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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-⁵14-001

REQUEST FOR RECUSAL

I. REQUEST

Appellant DFS Guam L.P. (“DFS”) files this Request for Recusal to seek an order from the Public Auditor recusing herself from hearing the instant appeal so that DFS can pursue its procurement appeal before the Superior Court of Guam without delay. DFS seeks this recusal in light of the Public Auditor’s decision to recuse herself in DFS’s initial procurement appeal, Docket No. OPA-PA 13-006 (the “Initial Procurement Appeal”), brought by DFS with respect to the same procurement at issue here, RFP No. GIAA 010-FY12 (“RFP”). See Office of Public Accountability’s (“OPA”) September 30, 2014 Dismissal Order Declining Public Auditor Hearing (“September 30

1 Order”). Given that the Appellant (DFS), the Respondent (the A.B. Won Pat International Airport
2 Authority, Guam (“GIAA”)), the Real-Party-in-Interest (Lotte Duty Free Guam, LLC (“Lotte”)), and
3 the RFP at issue in the instant appeal are identical to those in the previous appeal from which the
4 Public Auditor recused herself, the Public Auditor’s recusal from this appeal is a pro forma matter.
5 This is especially true because it was DFS’s opponents—GIAA and Lotte—that urged and obtained
6 the Public Auditor’s recusal in the previous appeal. Furthermore, the OPA’s September 30 Order
7 cites 5 G.C.A. § 5480, before holding that the “procurement appeal must be taken to the Superior
8 Court of Guam,” which could only occur with the Public Auditor’s recusal. *See* September 30 Order
9 at 2.

10 So while the instant Request should be a straightforward one without controversy, GIAA and
11 Lotte have contended before the Superior Court that that the OPA’s September 30 Order was not an
12 expression of recusal. Soon after DFS filed a civil action in the Guam Superior Court on October 14,
13 2014 to pursue its initial procurement protest, much to DFS’s surprise, both GIAA and Lotte argued
14 that the Superior Court did not have jurisdiction over DFS’s lawsuit because the Public Auditor had
15 not recused herself in the OPA’s September 30 Order. GIAA’s and Lotte’s claim is based on the
16 semantic argument that the word “recusal” was not included in the September 30 Order. GIAA and
17 Lotte failed to note the context of the OPA’s September 30 Order—i.e., that it followed both GIAA’s
18 and Lotte’s motion seeking the Public Auditor’s disqualification or recusal.

19 Thus, under normal circumstances, DFS would have filed the instant appeal directly in
20 Superior Court. But, given GIAA’s and Lotte’s claim that the Public Auditor did not recuse herself
21 from hearing DFS’s previous appeal, DFS is filing this appeal with the OPA despite the Public
22 Auditor’s prior recusal. DFS requests that the OPA recuse herself from the current appeal and clarify
23 that she recused herself from DFS’s previous procurement appeal on September 30, 2014. Such an
24 order would permit DFS to expeditiously receive a merits review of its protest denials that it has been
25 awaiting for so long. DFS further requests that the OPA act expeditiously in this regard so that DFS
26 can move past GIAA’s and Lotte’s use of this spurious objection to slow down DFS’s civil action in
27 the Superior Court.

28

1 **II. SUMMARY OF PROCEDURAL HISTORY RELEVANT TO RECUSAL ISSUE**

2 To the extent the OPA has not been following GIAA's and Lotte's misuse of the OPA's
3 September 30 Order to create procedural roadblocks before the Superior Court, DFS provides a brief
4 summary of that history here.

5 On May 17, 2013, GIAA denied DFS's first protest with respect to the RFP at issue. On May
6 30, 2013, DFS appealed the denial of Protest No. 1 to the OPA, which initiated Docket No. OPA-PA
7 13-006 and immediately stayed its proceedings given that DFS filed a civil action in the Guam
8 Superior Court appealing Protest No. 1 later that same day. On September 19, 2014, after extended
9 litigation before the Superior Court and the Supreme Court of Guam, the Superior Court entered
10 judgment of its dismissal of DFS's civil action for failure to exhaust its administrative remedies and
11 directed DFS to first bring its appeal of GIAA's denial of Protest No. 1 before the OPA.

12 Later that same day, GIAA and Lotte immediately filed motions in the now-resumed OPA
13 proceeding seeking the Public Auditor's disqualification and/or recusal on the ground that she was
14 biased. On September 30, 2014, before DFS could file a response to GIAA's and Lotte's
15 disqualification motions, the OPA issued its order indicating that the Public Auditor had recused
16 herself. *See* September 30 Order. Given the pending disqualification motions, the reference to these
17 motions in the September 30 Order (referring to "[n]umerous other filings and declarations" and
18 "certain objections to the hearing officer in this case"), and the directive to bring the appeal before
19 the Superior Court pursuant to 5 GCA § 5480, there was no reasonable dispute that the Public
20 Auditor had recused herself.

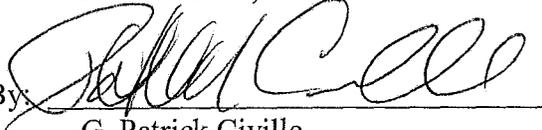
21 Consistent with the OPA's directive in its September 30 Order, DFS filed a civil action in
22 Superior Court to appeal GIAA's denial of DFS's first protest of the RFP on October 14, 2014. But
23 soon after this filing, GIAA and Lotte made numerous filings claiming that the Public Auditor did *not*
24 recuse herself in the OPA's September 30 Order. To wit, GIAA and Lotte made the following filings
25 in which they contended that the Superior Court lacked jurisdiction to hear DFS's civil action
26 because the Public Auditor had not recused herself:

- 1 • Defendant Lotte Duty Free LLC's Motion to Dismiss DFS' Complaint with Memorandum
2 of Points and Authorities in Support (filed on November 24, 2014, in Superior Court Case
3 No. CV0934-14), at p. 7.
- 4 • Answer of Defendant A.B. Won Pat International Airport Authority, Guam to DFS Guam
5 L.P.'s Complaint (filed on November 24, 2014, in Superior Court Case No. CV0934-14),
6 Second and Third Affirmative Defenses, at pp. 13-14.
- 7 • Defendant A.B. Won Pat International Airport Authority, Guam's Non-Opposition to
8 Defendant Lotte Duty Free LLC's Motion to Dismiss Complaint in CV0943-14 (filed on
9 December 22, 2014, in Superior Court Case No. CV0934-14), at p. 4 n.1.

10 The Superior Court has not yet resolved any of these motions but could act on them at any
11 point going forward.¹ What is clear is that DFS is continuing to suffer yet more delay while the
12 Superior Court works through this issue and, potentially, seeks the OPA to clarify its September 30
13 Order. The OPA, therefore, can save the parties and the Superior Court significant resources and
14 from yet more delay by acting quickly on the instant request and issuing an immediate order stating
15 that pursuant to 2 G.A.R. 4 § 12601, and based on the Public Auditor's review of all of the arguments
16 and filings by the parties in the Initial Procurement Appeal, the Public Auditor determined to recuse
17 herself from the Initial Procurement Appeal and has again determined to recuse herself from the
18 above-captioned appeal.

19 Respectfully submitted, January 20, 2015.

20 **CIVILLE & TANG, PLLC**

21 
22 By: _____

23 G. Patrick Civille
24 *Attorneys for Appellant*
25 *DFS Guam L.P.*

26 _____
27 ¹ In light of GIAA's and Lotte's position over the recusal issue, DFS was forced to file a writ of
28 mandate in the Guam Superior Court (Special Proceedings case No. SP0149-14) seeking the
OPA's confirmation that the Public Auditor recused herself in Docket No. OPA-PA-13-006. The
Court has yet to act on the writ.