenditures that went well beyond the subject of the
22 RFP. Specifically, the RFP required proposers to offer capital expenditures to the main terminal's
23 "retail space." *See* RFP Part V ("[T]he [Evaluation] Committee will evaluate the physical design and
24 construction of the retail space(s) . . ."). Instead of limiting its required capital expenditures to "the
25 retail space" as called for in the RFP, in its original proposal, Lotte offered to fund renovations to the
26 food court and restrooms and to construct a children's play area. Later, at the November 29, 2012
27 interview, Lotte also made a commitment, "subject to negotiation," to "invest" another \$32,000,000
28

1 in airport infrastructure development. Again, this offer was “above and beyond” the requirements of
2 the RFP and “not directly related” to it.

3 14. In addition to violating the RFP rules regarding multiple proposals and untimely
4 submissions discussed above, Lotte’s above offers rendered its proposal “non-responsive.” As
5 discussed above, all of the evaluation criteria in the RFP relate to “the retail space.” RFP, Part V.
6 Because Lotte’s above offers are unrelated to these evaluation factors, they do not meet the
7 requirements of the RFP and thus, are “non-responsive” and GIAA was required not to consider
8 Lotte’s proposal any further. *See* RFP Part II.H.

9 15. Nonetheless, GIAA accepted and considered Lotte’s proposal and its improper
10 modifications to that proposal. Indeed, the audio recording that was made during the November 29,
11 2012 interview of Lotte by GIAA’s Evaluation Committee confirms that the members of the
12 Evaluation Committee not only allowed but also enthusiastically embraced Lotte’s untimely and
13 unlawful modifications to its proposal.

14 16. Further, 2 G.A.R., Div. 4, § 3114 (f)(2) provides that “[p]roposals shall be evaluated
15 only on the basis of evaluation factors stated in the Request for Proposals.” GIAA’s acceptance and
16 consideration of Lotte’s proposal and its modifications violated this regulation because Lotte’s above
17 offers went beyond the evaluation criteria in the RFP.

18 17. GIAA’s acceptance and consideration of Lotte’s modified proposal violates Guam
19 public policy. One of the “underlying purposes and policies” of Guam’s procurement laws is “to
20 ensure the fair and equitable treatment of all persons who deal with the procurement system of this
21 Territory.” 5 G.C.A. § 5001 (b)(1). If GIAA wanted proposers to include in their proposals—as Lotte
22 did—items relating to other income streams, food court, restrooms or a children’s play area, it needed
23 to have said so in the RFP, not secretly (and exclusively) entertain offers from just one of the
24 proposers—Lotte. The foregoing facts establish that DFS and the other proposers were not afforded
25 fair and equitable treatment by the GIAA. Rather, the RFP process was altered to favor Lotte and
26 Lotte only.

27 18. GIAA’s acceptance of Lotte’s illegal modified proposal also amounted to a
28 misrepresentation to other RFP proposers and the Guam public that Lotte was in compliance with the

1 RFP rules when Lotte was not. The misrepresentation was material because it tended to deceive
2 Guam public officials and employees and the Guam public that Lotte was not attempting to
3 improperly influence the RFP process when, in fact, it was and that the RFP was being administered
4 in a fair, neutral, and even-handed manner when, in fact, it was not.

5 6 **V. STATEMENT OF THE RULINGS REQUESTED**

7 DFS notes at the outset that, upon the filing of this Appeal, the RFP award process should
8 have been suspended long ago pursuant to 5 GCA § 5425(g), which provides, in part, that “[i]n the
9 event of a timely protest under Subsection (a) of this Section or under Subsection (a) of § 5480 of this
10 Chapter, the Territory shall not proceed further with the solicitation or with the award of the contract
11 prior to final resolution of such protest” subject to administrative determinations that have not been
12 made. The agreement effectuating the RFP that GIAA and Lotte purported to execute on May 18,
13 2013 was invalid because GIAA management had no authority to award and execute that contract on
14 behalf of GIAA. Only the GIAA board has that authority but the GIAA board did not agree to bind
15 GIAA to that contract until June 12, 2013, which critically was after DFS submitted its Protest No. 2.
16 Hence, GIAA should have stayed the procurement process as soon as DFS submitted its Protest No. 2
17 on May 30, 2013 and, by statute, was not allowed to execute any contract regarding this RFP after
18 that date and, by statute, any acts in furtherance of the RFP after that are unauthorized and void, and
19 DFS requests such a ruling from the OPA.

20 DFS also requests the following rulings from the OPA: that the putative award of the contact
21 was in violation of Guam law and the terms of the RFP; that Lotte’s RFP proposal is non-responsive;
22 that a new RFP process be instituted; that an independent monitor be appointed to supervise the
23 GIAA’s future conduct in connection with this new RFP process; and that DFS be awarded
24 reasonable costs incurred in connection with the solicitation and protest.

25 **A. Lotte Violated the RFP’s Terms by Including Additional Inducements in Its Proposal** 26 **that Were Outside the Scope of the RFP, and Non-Responsive to the RFP.**

27 As stated above, Part V of the RFP sets forth the factors for evaluating the proposals, all of
28 which relate to “the retail space.” RFP Part V. Further, 2 GAR, Div. 4, § 3114(f) provides that

1 “[p]roposals shall be evaluated only on the basis of evaluation factors stated in the Request for
2 Proposals.” A proposal that does not provide “the required information” or “is not consistent with the
3 goals and objectives of GIAA’s concession program described in the RFP,” including the evaluation
4 criteria, may be found “non-responsive.” RFP Part II.H. “If a proposal is found to be non-
5 responsive, it will not be considered further.” *Id.*

6 Because Lotte’s November 29, 2012 presentation offered other income streams and capital
7 improvements that had nothing to do with “the retail space,” these offers do not meet the
8 requirements of the RFP and thus, are “non-responsive” and GIAA was required not to consider
9 Lotte’s proposal any further. *See* RFP Part II.H.

10 **B. Lotte Violated the RFP’s Terms by Attempting to Change, and Changing, Its Proposal**
11 **after the Bid Submission Deadline.**

12 Lotte’s attempts in its November 29, 2012 presentation to change its MAG rent and
13 Percentage Rental Rate offers and include other income streams and capital expenditures unrelated to
14 the retail space are patent violations of the RFP’s timing provision—the RFP only permitted
15 modifications “prior to the Proposal Due Date,” RFP Part III.D.3, and that date had long passed by
16 the time of the presentation. Moreover, Lotte cannot avoid this conclusion by characterizing its
17 November 29, 2012 presentation as a separate proposal because multiple proposals by a single
18 proposer are strictly prohibited by the RFP rules and because the October 17, 2012 deadline for
19 proposals already had passed. *See* RFP Part III.D.2, Part III.D.4.

20 **C. GIAA Should Have Disqualified Lotte.**

21 GIAA should not have considered Lotte’s proposal, and GIAA’s consideration of Lotte’s
22 proposal as improperly modified, and with the inclusion of inducements outside the scope of the RFP,
23 was in violation of procurement law and regulations and the terms and conditions of the RFP.
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1 **D. A New RFP Process Should Be Instituted.**

2 Because all of the foregoing facts establish that, as it now stands, this RFP process has been
3 irrevocably tarnished by a litany of fatal flaws, DFS requests that the OPA hereby mandate that the
4 results that were obtained through this flawed process be voided in their entirety, and that a new RFP
5 process be pursued in a timely fashion. Because Lotte is a non-responsible proposer and the source
6 of many of these fatal flaws, it should be barred from further participation in the RFP.

7
8 **E. An Independent Monitor Should Be Appointed to Supervise the GIAA's Future
Conduct in Connection with this New RFP Process.**

9 As discussed above, the GIAA's conduct throughout the course of the current RFP process,
10 including its response to DFS's proposal protest, has been characterized by bad faith, prejudice
11 against DFS, and a clear bias in favor of Lotte. The appropriate remedy to ensure that future
12 proceedings in connection with a new RFP process are conducted fairly and transparently is to
13 appoint a truly independent monitor, selected by an independent administrative or judicial officer,
14 and to empower that monitor to supervise and oversee the GIAA in relation to this matter. Such an
15 independent monitor should supervise, among other things, the procedures by which proposals are
16 solicited; the methods of communication between the GIAA and proposals; the criteria used by the
17 GIAA evaluation committee to evaluate the proposals; the procedures used by the GIAA board to
18 adopt or reject the recommendation of the evaluation committee; the negotiations of any contract
19 pursuant to the RFP; and the GIAA board's ultimate approval of any contract pursuant to the RFP.
20 Absent an independent monitor with broad authority to supervise the GIAA's conduct, there can be
21 no assurance that the GIAA will not simply repeat its pattern of bad faith conduct in violation of the
22 terms of a new RFP and applicable Guam laws.

23 **F. DFS Should Be Awarded Its Reasonable Costs.**

24 Pursuant to 5 GCA § 5425(h), if this proposal protest is sustained by the OPA, DFS is
25 "entitled to the reasonable costs incurred in connection with the solicitation and protest, including bid
26 preparation costs, excluding attorney's fees, if . . . there is a reasonable likelihood that the protestant
27 may have been awarded the contract but for the breach of any ethical obligation imposed by Part B of
28 Article 11 of this Chapter or the willful or reckless violation of any applicable procurement law or

1 regulation.” The foregoing facts establish that the GIAA’s proposer ranking methodology was
2 flawed. As one of the three RFP responsible proposers after Lotte is properly disqualified, DFS had a
3 reasonable likelihood that it would have been awarded the contract but for the wrongful conduct of
4 Lotte and the GIAA. Further, the repeated conduct of Lotte and the GIAA constituted willful or
5 reckless violations of applicable procurement laws and regulations.

6
7 **VI. SUPPORTING EXHIBITS, EVIDENCE, AND/OR DOCUMENTS**

8 Attached hereto are supporting documents and evidence to substantiate the foregoing claims
9 and grounds for appeal. DFS anticipates that further supporting documents and evidence will become
10 available within two weeks of this filing, by February 4, 2015, as DFS receives and reviews the
11 GIAA’s responses to an outstanding Sunshine Act request.

12 Although DFS has identified the attached documents and information in support of this
13 Appeal, DFS does not waive its right to rely upon additional documents, information and testimony.
14 To avoid any doubt, DFS’s investigation continues and it expressly reserves the right to cite to other
15 evidence and to present additional testimony during this Appeal or other proceeding related to Protest
16 No. 2.

17
18 **VII. CONCLUSION**

19 For all the foregoing reasons, DFS appeals the adverse decision of the GIAA (triggering an
20 automatic stay of the RFP process), and hereby requests a ruling that (i) GIAA violated the automatic
21 stay required by statute; (ii) that Lotte’s bid was non-responsive; (iii) the procurement violated the
22 terms and conditions of the RFP and Guam procurement law; (iv) that the putative contract be
23 declared void; (v) that a new RFP process be instituted; (vi) that an independent monitor be appointed
24 to supervise the GIAA’s future conduct in connection with this new RFP process; and (vii) that DFS
25 is awarded its reasonable costs pursuant to 5 GCA § 5425(h).

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VIII. DECLARATION RE COURT ACTION

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of Public Accountability within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

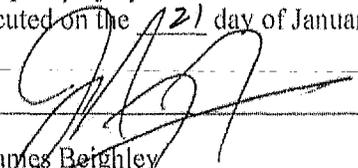
Dated: January 21, 2015

By: 
G. Patrick Civile
Attorneys for Appellant
DFS Guam, L.P.

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VERIFICATION

I, Lamonte James Beighley, am Appellant DFS Guam L.P.'s duly authorized representative and am authorized to make this verification. I have read the foregoing Notice of Procurement Appeal and Procurement Appeal and, based on information and belief and to the best of my knowledge, the facts stated therein are true and correct. I declare under penalty of perjury under the laws of Guam that the foregoing is true and correct. This verification was executed on the 12 day of January 2015.

By: 

Lamonte James Beighley

Appellant DFS Guam L.P.'s Duly Authorized Representative