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**RECEIVED**  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

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**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS**

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

Appellant.

APPEAL NO.: OPA-PA-13-006

**LOTTE DUTY FREE GUAM, LLC'S  
REQUEST TO PUBLIC AUDITOR TO  
CONSIDER POTENTIALLY  
DISQUALIFYING FACTS**

COMES NOW, interested party Lotte Duty Free Guam, LLC ("Lotte"), by and through its attorneys, Cabot Mantanona LLP, and respectfully submits this Request to the Public Auditor to Consider Potentially Disqualifying Facts ("Request") pursuant to Title 2 Guam Administrative Rules and Regulations ("GAR"), Div. 4 § 12601, and Title 5 Guam Code Annotated ("GCA") §§ 5601 and 5628(a)(1). Lotte seeks to alert the Public Auditor to facts which in the past have led her to recuse herself in the interest of upholding the integrity of her office as well as maintaining the fairness of the procurement process.

## BACKGROUND FACTS

Lotte was one of four proposers to RFP No. GIAA010-FY12 ("the RFP") for the specialty retail concession space at the A.B. Won Pat International Airport Authority, Guam ("GIAA" or "Airport") Main Passenger Terminal. See Declaration of Deborah E. Fisher, **EXHIBIT 1**, GIAA Decision, dated May 17, 2013 ("Airport Decision"). This RFP marked the first time that DFS Guam L.P. ("DFS") had to compete for the Airport concession, which it held for over 30 years previously. *Id.* at p. 1. Lotte's proposal was ranked the highest, while DFS's proposal was ranked not even second, but third. *Id.* Throughout the process, DFS was sending letters to the Airport, complaining about the RFP, which the Airport found to be "an effort to influence and undermine the process." *Id.* p. 2. DFS, however, never filed a formal protest, and when it finally tried to, that protest was held to be "late, frivolous, and found after investigation to be without merit." *Id.* at 2. Since the award of the contract on May 18, 2013, Lotte has followed through with a state of the art refurbishment to the Airport facilities. See Declaration of Deborah E. Fisher, **EXHIBIT 2**, Moodie Report, July 31, 2014.

After the Airport's decision was initially appealed to the Public Auditor, she appointed Mr. Peter Perez as the hearing examiner on December 13, 2013. At that time, DFS wrote a letter disclosing that it had retained Lujan Aguigui & Perez LLP ("Lujan Firm") to advise it. See Declaration of Deborah E. Fisher, **EXHIBIT 3**, "Response to Notice of Appointment of Hearing Officer," dated December 13, 2013, p. 2. The Public Auditor's spouse, Mr. James Brooks, works for the Lujan Firm as a

paralegal. See Declaration of Deborah E. Fisher, **EXHIBIT 4**, Lujan Firm web page.

Given the Public Auditor's emphasis in previous decisions regarding recusal and disqualification when a family member has had an employment association with a party, this fact should be considered by the Public Auditor.

### MEMORANDUM OF POINTS AND AUTHORITIES

Lotte respectfully requests that the Public Auditor, Doris Flores Brooks ("Public Auditor"), consider recusing or disqualifying herself from the above-captioned Office of Public Accountability ("OPA") appeal. In past decisions, the Public Auditor has recognized the best interests of the Territory as paramount. *In the Appeal of JMI Edison*, OPA-PA-13-009, Decision at 6 (Nov. 27, 2013). In addition, the caution exercised by the Public Auditor in matters where recusal or disqualification has been raised demonstrates her and the OPA's commitment to upholding the highest ethical standards.

Title 2 GAR, Div. 4, § 12601 provides:

**Disqualification of Public Auditor.** The Public Auditor may recuse herself or himself at any time and notify all parties, or any party may raise the issue of disqualification and state the relevant facts prior to hearing. The Public 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 G.C.A. §5480.

2 GAR, Div. 4 § 12601. The Public Auditor is charged with using her jurisdiction to promote "the integrity of the procurement process and the purposes" of the procurement

laws of Guam. 5 GCA § 5703; 2 GAR 12103(a). Guam's procurement laws emphasize the importance of impartiality to foster increased public confidence in the procurement process. See, e.g., 5 GCA § 5001(b)(3). Title 5 GCA § 5625 specifically provides that, as a matter of policy:

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

Public confidence in the procurement process depends on impartiality at all levels in the procurement process, and there is no position within the government with a greater effect on the procurement process than that of the Public Auditor, the final arbiter of procurement appeals to the OPA.

The Public Auditor has historically exercised the utmost diligence to ensure the impartiality of her office by recusing herself in analogous situations. For example *In the Appeal of Teal Pacific, LLC*, 09-002, the Public Auditor recused herself even when she did not believe her prior relationships with a party—with a doctor who was a principal of an appellant before her—would prejudice her actions. See *In the Appeal of Teal Pacific, LLC*, OPA-PA-09-002, Order of Dismissal (May 21, 2009). This precedent suggests that the instant matter also warrants recusal or disqualification.

"[T]he standard for disqualification of administrative adjudicators such as the Public Auditor is ... actual bias." *In the Appeal of Teleguam Holdings LLC*, OPA-PA-10-002, Dec. & Order Re: Purchasing Agency's Motion for the Public Auditor to Recuse

Self (“*GTA Appeal Decision*”), at 2 (Mar. 1, 2010) (citing *Sule v. Guam Board of Dental Examiners*, 2008 Guam 20 ¶ 19). However, an ethical conflict of interest is also a basis for disqualifying the Public Auditor from presiding over an appeal. *Id.* at 2-3. The ethical standards required of a government employee participating directly or indirectly in a procurement matter apply when that employee knows that any member of her immediate family has a financial interest pertaining to the procurement. *Id.* (citing 5 GCA § 5628(a)(1)).

These ethical standards are provided by statute, as follows:

**§ 5628. Employee Conflict of Interest.**

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

- (1) the employee or any member of the employee’s **immediate family** has a financial interest pertaining to the procurement;
- (2) a business or organization in which the employee, or any member of the employee’s immediate family, has a **financial interest** pertaining to the procurement; or
- (3) any other person, business or organization with whom the employee or any member of the employee’s immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement. 5 G.C.A. §5628. (emphasis added).

5 GCA § 5628(a)(1) (emphases added).

“Direct or indirect participation” is defined by statute as “involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.” *Id.* § 5601(d).

Here, the Public Auditor is the administrative adjudicator of this appeal. Her role as the

Public Auditor involves investigating, auditing, and ultimately deciding a procurement appeal. *GTA Appeal Decision*, at 3. Therefore, it is clear the Public Auditor directly or indirectly participates in this appeal.

The term “immediate family” is defined as spouse, children, parents, brothers, and sisters. 5 GCA § 5601(g). The Public Auditor's spouse, Mr. James Brooks, qualifies as part of her immediate family. Mr. James Brooks works for the law firm of Lujan Aguigui & Perez LLP, now Lujan Aguigui & Wolf LLP (“Lujan Firm”). See Declaration of Deborah E. Fisher, **EXHIBIT 4**. The Lujan Firm was one of the several law firms retained by DFS to advise it in this matter. See Declaration of Deborah E. Fisher, **EXHIBIT 3** at 2. In addition, the term “financial interest” means involvement in any relationship from which, or as a result of which, a person within the past year has received, or is presently or in the future entitled to receive, more than \$2,500.00 per year or its equivalent. 5 GCA § 5601(e)(1).

Mr. James Brooks is a paralegal at one of the several law firms DFS retained to challenge this procurement, the Lujan Firm. The Public Auditor previously recused herself from an OPA appeal where her stepson, Mr. Terrence Brooks, was serving as legal counsel for one of the Appellants. See *GTA Appeal Decision*, at 3. In deciding to recuse herself, the Public Auditor held that Mr. Terrence Brooks had a financial interest in Appellant because it was “likely” that he had been paid more than \$2,500.00 in the past year by the Appellant. *Id.* In addition, the Public Auditor disqualified herself in a matter where her spouse, as an employee of the Law Offices of Lujan Aguigui & Perez

LLP, performed research regarding a particular procurement. *In the Appeal of Far East Equipment Company LLC*, OPA-PA-08-002, Order of Dismissal (Feb. 7, 2008).

Similarly, in the instant matter, the Public Auditor's spouse, Mr. James Brooks, works for one of Appellant's law firms, the Lujan Firm, as a paralegal. See Declaration of Deborah E. Fisher, **EXHIBIT 4**. Given that the Lujan Firm was retained to represent a party in this appeal, it is necessary for the Public auditor to carefully examine these facts.

Lotte submits that the Public Auditor may have an ethical duty not to participate in this appeal. Accordingly, Lotte has set these facts forth for the Public Auditor to consider recusal or disqualification pursuant to 2 GAR, Div. 4 § 12601 and 5 GCA §§ 5601 and 5628(a)(1).

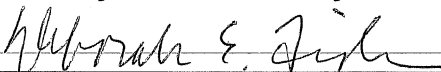
#### CONCLUSION

For the foregoing reasons, Lotte requests that the Public Auditor consider the potentially disqualifying facts presented herein.

Respectfully submitted this 19th day of September, 2014.

**CABOT MANTANONA LLP**  
**Attorneys for Lotte Duty Free Guam LLC**

By:

  
**DEBORAH E. FISHER**