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*Attorney for the Guam Solid Waste Authority ("GSWA")
By and through Receiver Gershman, Brickner & Bratton, Inc. ("GBB")*

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF GUAM

UNITED STATES OF AMERICA

CIVIL CASE NO. 02-00022

Plaintiff,

v.

GOVERNMENT OF GUAM,
Defendant.

**RECEIVER'S REPORT RE:
TRANSITION ISSUES AND
AUGUST 31, 2017 ORDER**

I. INTRODUCTION

The Receiver filed a quarterly status report on August 23, 2017 (ECF No. 1749), and began to present the report at the August 23, 2017 hearing before the Court. The Court continued the hearing to September 14, 2017 to permit the Receiver to finish its presentation (ECF No. 1750). On August 31, 2017, the Court ordered several entities to file status reports to address certain issues. On September 14, 2017, the Court continued the hearing and instructed the parties to continue working on the transition issues. A hearing on the transition issues is set for October 19, 2017. The Receiver now submits this Report to update the Court on the status of the transition issues.

II. STATUS OF CURRENT TRANSITION ISSUES

A. General Manager and Controller

As the Court knows, the GSWA has hired a General Manager. They have not yet been able to hire a Controller. The financial management of GSWA is essential to the successful transition of services and the long-term viability of the solid waste system on Guam. As this Court knows, there is a long and unfortunate history of financial mismanagement by the Government of Guam with respect to the solid waste program. The Receiver, with the support of the Court, has been able to correct the financial mismanagement and put the system on a solid financial footing. This has occurred despite efforts by the Government of Guam to improperly transfer cash from solid waste bank accounts, the Government of Guam's repeated efforts to have the Court adopt financial plans based on faulty assumptions and the demands to reimburse the Government of Guam for its debt service payments without taking the necessary steps to raise rates to enable the GSWA to pay these amounts. A qualified and properly trained Controller is essential to maintaining sound financial management and resisting those things that will undermine GSWA's financial health.

The General Manager is overseeing the hiring of the Controller. Interviewing has started but it is unclear how long it will take to obtain the services of a highly qualified individual.

The new General Manager is also working with the Receiver Operations Manager to learn the system. It is vitally important that he understand all aspects of the system to be successful. This takes time and will require him to fully focus on essentially shadowing Mr. Anderson for the remaining time of the transition.

Importantly, some of his time has been spent trying to work out the challenges he is facing with his relocation to Guam. This has included addressing contract issues between him and the Board which are still outstanding. It is our hope that these distractions can be resolved quickly so that all of his time and energy can be devoted to a successful transition.

1 The General Manager has enrolled for mandatory Government of Guam procurement
2 training; however, the training is not scheduled until January. The Controller, when hired, must
3 also undergo this training.

4 In the absence of a Controller, the General Manager must also take the lead assisting the
5 Board in adopting a budget (this issue is addressed later in this report). This budget must be in
6 place before the transition occurs.

7 It is vitally important that GSWA maintain a focus on these and the other transition issues
8 in order to accomplish a successful transition from receivership to operation by its Board of
9 Directors.

10 11 **B. The Temporary Employees and the May 28, 2009 AG Opinion.**

12 As requested by this Court, Chace Anderson, Receiver Operations Manager coordinated
13 a meeting with interested parties to address the status of the current employees who work for
14 GSWA, and specifically, their employment status after the transition. Also present at the meeting
15 were Director Christine Baleto of the Department of Administration, Attorney General Elizabeth
16 Barrett-Anderson, Deputy Attorney General Kenneth Orcutt, GSWA General Manager Greg
17 Martin, GSWA Waste Management Services Supervisor Alicia Fejeran, Shane Ngauta of the
18 Human Resources Division of the Department of Administration, and Attorney Vanessa
19 Williams.

20 Bill 111-34 was introduced by the Honorable Tom S. Ada at the request of the GSWA
21 Board. It was the intent of the proposed legislation to address the transition in the areas of
22 personnel, procurement, rates and contracting, by allowing GSWA, the agency under
23 receivership, to transition to the Government of Guam all contracts, procurement, personnel, real,
24 the rates currently charged GSWA customers and personal property, debts, and receivables, which
25 will be assumed by the GSWA Board.

1 The effort to address transition issues – specifically the status of current employees after
2 the transition--through Bill 111-34 was unsuccessful because the Governor vetoed the bill on
3 October 13, 2017. A copy of the veto communication is provided as **Attachment 1**¹.

4 The Receiver also raised his concern that Bill 111-34, as it deals with the transition of
5 temporary personnel which accounts for approximately half of the GSWA work force, conflicts
6 with a legal opinion previously provided by the Office of the Attorney General. Deputy Attorney
7 General Pat Mason had provided the Receiver with an opinion on May 28, 2009, which advised
8 that the Receiver, because of the authority granted to it by the District Court's Order appointing
9 it as Receiver, has the authority to enter into a contract for temporary labor ("Mason Opinion").
10 Mr. Mason's Opinion is provided as **Attachment 3**.

11 The Mason Opinion stated that because of provisions in the Organic Act, the Government
12 of Guam specifically could not enter into this kind of contract. Based on Mr. Mason's advice,
13 the Receiver entered into the contract directly instead of contracting on behalf of GSWA (then
14 the Solid Waste Management Division of the Department of Public Works). Now that the
15 transition from Receivership to the Government of Guam is scheduled to occur on January 1,
16 2018, the Government of Guam asks that the Receiver assign this contract for temporary labor to
17 the Guam Solid Waste Authority. The Receiver believes it cannot do this given the legal opinion
18 provided by Mr. Mason.

19
20 ¹ It should be noted, in Governor Calvo's veto communication, he faults the legislation for only one provision of the
21 legislation. The provision the governor objects to excludes the 2016 Limited Obligation Bonds from the being
22 assumed by GSWA. The governor describes this as a violation of the covenants made in the bond issue. Bond
23 covenants are provisions in bond issues that are primarily designed to protect bondholders. Bondholders must
24 consent if a bond covenant is changed. The bondholders in this matter have no security interest in whether the
25 Government of Guam is reimbursed for the debt service it pays from the Government's Section 30 Revenue. In fact,
26 it would violate the provisions of the bond issues involved to transfer responsibility for paying debt service from the
27 Government of Guam's Section 30 Revenue to GSWA. We reach this conclusion based on the plain language of
28 both the 2009 and 2016 debt instruments and a letter dated February 27, 2013, from Guam's Bond Counsel Stanley
J. Dirks to Lieutenant Governor Raymond S. Tenorio in which he states that the solid waste bonds are "secured by a
pledge of, and *payable solely from, Section 30 Revenues* {emphasis added}". The February 27, 2013 letter is
provided as **Attachment 2**. The provisions of the 2009 bond issue to which Governor Calvo refers does state a
legislative intent that GSWA reimburse the general fund of the Government of Guam. This has not been done in
recent years because the Government of Guam has not increased the rates to allow GSWA to make such payments.
The Governor has every right to veto the legislation but the Receiver believes the premise upon which he bases his
veto is faulty. The only party with an interest in whether GSWA reimburses the Government of Guam is the
Government of Guam itself. If the Legislature wants to change it, we believe they are free to do so by enacting new
law that changes it.

1 Attorney General Barrett-Anderson recently stated that she believes that the Mason
2 Opinion does not apply to this specific situation. Mr. Anderson, the Receiver Operations
3 Manager, requested the Attorney General provide a written legal opinion supporting the Office
4 of Attorney General position that the Mason Opinion is either wrong or does not apply. The
5 Attorney General said that she will have the GSWA Board request a written legal opinion on the
6 matter. In a subsequent email exchange between Attorney General Anderson and Receiver
7 Representative David Manning, the Attorney General also said again her office will provide a
8 legal opinion. The communication between Mr. Manning and the Attorney General is provided
9 as **Attachment 4**.

10 In an Opinion Memorandum dated October 16, 2017 the Attorney General provided a
11 written opinion that concluded “Maintaining the services of non-government employees to
12 provide stability of solid waste services to the people of Guam does not violate the Organic Act.
13 The Mason guidance is not relevant, nor is it applicable, to the issues surrounding transition from
14 federal receivership to the government of Guam.” (the “10/16/17 Opinion”). The 10/16/17
15 opinion is attached as **Attachment 5**.

16 With all due respect to the Office of the Attorney General, the Receiver does not believe
17 the 10/16/17 Opinion addresses the specific concern raised by the Receiver. The 10/16/17
18 Opinion references cases which are inapposite because they relate to state legal restrictions on
19 privatization. All of the cases deal with a state decision to privatize an entire function of their
20 government. This is analogous to the Receiver’s contracts that privatize the operation of the
21 Layon Landfill, the Hauler-only Transfer Station and the Household Hazardous Waste Program.
22 These contracts privatize an entire function of GSWA and were extensively reviewed by both the
23 Office of the Attorney General of Guam and the Receiver’s counsel. We do not now and have
24 never raised a question about the ability of GSWA to continue these contracts.

25 The PHRS contract is different in that it provides employees that supplement the
26 government work force. The areas in which these employees are utilized is not privatized but
27 instead are directly operated by GSWA. These functions are the administrative functions of
28 GSWA, the residential transfer stations and residential collection service. Our understanding of

1 the Mason Opinion is that this type of contract arrangement when entered by the Government of
2 Guam is a violation of the Organic Act. If the PHRS contract, in this context, is valid for the
3 Government of Guam, then presumably any Government of Guam agency could establish such a
4 contract to supplement its work force while still retaining operational control of all its functions;
5 thereby evading the merit system entirely.

6 The Receiver does not wish to further debate this issue, but will abide by whatever
7 direction the District Court determines to be appropriate in this matter.
8

9 **C. The Recycling Revolving Fund.**

10 A meeting was held on October 3, 2017 regarding the Recycling Revolving Fund. Those
11 in attendance were Guam EPA Administrator Walter Leon Guerrero, Receiver Operations
12 Manager Chace Anderson, GSWA General Manager Greg Martin, Representatives from the
13 Department of Public Works, GSWA Board's Vice Chairman Jon Denight, Attorney Terrence
14 Brooks, and numerous Guam EPA staff.

15 The Recycling Revolving Fund currently does not have approved rules by which it can
16 utilize the funds of the Recycling Revolving Fund. Administrator Walter Leon Guerrero asked
17 the participants to review the draft rules and provide written comments on them on Friday,
18 October 5, 2017. The Receiver submitted comments on the draft rules and the committee was
19 scheduled to meet again Tuesday, October 10, 2017. Guam EPA cancelled the second meeting
20 because of an illness. At this time, the second meeting has not been rescheduled.
21

22 **D. The Trusteeship and the RFP for Post Closure Contractor**

23 On May 2, 2016, the Court adopted the Receiver's financial plan whereby a Trusteeship
24 is to be created after transition to manage the contractor for the post-closure care of the Ordot
25 Dump and to report on its status to the District Court. (ECF No. 1668). Recently the Government
26 Guam has questioned this Order and has asked the Court to allow the GSWA Board of Directors
27 to manage the post-closure care of the Ordot Dump, and to have the Post-Closure Contractor enter
28 into a contract with and to report to the GSWA Board instead of the Trustee.

1 A conference call was held to discuss the issue on October 11, 2017. The participants
2 were Attorney General Barrett-Anderson, Deputy Attorney General Ken Orcutt, Attorney Robert
3 Mullaney, Laurie Williams from EPA, Attorney Georgette Conception, GSWA Board Chairman
4 Andrew Gayle, Receiver Representative David Manning, Receiver Operations Manager Chace
5 Anderson, GSWA General Manager Greg Martin, and Attorney Joyce Tang.

6 The Government of Guam asked both the Receiver Representative and the Department of
7 Justice whether it would compromise on their position of having the Trusteeship be the sole
8 manager of the post-closure care of the Ordot Dump. Both the Receiver and the Department of
9 Justice stated that their respective positions are that the Order of the District Court providing for
10 a Trustee (supported by an independent engineer) to be responsible for the post-receivership
11 management of the Ordot Dump Closure Facility should not be changed. Both also indicated that
12 after the GSWA Board of Directors has successfully managed GSWA in an efficient and
13 responsible manner for an extended period of time, it may then be appropriate for GSWA to
14 request that the Court transition the responsibilities of the Trusteeship to the GSWA Board.

15 The parties were not able to reach a compromise on this issue.
16

17 **III. NEW TRANSITION ISSUE: THE GSWA FY2018 BUDGET**

18 It has come to the Receiver's attention that the budget recently passed by the Guam
19 Legislature, includes an appropriation of Seven Million Five Thousand Two Hundred Twenty-
20 One Dollars (\$7,005,221) to GSWA. These are not appropriations from tax revenue or other
21 general revenues of the Government, but are appropriations from the revenue generated by
22 GSWA itself from the fees it levies on its customers. The budget clearly states that these
23 appropriations are for GSWA's "operations for Fiscal Year 2018". As a governmental entity
24 functioning in a post-receiver environment, GSWA will require legislative approval to spend the
25 funds it collects from its customers. This is explicitly made clear in the act that creates GSWA.

26 It is not clear to us how this appropriation came to be since as Receiver we have not
27 communicated with the Legislature on this matter, but have instead always relied on the District
28 Court for budget approval. It may be that this is simply a continuation of the budget that was in

1 place when GSWA was placed into receivership in 2008. The budget item included in the recently
2 adopted budget for FY2018 clearly does not reflect the new realities of GSWA's system and its
3 current finances since these funds are less than half of the funds required to sustain the system
4 going forward². Accordingly, it will be vital to GSWA's successful transition that the Board
5 adopt a budget for FY18 and transmit it to the Legislature with a request for approval.

6 **Attachment 6** is a copy of the Receiver's recent communication with the GSWA Board
7 of Directors calling this matter to their attention. It includes a schedule, organized in a budget
8 format, showing expenditures for the previous six years. This covers the period from the
9 beginning of FY 2012 (one month after the opening of the Layon Landfill) through the end of FY
10 2017. This schedule is based on audited numbers for FY 2012 through 2016, although the
11 breakdown for contract services is based on internal data that was not consistently included in the
12 published audits. This information was provided to the GSWA Board to assist them as they
13 develop the budget for Fiscal Year 2018. In the Receiver's opinion, the budget is a critical
14 transition item that must be addressed prior to transition.

15
16 Respectfully submitted this 18th day of October, 2017.

17 /s/ Vanessa L. Williams
18 VANESSA L. WILLIAMS, ESQ.
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28 ² The Government of Guam is clearly aware of the funds required to sustain GSWA operations and the revenue the
current GSWA rate structure provides as a result of its own audits of GSWA during the entire period during which it
has been in receivership.

ATTACHMENT

“1”



EDDIE BAZA CALVO
Governor

RAY TENORIO
Lieutenant Governor

Office of the Governor of Guam

October 13, 2017

Honorable Benjamin J.F. Cruz
Speaker

I Mina'trentai Kuåttro Na Liheslaturan Guåhan
Guam Congress Building
163 Chalan Santo Papa
Hagåtña, Guam 96910

GL#34-17-1081
Speaker Benjamin J.F. Cruz

OCT 13 2017
Time: 3:46 [] AM [] PM File No. 34-1026
Received By: [Signature]

Dear Mr. Speaker:

Attached is Bill No. 111-34 (COR) entitled "*An Act to Add New Subsections (d), (e), and (f) to § 51A117. . . all of Guam Code Annotated, Relative to the Transition of the Guam Solid Waste Authority out of Federal Receivership and the Delegation of Procurement Authority.*"

It is with regret that I have **VETOED** this bill.

As originally introduced, Bill 111-34 laid out a clear and sound path for guiding the transition of GSWA out of federal receivership and into autonomy. The bill ensured the stability of the Authority's operations and strengthened its autonomy. Most importantly, the bill provided protection for the employees of GSWA, both classified and unclassified.

Unfortunately after the public hearing, Bill 111-34 was amended by the Legislature's Committee on General Government Operations. Although there is no issue with two of the three amendments made,¹ the amendment to add language to proposed new Section 51A121(b) so as to permit GSWA to acquire from the federal receiver all existing obligations, assets duties of the Authority "*other than the 2016 Limited Obligation Section 30 Bonds*" (the 2016 Bonds) is impermissible because it violates the covenants made in the bond indenture.

¹The amendment to Section 5 on the merit system that was recommended by the Attorney General and the amendment to delegate procurement authority to GSWA are sound.

According to the Report Digest published after the public hearing by the Legislature's Committee on General Government Operations,² the amended language excluding the 2016 Bonds from being transferred to GSWA was intentionally included in order to "ensure that GSWA does not automatically take on the debt service burden of the bond borrowing, which is currently serviced by Section 30 funds." The Committee's finding on this point reveals a fundamental misunderstanding of the Section 30 bonds, including the policy and history underlying their issuance.

As the Legislature knows, Public Law 33-183³ authorized the refunding of the original Series 2009A Limited Obligation Section 30 Bonds (the 2009 Bonds) that were issued to pay for costs associated in complying with the federal Consent Decree related to closure of the Ordot Dump and the opening of the Layon Landfill. Because the 2016 Bonds refunded the 2009 Bonds, all of the terms and conditions contained in the original 2009 Bond's Supplemental Indenture were incorporated and reaffirmed into the indenture of the 2016 Bond (i.e., the "First Supplemental Indenture"). Under Section XV of the original 2009 Supplemental Indenture, and as restated in the identical Section XV of the 2016 First Supplemental Indenture, GSWA is obligated to apply a portion of its solid waste collection and disposal service revenues towards reimbursing the General Fund for payment of the bond's debt service.

After consulting with bond counsel and with Attorney General Elizabeth Barrett-Anderson, I have been advised that Bill 111-34 violates the covenants made in the bond indenture because it attempts to exclude GSWA from this reimbursement obligation. The exclusion attempt is misguided because the reimbursement requirement is a legal and contractual obligation of GSWA, and the Legislature may not pass a law that releases, extinguishes, or otherwise impairs it or the indenture itself. In this respect, Bill 111-34's attempt to avoid the requirements of the bond indenture is unlawful because it violates the Contracts Clause of the Organic Act. *See, Pangelinan v. Gutierrez*, 2004 Guam 16, ¶¶ 40, 42.

² *See*, COMMITTEE ON GENERAL GOV'T OPERATIONS AND FEDERAL, FOREIGN, AND REGIONAL AFFAIRS COMMITTEE REPORT DIGEST FOR BILL NO. 111-34 (COR), AS AMENDED BY THE COMMITTEE, *Findings and Recommendations*, p. 14, Section (2).

³ P.L. 33-183 was enacted into law by the Guam Legislature on June 22, 2016.

The Committee's report justifies that the amendment is necessary because purportedly *"the debt service burden for the bonds is a matter that will require deliberation at the legislative policy level."* The Committee is apparently unaware that the Legislature has already deliberated on this issue and that the requirements of the bond indenture on the issue of debt service payments were included because they reflect duly established legislative policy.

In May 2009, Public Law 30-07 was enacted to authorize the issuance of the Series 2009A Section 30 bonds. As required by 12 G.C.A. Section 50103(k), the Legislature was required to approve the terms and conditions of the bond issuance, including the provisions governing debt service payments and their reimbursement. As set forth in P.L. 30-07, the Section 30 bond indebtedness was to be *"payable only from funds in the Solid Waste Operations Fund available therefor and from revenue of the system [and] will not be and shall not be deemed to be public indebtedness of Guam. . ."*⁴ Thus because legislative policy on the bond debt service reimbursement was made, relied upon, and incorporated into the indenture since 2009 (and reaffirmed in 2016) as a contractual condition of the bond's issuance, the Legislature may not lawfully now attempt to extinguish the obligation through the lawmaking process.

Although I must veto Bill 111-34 because of the bond violation amendment made by the Committee on General Government, I support the remaining provisions of the bill. In this regard, I wish to thank Sen. Tom Ada for introducing Bill 111-34 and for his consistent leadership and initiative in guiding GSWA out of federal receivership. I share Sen. Ada's concerns about the status of the GSWA employees, and agree that it critical that the employees (classified, unclassified, and contractual) be protected during the transition. I therefore urge the Legislature to immediately reintroduce a new and legally compliant version of Bill 111-34, and to expedite its consideration and passage as quickly as possible.

Senseramente,



EDDIE BAZA CALVO

⁴ P.L. 30-07:2 (Power to Incur Indebtedness), *codified as* 10 G.C.A. § 51803.

I MINA'TRENTAI KUÁTTRO NA LIHESLATURAN GUÁHAN
2017 (FIRST) Regular Session

CERTIFICATION OF PASSAGE OF AN ACT TO *I MAGA'LÁHEN GUÁHAN*

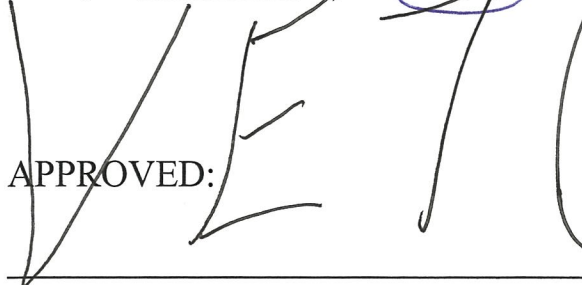
This is to certify that **Substitute Bill No. 111-34 (COR), "AN ACT TO ADD NEW SUBSECTIONS (d), (e), AND (f) TO § 51A117, AND NEW §§ 51A118, 51A119, 51A120, AND 51A121, ALL OF ARTICLE 1, CHAPTER 51A, TITLE 10, GUAM CODE ANNOTATED; TO AMEND § 4403(f) OF ARTICLE 4, CHAPTER 4, TITLE 4, GUAM CODE ANNOTATED; AND TO ADD A NEW § 5117A TO SUBARTICLE B OF ARTICLE 2, CHAPTER 5, TITLE 5, GUAM CODE ANNOTATED, RELATIVE TO THE TRANSITION OF THE GUAM SOLID WASTE AUTHORITY OUT OF FEDERAL RECEIVERSHIP AND THE DELEGATION OF PROCUREMENT AUTHORITY,"** was on the 29th day of September 2017, duly and regularly passed.

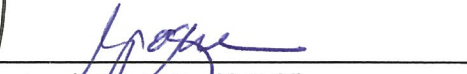

Benjamin J.F. Cruz
Speaker

Attested:


Dennis G. Rodriguez, Jr.
Acting Legislative Secretary

This Act was received by *I Maga'låhen Guåhan* this 2nd day of Oct,
2017, at 4:40 o'clock P.M.

APPROVED: 
EDWARD J.B. CALVO
I Maga'låhen Guåhan


Assistant Staff Officer
Maga'låhi's Office

Date: _____

Public Law No. _____

I MINA'TRENTAI KUÁTTRO NA LIHESLATURAN GUÁHAN
2017 (FIRST) Regular Session

Bill No. 111-34 (COR)

As amended by the Committee on General
Government Operations and Federal, Foreign, and
Regional Affairs; and substituted and further
amended on the Floor.

Introduced by:

Thomas C. Ada
FRANK B. AGUON, JR.
William M. Castro
B. J.F. Cruz
James V. Espaldon
Fernando Barcinas Esteves
Régine Biscoe Lee
Tommy Morrison
Louise B. Muña
Telena Cruz Nelson
Dennis G. Rodriguez, Jr.
Joe S. San Agustin
Michael F.Q. San Nicolas
Therese M. Terlaje
Mary Camacho Torres

**AN ACT TO *ADD* NEW SUBSECTIONS (d), (e), AND (f)
TO § 51A117, AND NEW §§ 51A118, 51A119, 51A120, AND
51A121, ALL OF ARTICLE 1, CHAPTER 51A, TITLE 10,
GUAM CODE ANNOTATED; TO *AMEND* § 4403(f) OF
ARTICLE 4, CHAPTER 4, TITLE 4, GUAM CODE
ANNOTATED; AND TO *ADD* A NEW § 5117A TO
SUBARTICLE B OF ARTICLE 2, CHAPTER 5, TITLE 5,
GUAM CODE ANNOTATED, RELATIVE TO THE
TRANSITION OF THE GUAM SOLID WASTE
AUTHORITY OUT OF FEDERAL RECEIVERSHIP AND
THE DELEGATION OF PROCUREMENT AUTHORITY.**

BE IT ENACTED BY THE PEOPLE OF GUAM:

Section 1. New Subsections (d), (e), and (f) are hereby *added* to § 51A117
of Article 1, Chapter 51A, Title 10, Guam Code Annotated, to read:

1 “(d) The Board *shall* establish a Compensation and Classification
2 Plan to include the compensation and classification of the employees. The
3 Compensation and Classification Plan *shall* apply to all positions, classified
4 and unclassified. The Board may amend from time to time, the compensation
5 rates and classification plan of the employees. Such rates and plan *shall* be
6 effective upon approval by the Governor.

7 (e) A new position *shall* include justification, an analysis of the
8 similarities and/or differences between the position to be created and positions
9 listed pursuant to 4 GCA § 4101.1, the position description, the proposed pay
10 range and demonstration of compliance with 4 GCA § 6301, a fiscal note as
11 that term is described in 2 GCA § 9101 *et seq.*, and any other pertinent
12 information.

13 (f) The General Manager of the Authority and the Director of the
14 Department of Administration *shall* post the position on their respective
15 websites for ten (10) working days.”

16 **Section 2.** A new § 51A118 is *added* to Article 1, Chapter 51A, Title 10
17 Guam Code Annotated, to read:

18 “§ **51A118.** The following Subsections *shall* apply for purposes of
19 effectuating the transition of personnel, procurement authority, and financial
20 management from federal receivership to full management and operation of
21 the Authority by the Authority upon termination of said receivership:

22 (a) All existing classified employees *shall* remain classified
23 with no diminution in any benefits or rights as established in this
24 Chapter;

25 (b) Notwithstanding any other provisions of law, the
26 Authority, in order to effect a stabilization of services during and after
27 transition from federal receivership, *shall* be empowered to retain any

1 non-government of Guam employee through employment contracts,
2 who is not within the classified service of the government of Guam, and
3 who is not entitled to any government benefits under this Chapter, for
4 no more than three (3) years from the date of transfer of management
5 from federal receivership; and

6 (c) All short term operational contracts, obligations, services,
7 and procurement in effect at the time of transition *shall* remain in effect
8 until they terminate pursuant to the terms of their respective
9 agreements. Notwithstanding Chapter 5 of Title 5 GCA, in the event
10 that the contract(s) to provide labor, supplies, and services determined
11 by the Authority to be essential to the uninterrupted operation of the
12 Authority, expires on the day of turnover or within three (3) years from
13 the date of turnover, the Authority is authorized to extend those
14 contracts for a period of up to three (3) years, but in no event shall an
15 extension under this Section exceed three (3) years from the date of
16 turnover.”

17 **Section 3.** A new § 51A119 is *added* to Article 1 of Chapter 51A, Title 10,
18 Guam Code Annotated, to read:

19 **“§ 51A119. Management Audit by Public Utilities Commission.**

20 The Public Utilities Commission (PUC) *shall* perform a management
21 audit of the existing operations of the Guam Solid Waste Authority. Said audit
22 *shall* be initiated within sixty (60) days from the date of enactment of this Act
23 and, to the maximum extent possible, completed by December 30, 2017. The
24 PUC *shall* have the full authority and powers conferred upon it by its enabling
25 legislation in Chapter 12 of Title 12 GCA.”

26 **Section 4.** A new § 51A120 is *added* to Article 1, Chapter 51A, Title 10,
27 Guam Code Annotated, to read:

1 **“§ 51A120. Service Rates.**

2 (a) Rates and charges for the collection, transportation, disposal,
3 storage, recycling and processing of solid waste in effect at the time of
4 enactment of this Act *shall* remain in effect and be adopted by the Authority
5 until the Public Utilities Commission (PUC) has approved a petition for
6 adjustment of rates.

7 (b) The Authority *shall* prepare a petition for adjustment of rates and
8 transmit the petition to the PUC. Transmittal to the PUC *shall* be
9 accomplished no later than one hundred eighty (180) days from the date of
10 termination of the federal receivership.

11 (c) The Authority *shall not* submit any proposed rate change to the
12 PUC until the following actions have occurred:

13 (1) the Authority *shall* publish notice of any proposed rate
14 change in a newspaper of general circulation, as defined in 5 GCA §
15 8104, at least sixty (60) days prior to submitting the proposed rate
16 change to the PUC. The notice required herein *shall* include the
17 Authority’s intention to submit its proposed rate change to the PUC, its
18 current rate, the proposed rate, the difference in the current and
19 proposed rates stated in percentage form, a justification for the change,
20 and an electronic mail address and physical location where comments
21 on the proposed rate change may be submitted; and

22 (2) the Authority *shall* publish notice of any proposed rate
23 change on its website at least sixty (60) days prior to submitting the
24 proposed rate change to the PUC. The notice required herein *shall*
25 include the Authority’s intention to submit its proposed rate change to
26 the Commission, its current rate, the proposed rate, the difference in the
27 current and proposed rates stated in percentage form, a justification for

1 the change, and an electronic mail address and physical location where
2 comments on the proposed rate change may be submitted.”

3 **Section 5.** A new § 51A121 is *added* to Chapter 51A, Title 10, Guam
4 Code Annotated, to read:

5 **“§ 51A121. Acquisition of Existing Systems, Employees and Debt.**

6 No later than thirty (30) days before the effective date of transfer of
7 operational control from the federal receiver to the Authority, the Authority
8 *shall* assume in writing from the federal receiver:

9 (a) all real property under the federal receiver’s
10 administration, and items of property, materials, and supplies under the
11 custody of the federal receiver, including construction work in
12 progress; and

13 (b) all working capital, cash, accounts payable and receivable,
14 deposits, advances payable and receivable, all books, records and maps,
15 and all other rights, obligations, assets, operational obligations and
16 liabilities, agreements and privileges of the Authority or attributable to
17 the Authority, other than the 2016 Limited Obligation Section 30
18 Bond.”

19 **Section 6.** § 4403(f) of Article 4, Chapter 4, Title 4, Guam Code Annotated,
20 is hereby *amended* to read:

21 “(f) The jurisdiction of the Commission *shall* also apply to the
22 adverse action appeals of certified, technical, and professional personnel of
23 the Guam Power Authority and the Guam Waterworks Authority; the
24 jurisdiction of the Commission *shall* apply to all classified personnel of the
25 Guam Memorial Hospital Authority and the Guam Solid Waste Authority;”

26 **Section 7.** A new § 5117A is *added* to Subarticle B of Article 2, Chapter
27 5, Title 5, Guam Code Annotated, to read:

1 “§ 5117A. Procurement Authority Shall Be Delegated to the
2 Guam Solid Waste Authority.

3 (a) Notwithstanding any other provision of the Guam
4 Procurement Law, the authority to procure supplies and services and
5 construction for the Guam Solid Waste Authority (GSWA) *shall* be
6 delegated by the Chief Procurement Officer and the Director of the
7 Department of Public Works to the Board of Directors of the Guam
8 Solid Waste Authority.

9 (b) GSWA *shall* ensure that its procurement officials undergo
10 and successfully complete procurement training pursuant to 5 GCA §
11 5141, and are enrolled in the earliest training class that becomes
12 available.”

13 **Section 8. Severability.** If any provision of this Act or its application to
14 any person or circumstance is found to be invalid or contrary to law, such invalidity
15 *shall not* affect other provisions or applications of this Act that can be given effect
16 without the invalid provisions or application, and to this end the provisions of this
17 Act are severable.

ATTACHMENT

“2”



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February 27, 2013

Raymond S. Tenorio
Lieutenant Governor of Guam
Ricardo J. Bordallo Governor's Complex
Adelup, Guam 96910

Stanley J. Dirks
(415) 773-5828
sjdirks@orrick.com

Re: Use of Bond Proceeds to Pay the Condemnation Judgment

Dear Lieutenant Governor Tenorio:

By your letter of February 22, 2013, you have asked a number of questions concerning the interpretation and application of certain provisions of the Indenture, dated as of June 1, 2009, by and among the Government of Guam, the Bank of Guam, as Trustee, and U.S. Bank National Association, as Co-Trustee, relating to Government of Guam Limited Obligation (Section 30) Bonds (the "General Indenture"), and the Supplemental Indenture, dated as of June 1, 2009, specifically relating to the Government of Guam Limited Obligation (Section 30) Bonds, Series 2009A (the "Supplemental Indenture"). Capitalized terms used in this letter have the respective meanings given to such terms in the General Indenture and the Supplemental Indenture.

The questions relate to the judgment in the Government's condemnation action to acquire land upon which the landfill financed by the Series 2009A Bonds has been and is being built (the "Judgment"). For ease of reference, we will reiterate and answer your questions in the order in which your February 22 letter poses them.

1. *Whether the Judgment is a Project Cost as that term is defined in the Indenture.*

Yes. The Judgment establishes the cost of land upon which the Series 2009A Project is being built and "payment of the Judgment" would therefore be payment of a portion of the cost of the acquisition and construction of the portion of the System constituting a new municipal solid waste disposal facility to be located in the Layon area . . .", i.e., a portion of the "Series 2009A Project" within the meaning of the Supplemental Indenture. As such, it is a cost chargeable to the capital account of the Series 2009A Project within the meaning of the Indenture definition of the term "Project Costs".

2. *Whether the judgment is a Series 2009A Project Cost as that term is defined in the Supplemental Indenture.*

Yes, as described in the answer to Question 1.

3. *Whether the Judgment is a judgment "applicable to or affecting" the Series 2009A Bonds as described in Section 6.08 of the Indenture.*



Raymond S. Tenorio

February 27, 2013

Page 2

No. The security for the Bonds is designed so that the results of acquisition, construction and operation of the Series 2009A Project (the Layon landfill and the closure of Ordot Dump, collectively) do not affect the Bonds, because the Bonds are secured by a pledge of, and payable solely from, Section 30 Revenues. Debt service on the Series 2009A Bonds is not payable from System Revenues, although a portion of such debt service is incidentally reimbursable to the Government from revenues of the System. See Article 15 of the Supplemental Indenture. In addition, Section 14.06 of the Supplemental Indenture permits the Supplemental Indenture provisions relating to the System Revenues, the System Revenue Fund and the Funds and accounts therein to be amended in any respect without the consent of any Bondowners. One of the purposes for designing the security for the Bonds in this fashion was to permit the proceeds of Bonds issued under the Indenture to be used for purposes other than the System.

4. *Whether the Indenture or the Supplemental Indenture requires the Government to pay the Judgment under any covenant or other contractual obligation.*

No. For the same reason as described in the answer to Question 3, the Indenture does not have any covenants relating to the acquisition, construction, maintenance or operation of the Series 2009A Project.

5. *Whether the Government is in violation of either the Indenture or the Supplemental Indenture for failure to pay the Judgment.*

No. Again, for the same reasons as described in the answers to Questions 3 and 4.

6. *Whether the Bond Trustee could declare a default under the Indenture and/or Supplemental Indenture as a result of the Government's failure to pay the Judgment.*

No. Again, for the same reasons as described in the answers to Questions 3 and 4.

7. *Whether an action or proceeding initiated by the former landowners to enforce the Judgment could serve as grounds for the Bond Trustee to declare a default.*

No. Again, for the same reasons as described in the answers to Questions 3 and 4.

8. *Whether a writ of execution or other order issued by the Superior Court of Guam to enforce payment of the Judgment or reversion of title to the landowners could constitute a default under Section 7.01(A)(4) of the Indenture.*



Raymond S. Tenorio
February 27, 2013
Page 3

No. Such a writ or order would not constitute approval of a petition for reorganization or the assumption of custody or control of the Government or of the whole or any substantial part of its property under a law for the relief or aid of debtors.

9. *What effect a notice of default issued under the Section 7.01(A)(3) of the Indenture or Section 7.01(A)(4) of the Indenture would have on the Series 2009A Bonds.*

The answer to this question is likely moot, given the answers to Questions 3 through 8, but if the Government were in default in the observance of any covenant, agreement or condition in the Indenture (other than a payment or bankruptcy default), a notice given by the Trustee, the Co-Trustee, a Credit Provider or the Owners of not less than 25% in aggregate principal amount of the Bonds at the time Outstanding would trigger the commencement of a 30 day cure period, after which, if the Government were still in default, the Trustee, the Co-Trustee and/or the Owners of the Bonds could exercise the remedies provided by law and by the Indenture, including declaring the principal of all of the Bonds to be due and payable immediately under Section 7.02(A) of the Indenture. None of the Indenture remedies, however, would interfere with the acquisition, construction, maintenance or operation of the Series 2009A Project or the payment of the costs of the Series 2009A Project with moneys in the Series 2009A Construction Account held under the Indenture.

10. *Whether the attached form of joint requisition complies with the requirements of the Indenture and Supplemental Indenture.*

Yes, if the following sentence were added: "Each such payment is a proper and lawful charge against the Series 2009A Construction Account." As specified by the definition of the term, a "Joint Requisition" must be executed on behalf of the Government either by the Governor or by "such other person as may be designated and authorized by the Governor to execute such instruments". If a Joint Requisition is presented to the Trustee that is signed by a person other than the Governor, the Trustee may request documentation of the Governor's authorization of such person. If it is signed by you as Acting Governor, it is possible that the Trustee will request documentation of the circumstances under which you are so acting.

Please let me know if you have any further questions in this regard.

Very truly yours,


Stanley J. Dirks

ATTACHMENT

“3”

**Alicia G.
Limtiaco
Attorney**



**Alberto Tolentino
Chief Deputy Attorney
General**

OFFICE OF THE ATTORNEY GENERAL

May 28, 2009

David Manning
Special Principle Associate
GBB's Receiver Representative
GBB Solid Waste Management Consultants
Government of Guam
Department of Public Works
Solid Waste Management Division
542 North Marine Dr. Corps
Tamuning, Guam 96913

Ref: GOV 09-0442

Re: Salary Increases for DPW Employees

Dear Mr. Manning:

You forwarded a letter dated May 20, 2009 to Attorney Thomas P. Keeler indicating that you intend to supplement (or increase) the salaries of two classified employees who work at the Solid Waste Management Division (SWMD) of the Department of Public Works (DPW) and increase the salary of one vacant position at SWMD. You indicate that you will ask the Court to approve payment of the increased amounts from the Trustee Account. You indicate that the SWMD employees have responsibilities and duties comparable to certain positions at Guam Water Works Authority (GWA) and therefore, the salaries of the SWMD employees will be increased to the amount now paid for the GWA positions. You have asked if the Office of the Attorney General has any concerns or suggestions regarding this action.

The Government of Guam, through the Office of the Attorney General, objects to the taking of such action because it is in violation of federal law and local law. The Organic Act of Guam requires that the Guam Legislature establish a merit system and, as far as practicable, appointments and promotions must be made in accordance with such merit system. 28 USC § 1422c(a). In response to this Organic Act mandate, the Legislature has established a merit system through duly enacted laws and rules and regulations. See generally 4 GCA, Chapters 1 through 6. Your plan for the three SWMD positions would create three new positions at SWMD without following the required procedures and would then fill the positions created without going through the merit system as required by the Organic Act.

In order to avoid clear violations of law, new positions can be created pursuant to the established procedures and the positions then can be filled according to the merit system. Also, there is an existing procedure to reclassified existing positions to fit the duties and responsibilities being performed by the persons filling the positions. We have been advised by officials at the Department of Administration (DOA) that no one representing the Receiver or DPW has made a request to DOA for the creation of new positions or the reclassification of existing positions. The

following is a brief description of the requirements for creating new positions and for filling classified positions under the merit system.

I. Creating New Positions

DOA has been tasked with the responsibility to create new positions within the Government of Guam. "All Guam statutes and regulations ... which refer to the non-adjudicatory authority of the Civil Service Commission ... are hereby amended to reflect the transfer of said authority to the Director of Administration, who shall henceforth perform all functions regarding ... the creation of new positions..." P.L. 28-68: IV: §45.

The process for creating new positions in the Government of Guam is not complicated, nor time consuming. However, in order to reduce unnecessary duplication and to confirm that the requirements and qualifications for the person who is to fulfill that particular responsibility are understood, there is a process established by law. The process, to include the development of qualifications for a particular job, and the amount to be compensated for that job is important in order to assure merit-based employment based upon competitive selection. Such is required by the Organic Act and due process of law. The following is a brief discussion.

The process for job creation and establishment is:

- 1) The department, in this case, Public Works (or the Receiver) determines that a new position is necessary and petitions the Director of DOA in writing.
- 2) The petition is accompanied by the justification for the new position; the essential details concerning the position; an analysis of the position with similarities to already established positions; the position description; the proposed pay range for the position; and a best estimate of the fiscal impact of the position created. This information is required by law and necessary for DOA in order to determine the proper evaluation of the job for purposes of determining pay and qualifications. Note that it is appropriate to attach a job description from another department or agency, or from any other source to include the federal government or private sector.
- 3) The intent to create a new position is posted on both the DOA website, the website of the initiating agency, and published in print and broadcast media, thereby formally informing the community of the intention to create the position and inviting comments from the public concerning the intention. The website announcement is posted for 10 days.
- 4) The Director of DOA and the director of the initiating agency review comments received concerning the new position.
- 5) The Director of DOA forwards the request for the new position with a recommendation to the Governor.
- 6) The Governor may approve the creation of the position and, if so, forwards that approval to DOA and the Legislative Secretary.

The position may formally be filled thirty days after forwarding the formal approval of the Legislative Secretary. 4 GCA § 6303(c).

The Government of Guam has, by law, a unified and uniform system of position classification and compensation for the Executive and Judicial branches of government. See the

Uniform Position Classification and Salary Administration Act of 1991, 4 GCA §6102. This unified system works to assure that employment in the Government of Guam is based upon merit and competitive selection. The policy requires that compensation is based upon internal equity and external competitiveness, is targeted to U.S. averages and labor markets, and that compensation policies reward individual employees commensurate with performance. 4 GCA §6301. In order to implement these policies and accomplish these goals, the Director of Administration and the Governor provide oversight to the process of creating new positions and establishing compensation for those positions.

II. Filling New Positions

The Organic Act of Guam is the federal statute establishing the Government of Guam, and serves as Guam's constitution. *Bordallo v. Baldwin*, 624 F.2d 932 (CA 9, 1980). The Organic Act provides that the Guam legislature establish a system of government employment based upon merit. "The legislature shall establish a merit system and, as far as practicable, appointments and promotions shall be made in accordance with such merit system." 28 USC §1422c (a). This charge to establish a merit system of employment is specific and binds the Government of Guam. *Haenser v. Department of Law*, 97 F. 3d 1152 (9th Cir. 1996).

Employees hired by the Government of Guam pursuant to competitive merit-based selection are classified employees. *Carleson v. Perez*, 2007 Guam 6, ¶32. Classified employees within the Government of Guam have a property interest in their employment. *Limtiaco v. Guam Fire Department*, 2006 Guam 10; *Carlson v. Perez*, 2007 Guam 6. Procedural due process imposes constraints on action taken by the government that deprives an individual of liberty or property interests within the meaning of the Due Process Clause of the Fourteenth Amendment. *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except "for cause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148 (1982).

As required by federal law, the Legislature did establish a merit system. It provides that "[e]mployment in the service of the Government of Guam *shall* be based upon merit, and selection and promotion of employees *shall* be free of personal *or* political consideration. ... All personnel actions, including appointments and promotions, *shall* be based, insofar as practicable, on competitive practical tests and evaluations..." 4 GCA §4101(a) (emphasis contained within the statute). All employees of the Government of Guam have an interest in the proper application of the merit-based system of employment because promotion and upward mobility is determined by this same merit-based system. The system provides, as follows:

- "All offices and employment in the Government of Guam, except for employment as academic personnel of the Guam Community College (GCC) and the University of Guam (UOG), ..., shall be divided into classified and unclassified services ..." 4 GCA §4102.
- "No preferences shall be given in the government service, except that residents of Guam who are physically or mentally impaired, but are physically and mentally able to perform

..., who are veterans of the Armed Services of the United States, or who are former members of the Guam Police Combat Patrol, ... shall receive a preferential credit of five (5) points, which shall be added to their competitive examination score ..." 4 GCA § 4104.

- "Rules subject to criteria established by this Chapter governing the selection, promotion, performance, evaluation, demotion, suspension and other disciplinary action of classified employees shall be adopted ... by the Director of Administration as to all other Executive Branch employment." 4 GCA §4105(a).
- "The personnel rules provided for in §4105 of the Chapter shall provide procedures for the employment of persons on the basis of merit, and shall include an orderly and systematic method of recruitment and the establishment of qualified lists for employment purposes. ... Specific policies shall be included, governing ... (1) The announcement of vacancies and acceptance of applications for employment; (2) Preparation and conduct of examinations; (3) Establishment and use of employment lists containing names of persons eligible for employment; (4) Establishment of promotional policies; (5) Certification of employment of persons from employment lists to fill vacancies and the making of temporary and emergency appointments; ... (7) Transfer, promotion and reinstatement of employees in the competitive service; ... (10) Development of employee morale, welfare and training; ..." 4 GCA §4106.

The system is not cumbersome or difficult to comply with. DOA, Human Resources Division, has qualified personnel who administer this merit-based system effectively for thousands of employees and many departments and agencies. It necessarily takes some time to assure that the appointment of individuals to classified positions within the government is fair and equitable. However, the Organic Act requires that the process be followed in all instances when it is not impracticable to do so. 28 USC 1422c(a) and *Haenser, supra*.

In addition to creating and filling new positions, DOA may reclassify existing positions if the duties and responsibilities of a position do not comport with the position being filled.

We do not believe that the Court's Order appointing the Receiver allows the Receiver to bypass the requirements of the Organic Act and the merit system as these laws relate to the pay classifications for government employees. The Court ordered that the Receiver was to "assume all the responsibilities, functions, duties, powers and authority of the Solid Waste Management Division of the Department of Public Works and any and all departments, or other divisions of the Department of Public Works insofar as they affect the Government of Guam's compliance with the Consent Decree." See March 17, 2008 Order Re: Appointment of Receiver, pp. 15-16. DPW is subject to the requirements of the Organic Act and the merit system. In appointing a Receiver to assume the duties of DPW, the Court has not authorized the Receiver to ignore the requirements of the Organic Act and the merit system as they relate to government personnel. The Court has also ordered that the Government of Guam "shall be responsible for compensation and expenses of the Receiver and of any and all persons or entities employed or contracted by the Receiver in carrying out the provisions of this Order." *Id.* at 18. **This allows the Receiver to hire its own employees and to enter into contracts for services.** It does not allow the Receiver to violate the Organic Act mandate requiring the Government of Guam to establish a merit system and to make appointments

and promotions according to such system. And it does not allow the Receiver to avoid the requirements of the merit system established by the Guam Legislature. Classified employees employed by DPW are subject to the requirements of the merit system. It is our position that the Receiver, in assuming the duties of the SWMD of DPW, must follow the requirements of the merit system when dealing with DPW employees. **If the Receiver deems it necessary to hire its own employees to handle Consent Decree matters or contract with other entities to handle Consent Decree matters, it can do so pursuant to and in compliance with Guam and federal laws.**

PATRICK MASON
Deputy Attorney General

ATTACHMENT

“4”

From: **Elizabeth Barrett-Anderson** <ebanderson@guamag.org>
Date: Thu, Oct 5, 2017 at 8:35 PM
Subject: RE: Receipt of Information & PHRS Recommendation
To: David Manning <dmanninggbb@gmail.com>
Cc: Ken Orcutt <korcutt@guamag.org>, "Karl P. Espaldon" <kespaldon@guamag.org>

Mr. Manning, thank you for your comments. I can assure you that the Organic Act will not be violated by the efforts of the GSWA Board, and as an agency, in the transition. In fact, GSWA will be guided in compliance with the Organic Act and the merit system.

However, it appears that your concerns require a more direct response so that this issue is resolved before the next court hearing. In doing so, I will issue an Opinion in response to the Board's inquiry into this matter, and incorporate your concerns as addressed herein.

Thank you for your clarification.

EBA

From: David Manning [mailto:dmanninggbb@gmail.com]
Sent: Friday, October 06, 2017 11:05 AM
To: Elizabeth Barrett-Anderson <ebanderson@guamag.org>
Cc: Joyce Tang <jtang@civilletang.com>; Tom Ada <tom@senatorada.org>; Chace Anderson <candersongbb@gmail.com>; agayle@gtanet.net; John Denight <jdenight@pepsi.com.gu>; Minakshi V. Hemlani, Esq. <mvhemlani@mvhlaw.net>; Joseph Duenas <joseph.duenas@guam.gov>; Ken Orcutt <korcutt@guamag.org>; Georgette Concepcion <gbc@guamlaw.net>; vlw@vlwilliamsllaw.com; Robert D. Mullaney <Robert.Mullaney@usdoj.gov>; Alexandra Taitano <algtaitano@gmail.com>
Subject: Re: Receipt of Information & PHRS Recommendation

Attorney General Barrett-Anderson,

We will get back to you in a few days on the questions and comments you have now provided regarding the procurement for an operator for the Ordot Closure Facility. At this time, however,

I would like to respond to the comments and concerns you addressed to me in your email dated October 2, 2017.

We agree with your recommendation that PHRS be utilized under our current contract to assist the Board in developing a Classification and Compensation Plan for GSWA. We will make the needed services available as the Board may request.

However, our concern with the advice given to the Receiver by former Deputy Attorney General Pat Mason, has still not been addressed. We have never, as you surmise, been under the impression that PHRS employees would be made GovGuam employees by law or that Mr. Mason's opinion applies to non-government employees. Our concern is instead, based on our reading of Mr. Mason's opinion, that the proposed method for the transition of these employees would be a violation of the Organic Act.

Mr. Mason's opinion makes it very clear that as Receiver, we have the authority to employ workers directly via contract in a way the Government of Guam could not employ workers. The opinion also made it clear that the reason the Government of Guam was barred from employing workers in this way was due to the Organic Act and Title 4, Chapter 4 of Guam Law.

In implementing our work while following Mr. Mason's advice, the Receiver employed certain workers through a limited number of direct contracts with individual workers and by hiring workers through the contract between the Receiver and PHRS. In other words, we were told that GSWA (and its predecessor the Solid Waste Management Division of DPW) could not employ workers in this manner because it would violate the Organic Act; however, the Receiver, can employ these workers in this way pursuant to the authority granted in the District Court Order appointing the Receiver.

Now, without any change in the Organic Act or written opinion from your office or counsel to the Board that distinguishes the prior opinion from your office, the transition of these employees is to be based on continuing the same contracts for three years after the Receivership terminates. Based on our understanding of Mr. Mason's opinion, this would be a violation of the Organic Act, and is, therefore, not possible.

This will continue to be an important transition issue for the Receiver until it is properly addressed in a specific written legal opinion supported by the necessary legal analysis and/or documentation of a change in the federal law, or another approach is adopted to address the transition of these workers that is consistent with Guam and federal law.

We are not trying to be difficult. Our concern has been that the transition be successful and the employees are fairly treated and valued for the tremendous contribution they have made and continue to make as we have restored this vital service for the people of Guam. In order to ensure this happens, we must be able to report to the District Court with confidence that the transition of these employees is to be accomplished in a way that is not in violation of the Organic Act or Title 4, Chapter 4 of Guam Law as reported in Mr. Mason's opinion. This is one of the most important issues of the Transition and we feel an obligation to ensure that it is properly addressed.

We look forward to continuing our work with the Board and your office to ensure a successful transition of GSWA.

David L. Manning

Receiver

Gershman, Brickner & Bratton, Inc. for
The United States District Court
Territory of Guam

www.guamsolidwastereceiver.org

Guam Office: 671-473-9149

Nashville Office: 615-830-1200

email: dmanninggbb@gmail.com

ATTACHMENT

“5”



Office of the Attorney General of Guam



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October 16, 2017

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puntalan@guamag.org

OPINION MEMORANDUM

Ref: GSWA 17-0609

TO: Chairperson, Guam Solid Waste Authority

FROM: Attorney General

SUBJECT: Guam Solid Waste Authority (GSWA) Board Request for Opinion Regarding Contract with PHRS for Transition of Non-Government Employees

This is in response to your request of whether Pacific Human Resource Services, Inc. ("PHRS") contract may continue services with Guam Solid Waste Authority ("GSWA") upon termination of the Receivership.

STATEMENT OF FACTS

PHR was contracted by Gershman, Brickner & Bratton, Inc. ("Receiver") to provide temporary employees to assist in the Solid Waste Management Division ("SWMD"). The contract was executed pursuant to a Request for Proposals dated August 27, 2009, and is set to expire with the end of receivership.

GSWA will assume control of its operations when the Receivership ends, which is anticipated to be on December 31, 2017. GSWA wishes to continue the contract with PHR so as to allow a smooth transition from the receivership and avoid any disruption of services to the community and municipalities of Guam. Legislation authorizing GSWA to continue contracts related to employment services between the Receiver and PHRS for a period of up to three-years is pending enactment.

For reasons which are unclear, the Receiver believes such a contract may violate the Organic Act. The Receiver has expressed concern regarding a letter authored by former Deputy Attorney General Patrick Mason. Deputy Mason sent the Receiver a guidance letter (hereinafter referred to as the "Mason guidance"), dated May 28, 2009, pertaining to salary increases for Department of Public Works employees.

In the letter, the Office of the Attorney General, on behalf of the government of

Guam, objected to the Receiver's plans to supplement (or increase) the salaries of two classified employees who worked at the Solid Waste Management Division of the Department of Public Works and increase the salary of one vacant position at SWMD as a violation of federal law and local law. The plan would create three new positions without following the required procedures through the merit system as required by the Organic Act of Guam.

DISCUSSION

The Organic Act of Guam provides that the Guam Legislature shall "...establish a merit system and, as far as practicable, appointments and promotions shall be made in accordance with such merit system." 48 USC §1422(c)(a). Guam's Organic Act's merit system is "designed to secure adequate protection to public career employees from political discrimination." *Haeuser v. Civil Serv. Comm'n*, 97 F.3d 1152, 1156 (9th Cir.1996) (quoting *State ex rel. Murtagh v. Dep't of City Civil Serv.*, 42 So.2d 65, 70 (1949)). The purpose of the merit system would not be furthered by applying it to the employees of a private company. Guam's merit system has no applicability to the private sector.

Guam's merit system requirement is not violated by continuing to have PHRS employees perform duties which were formerly performed by government of Guam employees prior to the Receivership. Guam's merit system does not categorically prohibit the government of Guam from contracting with private entities to perform governmental functions. See *Vermont State Employees' Association, Inc. v. Vermont Criminal Justice Training Council*, 704 A.2d 769 (Vt. 1997) (Attorney General did not clearly abuse his discretion in certifying that contract privatizing food service previously provided by state employees at state facility did not violate spirit and intent of classification plan and merit system principles); *Moore v. Department of Transp.*, 875 P.2d 765, 769, 772 (Alaska 1994) (State Constitution's merit system provision did not bar privatization of state employment); and *Mary Haub v. Montgomery County*, 727 A.2d 369 (Md. 1997) (In accord with the clear majority of cases throughout the country, we do not believe that general provisions establishing a merit system for government employees, such as those contained in the Montgomery County Charter, preclude the government from privatizing or contracting out to non-government entities specific government functions.)

The Mason guidance has no application to the contract of the PHRS non-government employees, and should not be extended beyond the question presented.

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Opinion Memorandum

Ref: GSWA 17-0609

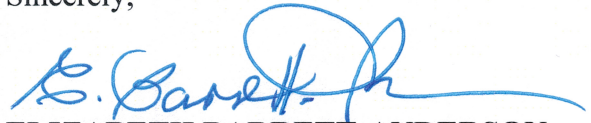
Re: Guam Solid Waste Board Request for Opinion Regarding
Contract with PHRS for Transition of Employees

Page 3

SUMMARY & CONCLUSION

Maintaining the services of non-government employees to provide stability of solid waste services to the people of Guam does not violate the Organic Act. The Mason guidance is not relevant, nor is it applicable, to the issues surrounding transition from federal receivership to the government of Guam.

Sincerely,



ELIZABETH BARRETT-ANDERSON
Attorney General of Guam

cc: The Honorable Ray Tenorio, Lt. Governor of Guam
All Members, Guam Solid Waste Authority Board

ATTACHMENT

“6”

From: David Manning <dmanninggbb@gmail.com>

Subject: GSWA FY2018 Budget

Date: October 12, 2017 at 8:49:32 AM GMT+10

To: Andrew Gayle <agayle@qta.net>, Jonathan M Denight <idenight@pepsi.com.gu>, Joseph Duenas <joseph_duenas@ymail.com>, "Minakshi V. Hemlani, Esq." <mvhemlani@mvhlaw.net>, Alexandra Taitano <algtaitano@gmail.com>

Cc: Greg Martin <gmartin.gswa@gmail.com>, Alicia Fejeran <avfejeran@gmail.com>, Chace Anderson <candersongbb@gmail.com>

Board Members,

When you assume responsibility for the operations of GSWA you will be responsible for the budget. Throughout the Receivership GSWA has operated under the authority of the District Court in all matters, including the budget. When the Receivership ends GSWA will operate under the direction of the Board and the Board will be governed by applicable laws and regulations. One of the laws is the act that creates GSWA and one of its basic provisions relates directly to the annual budget of GSWA. The applicable provision in the act regarding the budget is as follows:

To the best of my knowledge, the Board has taken no action in this area.

It has come to our attention that the budget recently passed by the Guam Legislature, does include a provision appropriating funds to GSWA. To be clear, these are not appropriations from tax revenue or other general revenues of the Government, but are appropriations from the revenue generated by GSWA itself from the fees it levies on its customers. As a governmental entity functioning in a post-receiver environment, GSWA will require an appropriation to spend the funds it collects from its customers. The following provision appropriating funds to GSWA is as follows:

It is not clear to us how this appropriation came to be since as Receiver we have not communicated with the Legislature on this matter, but have instead always relied on the Court for budget approval. It may be that this is simply a continuation of the budget that was in place when GSWA was placed into receivership in 2008. It clearly does not reflect the new realities of GSWA's system and its current finances since these funds are less than half of the funds required to sustain the system going forward. Accordingly, it will be vital to GSWA's successful transition that the Board adopt a budget for FY18 and transmit it to the Legislature with a request for approval.

To facilitate your consideration of this matter I am attaching a schedule, organized in a budget format showing expenditures for the previous six years. This covers the period from the beginning of FY 2012 (one month after the opening of the Layon Landfill) through the end of FY 2017.

This schedule is based on audited numbers for FY 2012 through 2016, although the breakdown for contract services is based on internal data that was not included in the published audits. We are available to assist the Board as you determine assistance is needed.

We will add this item to our reports to the District Court as a critical transition item that must be addressed prior to transition.

Thank you.

David L. Manning

Receiver

Gershman, Brickner & Bratton, Inc. for

The United States District Court

Territory of Guam

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**GOVERNMENT OF GUAM
SOLID WASTE OPERATIONS FUND**

Schedule of Expenditures by Object and Reserve Allocations
FY 2017, 2016, 2015, 2014, 2013 and 2012*

	<u>Estimated</u> FY 2017	<u>Actual</u> FY 2016	<u>Actual</u> FY 2015	<u>Actual</u> FY 2014	<u>Actual</u> FY 2013	<u>Actual</u> FY 2012
Personnel Costs:						
Salaries and Wages	\$ 987,377.00	\$ 980,036.67	\$ 976,664.00	\$ 1,036,595.00	\$ 1,058,836.00	\$ 1,171,869.00
Overtime	\$ 95,718.00	\$ 52,950.72	\$ 64,907.18	\$ 165,331.27	\$ 50,284.00	\$ 58,803.00
Fringe Benefits	\$ 373,859.00	\$ 367,740.08	\$ 385,023.00	\$ 403,064.00	\$ 400,080.00	\$ 411,461.00
Total Personnel Costs	\$ 1,456,954.00	\$ 1,400,727.47	\$ 1,426,594.18	\$ 1,604,990.27	\$ 1,509,200.00	\$ 1,642,133.00
Receiver fees:	\$ 700,000.00	\$ 691,662.52	\$ 698,622.22	\$ 681,996.45	\$ 603,620.00	\$ 741,257.00
Contract services:						
Landfill Operations	\$ 3,294,367.14	\$ 3,387,308.55	\$ 3,496,090.56	\$ 3,488,934.28	\$ 3,532,635.93	\$ 3,166,277.15
Hauler-only Transfer Station	\$ 2,914,745.25	\$ 3,002,930.28	\$ 2,748,844.26	\$ 2,700,485.67	\$ 2,796,162.71	\$ 2,861,265.37
HHW Operator	\$ 568,355.08	\$ 505,755.76	\$ 451,962.30	\$ -	\$ -	\$ -
Personnel	\$ 1,275,000.00	\$ 1,333,820.25	\$ 1,354,856.98	\$ 1,242,239.33	\$ 863,923.00	\$ 866,728.00
Repairs and Maintenance	\$ 1,068,039.84	\$ 1,065,008.18	\$ 1,197,400.92	\$ 1,017,805.50	\$ 775,558.00	\$ 956,034.00
Security Services	\$ 78,630.91	\$ 64,668.68	\$ 72,921.33	\$ 78,756.47	\$ 89,504.00	\$ 176,169.00
Legal services	\$ 118,268.71	\$ 90,044.13	\$ 89,164.58	\$ 63,907.35	\$ -	\$ 70,472.00
Other Services	\$ 1,200,000.00	\$ 1,130,105.41	\$ 1,075,969.85	\$ 948,941.95	\$ 571,603.36	\$ 392,452.48
Total Contract Services	\$ 10,517,406.93	\$ 10,579,641.24	\$ 10,487,210.78	\$ 9,541,070.55	\$ 8,629,387.00	\$ 8,489,398.00
Supplies and Materials:						
Fuel	\$ 202,862.37	\$ 192,423.66	\$ 270,023.04	\$ 369,264.30	\$ 302,786.00	\$ 310,748.00
Others	\$ 88,000.00	\$ 185,259.34	\$ 79,988.39	\$ 144,879.56	\$ 85,729.00	\$ 126,055.00
Total Supplies and Materials	\$ 290,862.37	\$ 377,683.00	\$ 350,011.43	\$ 514,143.86	\$ 388,515.00	\$ 436,803.00
Host Community Premium Benefits	\$ 350,000.00	\$ 301,193.00	\$ 305,872.00	\$ 321,670.00	\$ 313,562.00	\$ -
Equipment	\$ 20,000.00	\$ 11,393.00	\$ 14,384.00	\$ 6,144.00		
Utilities	\$ 75,000.00	\$ 73,355.22	\$ 70,153.28	\$ 70,428.00	\$ 106,629.00	\$ 82,359.00
Capital Outlay	\$ 25,000.00	\$ 1,553,551.00		\$ 1,318,663.00		
Miscellaneous	\$ 88,000.00	\$ 86,850.00	\$ 70,974.00	\$ 53,315.00	\$ 102,629.00	\$ 134,603.00
Total Expenditures	\$13,523,223.30	\$ 15,076,056.45	\$ 13,423,821.89	\$ 14,112,421.13	\$ 11,653,542.00	\$ 11,526,553.00
Required Reserves:						
Cell Closure Account	\$ 50,000.04	\$ 50,000.04	\$ 50,000.04	\$ 50,000.04	\$ 50,000.04	\$ 50,000.04
Equipment Replacement Account	\$ 680,644.56	\$ 680,644.56	\$ 680,644.56	\$ 680,644.56	\$ 680,644.56	\$ 680,644.56
New Cell Development Account	\$ 50,000.04	\$ 50,000.04	\$ 50,000.04	\$ 50,000.04	\$ 50,000.04	\$ 50,000.04
Post-Closure Account	\$ 99,999.96	\$ 99,999.96	\$ 99,999.96	\$ 99,999.96	\$ 99,999.96	\$ 99,999.96
Reserve for Unfunded Expenses	\$ 4,497,096.96	\$ 4,497,096.96	\$ 4,497,096.96	\$ 2,248,548.48		
Transfers out to General Fund	\$ -	\$ -	\$ -	\$ 2,248,548.00	\$ 4,497,097.00	\$ 4,497,097.00
Total	\$18,900,964.86	\$ 20,453,798.01	\$ 18,801,563.45	\$ 19,490,162.21	\$ 17,031,283.60	\$ 16,904,294.60
Revenue:						
Commercial Tipping Fees	\$10,096,966.77	\$ 10,262,368.98	\$ 10,120,183.93	\$ 9,541,066.46	\$ 11,154,525.85	\$ 10,251,931.55
Government Tipping Fees	\$ 1,688,551.53	\$ 1,607,083.63	\$ 1,495,203.32	\$ 1,501,484.80	\$ 1,160,077.12	\$ 335,068.51
Residential Fees	\$6,866,964.56	\$ 6,583,967.09	\$ 6,303,171.76	\$ 5,979,088.74	\$ 6,384,378.03	\$ 5,811,445.95
Host Community Premium Surcharge Fees	\$ 350,349.67	\$ 345,719.00	\$ 332,456.00	\$ 327,045.00	\$ 313,562.00	\$ -
Interest Income	\$ 30,000.00	\$ 53,524.00	\$ 41,636.00	\$ 59,070.00	\$ 60,114.00	\$ 70,606.00
Total	\$19,032,832.53	\$ 18,852,662.71	\$ 18,292,651.00	\$ 17,407,755.00	\$ 19,072,657.00	\$ 16,469,052.00
Surplus/(Deficit)	\$ 131,867.67	\$ (1,601,135.31)	\$ (508,912.45)	\$ (2,082,407.21)	\$ 2,041,373.40	\$ (435,242.60)

Note: Deficits are covered by an allocation accumulated of Fund Balance.

*Actual numbers are audited in total but the breakdown of contractual services and supplies is an estimate based on actual data not included in the audits.