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BEFORE THE OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEAL

IN THE APPEAL OF	DOCKET NO. OPA-PA-09-005
GUAM COMMUNITY IMPROVEMENT FOUNDATION, INC.	**DECLARATION OF JOHN WEISENBERGER**
Appellant.	

I, John Weisenberger, do hereby declare:

1. I am an Assistant Attorney General employed by the Office of the Attorney General of Guam.

2. I am co-counsel with Benjamin Abrams, representing the Department of Public Works in the above-captioned matter.

3. On October 9, 2009, at a Pre-Hearing Conference in the above-captioned matter, the Hearing Officer requested that the Department of Public Works file with the Office

of Public Accountability any Bond Counsel opinion as to whether there is a debt obligation on the government of Guam as a result of the financing that the International Bridge Corporation is endeavoring to arrange in the procurement known as the Construction of the New John F. Kennedy High School Finance, Demolition, Design, Build, Maintain and Leaseback; DPW RFP 700-5-1020-L-TAM.

4. To the best of my knowledge and belief, there is no Bond Counsel opinion on this matter.

5. In my professional opinion, such a Bond Counsel opinion is not necessary. Attached hereto, and marked as Exhibit A, is the opinion of the Guam Supreme Court in *In Re Request of Governor Felix P. Camacho*, 2006 Guam 5. The attached case answers the question posed concerning the debt obligation of the government of Guam for the arrangement being proposed by International Bridge Corporation to finance this procurement.

I declare under penalty of perjury that the foregoing statements are true to the best of my information and belief. Executed this 9th day of October, 2009.

JOHN WEISNEBERGER
Assistant Attorney General

IN THE SUPREME COURT OF GUAM

In re REQUEST OF GOVERNOR FELIX P. CAMACHO RELATIVE TO THE INTERPRETATION OF SECTION 11 OF THE ORGANIC ACT OF GUAM AND THE EDUCATION FACILITIES CONSTRUCTION INITIATIVES ACT OF 2001

Governor Felix P. Camacho
Petitioner.

Supreme Court Case No.: CRQ05-002

OPINION

Filed: March 21, 2006

Cite as: 2006 Guam 5

Request for Declaratory Judgment pursuant to
Section 4104 of Title 7 of the Guam Code Annotated
Argued and submitted on February 21, 2006
Hagåtña, Guam

Appearing for Petitioner:
Shannon Taitano, *Esq.*
Office of the Governor of Guam
P.O. Box 2950
Hagåtña, Guam 96932

"EXHIBIT A"

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; RICHARD H. BENSON, Justice *Pro Tempore*.

CARBULLIDO, C. J.:

[1] This matter comes before the court as a result of a request for declaratory judgment filed by the Governor of Guam, Felix P. Camacho ("the Governor"), pursuant to Title 7 GCA section 4104. The Governor requests that this court declare that (1) multi-year obligations, such as the financing lease contemplated by the Education Facilities Construction Initiative Act of 2001, as amended ("the Act"), which are payable solely from a special fund, are outside the definition of "indebtedness" under Section 11 of the Organic Act of Guam (codified at 48 U.S.C. § 1423a (Westlaw through P. L 109-2, 2005) and that (2) a pledge of federal grant revenues made by a sitting governor can bind future governors for the purpose of making lease payments under the Act.

[2] Because we cannot anticipate every possible difficulty which might be contained in similar multi-year obligations under the Act, we limit our holding to the financing Lease Agreement before us. We hold that the financing Lease Agreement entered into between the Guam Education Financing Foundation and the Guam Public School System[1] does not constitute "indebtedness" within the meaning of Section 11 of the Organic Act of Guam. Secondly, we hold that the Governor may bind future governors with respect to the allocation and pledge of Compact Impact Funds for lease payments, as provided by Section 4.03 of the Lease Agreement.

[1] The Lease Agreement, dated May 25, 2005, lists the parties as Guam Education Financing Foundation and the Guam Department of Education, Government of Guam. However, pursuant to Public Law 28-45, the Department of Education is now known as the Guam Public School System. *See* Guam Pub. L. 28-45:10 (June 6, 2005).

I.

[3] The Legislature enacted the Act in 2001 and amended it in 2005 in order to facilitate the financing of the design, construction, and maintenance of educational facilities. 5 GCA § 58104 (2005). The Act, codified at Chapter 58 of Title 5 of the Guam Code Annotated, empowers the government of Guam or an Education Agency[2] to employ a financing mechanism known as lease-back financing, or alternatively as a financing lease. *See id.* Specifically, the Act authorizes the government of Guam or the Education Agency to execute a ground lease, subject to legislative approval, to the contractor on which the contractor will construct, convert, or rehabilitate educational facilities. *Id.* In return, the contractor shall finance the design, construction, and maintenance of educational facilities, the cost of which will be amortized over a period, during which the contractor will lease back the property and educational facilities to the Education Agency. *Id.* Upon the expiration of the ground lease and the financing lease agreement, the property and the educational facilities become the property of the Education Agency and the rights and interests of the contractor with respect to the property are extinguished. *Id.* Under the Act, the financing lease may contain a provision obligating the Education Agency to vacate the educational facility in the event that sufficient funds are not available for the payment of rent under the agreement. 5 GCA § 58106 (2005). To minimize the cost to the Education Agency, the Act mandates the use of tax-exempt bonds, if possible, and authorizes the pledge of Compact Impact Funds or other federal grant revenues. 5 GCA § 58108 (2005).

[4] Pursuant to the Act, the Governor developed a financing lease plan which included a pledge of Compact Impact Funds. In accordance with the Act, the Department of Public Works

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[2] The Act states that Education Agency "shall mean the Guam Public School System, the University of Guam, or the Guam Community College." 5 GCA § 58103(d) (2005).

issued a Request for Proposal ("RFP") seeking qualified proposals for the financing, design and construction of public school facilities. The Pacific Daily News published notices announcing the RFP on April 14, 2004 and May 8, 2004. Three qualified proposals were received by the Department of Public Works prior to the closing date of the RFP. A committee evaluated all three proposals according to the criteria established in the RFP and ultimately recommended the selection of GEFF.

[5] On May 25, 2005, the Guam Education Financing Foundation ("GEFF") and the Guam Public School System ("GPSS"), entered into a financing lease agreement (the "Lease Agreement"). The Lease Agreement provides that GPSS, or the government of Guam, will execute a ground lease under which five parcels of land will be leased to the GEFF, a non-profit corporation. In return, GEFF will finance, design, construct and maintain school facilities on the land and lease-back the improved parcels to GPSS. The effective date for the Lease Agreement is October 1, 2006. In consideration for entering into the Lease Agreement, payments totaling $12,200,000.00 were to be made from Compact Impact Funds to fund the project initially, prior to its commencement. In addition to these provisions, the Lease Agreement contains an automatic renewal clause which provides for consecutive one-year renewal terms, in order to create a term of twenty years at minimum. Lease payments are to be made from Compact Impact Funds or other federal grant revenues pledged by the Governor of Guam or any funds appropriated or made available by the Guam Legislature. The Lease Agreement was signed by all parties involved, including GEFF, GPSS, and the Governor of Guam. In addition, the Attorney General of Guam approved the Lease Agreement as to form and legality. Furthermore, the legislature approved the ground lease between the government of Guam and GEFF for the sites of the new school facilities. Guam Pub. L. 28-68 (Sept. 20, 2005).

[6] On September 20, 2005, the Governor filed a Request for Declaratory Judgment with this court, asking whether the financing agreement outlined in the Act constitutes "indebtedness" under Section 11 of the Organic Act. Furthermore, the Governor asks whether or not a future governor would be bound by the pledge of Compact Impact Funds authorized by the Act that is codified, as amended, as Chapter 58 of Title 5 of the Guam Code Annotated. Though the Attorney General initially opposed the exercise of jurisdiction in the instant case, he later filed a Statement of No Position with regards to the two questions posed by the Governor's request.

II.

[7] This court has jurisdiction over requests for declaratory judgment pursuant to Title 7 GCA § 4104 (2005). *See also In re Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Sections 6 and 9 of the Organic Act of Guam*, 2004 Guam 10 ¶ 17.

[8] In order to invoke this court's jurisdiction pursuant to 7 GCA section 4104, a party seeking declaratory judgment must satisfy the following three requirements:

> (1) the subject matter of the inquiry must be appropriate for section 4104 review;
> (2) the issue raised must be a matter of great public importance; and
> (3) the issue must be such that its resolution through the normal process of law is inappropriate as it would cause undue delay.

See In re Request of Governor Carl T.C. Gutierrez Relative to the Organicity and Constitutionality of Public Law 26-35, 2002 Guam 1 ¶ 9 (citing 7 GCA § 4104). After requesting briefing on the issue of jurisdiction, this court held that the Governor's request for declaratory judgment satisfies the jurisdictional standard set forth in 7 GCA section 4104. First, the Governor's request requires an interpretation of local and federal law which relates to the duties of the Governor and the operation of the executive branch. Though the Governor suggests that the declaratory judgment of this court is necessary to provide bond counsel with an

unqualified legal opinion regarding the validity of bonds, the real question with regard to the first issue in the Governor's request is whether the financing scheme contemplated by the Act constitutes "indebtedness" under Section 11 of the Organic Act. The second issue in the Governor's request affects the powers and duties of the Governor and the operation of the executive branch with regard to his ability to bind future governors. Thus, both questions concern matters which may properly be reviewed by this court under 7 GCA section 4104.

[9] The second prong of the jurisdictional analysis requires "an importance of the issue to the body politic, the community, in the sense that the operations of the government may be substantially affected one way or the other by the issue's resolution." *In re Request of Gutierrez*, 2002 Guam 1 ¶ 26 (citation omitted). The issues presented in the Governor's request affect the government's ability to finance the construction and rehabilitation of public school facilities. As noted previously by this court, GPSS "is one of the largest departments in Guam's Government and has a mission that directly impacts on nearly every family on the island." *In re Request of Governor Carl T.C. Gutierrez for a Declaratory Judgment as to the Organicity of Guam Public Law 22-42*, 1996 Guam 4 ¶ 5 (published order, CRQ96-001, issued Oct. 24, 1996). Furthermore, the Attorney General concedes that the request involves a matter of great public interest.[3] We agree.

[10] Finally, the anticipated delay in pursuing resolution through the normal process of law, rather than through review under section 4104, must be "excessive or inappropriate." *In re Request of Gutierrez*, 2002 Guam 1 ¶ 29 (citation omitted). The intent of Title 7 GCA section

[3] Prior to accepting briefs on the subject matter of the request for declaratory judgment, we requested the input of several public officials regarding the exercise of jurisdiction with respect to the instant request. Attorney General Douglas B. Moylan was the only one to respond. Although Attorney General Moylan opposed the exercise of jurisdiction, he conceded that the request satisfied both the first and second prongs of the jurisdictional test applied here. In addition, he filed a Statement of No Position with regards to the two questions posed by the Governor in his request.

4104 was to provide a mechanism by which resolution of important issues of law could be obtained without requiring parties to litigate in the inferior court, a potentially lengthy process. *In re Request of Gutierrez*, 1996 Guam 4 ¶ 8. Although the exigencies of the public school system may have been created by the government itself, it is in the interest of the territory to expedite the process. Therefore, we find that the current needs of GPSS require a speedy resolution of these questions.

[11] For the abovementioned reasons, we find that the Governor's request satisfies the standards set forth in Title 7 GCA § 4104.

III.

[12] For cases brought before this court pursuant to our original jurisdiction, all issues are determined in the first instance. *In re Request of Gutierrez*, 2002 Guam 1 ¶ 8; *In re Request of Camacho*, 2003 Guam 16 ¶ 8. [4]

IV.

[13] The questions posed by the Governor in his request for declaratory judgment require us to determine whether the Lease Agreement before us constitutes indebtedness and whether the Governor's pledge of Compact Impact Funds will have a binding effect on future governors. We shall address both issues separately.

A. "Indebtedness"

[14] The first issue we address is whether the Lease Agreement entered into by GEFF and GPSS constitutes indebtedness under Section 11 of the Organic Act.

[15] The Organic Act states, in relevant part, that "no public indebtedness of Guam shall be authorized or allowed in excess of 10 per centum of the aggregate tax valuation of the property

[4] On March 6, 2006, the Ninth Circuit dismissed an appeal of *In re Request of Camacho*, 2003 Guam 16, for lack of jurisdiction, citing their recent decision in *Santos v. Guam*, 436 F.3d 1051 (9th Cir. 2006). *Moylan v. Camacho*, No. 03-72836 (9th Cir. Mar. 6, 2006) (unpublished order dismissing case for lack of jurisdiction).

in Guam." 48 U.S.C. § 1423a (Westlaw through P. L 109-2, 2005). This portion of the Organic Act operates as "a statutory limitation upon government borrowing, commonly referred to as a debt-limitation provision." *In re Request of Camacho*, 2003 Guam 16 ¶10 (citation omitted). "Debt-limitation provisions are generally applicable to obligations which must be paid directly or indirectly by resort to taxation." 15 McQuillin, *The Law of Municipal Corporations* § 41.17 (3d ed. 1987) (footnote omitted).[5]

[16] In *In re Request of Camacho*, 2003 Guam 16, this court directly addressed the meaning of "indebtedness" in Section 11 of the Organic Act. In interpreting debt with respect to Section 11, this court noted that "[a] debt is understood to mean an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed." *In re Request of Camacho*, 2003 Guam 16 ¶ 47 (quoting *Knowlton v. Ripley County Mem'l Hosp.*, 743 S.W.2d 132, 136 (Mo. Ct. App. 1998)). Furthermore, it is recognized that constitutional debt-limitation provisions contemplate a debt which pledges the full faith and credit of the state. *In re Request of Camacho*, 2003 Guam 16 ¶ 47. "Finally to constitute a debt, the obligation 'must be an absolute undertaking; if the municipality may avoid its obligation or if there remains conditions precedent to it, there is no indebtedness.'" *Id.* (quoting *City of Hartford v. Kirley*, 493 N.W.2d 45, 51 n. 13 (Wis. 1992)).

[17] The Governor argues that the financing Lease Agreement before us does not constitute "indebtedness" because it falls within the widely recognized special fund exception. The Governor argues that the special fund exception applies because the funds pledged are not from

[5] Though *The Law of Municipal Corporations* discusses debt-limitation provisions in the context of state constitutions, this court has recognized that the Organic Act of Guam operates in a similar manner, despite it being a federal statute. *In re Request of Camacho*, 2003 Guam 16 ¶ 15 n. 5.

the general fund and the obligations under the Lease Agreement are not backed by the full faith and credit of the government of Guam.

1. Special Fund Exception

[18] One generally recognized doctrine holds that municipal debts payable from a special fund do not constitute debts with respect to debt-limitation provisions similar to the one contained in Section 11. *See* 15 McQuillin § 41.31 (3d ed. 1987) ("If an obligation is payable out of a special fund only, and the municipality is not otherwise liable, it is generally held that there is no indebtedness."). The Organic Act, itself, enumerates an exception to the definition of indebtedness: "[b]onds or other obligations of the government of Guam payable solely from revenues derived from any public improvement or undertaking shall not be considered public indebtedness of Guam within the meaning of this section." 48 U.S.C. § 1423a. Consistent with the purpose of this listed exception to the definition of "indebtedness," we have held other debts of the government to be outside the definition of "indebtedness" when they are payable from a special fund as long as it will not burden the general fund in the future, such as bonds secured by tobacco settlement money. *In re Request of Camacho*, 2003 Guam 16 ¶ 52; *see also Guam Telephone Auth. v. Rivera*, 416 F.Supp. 283, 285 (D. Guam 1976) (finding that there is no debt created when the government of Guam does not "guarantee to make up any deficiency" of the special fund).

[19] Finding the special fund doctrine to be recognized in our jurisdiction, we now turn to the Lease Agreement to determine whether this exception is applicable in the instant case.

a. Special Fund

[20] As discussed previously, obligations which are payable from revenues derived from a public undertaking are not considered to be public indebtedness. However, this court has held

that a pledge of any specific tax revenue does not suffice for the establishment of a special fund. *In re Request of Camacho*, 2003 Guam 16 ¶ 53. In order for the special fund exception to apply, the funds pledged cannot be a part of the general fund; otherwise, the debt-limitation provision would be meaningless. *Id.*

[21] The Lease Agreement in the instant case contains numerous provisions regarding the rights and obligations of both the government of Guam and GEFF. Article 1, Section 1.01 defines "Available Funds" as:

> [C]ollectively, Compact Impact Funds in an amount equal to $6,100,000 per Fiscal Year or such larger amount as may be made available by the Governor in his sole and absolute discretion, any amounts available to pay amounts due under this Lease and held in the funds and accounts established pursuant to the Indenture, and any funds appropriated or otherwise made available for said purpose from time to time by the Guam Legislature.

Decl. of Shannon Taitano in Supp. of Req. for Declaratory J., Ex. A at 2.

[22] Compact Impact Funds are federal grants designed to defray costs associated with the residence of certain qualified nonimmigrants. *See* 48 U.S.C. § 1921c(e) (Westlaw through P. L 109-2, 2005). In furtherance of this purpose, Congress "authorized and appropriated to the Secretary of the Interior, out of any funds in the Treasury not otherwise appropriated, to remain available until expended, for each fiscal year from 2004 to 2023, $30,000,000.00 for grants to affected jurisdictions." 48 U.S.C. § 1921c(e)(3) (Westlaw through P. L 109-2, 2005). The statute defines "affected jurisdiction" to mean American Samoa, Guam, the Commonwealth of the Northern Marianas, or the State of Hawaii. 48 U.S.C.A. § 1921c(e)(2) (Westlaw through P. L 109-2, 2005). For each of these affected jurisdictions, the Secretary of the Interior will conduct periodic enumeration of qualified nonimmigrants, persons admitted to or residents of one of the affected jurisdictions pursuant to the compact between the United States and any one of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of

Palau. 48 U.S.C. § 1921c(e)(4) (Westlaw through P. L 109-2, 2005). The Secretary of the Interior shall allocate the grants to the affected jurisdictions based on those periodic enumerations. 48 U.S.C. § 1921c(e)(5) (Westlaw through P. L 109-2, 2005). The grants received are to be used only for "health, educational, social, or public safety services, or infrastructure related to such services, specifically affected by qualified nonimmigrants." 48 U.S.C. § 1921c(e)(3)(B) (Westlaw through P. L 109-2, 2005). The nature of Compact Impact Funds is similar to that of the tobacco settlement money discussed *supra*. The federal grants are designed for a specific purpose and to be used in limited circumstances. Therefore, the Compact Impact Funds are not part of the general fund.

b. Liability Under the Lease Agreement

[23] Though the Lease Agreement purports to avoid the creation of a debt within the limitation of Section 11 of the Organic Act, and the language in the Lease Agreement appears to have been crafted in an attempt to fall within the special fund doctrine, our inquiry does not end there. We must examine what result the insufficiency of the special fund would have on the government of Guam. Some courts have held obligations void for being in excess of the debt limitation provision, notwithstanding the creation of a special fund when the contracts have been framed as to create a general liability on the part of the municipality. *See* 15 McQuillin § 41.31 (3d ed. 1987).

[24] The Lease Agreement, in a section entitled "Limitations on Liability," states that "[n]othing herein shall be construed to require the Government of Guam or the Guam Legislature, to appropriate any money, other than the amounts pledged under Section 4.03(a) to pay any Rentals hereunder." Decl. of Taitano, Ex. A, at 14. Read together with Article 1, Section 1.01, which defines "available funds," these two sections of the Lease Agreement

demonstrate that the parties intended to create a special fund for the project separate and distinct from the general funds of the government of Guam. Furthermore, the Lease Agreement explicitly states, under Section 4.04(b), that "[n]o provision hereof shall be construed or interpreted as creating a general obligation or other indebtedness of the Lessee, the Lessor, the Government of Guam, or any political subdivision of the Government of Guam, within the meaning of any Organic Act or statutory debt limitation." Decl. of Taitano, Ex. A, at 14.

[25] In the instant case, the Lease Agreement attempts to avoid the creation of any general obligation for the government of Guam. In addition to the limited sources of repayment, contained in Article 1, Section 1.01 discussed *supra*, the Lease Agreement explicitly limits the liability of the government of Guam in sections 4.04 and 4.09. Section 4.04 limits the liability of the government of Guam to the last rental period in which there was an appropriation made for the project; furthermore, it provides that should there be insufficient funds, the Government may quit the project, vacate the premises, and be protected from any judgment against it for failure to pay future rentals for which it has not yet incurred liability. Decl. of Taitano, Ex. A, at 14. Section 4.09 outlines the obligations and liabilities in the event of nonappropriation, when sufficient "available funds" are not appropriated and are not otherwise legally available. Obligations of GPSS to pay terminate at the end of the construction period, the initial term, or the renewal term, during which the nonappropriation event occurs. At that time, GPSS may terminate the Lease Agreement at its discretion without penalty. Decl. of Taitano, Ex. A, at 16. These provisions prevent GEFF from looking to the revenue of the government of Guam should there be an event of non-appropriation or default. Therefore, the Lease Agreement sufficiently restricts the obligations of the Government to the special fund created in the instant case.

[26] A minority of jurisdictions have held contracts constitute debt within the meaning of "indebtedness" when they create a moral obligation to pay or have consequences that may compel a legislature to appropriate funds in the event the special fund is insufficient. *See Bd. of State Harbor Comm'rs v. Dean*, 258 P.2d 590, 634 (Cal. Dist.Ct. App. 1953); *see also Montano v. Gabaldon*, 766 P.2d 1328 (N.M. 1989). However, we decline to extend the meaning of indebtedness to debts which do not involve a legal obligation to pay; this is consistent with the rationale of *In re Request of Camacho*, 2003 Guam 16 ¶ 51, that a debt was not created where "the municipality can walk away from the obligation none the poorer."

[27] In conclusion, we find that the Lease Agreement is not a general obligation of the government of Guam. We find that the provisions contained in the Lease Agreement are sufficient to create a special fund and protect the general revenues of Guam. Therefore, we hold that the Lease Agreement in the instant case does not constitute "indebtedness" within the meaning of Section 11 of the Organic Act of Guam.

B. Binding Effect on Future Governors

[28] The second issue presented in the Governor's request is whether a sitting governor can bind future governors with respect to the allocation and pledge of Compact Impact Funds for lease payments, as provided by Section 4.03 of the Lease Agreement. Decl. of Taitano, Ex. A, at 13.

[29] The general rule recognized by a majority of jurisdictions is that a governmental body "may enter into contracts during [its] term of governance however, if the term of the contract extends beyond the term for which the [the governmental body] was elected[,] the ability . . . to bind subsequent [governmental bodies] is limited." 56 Am. Jur. 2d Municipal Corporations § 135 (2005). The policy behind such rule is also widely accepted:

> The obvious purpose of the rule is to permit a newly appointed governmental body to function freely on behalf of the public and in response to the governmental power or body politic by which it was appointed or elected, unhampered by the policies of the predecessors who have since been replaced by the appointing or electing power. To permit the outgoing body to 'hamstring' its successors by imposing upon them a policy[-]implementing and to some extent, policymaking [sic] machinery, which is not attuned to the new body or its policies, would be to most effectively circumvent the rule.

Lobolito, Inc. v. North Pocono School Dist., 755 A.2d 1287, 1289-90 (Pa. 2000) (quoting *Mitchell v. Chester Hous. Auth.*, 132 A.2d 873,878 (Pa. 1957)); *see also Rhode Island Student Loan Auth. V. NELS, Inc.*, 550 A.2d 624, 629 (R.I. 1988).

[30] The general rule which prohibits governmental bodies from binding successors has two exceptions. First, a governmental body may enter into a contract which extends beyond its term of office when specifically authorized by statute. 10A McQuillin § 29.101 (3d ed. 1987) ("Statutes . . . sometimes authorize municipal boards to make contracts which will extend beyond their own official term, and the power of the legislature in this respect is well settled."); *see also Program Admin. Servs., Inc., v. Dauphin County Gen. Auth.*, 874 A.2d 722, 725 (Pa. 2005) (The general rule "does not apply to classes of contracts specifically exempted by the legislature to permit governments to make and acquire long-term commitments when necessary for the public good."). Second, a governmental body may enter into a contract extending beyond its term when the subject matter of the contract involves a proprietary, as opposed to a governmental, function. 10A McQuillin § 29.101 (3d ed. 1987) (stating that while "the hands of successors cannot be tied by contracts relating to governmental matters," contracts relating to proprietary functions may be binding on successors); *Program Admin. Servs., Inc.*, 874 A.2d at

725 (stating that the prohibition "applies only to contracts involving the performance of a governmental function . . ."). We examine each exception in turn.[6]

1. Exception: Legislative Authorization

[31] Section 1423a of the Organic Act, as amended by Congress in 1998, states that "[t]he legislative power of Guam shall extend to all rightful subjects of legislation not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam." 48 U.S.C. § 1423a(Westlaw through P. L 109-2, 2005). Section 1423a was amended in order to "clarif[y] the legislature's power[s] to 'provide Guam with a greater measure of self-government . . . .'" *In re Request of Camacho,* 2004 Guam 10, ¶ 33 (quoting H.R. Rep. No. 105-742 (1998), 1998 WL 658802 at *3). This court has held that "legislative enactments are presumed to be constitutional."[7] *In re Request of Gutierrez,* 2002 Guam 1, ¶ 41; *A.B. Won Pat Guam Int'l Airport Auth. ex rel. Bd. of Dirs. v. Moylan,* 2005 Guam 5, ¶ 22, *cert. denied, Moylan v. A.B. Won Pat Guam Intern. Airport Auth. ex rel. Bd. of Directors*, 126 S. Ct. 338 (2005).

[32] "[T]here can be no question . . . as to the competency of a state legislature, unless prohibited by constitutional provisions, to authorize a [governmental body] to contract . . . and so to bind during the specified period any [successors] from altering or in any way interfering with such contract." *City of Detroit v. Detroit Citizens' St. Ry. Co.* 184 U.S. 368, 382 (1902)

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[6] We note that the Governor's request focuses only on the proprietary/governmental distinction and does not directly address the statutory authorization exception.

[7] In the Governor's Opening Brief, he states that "[e]ven though the Legislature has authorized the Governor to pledge future federal grant funds for the purposes contemplated by the financing lease in question, the Governor in fact has the sole power to determine the use of such grant funds." Governor's Brief, p. 12 n. 4 (citing *In re Request of Camacho*, 2004 Guam 10 ¶ 1). In *In re Request of Camacho*, 2004 Guam 10, we held that Public Law 26-169 was in derogation of the Governor's powers as set forth in the Organic Act because it granted final authority over federal funding sources to a statutorily created body. We did not address, as the Governor attempts to argue, whether the Governor has the *sole* authority over such federal funding sources. Nor do we address such issue in this instance. The Governor does not claim that the Act is either in violation of the Organic Act, nor does he claim that it is in violation of any federal law. As such, the presumption of organicity of statutes passed by the Guam Legislature remains undisturbed at this time.

(citations omitted). Thus, courts have held that where the legislature authorizes a contract, the term of which will extend beyond the contracting party's governmental term, and such authorized contract is made, it is valid and binding for the period of the running of the contract upon the successors of those entering into it. *See State ex rel. Veeder v. State Bd. of Educ.*, 33 P.2d 516, 523 (Mont. 1934); *Karpark Corp. v. Town of Graham*, 99 F.Supp. 124, 128 (M.D.N.C. 1951); *Yovetich v. McClintock*, 526 P.2d 999,1002-03 (Mont. 1974); *H. J. McNeel, Inc. v. Canyon County*, 277 P.2d 554, 557-58 (Idaho 1954);

[33] Thus, we hold that the pledge of Compact Impact Funds as lease payments, which is an obligation extending beyond the sitting Governor's term pursuant to Section 4.03 of the Lease Agreement, is authorized by the Guam Legislature.

a. Education Facilities Construction Initiative Act of 2001

[34] Particularly important to a determination of the issue before us is the legislative enactment of Title 5 GCA section 58104, entitled "Authorization to Enter into Long-Term Leases." It provides in relevant part:

> For the purpose of facilitating the financing of the design, construction and maintenance of an Education Facility encompassed by this Act, the government of Guam or an Education Agency, as the case may be, is authorized to lease, if required, to the Contractor, subject to legislative approval, sufficient government of Guam real property, to include, *but not be limited to*, Chamorro Land Trust Commission property and Guam Ancestral Lands Commission property, on which to construct, convert or rehabilitate an Education Facility; provided, such property is in the inventory of the Education Agency. The location of the property may be at the site of an existing Education Facility under the control of an Education Agency, which may be converted, rehabilitated or demolished and rebuilt under the provisions of this Act.
>
> Any lease of property pursuant to this Act will be for a period mutually agreed upon between the Education Agency and the Contractor as may be reasonably necessary to amortize over the Lease-Back period of the Contract, the costs associated with the financing, design, construction and maintenance of the Education Facility, *and in no event shall such period be less than twenty (20)*

> *years, or exceed thirty (30) years from the date of commencement of the Lease-Back period.*

5 GCA § 58104 (emphasis added).

[35] Also relevant to our analysis is section 58108, entitled "Use of Tax-Exempt Bonds for Financing," which authorizes a pledge of Compact Impact Funds. Section 58108 provides in part: "the Lease and the Lease-Back may include a pledge of compact impact funds or other federal grant revenues that are legally available for such purpose. Any such pledge made hereunder shall be valid and binding from the time the pledge is made." 5 GCA § 58108.

b. Pledge of Compact Impact Funds Beyond Term of Sitting Governor

[36] The Legislature has expressly authorized the government of Guam to enter into a long-term lease for a period of time that "may be reasonably necessary" to amortize the costs associated with the financing, design, construction and maintenance of the facilities. 5 GCA § 58104. Such lease period, according to section 58104, shall not be less than twenty years, nor exceed thirty years, from the date of the commencement of the lease-back period. In addition, and with respect to the financing cost, section 58108 authorizes the pledge of Compact Impact Funds that are legally available for such purpose, and where such a pledge is included in the lease, it "shall be valid and binding" from the time the pledge is made. 5 GCA § 58108.

[37] The Lease Agreement herein provides that GPSS, or the government of Guam, will execute a ground lease under which parcels of land will be leased to GEFF. In return, GEFF will finance, design, construct and maintain school facilities on the land, and lease back the improved parcels to GPSS. As consideration for the Lease Agreement, payments totaling $12,200,000.00 were to be made from Compact Impact Funds to fund the project initially, prior to the commencement of the Lease. In addition, lease payments are to be made from Compact Impact

Funds pledged by the Governor or any funds appropriated or made available by the Guam Legislature.

[38] As previously stated, as an exception to the general rule that prohibits governmental bodies from binding successors, a governmental body may enter into a contract that extends beyond its term of office when specifically authorized by statute. We find that the Guam Legislature has expressly authorized the pledge of Compact Impact Funds to pay the costs of financing the design, construction and maintenance of the facilities, amortized through the lease-back period, which shall not be less than twenty years nor exceed thirty years. Accordingly, because the Guam Legislature has expressly authorized the Governor to pledge Compact Impact Funds as contemplated in Section 4.03 of the Lease Agreement, we hold that such pledge is binding upon future governors. *See Murphy v. Erie County*, 34 A.D.2d 295, 298 (N.Y.A.D. 1970) ("For the county to exercise such authority, there must be (and there is) clearly expressed legislative intent to grant this power. In stating that the county may enter into contracts 'for such term of duration as may be agreed upon by the county and such person or persons' the Legislature has given such power to the county.")(citations omitted); *State ex rel. Veeder*, 33 P.2d at 523 (holding that "the act under which the board proposes to pledge the student fees for the period of the bonds expressly provides therefor" and thus, contract binding future boards was valid).

[39] For these reasons, we answer in the affirmative the Governor's second certified question of whether a sitting governor can bind future governors with respect to the allocation and pledge of federal grant revenues for lease payments under a financing lease authorized by the Act.

2. Exception: the Governmental/Proprietary Distinction

[40] The Governor submits that the Lease Agreement was entered into in good faith, is reasonable, and involves proprietary, as opposed to governmental, functions, and therefore the pledge of Compact Impact Funds pursuant to the Lease Agreement is binding upon future governors.

[41] The governmental/proprietary distinction and its use in determining whether a governmental body may bind a successor is explained in one treatise:

> Thus, where the contract involved relates to governmental or legislative functions of the council, or involves a matter of discretion to be exercised by the council unless the statute conferring power to contract clearly authorizes the council to make a contract extending beyond its own term, no power of the council so to do exists, since the power conferred upon municipal councils to exercise legislative or governmental functions is conferred to be exercised as often as may be found needful or politic, and the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors. But in the exercise of the business powers of a municipal corporation, the municipality and its officers are controlled by no such rule, and they may lawfully exercise these powers in the same way, and in their exercise the municipality will be governed by the same rules which control a private individual or a business corporation under like circumstances.

City of Hazel Park v. Potter, 426 N.W.2d 789, 792 (Mich. Ct. App. 1988) (quoting 56 Am. Jur. 2d Municipal Corporations § 154 (2005)).

[42] Based on the above principles, if the Lease Agreement arises out of a business or proprietary function of a governmental body, then the pledge of Compact Impact Funds may be binding upon successor governors. The converse of this is that if the Lease Agreement relates to a legislative or governmental function (as opposed to a proprietary function) of a governmental body, no action taken by the sitting Governor is binding upon his successors.[8] 10A McQuillin §

[8] Again, authorization by statute to do otherwise would control, regardless of classification as governmental or proprietary. *See Tweed v. City of Cape Canaveral*, 373 So.2d 408, 409-10 (Fla. Dist. Ct. App. 1979) (holding that where a statute authorizes the governmental body to enter into longer term *governmental function* contracts with employees, the "statute governs over the cited case and city councils can enter into contracts

29.101 (3d ed. 1987).

[43] There exist some well-settled examples of governmental functions, such as those pertaining to the creation and enforcement of police regulations, the prevention of crime, and the preservation of public health. 15 McQuillin § 53.30 (3d ed. 1987).[9] Furthermore, certain functions are generally viewed as proprietary, such as, "the construction and maintenance of municipal water and light plants, . . . the constructions and operation of garages and parking facilities for motor vehicles, and generally the management of property owned by the municipality." 15 McQuillin § 53.30.10 (3d ed. 1987) (footnotes omitted).

[44] Particularly significant to the facts before us, it has been held that while the decision to build may be a governmental function, the actual construction performed is a proprietary function. *See Unified Gov't of Athens Clarke County v. North*, 551 S.E.2d 798, 802-803 (Ga. Ct. App. 2001) ("The Unified Government's decision to commit to construct the access road was governmental, but once the commitment to build had been made the subsequent steps in completing the project can be viewed as within the proprietary function of the Unified Government."); *Jackson v. City of Rome*, 187 S.E. 386, 390 (Ga. 1936). *See also Town of Fort Oglethorpe v. Phillips*, 165 S.E.2d 141, 143-4 (Ga. 1968) (the safe construction and maintenance of a street is within a municipality's corporate powers rather than its governmental powers). *But see Altoona Hous. Auth. v. City of Altoona*, 785 A.2d 1047, 1053-54 (finding that "the construction and operation of the [housing project], which were necessarily subject to

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for employment of persons performing governmental functions for periods of time extending beyond the term of office. . . ."); *Chichester School Dist. v. Chichester Educ. Ass'n.*, 750 A.2d 400 (Pa. Commw. 2000), *appeal denied*, 568 Pa. 668, 795A.2d 980, 2000 WL 1634528 (No. 333 M.D. Alloc. Dkt.2000, filed Oct. 31, 2000) (recognizing that the "policy of preventing last-minute commitments by outgoing legislative boards was not implicated and that the contracts, although clearly governmental functions, were authorized by statute.")

[9] The establishment and maintenance of schools are also listed among the generally recognized governmental functions. 15 McQuillin § 53.30. However, as will be explained, we do not read this section to include the construction and rehabilitation of the facilities themselves.

agreements (including terms of financing) extending beyond the terms of the members of the board . . . were governmental as opposed to proprietary actions.") (Pa. Commw. Ct. 2001).

[45] In addition, at least one court has observed that where a statute authorizes the construction of a building, the costs associated with the authorized construction are binding upon future successors. *H. J. McNeel, Inc.*, 277 P.2d at 557-58 (stating that the authority to build a jail carries with it the power to pay all necessary costs regardless of when such costs accrue). The same has been said regarding employment of a construction supervisor to oversee construction work, when law authorizes the construction itself. *Gulf Bitulithic Co. v. Nueces County*, 11 S.W.2d 305, 313 (Tex. Comm'n App. 1928) (stating that where the county is authorized by law to plan, design and build roads, this included the right to employ a construction supervisor to carry on the project until its final completion.).

[46] Similarly, it has been observed that the financing of a school construction project is a proprietary function, as opposed to the decision to build such school, which remains a governmental function. *Program Admin. Servs., Inc.*, 874 A.2d at 728 ("[T]he decision whether to build a school building is a governmental function. . . . Here, however, the Authority does not purport to decide whether any school district should build a school; it serves only as a means of financing such projects if one does."); *State ex rel. Veeder v. State Bd. of Educ.*, 33 P.2d 516, 523 (Mont. 1934) ("the board in arranging for the financing of the erection of the building . . . act[s] in its capacity as business manager of the institution and not in its governmental or legislative capacity.")

[47] Despite the application of the governmental/proprietary test by many courts, the distinction has received much criticism and has been regarded as difficult, if not impossible, to apply. *See, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 433 (1978);

Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955); *Nw. Natural Gas Co. v. City of Portland*, 711 P.2d 119, 123-26 (Or. 1985); *State ex rel. Ass'n for Preservation of Tenn. Antiquities v. City of Jackson*, 573 S.W. 2d 750, 753 (Tenn. 1978). We are also faced with the reality that "[t]he governmental/proprietary test does not consist of a single criterion. Rather it is a collection of rules, each of which dictates that the presence of a certain factor will cause an activity of a public entity to be either 'public' or 'private' in nature." Janice C. Griffith, Local Government Contracts: Escaping from the Governmental/Proprietary Maze, 75 Iowa L. Rev. 277 (1990).

[48] The governmental/proprietary test was applied in the Ninth Circuit case of *Telford v. Clackamas*, 710 F.2d 567 (9th Cir. 1983). The distinction drawn by the *Telford* court between governmental and proprietary functions focuses on the *nature* of the services to be provided under the contract. *Telford* analyzed the validity of an employment contract, under which Mr. Telford was to serve as the Executive Director and Secretary-Treasurer of the Clackamas County Housing Authority. *Id.* at 568. In finding the services under the contract to be proprietary in nature, the court noted that "Telford's specific contractual duties were identical to those that would be provided by a private corporation or a private landlord." *Id.* at 571. Furthermore, the court found that the employee's contractual duties "did not fall within the class of governmental functions in any substantial part" as he lacked the authority to create policy. *Id.*

[49] Upon finding that the contract encompassed proprietary, versus governmental, functions, the court in *Telford* went further and stated that a "public body may not enter a contract for governmental functions extending beyond its own term . . . .[but the ability] to contract with one to perform proprietary functions . . . is limited only by 'reasonableness and good faith." *Id.* at 570 (citation omitted). The distinction articulated by the *Telford* court has been recognized and

applied in at least one instance by the District Court of Guam Appellate Division. Relying on other jurisdictions while noticing the absence of Guam law on point, the Appellate Division found an agreement involving proprietary functions would be binding on future Governors if the contract is reasonable and entered into in good faith. *Gov't of Guam v. FHP, Inc.*, Civ. Nos. 90-00014A, 90-000206A, 90-00040A, 1991 WL 275584 (D. Guam App. Div. July 10, 1991).

[50] With the caveat that the governmental/proprietary distinction is by no means a clear concept with bright line rules, we nonetheless conclude, based on the cases cited above, that the functions encompassed in the Lease Agreement are proprietary in nature, and not governmental. The services to be provided under the Lease Agreement by GEFF are the financing, design, construction, and maintenance of facilities to be used for public education. GEFF is not responsible for creating any policy with regards to public education, and in fact, it did not and will not make the decision to construct or rehabilitate a public school facility. Rather, GEFF's duties are based purely on the needs of the territory and their priorities as determined by GPSS.

[51] While we hold that the Lease Agreement involves proprietary functions, we do not reach the issue of whether the Lease Agreement is reasonable, nor do we decide whether it was entered into in good faith, as required by *Telford* and *FHP*.[10] This is because our holding with respect to the legislative authorization exception makes such an analysis unnecessary at this time. Rather, we conclude only that unless otherwise authorized by the Guam Legislature, where the term of a contract entered into by a governmental body extends beyond the term of its governmental office, such contract is valid only where the nature of duties in such contract substantially

[10] As stated in our earlier case of *People v. Quenga*, 1997 Guam 6 ¶ 13 n.4: "Precedent [from the Appellate Division of the District Court of Guam] that was extant when we became operational continues unless and until we address the issues discussed there. We will not divert from such precedents unless reason supports such deviation." As we did in *Quenga*, we choose herein to let the law as announced in *Guam v. FHP* stand, "without our reaching the merits of the issue presented, because we see no reason to reconsider its conclusions" at this time. *Quenga*, 1997 Guam 6 n.4.

involve proprietary functions, and further, only where the contract is reasonable and is entered into in good faith.

V.

[52] We hold that the Lease Agreement between GEFF and GPSS does not constitute "indebtedness" within the meaning of Section 11 of the Organic Act of Guam. Furthermore, we hold that the Governor's pledge of Compact Impact Funds will have a binding effect on future governors. Though the Lease Agreement might be valid under the governmental-proprietary distinction analysis, we find such analysis unnecessary given the statutory authorization to enter into long-term leases and to pledge Compact Impact Funds. Therefore, we hold that the pledge of Compact Impact Funds as payment for rent under the Lease Agreement to be binding against future governors because the Act contains specific legislative authorization to enter into the Lease Agreement.