

1 KATHLEEN V. FISHER, ESQ.
2 WILLIAM N. HEBERT, ESQ.
3 SARAH L. FABIAN, ESQ.
4 CALVO FISHER & JACOB LLP
5 Attorneys at Law
6 259 Martyr Street, Suite 100
7 Hagatna, Guam 96910
8 Telephone No.: (671) 646-9355
9 Facsimile No.: (671) 646-9403

10 Attorneys for Agency
11 A.B. Won Pat International Airport Authority, Guam

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 12/20/13

TIME: 3:54 AM PM BY: C. Roque

FILE NO OPA-PA: 12-006

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

14 IN RE THE APPEAL OF DFS GUAM L.P.,

APPEAL NO.: OPA-PA-13-006

15 Appellant.

16 **A.B. WON PAT INTERNATIONAL**
17 **AIRPORT AUTHORITY, GUAM'S**
18 **OBJECTION TO THE OFFICE OF**
19 **PUBLIC ACCOUNTABILITY HEARING**
20 **APPEAL**

1 A.B. Won Pat International Airport Authority, Guam ("GIAA" or "Airport"), by and
2 through its attorneys, Calvo Fisher & Jacob LLP, hereby objects pursuant to 2 GAR Div. 4 §
3 12601 to the Office of Public Accountability ("OPA" or "Public Auditor") hearing this OPA
4 appeal.

5 Last Friday, December 13, 2013, a little over an hour before the deadline to submit
6 objections to the OPA's appointment of Peter C. Perez as the hearing officer in this OPA appeal,
7 DFS Guam L.P. ("DFS") disclosed *for the first time* that it had retained David Lujan and his firm
8 Lujan, Aguiqui & Perez LLP ("LAP") to advise DFS about issues related to the RFP at issue in
9 this case. *Not* disclosed in DFS's belated filing was the fact that an unlicensed research attorney
10 at LAP, James Brooks, is married to the Public Auditor, Doris Flores-Brooks. DFS should have
11 disclosed this information regarding this close family connection seven months ago, on May 30,
12 2013, when it filed its appeal to the OPA. It is not clear why this disclosure was not made at that
13 time. Further, given that Mr. Brooks's connection to the OPA has apparently required Ms.
14 Brooks to recuse herself in the past, *see In the Appeal of Far East Equipment Company, LLC,*
15 *OPA-PA-08-001, (Order of Dismissal, Jan. 31, 2008),* it is also not clear why Ms. Brooks did not
16 also, on her own initiative, make a timely disclosure of this close family connection in light of
17 this high profile OPA appeal from GIAA's award of the Airport concession to Lotte Duty Free
18 Guam LLC ("Lotte"). Equally disturbing is that, notwithstanding a stay of DFS's OPA appeal
19 while it unsuccessfully sought an injunction in the Superior Court against Lotte's occupancy of
20 the Airport premises, the Public Auditor recently appointed Peter C. Perez, a partner of the LAP
21 firm, as the hearing officer. The close family connection itself, the failure to make timely
22 disclosures of it by the Public Auditor and DFS, and the Public Auditor's appointment of Mr.
23 Perez raise serious questions regarding the impartiality of these proceedings.

24 The failure to make proper disclosures is even more disconcerting given recent threats by
25 DFS to Lotte that DFS is relying on the OPA to undo the award and deprive the Airport and the
26 traveling public of Lotte's contractual obligation to undertake extensive renovations to the
27 premises. Further, recent public statements by Ms. Brooks reveal what appears to be a bias in
28 favor of DFS, which, notwithstanding its long tenure at the Airport, was not even the second-

1 ranked bidder. So, for example, Ms. Brooks made comments suggesting that she may have
2 prejudged issues relating to DFS's appeal of GIAA's decision, including the question of whether
3 she has jurisdiction and whether the automatic stay provision in the Guam Procurement Law
4 should have precluded the award to Lotte notwithstanding the fact that the underlying protest of
5 this appeal was untimely.

6 GIAA hereby submits this objection and requests appropriate disclosures and
7 clarifications from the Public Auditor and DFS. GIAA also reserves the right to move on the
8 grounds set forth herein and other grounds based on additional disclosures to disqualify the OPA
9 from hearing this appeal. The grounds for GIAA's objection are set forth in more detail below.

10 **A. The Public Auditor Should Recuse Herself When Necessary**

11 The Guam Procurement Regulations provides:

12 **Disqualification of Public Auditor.** The Public Auditor may recuse herself or
13 himself at any time and notify all parties, or any party may raise the issue of
14 disqualification and state the relevant facts prior to the hearing. The Public
15 Auditor shall make a determination and notify all parties. In the event of
disqualification or recusal of the Public Auditor, a procurement Appeal must be
taken to the Superior Court of Guam in accordance with 5 GCA § 5480.

16 2 GAR Div. 4 § 12601. Pursuant to this regulation, the Public Auditor has recused herself in
17 appeals implicating a close connection with her family members. In *In the Appeal of Far East*
18 *Equipment Co., LLC*, OPA-PA-08-001, where LAP represented the Port and Ms. Brooks's
19 husband, Mr. Brooks, was an employee of LAP, the acting administrator held that Ms. Brooks
20 had determined that she must disqualify herself from the case. (Order of Dismissal, Jan. 31,
21 2008.) It is hard to believe, in light of the extensive publicity launched by DFS regarding its OPA
22 appeal and Superior Court action, that the Public Auditor was unaware that her husband's law
23 firm had been retained in connection with DFS's effort to unseat Lotte as the successful proposer.

24 Similarly, in *In the Appeal of Teleguam Holdings, LLC dba GTA Telecom*, OPA-PA-10-
25 002, a motion to recuse Ms. Brooks apparently arose "from the fact that the Public Auditor's
26 stepson, Terrence Brooks, Esq., is the Legal Counsel for the Appellant." (Dec. & Order, Mar. 1,
27 2010 at 1.) The OPA subsequently found that "she has a conflict of interest as a result of Terrence
28 Brooks, Esq.'s position as one of the Appellant's legal counsel" and recused herself from the

1 proceeding. (*Id.* at 2, 3.)

2 The same concerns acknowledged by the OPA in the cases referenced above raise serious
3 questions regarding the impartiality of the OPA in this case, in light of the facts set forth below.

4 **B. The Public Auditor's Husband's Law Firm Has Been Secretly Working for DFS**
5 **Regarding the Subject of this Appeal**

6 On December 13, 2013, DFS filed its Response to Notice of Appointment of Hearing
7 Officer ("DFS Response") disclosing for the first time that DFS had retained LAP to advise DFS
8 about issues related to the RFP at issue in the OPA appeal. DFS's disclosure that Mr. Lujan and his
9 law firm LAP are involved in this matter comes seven months after DFS filed its Notice of Appeal
10 before the OPA and its Complaint in the Superior Court of Guam and provides at the very least a
11 context and a perception about whether the Public Auditor's appointment of Mr. Perez as the
12 hearing officer and her public positions have unfairly favored DFS on the issues pending before
13 her.

14 DFS's Response revealed very little about LAP's actual involvement with the RFP at issue,
15 stating generally:

16 DFS notes that it retained David Lujan of what was then the law firm of Lujan
17 Aguigui & Perez LLP ("LAP") to generally advise DFS about issues related to the
18 Guam International Airport Authority's determination that Lotte Duty Free Guam
19 LLC was the successful proposer for the RFP that is the subject of this
20 appeal. Neither Mr. Lujan nor anyone else at LAP has had any role in the judicial
or administrative proceedings brought by DFS in connection with the RFP at issue
in this Appeal.

21 (DFS's Response at 1.) Notably, DFS's Response and the revelation that DFS had secretly
22 retained LAP "about issues related to the [GIAA's] determination that Lotte Duty Free Guam LLC
23 was the successful proposer for the RFP" notwithstanding being represented by Gibson Dunn &
24 Crutcher LLP, a 1,100 attorney Los Angeles-based firm, and two local firms, Blair Sterling
25 Johnson & Martinez, PC and Civile & Tang, PLLC, *on the same matter* was directed to the OPA's
26 appointment of Peter C. Perez as a hearing officer – not to the ability of the Public Auditor herself
27 to entertain the above-referenced appeal. (*See* GIAA's Objection to the Appointment of Peter C.
28 Perez, submitted Dec. 16, 2013.)

1 Not disclosed in DFS's belated filing is the information that the Public Auditor, Ms.
2 Brooks, is married to James Brooks. *See, e.g., In the Appeal of Far East Equipment Co., LLC,*
3 *OPA-PA-08-001 (Order of Dismissal, Jan. 31, 2008) (OPA recusal based on James Brooks's*
4 *employment at LAP). Mr. Brooks has been working at LAP for over 10 years and is currently a*
5 *research associate. (See Declaration of Sarah Fabian ("Fabian Decl."), filed concurrently herewith,*
6 *Ex. 6.) Despite having this knowledge presumably as early as May 30, 2013, when DFS filed its*
7 *appeal before the OPA, DFS only disclosed this information a little over an hour before the*
8 *deadline to submit objections to the OPA's appointment of Peter C. Perez as the hearing officer in*
9 *this appeal. (See DFS's Response.)*

10 As the Public Auditor's husband, Mr. Brooks falls within the definition of "immediate
11 family" under 5 GCA § 5601(g). DFS's payment of legal fees for LAP's services also directly or
12 indirectly contributes to Mr. Brooks's salary at LAP, where he is and has been a research associate
13 for 10 years. The extent of Mr. Brooks's involvement—or even the LAP firm's role—is unknown
14 at this point because DFS has chosen to be cryptic about that subject and because the OPA has not
15 made any disclosures on its own initiative. GIAA has asked one of DFS's local firms to
16 immediately provide further information on this subject (*see Fabian Decl. Ex. 7*), and requests a
17 full disclosure from the Public Auditor at this time, unless she chooses to recuse herself in light of
18 the recent revelations by DFS.

19 As stated above, the fact that Ms. Brooks's husband's law firm, LAP, has worked on the
20 subject of this appeal, and that this information was not disclosed in a timely manner by either DFS
21 or the OPA, is very worrisome in and of itself, but it becomes even more concerning given that the
22 hearing officer appointed for this appeal, Peter C. Perez, *also* has a very close connection to LAP
23 and in fact is still being held out as a partner of that law firm. (*See GIAA's Objection to the*
24 *Appointment of Peter C. Perez, submitted Dec. 16, 2013.*) Viewed together, these circumstances
25 raise very serious questions about how these proceedings could possibly be fair.

26 //

27 //

28 //

1 **C. DFS's Recent Threats that the OPA Will Unseat Lotte and that DFS will Resume**
2 **its Expired Tenancy at the Airport (Notwithstanding DFS's Agreement to a**
3 **Transition Plan and the Superior Court's Refusal to Stop Lotte from Honoring its**
4 **Contract by Moving into the Airport) Suggest that DFS Thinks It Has the Inside**
5 **Track with the Public Auditor**

6 DFS has recently (albeit before disclosing its secret LAP "ace in the hole") threatened Lotte
7 that it should cease its contractually mandated renovations at the Airport because DFS will prevail
8 at the OPA and will resume its incumbency at the Airport. (*See* Fabian Decl. Exs. 8-9) It is hard
9 to imagine how this could happen without some level of undue influence since DFS has no
10 contractual entitlement to occupy the Airport premises whatever the OPA does or does not do on
11 the appeal. (*See* Fabian Decl. Exs. 1-4, 9.) Indeed, DFS has made unfounded allegations of
12 corruption against GIAA officials. (*See* DFS's Appeal to OPA, filed on May 30, 2013; DFS's First
13 Amended Complaint, CV-0685-13, filed on July 2, 2013.) It is simply unfathomable that while
14 making those allegations of public corruption, DFS secretly hired LAP for the entire seven months
15 that its appeal has been pending without disclosing that it had retained LAP and, therefore, the
16 Public Auditor's husband.

17 In this high profile matter, where the stakes for the Airport and the people of Guam could
18 not be higher (*see* Declaration of Carlos Bordallo ("Bordallo Decl."), filed concurrently herewith;
19 Declaration of Frank Santos ("Santos Decl."), filed concurrently herewith; *see also* Fabian Decl.
20 Ex. 5), it is critical that there be both the perception and fact of a neutral Public Auditor who will
21 exercise the highest degree of ethical standards. The Public Auditor is entrusted with the power
22 and duty to "hear and decide all appeals of decisions that arise under 5 GCA § 5425(c)." 1 GCA §
23 1909(k) (2005). In implementing and enforcing the Guam Procurement Law, 5 GCA § 5625
24 explicitly requires impartiality and fostering public confidence:

25 Public employees must discharge their duties impartially so as to assure fair
26 competitive access to governmental procurement by responsible contractors.
27 Moreover, they should conduct themselves in such a manner as to foster public
28 confidence in the integrity of the territorial procurement organization.

29 5 GCA § 5625 (2005). As the final administrative adjudicator in procurement matters, the Public
30 Auditor is charged with the highest degree of ethical standards. Indeed, the Public Auditor was
31 initially responsible for developing the ethical standards for training the leaders of government

1 agencies. *See* 4 GCA § 15410 (2005) (“The Public Auditor shall develop standards for the ethics
2 program until the Guam Ethics Commission is appointed and functioning. . . .”). GIAA submits
3 that strict adherence to the letter and spirit of those ethical standards is essential in this matter. *See*
4 *Data Mgmt. Resources, LLC v. Office of Public Accountability*, 2013 Guam 27 ¶ 33 (affirming
5 OPA has jurisdiction to “promote the integrity of the [] procurement process and the purposes of
6 Guam’s Procurement Law[,]’ and OPA is empowered to carry out other duties and powers
7 delegated to it by law.”)

8 **D. The Public Auditor’s Public Statements Regarding Issues Relevant to this Appeal**
9 **Compound the Worries Raised by the Failure to Disclose her Relationship with**
10 **James Brooks and LAP and the Threats by DFS**

11 The appeal to the OPA filed by DFS was stayed on June 5, 2013 after DFS filed an action
12 in the Superior Court. Notwithstanding the OPA’s Stay Order, the Public Auditor has made
13 statements during the stay that reflect her viewpoint on matters that are pending before her in a
14 manner that reflect a potential bias in favor of DFS. Most recently, on December 13, during a
15 public hearing on a bill that proposes to amend the Procurement Law, the Public Auditor stated, in
16 addressing the issue of the OPA’s response following a protestor’s filing of an appeal:

17 Like for example, the DFS decision, the DFS [appeal]. What happened there. The
18 reason it’s six days is because DFS filed in Superior Court so it was halted. And
19 then the Superior Court rendered a decision and it’s now back before me.

20 (Fabian Decl. ¶ 2 (emphasis added).)¹

21 The question of whether the Public Auditor has jurisdiction to hear the appeal at this time is
22 before the OPA. (*See* DFS’s Request to Lift Stay, filed on Nov. 22, 2013; GIAA’s Opposition to
23 DFS Guam L.P.’s Request to Lift Stay, filed on Nov. 27, 2013 (“GIAA’s Opposition”); DFS’s
24 Reply in Support of Request to Lift Stay, filed on Dec. 3, 2013; Lotte’s Objection and Opposition,
25 filed on Dec. 3, 2013.) Following the dismissal of the action that DFS filed in Superior Court,
26 DFS asked the Public Auditor to lift its stay and immediately take jurisdiction over the appeal. (*See*
27 DFS’s Request to Lift Stay, filed on Nov. 22, 2013.) The Airport opposed that request, on grounds
28 that an appeal of the Superior Court’s judgment has been filed with the Guam Supreme Court and

¹ The transcript excerpts presented herein are not official. (*See* Fabian Decl. ¶ 2.) If GIAA files a formal motion regarding the issues presented herein, it will endeavor to update this transcript with an official version.

1 that until that appeal is resolved the Public Auditor is barred by the Procurement Law from hearing
2 the case. (See GIAA's Opposition.) This is a fundamental jurisdictional question that has been
3 briefed to the Public Auditor, but not heard. The Public Auditor's public statement that the appeal
4 is "back before [her]" not only contradicts the Procurement Law, but also suggests that the Public
5 Auditor may have already made a decision regarding the issue of the OPA's jurisdiction – before
6 even hearing argument on this issue.²

7 At the public hearing on December 13, the Public Auditor also staked out her position
8 regarding the enforcement of an automatic stay between the issuance of a decision on a protest and
9 the award of the contract:

10 If the automatic stay is not placed through the appeals process, it almost renders [the
11 OPA] moot. Why bother? Vendor, why bother? If the agency is allowed to go
12 forward, the agency becomes judge and jury. Should they become judge and jury?
13 This is an issue because we never had an issue of automatic stay before, everybody
14 always honored it and resolved it. This year three different agencies ignored it. As
15 John said, they gave the award today, issued the thing the next day. No opportunity
16 for the vendor to protest. The Airport, the Hospital and DOE.

17 (Fabian Decl. ¶ 2 (emphasis added).) The question of whether the Airport should have observed an
18 automatic stay after denying DFS's first protest despite the untimeliness of that protest is one of
19 the issues before the OPA on this appeal. Indeed, DFS expressly states that one of the issues on
20 appeal is that "GIAA failed to observe the requirement that it 'not proceed further with the
21 solicitation or with the award of [a] contract prior to final resolution of [a pending protest]."
22 (DFS's OPA Appeal at 2-3 (quoting 5 GCA § 5425(g).) DFS also stated to the OPA that "the
23 GIAA's failure to impose the requisite stay mandated by statute" is one of "the various issues
24 implicated in this appeal." (DFS's Request to Lift Stay at 3.) In fact, the automatic stay provision
25 was never triggered in this case because, among other reasons, DFS's protest was untimely, but
26 more to the point this issue has not even been briefed, much less heard.

27 ² Extrajudicial statements may warrant disqualification of an administrative fact-finder when they reflect "prejudgment
28 of specific facts at issue in an adjudicatory proceeding." *Matter of 1616 Second Ave. Rest., Inc. v. New York State Liq.
Auth.*, 75 N.Y.2d 158, 162, 550 N.E.2d 910, 912, 551 N.Y.S.2d 461, 463 (1990) (citing *Kennecott Copper Corp. v.
Federal Trade Comm.*, 467 F.2d 67, 80 (10th Cir. 1972); *Cinderella Career & Finishing Schools v. Federal Trade
Comm.*, 425 F.2d 583, 591 (D.C. Cir. 1970)). GIAA reserves the right to submit a motion to disqualify the OPA if
there is no self-recusal.

1 In light of the undisclosed relationship with James Brooks and LAP, the appointment of
2 Peter C. Perez as hearing officer, and DFS's threats suggesting it thinks it has the inside track at the
3 OPA, the OPA's public statements suggesting that it may have prejudged important issues raises
4 questions about a possible unfair bias in favor of DFS, at the very least creates an appearance of
5 impropriety, and is deeply troubling to GIAA.

6 Based on the foregoing, GIAA hereby submits its objection to the Public Auditor hearing
7 this appeal and requests a full disclosure regarding all underlying issues.

8 Respectfully submitted this 20th day of December, 2013.

9
10 **CALVO FISHER & JACOB LLP**
11 Attorneys for Agency
12 A.B. Won Pat International
13 Airport Authority, Guam

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
By: 
SARAH L. FABIAN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

KATHLEEN V. FISHER, ESQ.
WILLIAM N. HEBERT, ESQ.
SARAH L. FABIAN, ESQ.
CALVO FISHER & JACOB LLP
Attorneys at Law
259 Martyr Street, Suite 100
Hagatna, Guam 96910
Telephone No.: (671) 646-9355
Facsimile No.: (671) 646-9403

Attorneys for Agency
A.B. Won Pat International Airport Authority, Guam

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 12/20/13
TIME: 3:54 AM PM BY: C. Roque
FILE NO OPA-PA: 13-006

**.IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS**

IN RE THE APPEAL OF DFS GUAM L.P.,

Appellant.

APPEAL NO.: OPA-PA-13-006

CERTIFICATE OF SERVICE

1 I, Sarah L. Fabian, declare as follows:

2 1. I am an associate of the law firm of Calvo Fisher & Jacob LLP, legal counsel for
3 A.B. Won Pat International Airport Authority, Guam.

4 2. That I am a citizen of the United States of America, over the age of eighteen years,
5 have personal knowledge of the facts stated herein, and if called to testify I could and would
6 competently testify thereto.

7 3. That on the 20th day of December, 2013, I caused a copy of **A.B. WON PAT**
8 **INTERNATIONAL AIRPORT AUTHORITY, GUAM'S OBJECTION TO THE OFFICE**
9 **OF PUBLIC ACCOUNTABILITY HEARING APPEAL**, filed with the Office of Public
10 Accountability to be served upon the below-listed parties via hand delivery:

11 William J. Blair, Esq.
12 **BLAIR STERLING JOHNSON & MARTINEZ, PC**
13 1008 DNA Building
14 238 Archbishop F.C. Flores St.
Hagåtña, Guam 96910
Attorneys for DFS Guam, L.P.

15 G. Patrick Civile, Esq.
16 **CIVILLE & TANG, PLLC**
17 Suite 200, 330 Hernan Cortez Ave.
Hagåtña, Guam 96910
Attorneys for DFS Guam, L.P.

18 Cesar C. Cabot, Esq.
19 **CABOT MANTANONA LLP**
20 Edge Building, Second Floor
21 929 South Marine Corps Drive
Tamuning, Guam 96913
Attorneys for Lotte Duty Free Guam, LLC

22 **OFFICE OF THE ATTORNEY GENERAL**
23 287 West O'Brien Drive
24 Hagåtña, Guam 96910
Attorneys for the Territory of Guam

25
26 //

27 //

28

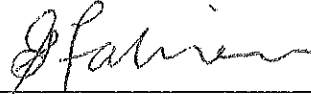
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4. That on the 20th day of December, 2013, I caused a copy of **A.B. WON PAT INTERNATIONAL AIRPORT AUTHORITY, GUAM'S OBJECTION TO THE OFFICE OF PUBLIC ACCOUNTABILITY HEARING APPEAL**, filed with the Office of Public Accountability to be mailed via U.S. Postal Service, Certified Mail Receipt No. 7012 3050 0001 7246 7489, return receipt requested, to the below-listed party:

Maurice M. Suh, Esq.
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Ave.
Suite 4700
Los Angeles, CA 90071
Attorneys for DFS Guam, L.P.

I declare under penalty of perjury under the laws of Guam and the United States of America that the aforementioned is true and accurate to the best of my knowledge and belief.

Executed this 20th day of December, 2013, in Hagåtña, Guam.



SARAH L. FABIAN