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9 ATTORNEYS FOR APPELLANT DFS GUAM, L.P.

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 2/20/2015
TIME: 3:45 AM PM BY: M.B.
FILE NO OPA-PA: 15-002

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

14
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16 In the Appeal of

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

DOCKET NO. OPA-PA-15 - 002

**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 February 5, 2015, denying DFS’s June 7, 2013 protest of GIAA’s RFP No. GIAA 010-FY12 (“RFP”)
4 “to develop, construct, and operate a high quality specialty retail concession at the [Airport’s] Main
5 Passenger Terminal” (the “Airport Concession”). This appeal concerns DFS’s third protest of the
6 RFP; GIAA’s denial of DFS’s first protest was appealed on May 30, 2013 under Docket No. OPA-
7 PA 13-006, and was dismissed on September 30, 2014 when the Public Auditor recused herself from
8 hearing the matter after GIAA and Real-Party-in-Interest Lotte Duty Free Guam LLP (“Lotte”)
9 alleged that she was biased. Similarly, DFS’s second protest was appealed on January 21, 2015
10 under Docket No. OPA-PA-15-001, and was dismissed on January 23, 2015 when the Public Auditor
11 again recused herself. The bases for DFS’s third protest, which are set forth fully herein, are distinct
12 from the bases for DFS’s first and second protests.

13 **I. APPELLANT’S INFORMATION**

14 Name: DFS Guam L.P.
15 Mailing Address: 1296 Pale San Vitores Road
16 Tumon, Guam 96913
17 Business Address: 1296 Pale San Vitores Road
18 Tumon, Guam 96913

19 For purposes of this appeal, please direct correspondence to DFS’s counsel, G. Patrick Civile,
20 Esq. (pciville@civilletang.com), Civile & Tang, PLLC, 330 Hernan Corrtex Ave. Ste. 200, Hagatna,
21 Guam 96910.

22 **II. SOLICITATION INFORMATION**

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

1
2
3 Names of Competing Bidders:

- 4 1. Lotte Duty Free Guam, LLC (bidder to which GIAA purported to award the contract)
- 5 2. The Shilla Duty Free
- 6 3. James Richardson (Guam), LLC

7 The decision being appealed, included in the Supporting Documents attached hereto, was
8 made on February 5, 2015, by Charles H. Ada II, Executive Manager of GIAA and head of the
9 relevant purchasing agency.

10 III. NOTICE OF APPEAL

11 DFS brings this appeal of GIAA's February 5, 2015 decision to deny DFS's third proposal
12 protest ("Protest No. 3") regarding GIAA's conduct in connection with its administration of the RFP
13 and its related decision to approve the recommendations of GIAA's evaluation committee ranking
14 Lotte and its relevant subsidiaries and affiliates as the "most qualified proposer" pursuant to the RFP.

15 DFS initiated its Protest No. 3 on June 7, 2013, by sending a letter to GIAA indicating that
16 DFS had learned of misconduct beyond what it identified in its first and second procurement protests
17 ("Protest No. 1 and No. 2") based on GIAA's June 3, 2013 response to DFS's May 24, 2013
18 Sunshine Act request—seeking, *inter alia*, information regarding the criteria the GIAA adopted as
19 required by 12 GCA § 1203.1(a)(ii)—that GIAA had "found no documents responsive to this
20 request." GIAA's response that it had no responsive documents made clear that GIAA had violated
21 or ignored 12 GCA § 1203.1, which required GIAA to adopt operational criteria for an airport
22 concession and then conform any procurement relating to any airport concession to these criteria.
23 Relatedly, the lack of the criteria mandated by 12 GCA § 1203.1 also shows that GIAA had no fair
24 and objective criteria to evaluate the competing procurement proposals submitted in response to the
25 RFP. DFS's Protest No. 3 is focused on these critical failures by GIAA.

26 On February 5, 2015, GIAA notified DFS that its Protest No. 3 had been denied. DFS now
27 brings this timely appeal of that decision pursuant to 5 G.C.A. § 5425(e) within the 15-day statutory
28 period for appeal.

1 This Notice of Appeal, together with the following statement of grounds for appeal, statement
2 of the rulings requested, and the supporting evidence and documents referenced, collectively
3 constitute DFS's appeal ("Appeal") of GIAA's February 5, 2015 denial of DFS's Protest No. 3.

4 **IV. STATEMENT OF GROUNDS FOR APPEAL**

5 **A. Issues Subject to Appeal**

6 DFS's Protest No. 3 and this Appeal are based on the following independent bases (these
7 bases are in addition to those set forth in DFS's other protests to the RFP at issue and DFS's previous
8 appeals of its other protests to this RFP):

- 9 1. GIAA's purported agreement with Lotte regarding the Airport Concession is improper,
10 unlawful, and void *ab initio* because it does not conform to the criteria for the operation of
11 an airport concession mandated by 12 GCA § 1203.1(a)(2) because no such criteria were,
12 according to the GIAA, ever promulgated by the GIAA. The GIAA simply abdicated its
13 duty to promulgate these statutorily-mandated criteria and it cannot be held to benefit in
14 any way from this total dereliction.
- 15 2. GIAA's evaluation of the competing proposals for the RFP was improper, unlawful, and
16 fatally compromised because GIAA failed to adopt approved criteria for the operation of
17 an airport concession mandated by 12 GCA § 1203.1(a)(2), without which GIAA could
18 not fairly determine which proposal best fit that criteria.
- 19 3. GIAA publicly and expressly misrepresented in the RFP that it had established the criteria
20 mandated by 12 GCA § 1203.1(a)(2).
- 21 4. The contract between GIAA and Lotte purporting to effectuate the RFP is void under
22 Guam law because the contract was entered into in contravention of the mandatory
23 automatic stay provided for by statute, 5 GCA § 5425(g).
- 24 5. GIAA's conduct throughout the proposal submission and evaluation period, which was
25 focused more on covering up its own violations and, at times, abetting Lotte's various
26 RFP violations rather than policing them, casts serious doubt on the fundamental
27 impartiality of GIAA in accepting and evaluating proposals, as well as the integrity of
28 GIAA's ultimate finding that Lotte was the "best qualified proposer."

1 6. GIAA's decision to respond to DFS's Protest No. 3 by unilaterally conducting a wholly
2 unmonitored investigation into itself also created a troubling and inherent conflict of
3 interest. The alleged impropriety on the part of GIAA casts serious doubt on the fullness
4 and fairness of this ostensible "investigative" process, which ultimately resulted in the full
5 ratification of GIAA's previous findings and the affirmative exoneration of all GIAA
6 Board Members of any wrongdoing in connection with this RFP.

7 **B. Supporting Facts**

8 The following facts support DFS's Protest No. 3 and this Appeal:

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

15 2. Appended as Attachment B to the RFP was an exemplar of the concession agreement
16 to be used as a basis for GIAA's negotiations of a final agreement with the winning proposer. In
17 Section 6.5 of that exemplar agreement, GIAA references GIAA's Non-Airline and Concession
18 Lease Policies. By this reference, *as GIAA has conceded*, GIAA misrepresented to the public that it
19 had adopted criteria mandated by 12 GCA § 1203.1. The language contained in Section 6.5 of the
20 exemplar agreement is contained in Section 6.1.2 of the purported May 18, 2013 Lotte Concession
21 Agreement.

22 3. On or before the October 17, 2012 deadline, DFS, Lotte, The Shilla Duty Free, and
23 JR/Duty Free submitted timely proposals in response to the RFP.

24 4. On April 12, 2013, the GIAA purported to award the RFP to Lotte notwithstanding the
25 pendency of DFS's unresolved Protest No. 1.

26 5. On May 18, 2013, GIAA purported to enter into an agreement with Lotte to effectuate
27 GIAA's purported award of the RFP to Lotte. Notably, it was GIAA's management and not GIAA's
28 board of directors that purported to execute the agreement on behalf of GIAA.

1 GIAA to that contract until June 12, 2013, which critically was after DFS submitted its Protest No. 3
2 (and Protest Nos. 1 and 2). Hence, GIAA should have stayed the procurement process as soon as
3 DFS submitted its Protest No. 3 on June 7, 2013 and, by statute, was not allowed to execute any
4 contract regarding this RFP after that date and, by statute, any acts in furtherance of the RFP after
5 that are unauthorized and void, and DFS requests such a ruling from the OPA.

6 DFS also requests the following rulings from the OPA: that the purported award of the
7 contract was in violation of Guam law and the terms of the RFP; that a new RFP process be instituted;
8 that an independent monitor be appointed to supervise the GIAA's future conduct in connection with
9 this new RFP process; and that DFS be awarded reasonable costs incurred in connection with the
10 solicitation and protest.

11 **A. GIAA Violated 12 GCA § 1203.1 Because the Agreement It Purported to Enter into with**
12 **Lotte for the Airport Concession Did Not Conform to Any Criteria for the Operation of**
13 **an Airport Concession As Required by that Statute.**

14 Title 12 GCA Section 1203.1(a)(2) states that: "Any agreement between [GIAA] and any
15 other party concerning the operation of a concession, other business or a service provider" at the
16 Airport shall conform to the "criteria established for the operation of a concession, other business or
17 service provider" at the Airport. This statute further states that this "criteria shall be reviewed at a
18 public hearing held within ninety (90) days of the effective date of this" statute, which was in 1992.

19 GIAA concedes in its February 5, 2015 denial of DFS's Protest No. 3 that it never adopted
20 any such criteria. *See* GIAA's February 5, 2015 Denial of DFS's Protest No. 3. This failure, in itself,
21 is a violation of 12 GCA Section 1203.1. But GIAA further violated this statute because the June 12,
22 2013 agreement that GIAA purported to enter into with Lotte to effectuate the RFP does not conform
23 to any airport concession criteria because no such criteria exist.

24 GIAA has never explained why it did not adopt the statutorily-mandated criteria referenced in
25 12 GCA Section 1203.1. Nor has it explained why it was untruthful to the public, as well as the
26 Guam Legislature, in claiming it had adopted such criteria.

27 Further, GIAA's excuse that it followed Guam Procurement Law (an assertion that DFS
28 vigorously disputes) is irrelevant because the Guam Procurement Law governs the *procedures* by
which a procurement is governed. Meanwhile 12 GCA Section 1203.1 is focused on criteria

1 regarding the operation of an airport concession, which is focused on the *substance* of how an RFP
2 related airport concession should be evaluated and administered. Thus, Guam Procurement Law and
3 Section 1203.1 are entirely separate regimes that are focused on entirely different considerations and
4 concerns. The GIAA is required to follow both sets of rules in administering a procurement, which
5 GIAA undisputedly failed to do here.

6 **B. A New RFP Process Should Be Instituted.**

7 Because the foregoing facts establish that, as it now stands, this RFP process has been
8 irrevocably compromised by fundamental flaws, DFS requests that the OPA hereby mandate that the
9 results that were obtained through this flawed process be voided in their entirety, and that a new RFP
10 process be pursued in a timely and proper fashion, including the adoption of criteria mandated by
11 12 GCA 1203.1(a). Because Lotte is a non-responsible proposer as the source of many violations of
12 Guam Procurement Law and the provisions of the RFP, it should be barred from further participation
13 in the RFP or any new RFP process.

14 **C. An Independent Monitor Should Be Appointed to Supervise the GIAA's Future
15 Conduct in Connection with this New RFP Process.**

16 GIAA's conduct throughout the course of the current RFP process, including its response to
17 DFS's proposal protest, has been characterized by bad faith, prejudice against DFS, and a clear bias
18 in favor of Lotte. The appropriate remedy to ensure that future proceedings in connection with a new
19 RFP process are conducted fairly and transparently is to appoint a truly independent monitor, selected
20 by an independent administrative or judicial officer, and to empower that monitor to supervise and
21 oversee the GIAA in relation to this matter. Such an independent monitor should supervise, among
22 other things, the adoption of criteria as required by 12 GCA Section 1203.1; the procedures by which
23 proposals are solicited; the methods of communication between the GIAA and proposers; the criteria
24 used by the GIAA evaluation committee to evaluate the proposals; the procedures used by the GIAA
25 board to adopt or reject the recommendation of the evaluation committee; the negotiations of any
26 contract pursuant to the RFP; and the GIAA board's ultimate approval of any contract pursuant to the
27 RFP. Absent an independent monitor with broad authority to supervise the GIAA's conduct, there
28 can be no assurance that the GIAA will not simply repeat its pattern of bad faith conduct in violation

1 of the terms of a new RFP and applicable Guam laws.

2 **D. DFS Should Be Awarded Its Reasonable Costs.**

3 Pursuant to 5 GCA § 5425(h), if this proposal protest is sustained by the OPA, DFS is
4 “entitled to the reasonable costs incurred in connection with the solicitation and protest, including bid
5 preparation costs, excluding attorney’s fees, if . . . there is a reasonable likelihood that the protestant
6 may have been awarded the contract but for the breach of any ethical obligation imposed by Part B of

7 Article 11 of this Chapter or the willful or reckless violation of any applicable procurement law or
8 regulation.” The foregoing facts establish that the GIAA has a fundamental disregard for the laws
9 and regulations governing its operations. As one of the three RFP responsible proposers after Lotte is
10 properly disqualified due its misconduct as described in DFS’s other procurement protests to this
11 RFP, DFS had a reasonable likelihood that it would have been awarded the contract but for the
12 wrongful conduct of Lotte and the GIAA. Further, the repeated conduct of Lotte and the GIAA
13 constituted willful or reckless violations of applicable procurement laws and regulations.

14 **VI. SUPPORTING EXHIBITS, EVIDENCE, AND/OR DOCUMENTS**

15 Attached hereto are the following supporting documents and evidence to substantiate the
16 foregoing claims and grounds for appeal:

- 17
- 18 A. Excerpts of RFP No. GIAA 010-FY12 (Including Excerpts of Attachment B to RFP)
- 19 B. Excerpts of the purported May 18, 2013 Lotte Concession Agreement
- 20 C. DFS’ May 24, 2013 Sunshine Act Request to GIAA
- 21 D. GIAA’s June 3, 2013 response to DFS’ May 24, 2013 Sunshine Act Request
- 22 E. DFS’ June 7, 2013 Protest 3 Letter to GIAA
- 23 F. GIAA’s February 5, 2015 Letter Denying DFS’ Protest 3

24 Although DFS has identified the attached documents and information in support of this
25 Appeal, DFS does not waive its right to rely upon additional documents, information and testimony.
26 To avoid any doubt, DFS’s investigation continues and it expressly reserves the right to cite to other
27 evidence and to present additional testimony during this Appeal or other proceeding related to Protest
28 No. 3.

29 **VII. CONCLUSION**

30 For all the foregoing reasons, DFS appeals the adverse decision of the GIAA (triggering an

1 automatic stay of the RFP process), and hereby requests a ruling that (i) GIAA violated the automatic
2 stay required by statute; (ii) the procurement violated mandatory provisions of the GIAA's enabling
3 legislation; (iii) that the putative contract, as a consequence, be declared void; (iv) that a new RFP
4 process be instituted; (v) that an independent monitor be appointed to supervise the GIAA's future
5 conduct in connection with this new RFP process; and (vi) that DFS is awarded its reasonable costs
6 pursuant to 5 GCA § 5425(h).

7 **VIII. DECLARATION RE COURT ACTION**

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

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

15
16 Dated: February 20, 2015

17 By: 
18 G. Patrick Civile
19 Attorneys for Appellant
20 DFS Guam, L.P.
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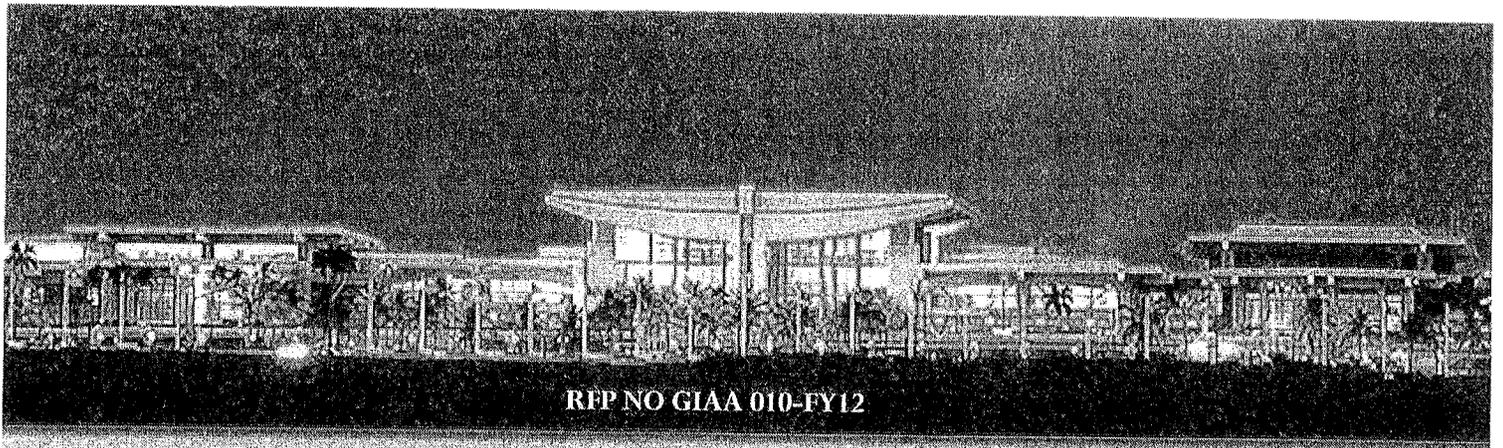
VERIFICATION

I, David A. Suzuki, am Appellant DFS Guam L.P.'s Vice-President of Corporate Legal 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 18th day of February 2015.

By: 

David A. Suzuki
Vice-President of Corporate Legal
Appellant DFS Guam L.P.

EXHIBIT A



RFP NO GIAA 010-FY12

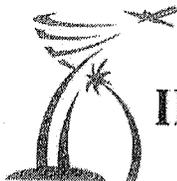
REQUEST FOR PROPOSAL

PROPOSAL DUE DATE:

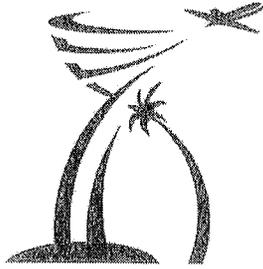
4:00 P.M. Friday,
September 21, 2012
Chamorro Standard Time

PLACE OF SUBMITTAL:

Antonio B. Won Pat
International Airport Authority, Guam
Administration Office, 3rd Floor
355 Chalan Pasajeru
Tamuning, Guam 96913
Attn: Charles H. Ada II
Executive Manager



**A.B. WON PAT
INTERNATIONAL AIRPORT AUTHORITY,
GUAM**



A. B. WON PAT
INTERNATIONAL AIRPORT AUTHORITY,
GUAM

REQUEST FOR PROPOSAL

Specialty Retail Merchandise Concession – Multiple Concepts

RFP No. GIAA 010-FY12

PROPOSAL DUE DATE:

4:00 P.M. Friday, September 21, 2012
Chamorro Standard Time

PLACE OF SUBMITTAL:

Antonio B. Won Pat
International Airport Authority, Guam
Administration Office, 3rd Floor
355 Chalan Pasajeru
Tamuning, Guam 96913
Attn: Charles H. Ada II
Executive Manager

NOTICE INVITING PROPOSALS

The A.B. Won Pat International Airport Authority, Guam (GIAA) a public corporation and an autonomous instrumentality of the Government of Guam, invites the submission of competitive proposals from qualified parties (Proposers) to develop, construct, and operate a high quality specialty retail concession at the GIAA Main Passenger Terminal. The objective of this Request for Proposals (RFP) is to expand GIAA's existing retail concession program with world-class amenities for the traveling public. GIAA seeks proposals for multiple concepts within a single location with aesthetically pleasing facility designs that will enhance customer service and value.

The complete RFP package is available for pick-up at GIAA's Administrative Offices and can be made available for transmittal via email. All prospective Proposers must submit the attached Acknowledgment of Receipt to ensure that they receive any notices or addenda relating to the RFP.

A pre-proposal conference will be held at GIAA Conference Room 3 at 2:00 p.m., Friday, August 17, 2012, followed by an optional tour of the available facilities. Prospective proposers are encouraged to attend. To register for the tour, prospective Proposers must complete and fax the attached Registration Form to the contact below no later than August 13, 2012.

To be considered, Proposers must deliver in a sealed package to the address below prior to the date and time stated below: 1) one original and seven copies of their proposal prepared in accordance with the instructions set forth in the RFP; 2) one CD containing an electronic file copy of their proposal in .PDF format; 3) all other documents and information required by the RFP. The outside of the sealed package must clearly state the name and address of the Proposer and the RFP No. and name.

Deliver proposals to:

By Hand Delivery:

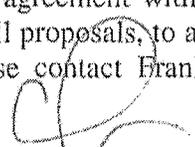
A.B. Won Pat International Airport Authority
Administration Office, 3rd Floor
355 Chalan Pasajeru
Tamuning, Guam
Attn: Executive Manager

By Mail:

A.B. Won Pat International Airport Authority
P.O. Box 8770
Tamuning, Guam 96931
Attn: Executive Manager

**PROPOSALS MUST BE RECEIVED BY GIAA NO LATER THAN
4:00 PM, Friday, September 21, 2012 (Chamorro Standard Time)**

Late proposals will not be considered. The submission of a proposal by any proposer does not in any way commit GIAA to enter into an agreement with that proposer, or any other proposer. GIAA reserves the right to reject any or all proposals, to advertise for new proposals or to cancel the RFP. For further information please contact Frank P. Taitano at (671) 646-0300-2 or frankpt@guamairport.net.



Charles H. Ada II
Executive Manager

EXECUTIVE SUMMARY

For the convenience of interested parties, this Executive Summary describes the Request for Proposal (RFP) Process and Concession Opportunity. This Executive Summary is not intended to be a detailed or complete description of the RFP process or Concession Opportunity, and reference must be made to the other Sections of this RFP Document for the detailed specifications. Please note that the economic and other terms of this concession opportunity, including the provisions relating to rent, lease term, deposits, insurance, and operational and merchandising requirements, are described in more detail in the RFP and the form concession lease agreement attached.

KEY ELEMENTS OF RFP PROCESS

<u>Element</u>	<u>DESCRIPTION</u>
Schedule	GIAA has adopted the following schedule of events for this RFP. This schedule is subject to change at the sole discretion of GIAA and proposers will be notified of any changes by an addendum to this RFP. All times are Chamorro Standard Time (ChST).
Event	Date
RFP Issue Date	July 19, 2012
Last Day to register for Tour	August 13, 2012 at 5:00 p.m. See Attachment H-13 for Registration Form
Pre-proposal Conference and Tour	August 17, 2012 at 2:00 p.m. Meet at GIAA Conference Room 3
Deadline for Receipt of Written Questions	August 30, 2012 at 4:00 p.m.
Issuance of Answers to Written Questions	September 6, 2012
Proposal Due Date	September 21, 2012 at 4:00 p.m.
Interviews with Proposers	Proposers will be notified
Notice of Award	Upon GIAA Board Approval
Minimum Annual Guaranteed Rent (MAG Rent)	The minimum annual guaranteed rent proposed must equal or exceed \$6 Million Per Annum .

<u>Element</u>	<u>DESCRIPTION</u>
Percentage Rent	The minimum percentage rent rate proposed must equal or exceed 25% of gross revenues.
Minimum Qualifications	<p>Experience</p> <p>a. Proposers must have at least five (5) years of continuous experience within the last seven (7) years in the ownership and management of a similar type of retail merchandise business as that which is contemplated under this RFP.</p> <p>b. At least one single location operated by the Proposer must have had gross sales of at least <u>\$25 million</u> per year for each of the five (5) qualifying years.</p> <p>c. Proposers must demonstrate history of having successfully operated within a TSA (or foreign equivalent) administered or controlled airport environment for a minimum of 5 years.</p> <p>Financial Capability</p> <p>Proposer must provide evidence of its ability to finance and undertake the financial commitments required to successfully develop, construct and operate the proposed concession.</p> <p>Other</p> <p>a. Proposer must have submitted and fully completed all documents or forms required by this RFP.</p> <p>b. Proposer must be authorized to conduct business on Guam at execution of the concession agreement.</p> <p>c. Proposer must include a statement in the proposal agreeing to all of the terms and conditions described in the RFP.</p>
Proposal Guaranty	Each proposal shall be accompanied by a Proposal Guaranty as follows: cashier's or certified check made payable to GIAA in the amount of Twenty-Five Thousand U.S. Dollars (US\$25,000.00) . Cash will not be accepted in lieu thereof. Such Proposal Guaranty shall be submitted with the understanding that it will guarantee that the Proposer will not withdraw its proposal for a period of ninety (90) days after the scheduled Proposal Due Date, and that if the Proposer is selected to commence negotiations with GIAA, the Proposer will commence such negotiations.

KEY BUSINESS TERMS OF CONCESSION OPPORTUNITY

<u>Element</u>	<u>DESCRIPTION</u>
Premises	Retail Space of approximately 24,076 square feet. Future Retail Space of approximately 1,719 square feet.
	Optional Storage/Employee Lounge/Offices/Exclusive-use elevator of approximately 12,415 square feet.
Rent	Rent means all amounts payable by the Concessionaire, including but not limited to, Annual Rent, fees, any additional rent, and any liquidated damages specified in the concession agreement for non-compliance with the requirements for concession operations. Annual Rent equals the greater of (1) MAG Rent or (2) Percentage Rent.
Security Deposit	Upon execution of the Concession Agreement, the Concessionaire shall furnish to GIAA a security deposit in the amount of 100% of the MAG Rent. The security deposit may be in the form of a performance bond or other instrument acceptable to GIAA (e.g., line of credit or letter of credit).
Term	Not to exceed 10 years. First five (5) years EXCLUSIVE, with remaining years NON-EXCLUSIVE
Merchandise Required for Sale ("Exclusive Merchandise")	<ul style="list-style-type: none"> • Luggage, handbags and leather carry goods • Hard and soft cover luggage; briefcases • Wardrobe carriers, Luggage carriers • Tote bags, Backpacks • Purses, Wallets, Handbags • Personal Accessories • Home Décor • Jewelry (fine and costume) • Bath & Body • Cosmetics, Skincare • Fragrances • Opticals • High quality men's women's and children apparel • Liquor • Cigarettes, Cigars, Tobacco

Element	DESCRIPTION
	<ul style="list-style-type: none"> • Lighters, Pipes
Permissible Merchandise ("Non-exclusive Merchandise")	Not limited to: <ul style="list-style-type: none"> • Souvenir and Gifts • Toys and Games • Giftware • Packaged food
Minimum Investment Amount	A minimum capital investment of \$250.00 per square foot is required.

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B

This Form of Agreement is for example purposes only and subject to change.

DRAFT Form of

SPECIALTY RETAIL CONCESSION AGREEMENT

BETWEEN THE

ANTONIO B. WON PAT INTERNATIONAL AIRPORT AUTHORITY, GUAM

AND

COVERING THE OPERATION AND MANAGEMENT

OF A

SPECIALTY RETAIL MERCHANDISE CONCESSION

AT THE

ANTONIO B. WON PAT INTERNATIONAL AIR TERMINAL

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SPECIALTY RETAIL CONCESSION AGREEMENT

THIS SPECIALTY RETAIL CONCESSION AGREEMENT ("Agreement"), is made and entered into this ____ day of _____, 2012, by and between the **ANTONIO B. WON PAT INTERNATIONAL AIRPORT, GUAM** (hereinafter the "Authority"), a public corporation and autonomous instrumentality of the government of Guam, whose mailing address is Post Office Box 8770, Tamuning, Guam 96931, and _____ (hereinafter referred to as "Concessionaire"), a [insert type of entity] whose mailing address is _____.

RECITALS

WHEREAS, the Authority is the owner of the Antonio B. Won Pat International Airport, Guam (hereinafter referred to as "Airport") and operates said Airport for the promotion and accommodation of air commerce and air transportation between Guam and the United States and other countries; and

WHEREAS, the Airport which consists of a main passenger terminal (the "Terminal"), cargo facility and surrounding properties; and

WHEREAS, the Authority issued a Request for Proposals ("RFP") for a specialty retail concession at the Airport covering the right to operate certain of its facilities for the conduct of certain business at the Airport; and

WHEREAS, Concessionaire submitted to the Authority a proposal responding to the RFP for the design, construction and operation of specialty retail concession at the Airport; and

WHEREAS, the Authority carefully analyzed and fully reviewed said proposal and determined that the specific commitments and undertakings of Concessionaire in its proposal comport with the basic specifications contained in the Authority's Request for Proposals; and

WHEREAS, the Authority has determined that Concessionaire is a responsible and is the best qualified proposer and, therefore, desires to grant Concessionaire a lease to design, construct and operate the specialty retail merchandise concession presented in its proposal on the terms and conditions set forth herein; and

WHEREAS, Concessionaire desires to secure and enter into a concession agreement in accordance with the foregoing and undertakes to provide first class facilities and services to meet the demands of the Authority's concession program, patrons, the public, and other users of the Airport at the Terminal locations identified in this Agreement under the terms and conditions of this Agreement.

NOW, THEREFORE, the parties hereto, for and in consideration of the payment of the fees
393675 Concession Agreement Legal Approved RFP GIAA010-FY12 Final

opens for business all such retail outlets or stores. Rent paid under this Section shall be deemed Percentage Rent for the purposes of determining Concessionaire's obligation to pay MAG Rent at the end of the first Lease Year of the Term.

6.5. Adjustment. In the event Concessionaire fails to make Percentage Rent payments under Section 6.2 within the time provided hereunder, or if the total Percentage Rent paid by Concessionaire during a Lease Year is less than the MAG Rent, then Concessionaire shall pay the difference between the Percentage Rent required to be paid to the Authority during that Lease Year and the MAG Rent. This amount shall be calculated at the end of each Lease Year and an invoice shall be sent by the Authority to Concessionaire for such amount. The imposition of the MAG Rent is consistent with the Authority's Non-Airline and Concession Lease Policies and the policies established by the Federal Aviation Administration ("FAA"), to which the Authority is subject. Such minimum rents are necessary to allow the Authority to recover its costs associated with Concessionaire's continued business operations at the Airport, including but not limited to administrative costs, general maintenance expenses, marketing, etc.

6.6. Reserved.

6.7. Failure to Pay Rent A Breach of Agreement. It is understood and agreed by the parties hereto that the failure of Concessionaire to pay the rent herein when due is a breach of this Agreement for which the Authority may terminate same pursuant to Article 12 herein, and/or take such other legal action as it deems necessary. The Authority expects all rent to be paid on time and Concessionaire agrees to pay on time.

No acceptance by the Authority of rent from Concessionaire, in whole or in part, for any period after a default of any terms, covenants or conditions to be kept or observed by Concessionaire shall be deemed a waiver of any right on the part of the Authority to terminate this Agreement because of such default.

6.8. Concessionaire Reports. Beginning on the Effective Date of this Agreement, except as provided in Section 6.8.1, below, and continuing until and including the month immediately following the termination or expiration of this Agreement, Concessionaire shall, on or before the twentieth (20th) calendar day of each calendar month, without prior demand, submit to the Authority reports ("Concessionaire Reports") setting forth the amount of Concessionaire's Gross Revenues received at each location operated by Concessionaire for the preceding calendar month. Each facility or unit shall be reported as a separate location, segregated by each source or general type of article sold or service rendered. Each monthly accounting shall be in such manner and detail and upon such forms as are prescribed by the Authority and shall be certified by an officer of Concessionaire. The Authority shall have the right to require Concessionaire to modify the Concessionaire Report. If Concessionaire fails to submit the Concessionaire Report within the time prescribed herein, then,

EXHIBIT B

SPECIALTY RETAIL MERCHANDISE CONCESSION AGREEMENT

BETWEEN THE

ANTONIO B. WON PAT INTERNATIONAL AIRPORT AUTHORITY, GUAM

AND

LOTTE DUTY FREE GUAM, LLC

May 18, 2013

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SPECIALTY RETAIL CONCESSION AGREEMENT

THIS SPECIALTY RETAIL CONCESSION AGREEMENT ("Agreement"), is made and entered into this 18th day of May, 2013, by and between the **ANTONIO B. WON PAT INTERNATIONAL AIRPORT, GUAM** (hereinafter the "Authority"), a public corporation and autonomous instrumentality of the government of Guam, whose mailing address is Post Office Box 8770, Tamuning, Guam 96931, and **LOTTE DUTY FREE GUAM, LCC** (hereinafter referred to as "Concessionaire"), a Guam limited liability company, whose mailing address is c/o Edge Building, Second Floor, 929 S. Marine Corps Drive, Tamuning, Guam 96913.

RECITALS

WHEREAS, the Authority is the owner of the Antonio B. Won Pat International Airport, Guam (hereinafter referred to as "Airport") and operates said Airport for the promotion and accommodation of air commerce and air transportation between Guam and the United States and other countries; and

WHEREAS, the Airport which consists of a main passenger terminal (the "Terminal"), cargo facility and surrounding properties; and

WHEREAS, the Authority issued Request for Proposal No. GIAA010-FY12 (the "RFP") seeking proposals for the development, construction, operation and maintenance of a high quality specialty retail concession at the Airport; and

WHEREAS, Concessionaire submitted to the Authority a proposal ("Concessionaire's Proposal") responding to the RFP setting forth Concessionaire's proposal for the design, construction and operation of a specialty retail concession at the Airport; and

WHEREAS, Concessionaire's Proposal includes capital improvements to the Airport intended to enhance the overall retail experience of the travelling public; and

WHEREAS, the Authority carefully analyzed and fully reviewed said proposal and determined that the specific commitments and undertakings of Concessionaire in its proposal comport with the basic specifications contained in the Authority's Request for Proposals; and

WHEREAS, the Authority has determined that Concessionaire is a responsible proposer and is the best qualified proposer and, therefore, desires to grant Concessionaire a lease to design, construct and operate the specialty retail merchandise concession presented in its proposal on the terms and conditions set forth herein; and

WHEREAS, Concessionaire desires to secure and enter into a concession agreement in accordance with the foregoing and undertakes to provide first class facilities and services to meet the demands of the Authority's concession program, patrons, the public, and other users of the Airport at

Additional Retail Space	25.0
-------------------------	------

or

6.1.2. Minimum Annual Guaranteed Rent. The Minimum Annual Guaranteed Rent (“MAG Rent”) shall be an annual amount for the applicable Lease Year for the portion of the Premises listed in the table below:

Premises	Year 1
Main and Future Retail Space	US\$15,160,000.00
Arrivals Retail Space	US\$ 240,000.00

The imposition of the MAG Rent is consistent with the Authority’s Non-Airline and Concession Lease Policies and the policies established by the Federal Aviation Administration (“FAA”), to which the Authority is subject. Such minimum rents are necessary to allow the Authority to recover its costs associated with Concessionaire’s continued business operations at the Airport, including but not limited to administrative costs, general maintenance expenses, marketing, etc.

6.2. Payment of Rent.

6.2.1. Payment of MAG Rent. The MAG Rent for the applicable Lease Year shall be payable monthly in advance in equal installments (i.e, 1/12 of the MAG per month) on the first (1st) day of each month (the “Monthly MAG Payment”) during the applicable Lease Year, subject to Year-end reconciliation as provided herein.

6.3. Payment of Percentage Rent. The Percentage Rent shall be initially calculated and payable by Concessionaire (to the extent that it exceeds the Monthly MAG Payment) in arrears on a monthly basis not later than the twentieth (20th) day following the end of the calendar month for which the Percentage Rent relates (the “Monthly Percentage Rent Payment”), subject to Year-end reconciliation as provided herein. The Monthly Percentage Rent Payment shall be an amount equal to the amount (if any) that the Percentage Rent calculated for the given month exceeds the Monthly MAG Payment for the given month. Within forty-five (45) days after the last day of the applicable Year, Concessionaire shall calculate and report to the Authority the Percentage Rent for the entire Year and pay therewith any additional Percentage Rent owed for such Year; it being understood that Concessionaire shall pay to the Authority, within forty-five (45) days after the last day of the applicable Year, any unpaid balance of the greater of the Minimum Annual Guaranteed Rent or the Percentage Rent for such Year. All calculations relating to Percentage Rent are subject to the review and approval of the Authority.

6.4. Reserved.

6.5. Reserved.

EXHIBIT C

WILLIAM J. BLAIR
THOMAS C. STERLING
RICHARD L. JOHNSON
JEHAN'AD G. MARTINEZ

JAMES F. BALDWIN
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LAW OFFICES
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A PROFESSIONAL CORPORATION

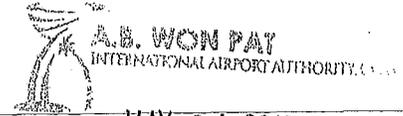
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HAGÁTÑA, GUAM 96910-5205

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(671) 477-7857

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WRITER'S E-MAIL:
wjbflair@kbsjlaw.com

May 24, 2013



MAY 24 2013

TIME: 3:48 PM

REC'D BY: [Signature]

VIA E-MAIL & HAND DELIVERY
chuck.ada@guamairport.net

Mr. Charles H. Ada, II
Executive Manager
GUAM INTERNATIONAL AIRPORT AUTHORITY
Administration Office, 3rd Floor
355 Chalan Pasajeru
Tamuning, Guam 96913

RE: SUNSHINE ACT REQUEST

Dear Mr. Ada:

This request for public records is made pursuant to the Sunshine Reform Act of 1999 set forth in 5 GCA §10101 et seq. We seek the following document:

1. The Authority's Non-Airline and Concession Lease Policies referred to in Section 6.1.2 of the Specialty Retail Merchandise Concession between the Authority and Lotte Duty Free Guam, LLC, signed on May 18, 2013.

2. All documents reflecting any operational criteria adopted by the GIAA as required by 12 GCA 1203.1(a)(ii).

Please let me know what will be the copying charges incurred in connection with this request.

Very truly yours,

BLAIR STERLING JOHNSON & MARTINEZ
A Professional Corporation

William J. Blair
WILLIAM J. BLAIR

EXHIBIT D



P.O. Box 8770
Tamuning, GU 96931

Tel: (671) 646-0300
Fax: (671) 646-8823

www.guamairport.com

June 3, 2013

VIA EMAIL wjblair@kbsilaw.com

William J. Blair

BLAIR STERLING JOHNSON & MARTINEZ

Suite 1008 DNA Building
238 Archbishop F.C. Flores St.
Hagatna, Guam 96910

RE: RESPONSE TO MAY 24, 2013 SUNSHINE REFORM ACT OF 1999 REQUEST

Dear Mr. Blair:

The A.B. Won Pat International Airport Authority, Guam ("GIAA") is in receipt of your Sunshine Act request dated May 24, 2013, for the following documents:

1. The Authority's Non-Airline and Concession Lease Policies referred to in Section 6.1.2 of the Specialty Retail Merchandise Concession between the Authority and Lotte Duty Free Guam, LLC, signed on May 18, 2013.
2. All documents reflecting any operational criteria adopted by the GIAA as required by 12 GCA 1203.1(a)(ii).

GIAA has found no documents responsive to your request. With respect to Non-Airline and Concession Leases, GIAA's policy is to comply with all applicable laws and regulations consistent with the best interest of GIAA and the public.

Should you have any questions, please do not hesitate to contact me.

Si Yu'usMa'ase,



Charles H. Ada II
Executive Manager

cc: Legal Counsel



EXHIBIT E

WILLIAM J. BLAIR
THOMAS C. STERLING
RICHARD L. JOHNSON
JEHAN'AD G. MARTINEZ

JAMES F. BALDWIN
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WRITER'S E-MAIL:
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June 7, 2013

VIA E-MAIL & HAND DELIVERY
chuck.ada@guamairport.net

Mr. Charles H. Ada, II
Executive Manager
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Administration Office, 3rd Floor
355 Chalan Pasajeru
Tamuning, Guam 96913

**RE: DFS PROTEST OF PROPOSAL PROCESS/AWARD OF
PROPOSAL: RFP NO. GIAA010-FY10**

Dear Mr. Ada:

DFS Guam L.P.'s ("DFS") submits this protest of the process undertaken by the Guam International Airport Authority ("GIAA") in connection with the solicitation and purported award of RFP No. GIAA 010-FY12 ("RFP"). As you are aware, we previously protested the actions related to the selection of Lotte in connection with the RFP through our letters of October 30, 2012, April 11, 2013, April 23, 2013, and May 2, 2013, culminating in the GIAA's rejection of that proposal protest on May 17, 2013. We submitted a second protest in connection with the RFP, raising additional independent bases for protest, on May 29, 2013. DFS now raises in this protest yet another new and independent basis for protesting this solicitation and award, pursuant to 5 GCA Guam Government Operations, Article 9, Section 5425 et seq. and RFP No. GIAA 010-FY12. Accordingly, this protest is distinct and separate from DFS' prior protests. DFS reserves the right to further supplement this protest as additional facts are discovered.

The process undertaken by the GIAA in connection with the solicitation and purported award of the RFP violated 12

To Mr. Charles H. Ada, II

Date June 7, 2013

Page 2

GCA §1203.1, and was therefore an unauthorized exercise of agency power and is invalid *ab initio*. 12 GCA §1203.1 (a) provides that "[a]ny agreement between the [GIAA] and any other party concerning the operation of a concession . . . shall conform to the [various requirements and limitations enumerated therein.]" (Emphasis added). 12 GCA §1203.1(a)(ii) proceeds to specifically require the GIAA to adopt "criteria established for the operation of a concession . . . which criteria shall be reviewed at a public hearing held within ninety (90) days of the effective date of this Section, and held in accordance with the Administrative Adjudication Law." (Emphasis added). Accordingly, any solicitation and award of a concession contract by the GIAA must be governed by criteria that has been adopted pursuant to 12 GCA §1203.1(a)(ii).

On May 24, 2013, DFS submitted various Sunshine Act requests for public documents seeking, *inter alia*, information regarding the criteria that the GIAA had presumably adopted as required by 12 GCA §1203.1(a)(ii). In its June 3, 2013 response, however, the GIAA stated that it had "found no documents responsive" to this request—despite the fact that the GIAA's putative contract with Lotte in connection with the RFP references certain Non-Airline Lease and Concession Policies at Section 6.1.2.¹

As DFS understands the GIAA's current position on this issue, the GIAA has either (1) failed to adopt any operational criteria as required by 12 GCA §1203.1(a)(ii); or (2) failed to locate the applicable criteria even after conducting a diligent search in connection with DFS' Sunshine Act request. In the second instance, it is patently obvious that the GIAA could not have been following criteria *which it is unable to locate in the*

¹ DFS is aware that in 1995, operational criteria were proposed pursuant to 12 GCA §1203.1(a)(ii). After conducting thorough diligence, DFS has been unable to conclusively determine whether those policies were actually adopted by the GIAA; accordingly, DFS asserts that the legal status of those policies is unclear at this juncture. If those operational criteria were in fact adopted as proposed by the GIAA, the terms of this RFP did not comply with the requirements of the 1995 criteria, and accordingly this RFP would still be invalid.

To Mr. Charles H. Ada, II

Date June 7, 2013

Page 3

first place when it conducted this RFP.² Accordingly, under either of the two possible scenarios that would support the GIAA's response to DFS' Sunshine Act request, the RFP was issued in direct contravention of the terms of 12 GCA §1203.1(a)(ii). As such the RFP constituted legislatively unauthorized action by this agency, and accordingly it was null and void *ab initio*.

We reserve DFS' right to seek administrative and judicial review of this protest.

If you have any questions, please do not hesitate to contact me.

Sincerely,

BLAIR STERLING JOHNSON & MARTINEZ
A Professional Corporation



WILLIAM J. BLAIR

cc: Michael Pangelinan, Esq.
William Hebert, Esq.
Maurice Suh, Esq.

² DFS only learned of the GIAA's current position with respect to any policies pursuant to 12 GCA §1203.1(a)(ii) from the GIAA's correspondence on June 3, 2013, which prompted this timely protest. In the past, the legal status of any Non-Airport and Concession Lease Policies was unclear to DFS.

EXHIBIT F



A.B. WON PAT
 INTERNATIONAL AIRPORT AUTHORITY, GUAM
 ATURIDAT PUETTON BATRON AIREN GUAHAN ENTENASIONAT

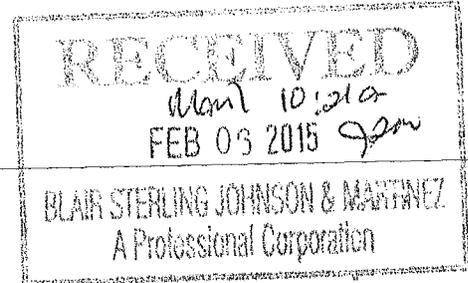
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Tel: (671) 646-0300
 Fax: (671) 646-8823

www.guamairport.com

February 5, 2015

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED



Mr. Jehan'ad G. Martinez
 Blair Sterling Johnson & Martinez
 Suite 1008 DNA Building
 238 Archbishop F.C. Flores Street
 Hagåtña, Guam 96910-5205

RE: Request For Proposal For Specialty Retail Concession – Multiple Concepts
RFP No. GIAA010-FY12

Hafa Adai Mr. Martinez:

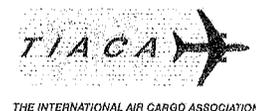
Pursuant to 2 Guam Administrative Rules and Regulations (“GAR”) Div. 4 § 9101(g), the A.B. Won Pat International Airport Authority (“GIAA” or “the Airport”) hereby issues its decision on the matters raised in the letter submitted by DFS Guam L.P. (“DFS”) on June 7, 2013 (“DFS’s Third Protest” or “the Third Protest”). After careful consideration, GIAA concludes that DFS’s Third Protest is untimely and lacks merit, and denies it on those grounds.

I. BACKGROUND FACTS

GIAA has the authority to enter into contracts, leases, and concession agreements under 12 GCA §1105(h). *See* 12 GCA § 1105(h) (“The Authority shall have and exercise each and all of the following Powers: . . .(h) To make and enter into contracts, leases, concession agreements and permits. . . .”) Under 12 GCA § 1203.1:

(a) Any agreement between the [GIAA] and any other party concerning the operation of a concession, other business or a service provider at [GIAA] shall conform to the following:

(1) allow for an exclusive right to sell certain goods or provide certain services only after a competitive proposal procedure, according to the General Services Administration rules and regulations, and for a duration of no longer than five (5) years (Any exclusive right for a duration of longer than five (5) years shall be given by the ABWPGIAA to any party only upon subsequent approval by I Liheslaturan Guåhan by statute.);



(2) criteria established for the operation of a concession, other business or service provider at the ABWPGIAA, which criteria shall be reviewed at a public hearing held within ninety (90) days of the effective date of this Section, and held in accordance with the Administrative Adjudication Law. . . .

12 GCA § 1203.1.

The Guam Legislature passed §1203.1 in 1992, Pub. Law 21-135. In 1995, GIAA held public hearings on the criteria to be established for the operation of non-airline concessions. GIAA has been able to locate a copy of a document entitled, "Preliminary Draft Non-Airline Lease and Concession Policies," dated August 1995. GIAA has also been able to locate minutes of a hearing held on October 19, 1995, at which GIAA received comments from the public, including DFS, on the August 1995 Preliminary Draft. However, GIAA has not been able to locate any record that it finally adopted the August 1995 Preliminary Draft criteria or any other non-airline concession criteria. GIAA's meetings are public. *See* 5 GCA § 8103. DFS would have had notice of any agenda item or any vote on "final" Non-Airline Lease and Concession Policies.

Notwithstanding DFS's footnoted assertion in its Third Protest that "the legal status of any Non-Airport and Concession Lease policies was unclear to DFS . . . ," the facts show that DFS has known since at least 2001 that GIAA had not adopted and promulgated any final non-airline concession criteria. In 2001, GIAA issued an RFP for the airport retail merchandise concession (the "2001 RFP"). During the 2001 RFP process, DFS submitted the following question to GIAA, which gave the following answer:

DFS QUESTION ONE:

12 GCA 1203.1 governs the award of merchandise concessions by the GIAA. 12 GCA1203.1 provides that any agreement awarding an exclusive concession for certain goods and services may be awarded only after a "competitive proposal procedure according to the General Service Administration rules and regulations." In addition, 12 GCA 1203.1(a)(ii) provides that any concession agreement must also conform to operational criteria reviewed at a public hearing held in accordance with the Administrative Adjudication Act within 90 days of the enactment of the statute. Pursuant to the statute, the GIAA on October 19, 1995 held a public hearing on proposed Non-Airline Lease and Concession Policies, dated August 1995. It is DFS' understanding that these proposed policies (the "Criteria") were later adopted by the GIAA.

Article I, Section 2 of the Criteria set forth a number of administrative determinations made at the time by the GIAA. In section 2.1 it was found that the competitive sealed proposal provisions of the Guam Procurement Law had been repealed by P.L. 18-8:8. As a consequence, GIAA found that the Legislature

intended that the GIAA use the "competitive sealed bidding" procedure authorized by 5GCA 5211, et seq.

Article IV, Section 2.6 of the Criteria sets forth the method by which concession fees are to be established. That method is substantially and materially different from the method described in the RFP.

Since the procedure described in the RFP does not conform to the competitive sealed bidding procedure or the Criteria, DFS asks under what legal authority is the GIAA proceeding under this procurement? This issue is made critical by the fact that there are no representations by GIAA in the draft Concession Agreement as to the validity of the agreement or the authority of the GIAA to enter into it and award the concession to the winning proposer. To the contrary, Section 13.34 of the draft Concession Agreement requires the concessionaire to waive any claims it might have against the GIAA resulting from a legal challenge to the validity of the agreement.

If the GIAA asserts that the award of the concession need not conform to the 1995 Criteria, how will the award satisfy the requirements of 12 GCA 1203-1(a)(ii)?

GIAA RESPONSE TO Q1:

*Notwithstanding 12 GCA § 1203.1, the legal authority under which GIAA is proceeding for the present Request for Proposal (RFP) is found in the Guam Procurement Law (Title 5 GCA §§ 5000 et seq.) and Regulations (Vol. 2 Guam Administrative Rules & Regulations Div. 4.). Title 12 GCA § 1203.1 requires competitive bidding only as to exclusive concession agreements and does not require competitive bidding for a non-exclusive concession agreement as contemplated under the GIAA RFP. **Furthermore, based on information and belief, the proposed Non-Airline Lease and Concession Policies, dated August 1995 or the "Criteria" were not fully and properly adopted and promulgated in accordance with the Administrative Adjudication Law pursuant to 12 GCA § 1203.1(a)(ii).***

(Italics in original; emphasis in bold added.) As of October 31, 2001, DFS was aware that GIAA took the position that the August 1995 Criteria were never fully adopted or promulgated.

The addendum in which GIAA included this response was made a part of the 2001 RFP. As you know, DFS's 2002 Concession Agreement makes no reference to any non-airline concession policies.

In 2006, DFS entered into a concession agreement with GIAA. In § 5.1.3 of that concession agreement, it states in relevant part: "The imposition of the MAG Rent is consistent with the Authority's Non-Airline and Concession Lease Policies and the policies established by the Federal Aviation Administration ("FAA"), to which the Authority is subject." (2006 Concession Agreement § 5.1.3 at p.9.) In 2009 DFS entered into a concession agreement with GIAA. In § 5.1.3 of that concession agreement, it states in relevant part: "The imposition of the MAG Rent is consistent with the Authority's Non-Airline and Concession Lease Policies and the policies established by the Federal Aviation Administration ("FAA"), to which the Authority is subject." (2009 Concession Agreement § 5.1.3 at p.7.)

II. PROCEDURAL HISTORY

On April 12, 2013, based upon rankings recommended by the independent Evaluation Committee, GIAA's Board of Directors found that LotteDuty Free Guam, LLC ("Lotte") was the most qualified proposer. Of the four proposers, DFS was not ranked the second most-qualified proposer.

On April 23, 2013, DFS submitted a bid protest regarding the RFP procurement process ("DFS's First Protest" or "the First Protest"). On May 3, 2013, GIAA sent a letter to DFS requesting additional information to support the facts and conclusions set forth in the First Protest, to which DFS responded on May 7, 2013.

On May 17, 2013, GIAA denied DFS's First Protest because, among other reasons, it was untimely.

On May 18, 2013, GIAA entered into a specialty retail concession agreement with Lotte.

On May 29, 2013, DFS submitted its Second Protest, which protested the signing of the specialty retail concession agreement with Lotte.

On May 30, 2013, DFS filed an appeal of GIAA's denial of DFS's First Protest with the Office of Public Accountability ("OPA") ("the OPA Appeal"). Two hours later, DFS commenced an action in Superior Court against GIAA, Lotte, and the Territory of Guam entitled, *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., Guam, et al.*, Civil Case No. CV0685-13 (Super. Ct. Guam). Because the Complaint repeated many of the allegations of the OPA Appeal, on June 5, 2013, the OPA issued an order staying the First Protest Appeal pursuant to 2 GAR Div. 4 § 1210(b), on the grounds of "judicial involvement."

On June 7, 2013, DFS submitted to GIAA its Third Protest, which protested that the solicitation and award of the RFP violated 12 GCA § 1203.1.

On June 28, 2013, in light of press releases by DFS claiming that "DFS is in possession of a growing body of evidence," GIAA sent a letter to DFS requesting for any evidence or

information that DFS had not already provided to GIAA that supports the facts and conclusions set forth in DFS's Second and Third Protests.

On July 2, 2013, DFS filed its First Amended Complaint ("FAC"). In its FAC, DFS alleged that the award of the specialty retail concession to Lotte was wrongful for the reasons set forth in the First, Second and Third Protests. As of the date DFS filed its FAC, GIAA had not responded to either the Second or Third Protests.

On July 5, 2013, DFS responded to GIAA's June 28, 2013 letter requesting for additional information to support DFS's Second and Third Protests. GIAA was prohibited from acting on these protests by 2 GAR Div. 4 § 9101(i), because it could not act when "an action concerning the protest ha[d] commenced in court...." 2 GAR Div. 4 § 9101(i).

On July 15, 2013 DFS filed its *ex parte* application for a TRO and preliminary injunction, which the Superior Court heard on July 17, 2013. On July 19, 2013, the Superior Court dismissed the action on the grounds that it lacked subject matter jurisdiction because DFS had failed to exhaust its administrative remedies and denied DFS leave to amend the action on the grounds that it would be futile ("July 19 Dec. & Order").¹

On July 20, 2013, DFS vacated and handed over a majority² of the Airport concession space to Lotte pursuant to a mutually agreed upon transition plan between GIAA, DFS and Lotte. Since that time, Lotte has been occupying and improving the Airport concession space, as well as operating the Airport concession.

After further proceedings in the Superior Court and the Supreme Court of Guam, judgment on DFS's first action was entered on September 18, 2014, which terminated the "judicial involvement" that stayed GIAA's action on the Second and Third Protests. On September 19, 2014, GIAA sent a letter to DFS asking if it had any additional facts, documents or witnesses that DFS believed GIAA should consider before issuing its decision on the pending Second and Third Protests.

On September 30, 2014, the Public Auditor declined jurisdiction and dismissed DFS's OPA Appeal. The Public Auditor ordered that the OPA Appeal be taken to the Superior Court of Guam, in accordance with 5 GCA § 5480.

On October 3, 2014, DFS notified GIAA that although DFS did not have additional facts, documents or witnesses for GIAA to consider before issuing its decision on the Second and Third Protests, DFS identified the following broad categories of information that DFS claimed is available to GIAA in making its decision on the Second and Third Protests:

² DFS continued to occupy 1,709 square feet of space under a September 2009 lease agreement with GIAA (aka "MMJ/LeSportsac Lease Agreement") until September 2014.

- The documents and information provided by DFS to GIAA in connection with Protest No. 1.
- GIAA's, the Guam Visitors Bureau's ("GVB") and the Guam Economic Development Authority's written responses to Sunshine Reform Act requests made on behalf of DFS, James Richardson Guam LLC (JR/Duty Free), and others, and the documents, files and information produced by these entities pursuant to those Sunshine Reform Act requests, including, without limitation, documents bearing prefixes GIAA; GIAABSJM; GIAABSJM2; GIAABSJM3; GIAABSJM4; GIAABSJM5; GIAABSJM6; GIAA-B; GIAABKX2; GIAA; GIAATMT, GEDA, and all electronic, non-Bates stamped files or videos.
- The documents, files and information produced by GIAA pursuant to Sunshine Reform Act requests by Senator Benjamin J.F. Cruz.
- The recording of the Executive Session of the GVB in November 2013, and the recordings of any GIAA Board meeting in which the RFP was discussed, including special board meetings.
- Communications between GIAA and third parties, including DFS and Leigh Fisher, over the years regarding 12 GCA § 1203.1, including, without limitation, correspondence related to or referencing the concession lease operational criteria or the Non-Airline and Concession Lease Policies, which are at the heart of DFS's Protest No. 3.
- The information known by employees, advisors and consultants of GIAA, the GVB, Lotte, and others who were involved in or aware of the RFP process, including those that participated in the interview of Lotte, the review of Lotte's original and modified proposals, and the selection of Lotte as the most qualified bidder of the RFP.
- The public testimony of Gilbert Robles or any other then-employee of GIAA before a committee of or the entire Guam Legislature regarding or related to any concession lease operational criteria or the Non-Airline and Concession Lease Policies.
- The media articles, posts, stories and recordings that include statements made on behalf of the GIAA or from GIAA employees regarding the RFP, the selection of Lotte as the most qualified bidder and/or the contract between GIAA and Lotte at the Airport.

- The pleadings, evidence and arguments submitted during the proceedings before the Guam Superior Court and Guam Supreme Court

GIAA conducted its own independent investigation and reviewed all of the materials DFS identified in its October 3, 2014 letter and in its responses to GIAA's prior requests for information.

On October 14, 2014, DFS filed an action in the Superior Court against GIAA, Lotte, and the Territory of Guam entitled *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., Guam, et al.*, Civil Case No. CV0943-14 (Super. Ct. Guam). On October 30, 2014, DFS filed a Verified Petition for Alternative and Peremptory Writ of Mandate against the Public Auditor and Office of Public Accountability.

III. ANALYSIS

DFS submitted its Third Protest on June 7, 2013. The Third Protest was submitted after GIAA had made an award of the specialty retail concession agreement to Lotte. For nearly 15 months, GIAA was prevented by law from completing its work and issuing its decision on this protest due to DFS's filing of its FAC.

A. DFS's Third Protest was Untimely

Under the Procurement Law, a protest is timely only if it is submitted within 14 days "after such aggrieved person knows or should know of the facts giving rise thereto." 5 GCA 5425(a). On July 19, 2012, GIAA issued the present RFP. Appended to the RFP was an exemplar of the concession agreement to be used as a basis for GIAA's negotiations of a final agreement with the winning proposer. In Section 6.5 of that exemplar agreement there is reference to GIAA's Non-Airline and Concession Lease Policies. Notwithstanding this reference, DFS knew, based upon GIAA's response to DFS's questions during the 2001 RFP, that GIAA had taken the position that it had not adopted any such policies. As soon as DFS received its RFP packet, DFS was on notice to protest during the RFP process the lack of any such policies. In addition, GIAA's meetings are public by law. 5 GCA § 8103. DFS would have had knowledge of any agenda item or vote at a public meeting of GIAA's Board that it had adopted Non-Airline and Concession Lease Policies. Throughout the entire procurement process in 2012 and 2013, DFS was on notice that these policies had not been fully adopted and promulgated.

An important purpose of procurement protests is to bring to the attention of the procuring agency any defects in the process that could be promptly addressed and corrected. By waiting until after GIAA awarded the Specialty Retail Concession to Lotte and after GIAA had already executed the concession agreement with Lotte, DFS undermined this important purpose of procurement protests. Accordingly, because DFS did not timely protest GIAA's lack of non-airline concession criteria, its Third Protest is denied. See 5 GCA 5425(a).

B. DFS is Estopped from Asserting that the Lotte Concession Agreement is Void

DFS asserts that Lotte's Concession Agreement is void *ab initio* because GIAA had not promulgated Non-Airline and Concession Lease Policies pursuant to 12 GCA § 1203.1. GIAA is estopped from raising this argument because it operated under and benefitted from two concession agreements that purported to be governed by GIAA's Non-Airline and Concession Lease Policies – and DFS does not claim that either of these two contracts is void *ab initio*. It would be inequitable to permit DFS to benefit by arguing that a term in Lotte's Concession Agreement renders that agreement void when the same argument would have rendered DFS's own concession agreements void. Likewise, DFS should not be permitted to wait until after the Lotte Concession agreement was signed to raise the question of whether GIAA had passed final Non-Airline and Concession Lease Policies. *See Benavente v. Taitano*, 2006 Guam 16 ¶ 67 (criticizing the timing of the Petitioners' challenge to use of voting machines, remarking "the error complained of—the lack of [Administration Adjudication Law] approval in this case of the iVotronic voting system—could have been corrected in advance of the election . . . [but Petitioners] chose rather to wait until the election was held and then brought the noncompliance to the attention of the court, after thousands of people voted.").

C. Because GIAA Followed the Procurement Law, DFS Has Not Been Injured by the Alleged Failure of GIAA to Adopt Non-Airline and Concession Lease Policies Pursuant to 12 GCA § 1203.1

DFS asserts that because GIAA had not adopted Non-Airline and Concession Lease Policies pursuant to 12 GCA § 1203.1, the entire procurement process and Lotte's Concession Agreement must be thrown out. To the contrary, because GIAA followed Guam's Procurement Law and Regulations, it is immaterial whether GIAA had adopted or followed Non-Airline and Concession Lease Policies pursuant to 12 GCA § 1203.1. *See Carlson v. Perez*, 2007 Guam 6 ¶¶ 28-29 (alleged failure of defendant to adopt personnel rules at the time of employees' discharge did not render their discharges unlawful, so long as the plaintiffs were given due process); *Benavente v. Taitano*, 2006 Guam 16 ¶ 66 (the fact that Guam Election Commission failed to gain approval of a particular voting system pursuant to the Administrative Adjudication Law did not *per se* void the votes cast through a particular voting system, because there was no showing that the failure affected the voting process or outcome). Therefore, even if 12 GCA § 1203.1 mandates GIAA to adopt a concession lease policy, its failure to do so does not render existing leases invalid.

GIAA has found no evidence that GIAA fully adopted and promulgated final Non-Airline Lease and Concession Policies, but GIAA's alleged failure to adopt these policies did not affect the RFP process or its outcome, and all proposers' rights were protected by GIAA's adherence to the Procurement Law and Regulations. DFS's Third Protest is denied because it lacks merit.

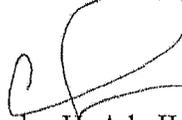
D. DFS Was Not Entitled to an Automatic Stay

DFS contends that this protest triggered the automatic stay under the Procurement Law. However, because DFS's Third Protest was both untimely and made after the award of the specialty retail concession agreement, DFS was not entitled to an automatic stay pursuant to 5 GCA § 5425(g). *See Guam Imaging, Consultants, Inc. v. Guam Memorial Hospital Authority*, 2004 Guam 15 ¶ 23 (“[T]he automatic stay provisions found in ... the Guam Procurement Law require that a protest in the context of ... procurement of services be both factually timely and be pursued before the award has been made in order to trigger the automatic stay”) (emphasis added); *see also, In the Appeal of J&B Modern Tech*, OPA PA-14-0001, Decision and Order [Re: J&B Modern Tech's Motion to Declare Stay in Effect], at 4 (May 29, 2014) (“However, J&B's Protest was filed after GDOE awarded the contract to JRN ... Consequently, the automatic stay was not triggered in this case.”).

IV. CONCLUSION

For the foregoing reasons, GIAA denies DFS's Third Protest. Pursuant to 5 GCA § 5425(c), DFS is advised that it has a right to administrative and judicial review.

Si Yu'us Ma'ase,



Charles H. Ada II
Executive Manager

cc: William J. Blair