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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.

**SPECIAL REPORT
OF THE RECEIVER**

The Receiver submits this Special Report in anticipation of the December 20, 2017 Status Hearing, to provide the Court with an update to the progress of the Financial Plan approved by the Court in its May 2, 2016 Order (ECF No. 1668), and to respond to the GSWA Board of Directors' Supplemental Status Report filed on December 1, 2017 (ECF No. 1775)

The Receiver notes the Motions for Reconsideration that have been filed on December 15, 2017 (ECF Nos. 1777 & 1778). This Special Report is not intended to respond to nor waive a response to those Motions, and the Receiver specifically reserves the right to respond to those Motions in due course pursuant to CVLR 7(f).

Respectfully submitted this 18th day of December, 2017.

/s/ Vanessa L. Williams
VANESSA L. WILLIAMS, ESQ.

Special Report of the Receiver

Update of the Financing Plan and Response to the GSWA Board of
Directors' Supplemental Status Report in Response to Court's Order,
ECF 1771

Civil Case No. 02-00022

United States of America v. Government of Guam
Guam Solid Waste Management Division

Prepared for:



U.S. District Court of Guam

Submitted by:



Gershman, Brickner & Bratton, Inc.
8550 Arlington Blvd, Suite 304
Fairfax, Virginia 22031

December 18, 2017

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Civil Case No. 02-00022
United States of America v Government of Guam

Guam Solid Waste Authority

In this special report we will provide the Court with an update to the progress of the Financial Plan approved by the Court in its Order dated May 2, 2016 and to respond to the GSWA Board of Directors' Supplemental Status Report filed on December 1, 2017.

Financial Plan

In its quarterly report dated October 21, 2015, the Receiver proposed a financial plan to pay for certain unfunded Consent Decree requirements including the post-closure maintenance of the Ordot Dump¹. After extensive hearings on an alternative proposal from the Government of Guam², the Court approved the Receiver's proposal.

The following table uses the same format as was used when the proposal was first presented to the Court but is updated for actual expenditures through September 30, 2017³ and revised estimates thereafter. In addition, we have added a preliminary estimate of the cost of the work necessary to address the landfill gas mitigation issue at the Ordot Dump Closure Facility.

Year	Funding Requirement					Funds Available				
	Additional Projects	Allocation of Funds to Ordot Dump Post-Closure Reserve	Interim Post-Closure Maintenance	Ordot Landfill Gas Mitigation Project	Closure Cost of Cells 1 & 2 and New cell at Layon Landfill	Balance at Beginning of FY*	Funds Added During FY (Includes Actual and Estimated Interest Earnings)	Funds Used for Capital and Ordot Post-Closure Expense During FY	Funds Used for Legal Expense During FY	Balance at End of FY
FY2015	\$ -					\$ 1,873,790.40	\$ 4,497,546.91	\$ -	\$ 77,441.35	\$ 6,293,895.96
FY2016	\$ 904,958.64	\$ -	\$ 284,599.01			\$ 6,293,895.96	\$ 4,501,596.96	\$ 1,189,557.65	\$ 66,604.68	\$ 9,528,493.92
FY2017	\$ 4,078,657.15	\$ 4,000,000.04	\$ 1,113,274.46	\$ 235,414.14	\$ 107,461.46	\$ 9,528,493.92	\$ 4,501,596.96	\$ 9,534,807.25	\$ 109,472.57	\$ 4,385,811.06
FY2018	\$ 5,075,018.13	\$ 2,000,000.00	\$ 733,070.18	\$ 2,000,000.00	\$ 653,471.54	\$ 4,385,811.06	\$ 4,501,596.96	\$ 10,461,559.85	\$ 100,000.00	\$ (1,674,151.83)
FY2019	\$ -	\$ 2,000,000.00			\$ 1,000,000.00	\$ (1,674,151.83)	\$ 4,501,596.96	\$ 3,000,000.00	\$ 100,000.00	\$ (272,554.87)
FY2020	\$ -	\$ 2,000,000.00			\$ 2,859,943.19	\$ (272,554.87)	\$ 4,501,596.96	\$ 4,859,943.19	\$ 100,000.00	\$ (730,901.10)
FY2021	\$ -	\$ 2,000,000.00			\$ 4,590,823.02	\$ (730,901.10)	\$ 4,501,596.96	\$ 6,590,823.02	\$ 100,000.00	\$ (2,920,127.17)
FY2022	\$ -	\$ 2,000,000.00			\$ 1,730,879.83	\$ (2,920,127.17)	\$ 4,501,596.96	\$ 3,730,879.83	\$ 100,000.00	\$ (2,249,410.03)
FY2023	\$ -	\$ 1,670,900.00				\$ (2,249,410.03)	\$ 4,501,596.96	\$ 1,670,900.00	\$ 100,000.00	\$ 481,286.93
FY2024	\$ -					\$ 481,286.93	\$ 4,501,596.96	\$ -	\$ 100,000.00	\$ 4,882,883.89
FY2025	\$ -					\$ 4,882,883.89	\$ 4,501,596.96	\$ -	\$ 100,000.00	\$ 9,284,480.85

*The beginning balance for FY15 the amount for May 1, 2014 through September 30, 2014 (the initial months set aside per the District Court's Order).

Note: Shaded areas are estimates. Areas not shaded are actual expenditures and funds available.

The revised estimates do not include an updated estimate of the cost of the Ordot Dump Post-Closure Reserve. An update of this vital element will need to await the final approval of the post-closure plan and cost for the services of the Trustee and Independent Engineer which will not be available until the procurements for these services are complete.

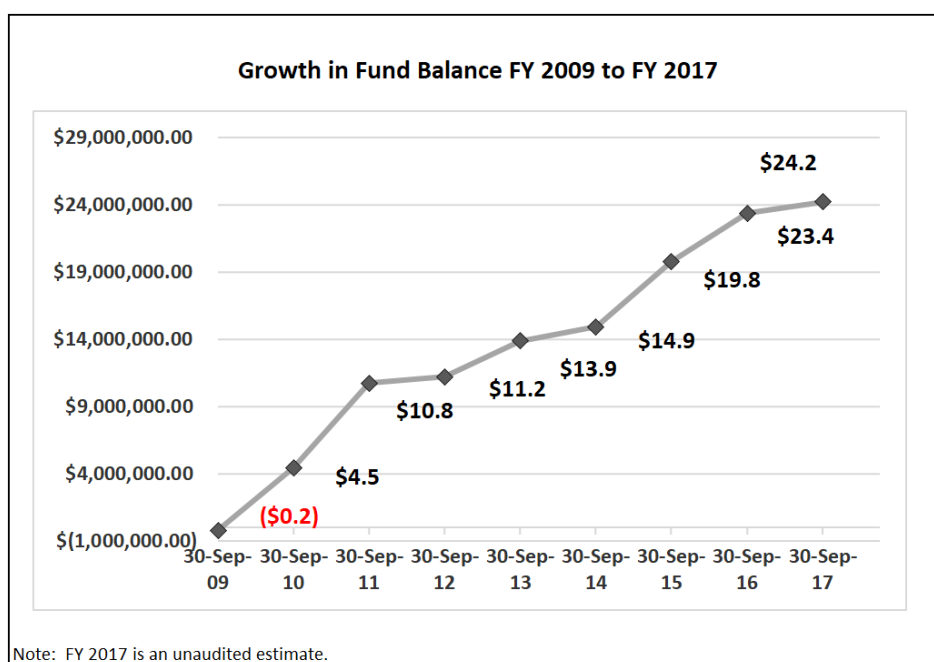
¹ See the following orders: Order dated April 20, 2015, "Residential Transfer Stations; Order dated May 1, 2015, "Dero Road;" Order dated May 27, 2015, "Post-closure Care of the Ordot Dump;" and, Order dated June 29, 2015, "Rt. 4 Safety Enhancements."

² The Court ultimately found the Government of Guam's alternative "pay-as-you-go proposal simply is not sufficient nor responsible (see Order of May 2, 2016)."

³ The actual balances on the date of this report in the Reserve for Unfunded Expenses and the Ordot Post-Closure Reserve are \$2,622,276.21 and \$4,504,506.06 respectively.

As we near completion of the “Additional Projects”⁴, and continue incurring expenditures for the other projects shown in the table, the cash flow of the financing plan will likely turn negative at times. As this occurs, it will be necessary to utilize some of GSWA’s operating fund balance to continue the work and funding the Ordot Post-Closure Reserve uninterrupted.

The fund balance is a vital aspect of the of management. Any organization must maintain a reasonable fund balance. Fund balance does not represent a source of free money that can be used for any purpose. The following graphic outlines GSWA’s fund balance growth over the period of the Receivership. The importance of fund balance in any governmental organization is critical to ensure that operations can continue when unexpected problems or economic disruptions confront the organization. This is especially true for a governmental organization like GSWA, an autonomous agency of the Government of Guam.

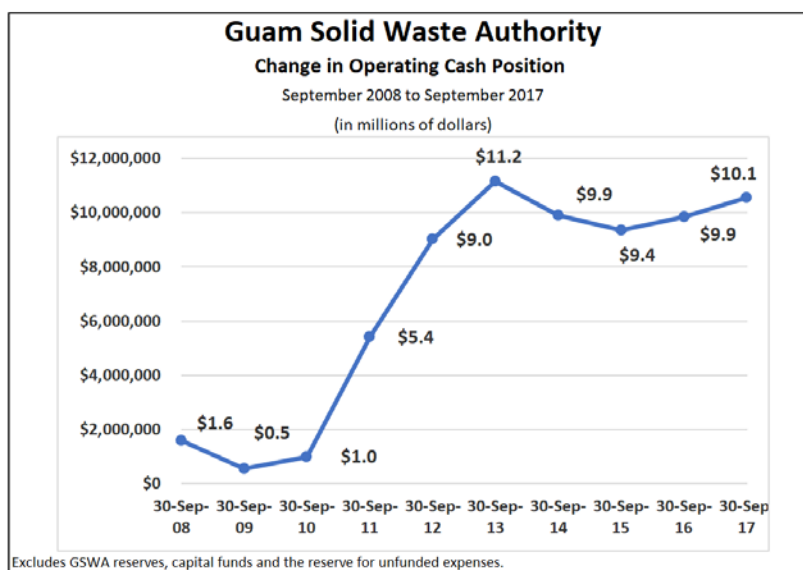


It is also important to understand that fund balance also includes dedicated reserves that may only be used for specific purposes. For GSWA this includes the dedicated reserves set aside to pay for equipment replacement, post-closure care of the Layon Landfill, building new cells when needed at Layon and closing cells when the cells reach capacity. These reserves enable GSWA to function without major infusions of funds from the General Fund of the Government of Guam (an unlikely source of funds given the continuing cash deficit of GovGuam) or major rate increases to support debt financing. The

⁴ The “Additional Projects include: the Dero Road rehabilitation project, the cleanup and upgrades to the residential transfer stations at Agat and Malojloj and the environmental closure of the Dededo Residential Transfer Station, along with the planning and construction management of these projects.

undesigned fund balance acts as a reserve against budgetary deficits, unanticipated costs and economic downturns that will, from time-to-time occur on Guam as elsewhere.⁵

The following figure illustrates the cash component of GSWA's undesigned fund balance:



The above figure does not include the cash balances of GSWA's required reserves (these balances are all cash) and demonstrated the relatively stable cash position of GSWA in recent years.

The use of fund balance in the Receiver's Financing Plan is an appropriate use and it is also temporary. The funds will be used for vital GSWA's purposes and when the plan is completed the fund balance should be fully replenished. When the Financial Plan of the Receiver is completed, the funding stream currently dedicated to it should be dedicate primarily to GSWA's reserves to build the next new cells at Layon and to close cells as they are used to their capacity. This will ensure that GSWA is not dependent on significant rate increases or required to take on debt to pay for these capital costs.

GSWA Board of Directors' Supplemental Status Report in Response to Court's Order, ECF 1771

On November 27, 2017, the GSWA Board of Directors filed the above referenced report with the Court. We believe that the report is both confusing and inaccurate. To address these issues we will name the section from the Board's Supplemental Status Report⁶ with which we are concerned and then offer our comments on that section to the Court.

⁵ Fund balance also includes certain non-cash items. Such as the net difference between an organization's total amount of receivables (i.e. amounts owed to the agency) and its net payables (the total amount the agency owes to vendor's and others).

⁶ In addition to the Board's Supplemental Status Report, on December 15, 2017 the Board also filed a motion for reconsideration which is essentially a restatement of the Supplemental Status Report making our comments in this Special Report also applicable to the Motion for Reconsideration.

Comptroller⁷

The Board in its Supplemental Status Report, states that it pursued the recruitment of a Comptroller in the manner recommended by the Receiver; the clear inference being that if there is blame here, it should be placed on the Receiver. The Board informs the Court that it was May 2017 when the Receiver recommended that the financial officer being recruited by the Board be revised from Chief Financial Officer to Comptroller. The recommendation to make this change was, in fact, made much earlier in May 2015.

Attachment I is an email exchange between Chace Anderson and Board Member Jonathan Denight⁸ dated January 19, 2017 in which Mr. Anderson reminded Mr. Denight of the Receiver's earlier recommendation that the position be changed from a Chief Financial Officer to a Comptroller. Mr. Denight acknowledged his memory of that recommendation and responded to Mr. Anderson that the position should be changed to a Comptroller. A few days later, on January 26th, Mr. Anderson was informed by Georgette Concepcion, legal counsel to the Board, that the Board had decided not to make the change recommended by the Receiver, but to proceed with the recruitment of a Chief Financial Officer (see Attachment II).

Rules and Regulations

In its Supplemental Status Report the Board of Directors states that "....it must question the Receiver's intent." The blame they place on the Receiver is the result of their request that the Receiver provide input into the Board's process of rewriting the operating rules. It is now apparent that they actually expected the Receiver to draft the rules for them. Months before the Board's request to Mr. Anderson at its May 2017 meeting, the Receiver had urged the Board to address the operating rules. The transition timeline recommended by the Receiver and approved by the Court required the Board to begin this process in September 2016. The Board now seems to suggest that it was powerless to address these rules since it was not familiar with GSWA operations despite the fact that one of its primary functions prior to transition was to gain an understanding of GSWA operations. The Receiver made or caused to be made, numerous presentations at Board meetings on each and every function of GSWA and the Board was ordered to attend all status hearings before the District Court during which numerous presentations describing the operations of GSWA were presented. At each meeting of the Board the Receiver made itself available to address any questions or concerns board members wanted to pursue. The Board was given its own legal counsel more than three years ago in recognition that rule making is essentially a legal function that needed to be pursued by the Board. Despite all of this, the Board chose not to perform this work at the time prescribed by the Court approved timeline; waiting until May 2017 to take up the matter, and then only in response to an Order of the District Court⁹. Even then, the Board's response was to ask the Receiver to do the work for them. Since rule making is a legal process and the Receiver is not a lawyer, it was the Receiver's understanding that it had been asked to

⁷ The spelling of this position has been in flux in the various filings with this Court. In the most recent legislation concerning this matter, the Guam Legislature adopted the term "Comptroller" therefore we will use this as the official spelling of the position.

⁸ Mr. Denight is Vice Chairman of the Board of Directors and was designated by the Board to lead the recruitment for both the General Manager and the financial officer.

⁹ See Order dated May 22, 2017.

provide comments not to rewrite the rules themselves. We agreed to provide the requested input and now the Board complains that it took too long.

It is clear that had the Board began its work on this matter at the time specified on the Court approved transition timeline, the Board would have had the time it needed to address this important issue. By not beginning its work on this issue at the time specified by the Court approved timeline, the Board now seeks to absolve itself of responsibility by blaming the Receiver.

Complete versus Partial Transition out of Receivership

In this part of the Supplemental Status Report, the Board accuses the Receiver of having “forced the Court into this position (i.e. the extension of the Receivership) by choosing not to actively pursue RFP’s for a Trustee and Independent Engineer.” The Board actually accuses the Receiver of being “disingenuous” in this matter when it was the Board itself along with the Attorney General (AG) who caused the delay by continuing to challenge the need for the Trustee and Independent Engineer long after the Court had decided that both the Trustee and Independent Engineer were necessary.

Responding to any RFP is an expensive process for those interested in providing such services. To undertake a procurement process for a service with a challenge to the need for the service pending in the Court, will simply not work. Potential providers of such services will not invest the time and other resources needed when there is doubt that the procurement will result in an opportunity to provide any such service. The Court was informed by the Receiver that as long as these issues were pending before the Court, procurement of the services for both the Trustee and Independent Engineer would be delayed since it was unreasonable to expect potential providers of these services to participate in the procurement process as long as a legal cloud was over the procurement itself.

The Board further accuses the Receiver of failing to pursue the procurement “despite....the court’s November 24, 2017 Order” resolving the matter. However, in that same Order the Court also noted its agreement with the request of the United States that the Receiver be retained beyond December 31, 2017 to complete work to address the “exceedances of methane detected at the Ordot Closure Facility”. Four days later on November 28, 2017, we formally informed the Court that we would adjust the procurement schedule for the Trustee and Independent Engineer to coincide with the completion of the work to address the methane exceedances. While the initial delay in this matter was the direct result of the Board and the AG’s attempt to relitigate the need for these services, we also believe that there is now an opportunity to save money by not paying both the Trustee and Independent Engineer for a portion of the time during which the Receiver remains in place. In its Order dated December 1, 2017, the Court approved the Receiver’s recommendation.

The Receiver has been forthcoming and cooperative in all respects in these matters. The Board’s accusations of bad faith by the Receiver are not only without merit, but are not helpful to the smooth and orderly transition process this Court properly seeks as we conclude our work in these important matters.

Transition Management

In this section the Board argues that that since Mr. Martin has had more than 90 days to work with the Receiver, the transition should proceed on December 31, 2017. The Board also inexplicably maintains that there was “ample time” for transition of the Comptroller even though they knew

that the person the Board just hired had extremely limited time that was not close to the time they themselves had recommended for transition. It is now clear that clear that the person hired by the Board as Comptroller will not arrive for work at GSWA until January 2018.

In the Board's motion for reconsideration filed on December 15, 2017, the Board falsely states that the Receiver refused to allow monies to be expended towards recruitment. The Board minutes submitted in support of Board's claim that the Receiver refused to allow monies to be expended towards recruitment do not support the Board's claim. It should be noted, however, that the 2015 recruitment effort to which the Board is referring is an effort launched by the Board without Court approval. The Receiver always assured the Board that it would support it in its recruitment efforts both financially and otherwise but that these efforts could only be undertaken with the approval of the District Court.

Procurement

In this section of the Board's Supplemental Status Report, the Board criticizes the Receiver and the United States for their "eleventh hour" concerns about procurement training. We will simply note that the Receiver has an obligation to the Court to keep the Court fully informed on issues that are relevant to matters pending before the Court. This is what we did.

In the December 15, 2017 motion for reconsideration the Board also informs the Court that Alicia Fejeran told the Board at its meeting on November 29, 2017 that she "acts as GSWA's procurement officer." Ms. Fejeran actually told the Board that she is the procurement administrator. This is someone, according to the AG's training materials who assists the procurement officer. The procurement officer under the Receivership is the Receiver.

The Board concludes its Supplemental Status Report by erroneously stating "the Receiver has admitted, it has a clear conflict of interest and its recommendations should be examined without prejudice to the agency's past." The Receiver made no such admission because it is not true. We did acknowledge that we are *perceived* to have a conflict. The Receiver's duty is to this Court. As such, we have a duty to keep the Court fully informed and we have always endeavored to do so.

We thank the Court for its consideration of our views in this matter.

I declare under penalty of perjury under the laws of Guam and the United States that the foregoing is true and correct.

Dated this 18th day of December 2017.



David L. Manning
Receiver Representative



Fwd: CFO vs comptroller

From: Jon Denight <idenight@pepsi.com.gu>
Subject: Re: CFO vs comptroller
Date: January 19, 2017 at 5:20:57 PM GMT+10
To: Chace Anderson <candersongbb@gmail.com>
Cc: "Andrew M. Gayle" <agayle@gt.net>, Georgette Concepcion <gconcepcion@guamlawfirm.com>, "Joseph Deanas (joseph_duenas@ymail.com)" <joseph_duenas@ymail.com>, Alexandra Taitano <algtaitano@gmail.com>, Alicia Fejeran <avfejeran@gmail.com>

Chace. Let's go with Controller, or Comptroller in govt lingo.
I do remember that discussion now that you mention it.

Andrew, Joe and Allie.

Chace will change position to Comptroller and move ahead with the announcement unless he hears any objection from you by tomorrow. Thanks.

Joe. Thanks for the phone in today.

Jon.

Sent from my iPhone

On Jan 19, 2017, at 1:43 PM, Chace Anderson <candersongbb@gmail.com> wrote:

Andrew, Members of the Board and Georgette,

After the board meeting today I thought about Andrew's comment that the Board had agreed to change the title of the CFO to Comptroller. I went back to an email David had sent you on May 1, 2015, where he said the following: "... the job descriptions of the GM and CFO set up a conflict between the GM and CFO, both of whom are given full control of GSWA business operations and both report independently to the Board. To some extent the legislation itself sets up this problem, but the board is not required by law to have a CFO (i.e. the board "**may appoint a Chief Financial Officer...**". We suggest that the board, instead of a CFO, hire a comptroller who also serves as Assistant GM for Administration. This position, initially hired by the Board, could have a reporting relationship to the GM with a "dotted line" relationship directly to the Board. In other words, this person would be responsible to the board through the GM, but eliminate the conflict inherent in the way this is now proposed." These issues were not discussed today when the recommendation to revert the title back to CFO was made.

After reading David's paragraph again I went back to the legislation to double check and it does make a clear distinction between how the legislature describes the Board's responsibility to hire a GM verses a CFO. I have provided below the actual wording so you can read it. In the case of the GM the legislature continually uses the word "shall" which means a requirement of the board. But in the CFO position the legislature carefully writes that "the board may appoint a Chief Financial Officer..." The word "may" does not make it a requirement but a discretion of the board. If I had remembered this at the time of the board meeting today I would have brought it to your attention then. At the board meeting I was under the impression that the legislature had required the hiring of a CFO which clearly is not the case.

§51A106. General Manager (GM).

(a) The Board *shall* appoint a General Manager, who *shall* be its chief executive officer and *shall* serve at its pleasure. The General Manager *shall*, at a minimum, possess the following qualifications:

§51A109. Chief Financial Officer. The Board may appoint a Chief Financial Officer, who *shall* be a Certified Public Accountant. The Board *shall* fix the Chief Financial Officer's compensation. The Chief Financial Officer *shall* have full charge and control of the fiscal, business and accounting operations of the Authority, subject to the supervision of the Board.

http://202.128.4.46/Public_Laws_31st/P.L.%2031-20%20SBill%20No.%2035-31%20.pdf



Fwd: GM and CFO Announcements

From: Georgette Concepcion <gbc@guamlaw.net>
Subject: GM and CFO Announcements
Date: January 26, 2017 at 2:38:58 PM GMT+10
To: Chace Anderson <candersongbb@gmail.com>
Cc: Alexandra Taitano <algtaiano@gmail.com>, "Andrew M. Gayle" <agayle@gta.net>, 'Jonathan M Denight' <jdenight@pepsi.com.gu>, "Joseph Deanas (joseph_duenas@ymail.com)" <joseph_duenas@ymail.com>

Chace,

After considering your email of Jan. 19, 2017, reviewing the GSWA and other autonomous agencies' enabling acts, the Board would like you to proceed with announcing the GM and CFO positions as voted at last week's Board meeting.

Attached are the final drafts of the announcements. You may want to revise the CFO announcement with regard to "how to inquire" section because the link includes "comptroller".

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2 attachments



GSWA GM Job Announcement FINAL 1.26.17.doc
2756K



GSWA CFO Job Announcement FINAL 1.26.17.doc
2750K