

I MINA'BENTE SIETE NA LIHESLATURAN GUÅHAN

2005 First Regular Session

Bill No. [•] (COR)

**DRAFT**

Introduced by: \_\_\_\_\_

**AN ACT AUTHORIZING A PUBLIC-PRIVATE PARTNERSHIP BY  
CONCESSION OVER THE WATER AND WASTEWATER SYSTEMS  
OF THE GUAM WATERWORKS AUTHORITY.**

**BE IT ENACTED BY THE PEOPLE OF GUAM:**

**Section 1. Legislative Findings and Intent.** Public Law 23-119:1 established the Guam Waterworks Authority (“GWA”) as an autonomous government agency in 1996, which subsequently became a public corporation under Public Law 26-76 in 2002, to produce, treat, transmit, store, distribute and sell water within Guam as well as collect, treat and dispose of wastewater within Guam. As a result of repeated violations by GWA of the Clean Water Act (33 United States Code (“U.S.C.”) §§ 1251 - 1387), the Safe Drinking Water Act (42 U.S.C. §§ 300f - 300j) and conditions under the National Pollution Discharge Elimination System Permits issued to GWA, the United States Government filed a civil action seeking injunctive relief and the assessment of civil penalties against GWA and the Government of Guam. To enforce compliance and mitigate the grave public health risks as well as the general endangerment of the People of Guam that such violations created, the United States Government sought in its complaint both a preliminary and permanent injunction as well as the appointment of a receiver. The United States Government, the Government of Guam and GWA subsequently agreed to enter into a Stipulated Order for Preliminary Relief, dated June 5, 2003, as the most appropriate way to ensure that GWA implemented short-term projects and initial planning measures, which begin to address the foregoing compliance issues (the “*Stipulated Order Issues*”). While GWA achieved many of the scheduled objectives of the Stipulated Order for Preliminary Relief, and notwithstanding the fine efforts to date by GWA’s employees, the Consolidated Commission on Utilities (“CCU”) decided to explore a public-private partnership as an appropriate way for GWA to

provide the level of service expected by its rate-payers and otherwise address the Stipulated Order Issues on a sustained, long-term basis. By resolution dated May 25, 2004, the CCU determined that a public-private partnership by concession may best serve the long-term interests of GWA's rate-payers. *I Liheslaturan Guåhan* finds that neither Public Law 24-37 nor Public Law 24-294 (authorizing private sector participation through the use of the Build-Operate-Transfer concept to design, construct and operate water and wastewater projects on Guam) provide the basis for the award of such concession. *I Liheslaturan Guåhan* further finds that a concession may provide GWA with the most effective means to resolve the Stipulated Order Issues, improve water and wastewater services for GWA's customers, introduce efficiency into GWA's operations, minimize the potential for unwarranted political interference with GWA's operations, protect the People of Guam's interest in Guam's water resources and reduce the long-term rate levels paid by GWA's customers. *I Liheslaturan Guåhan* desires to establish a legislative framework that may allow the private sector to operate, maintain, design, construct, improve, manage, rehabilitate, expand, finance, repair and refurbish all, or any part, of GWA's water production, treatment, transmission and distribution systems as well as its wastewater collection, treatment and discharge systems on a long term and economically viable basis through the award of a concession over GWA Systems and grant of a water and wastewater service franchise.

**Section 2. Definition of Terms.** The following terms used in the Act shall have the meaning stated below:

- (a) **"Concession"** shall have the meaning defined in Section 3 (*Public-Private Partnership by Concession*);
- (b) **"Concession Agreement"** means the agreement, as amended from time to time, between GWA and the Concessionaire that sets forth the terms and conditions under which GWA grants, and the Concessionaire accepts, the Concession over GWA Systems;
- (c) **"Concession Fee"** shall have the meaning defined in Section 3(f);

- (d) “**Concessionaire**” means the privately-held corporation or partnership, organized and existing under the laws of Guam and appointed by GWA as the concessionaire under the Concession Agreement;
- (e) “**CCU**” means the Consolidated Commission on Utilities, established under Public Law 26-76, and any successor or assignee of the CCU in respect of the rights and obligations of the CCU acquired and imposed pursuant to this Act;
- (f) “**Employee Coordinating Committee**” or “**ECC**” shall have the meaning defined in Section 5 (*Role of GWA Employees*);
- (g) “**Franchise**” shall have the meaning defined in Section 6 (*Water and Wastewater Service Franchise*);
- (h) “**GWA**” means Guam Waterworks Authority, established under Public Law 23-119:1, as amended from time to time;
- (i) “**G.C.A.**” means the Guam Code Annotated;
- (j) “**Government**” means the Government of Guam;
- (k) “**GWA Employee Transfer Terms**” shall have the meaning defined in Section 3(c);
- (l) “**GWA Systems**” means all or substantially all of GWA’s fixed and movable assets including GWA’s real property interests, the water production, treatment, transmission and distribution systems as well as the wastewater collection, treatment and discharge systems owned by GWA whether now possessed or hereinafter acquired as further defined in the Concession Agreement;
- (m) “**PUC**” means the Guam Public Utilities Commission, established under Public Law 17:74, as amended;

- (n) **“Rate Stabilization Agreement”** means the rate agreement, as amended from time to time, between the PUC and the Concessionaire as further described in Section 7 (*Rate Stabilization*) and Section 8(c) (*Pledge and Agreement by Government*);
- (o) **“RFP”** shall have the meaning defined in Section 4(c) (*Request for Proposals*);
- (p) **“Stipulated Order”** means the Stipulated Order for Preliminary Relief, dated June 5, 2003, as amended from time to time, approving the agreement between United States Government and GWA under which GWA has agreed to implement short-term projects and initial planning measures that begin to address certain environmental compliance issues; and
- (q) **“Transaction Documents”** means the Concession Agreement and any other agreements/legal instruments (as each may be amended from time to time) deemed necessary by the CCU for the award of the Concession over GWA Systems other than the Rate Stabilization Agreement.

**Section 3. Public-Private Partnership by Concession.** GWA shall enter into a public-private-partnership by a concession that provides a private contractor with the right to operate, maintain, design, construct, improve, manage, rehabilitate, expand, finance, repair and refurbish the GWA Systems as further defined in a Concession Agreement (the *“Concession”*) in accordance with the following guidelines and principles:

- (a) GWA shall (i) retain ownership over all of the real property assets and fixtures that comprise GWA Systems and lease such assets and fixtures to the Concessionaire during the Concession period, and (ii) continue to exist as a public corporation, which among other things administers the Concession Agreement as well as the other Transaction Documents during the Concession period;
- (b) The Concession shall uphold the principle that the water resources in Guam constitute a public asset and belong to the People of Guam. While the Concessionaire shall enjoy the same priority of use of such resources as GWA, the Concessionaire shall not receive any ownership interest in such water resources;

- (c) Subject to Section 13 (*Conflict of Interest*), the Concessionaire shall make a good faith offer of employment to each member of GWA's work force whose employment by GWA may be terminated as a consequence of the award of the Concession on terms and conditions (the "*GWA Employee Transfer Terms*") that meet or exceed the GWA compensation and benefits program, which applies to such member immediately prior to such award;
- (d) The Concession period shall extend for a period of up to 25 years with the option to extend for an additional period to be negotiated between GWA and the Concessionaire and based on satisfactory performance of the Concessionaire and the approval of the CCU;
- (e) The CCU shall select the Concessionaire through a transparent and competitive bidding procedure. Each bidder, or any number of members of a bidding consortium, (as the case may be) shall (i) satisfy minimum net asset value or market capitalization requirements, (ii) demonstrate substantial experience and expertise with the management, operation and maintenance of major water and wastewater projects, and (iii) possess a good reputation within, and/or outside, the United States market as a major independent water and wastewater service provider, in each case as further prescribed by the CCU in the pre-qualification and bidding rules;
- (f) The Concessionaire may be required to remit a fee (the "*Concession Fee*"), which among other things: (i) provides compensation for the grant of the Concession and lease over the GWA Systems; (ii) reimburses GWA for its transaction costs arising out of the preparation and award of the Concession, (iii) allows GWA to take out its outstanding indebtedness, (iv) funds GWA's operation costs during the Concession period, and (v) provides any other form of consideration for the award of the Concession that the CCU may deem appropriate, in each case as further described in the Transaction Documents;
- (g) The Concession Agreement shall obligate the Concessionaire to comply with the requirements of the Stipulated Order and all applicable Federal and local laws; and

- (h) To the extent required by applicable law, the United States Environmental Protection Agency shall have consented to the terms and conditions for the award of the Concession.

#### **Section 4. Transaction Process**

(a) **Management.** The CCU shall have the authority to develop a transaction structure, market the Concession opportunity to potential bidders, oversee the preparation of all bidding documents (including the request for proposal, information memorandum, and draft Transaction Documents), pre-qualify potential bidders, administer due diligence activities, negotiate terms of the Transaction Documents and otherwise manage the entire transaction process through the award of the Concession and subsequent turnover of GWA Systems to the Concessionaire. The CCU shall also formulate and prescribe rules for the pre-qualification of potential bidders as well as bidding rules for the selection of a preferred bidder consistent with this Act which shall not be subject to the Administrative Adjudication Law as provided in Chapter 9, Title 5 of the G.C.A. The CCU or its designee(s) shall serve as a single point of contact between the Government and potential offerors and subsequently with pre-qualified bidders as well as the preferred bidder.

(b) **Pre-Qualification.** The CCU shall pre-qualify potential bidders that express their interest based on objective selection criteria, which among other things shall (i) conform to the requirements established in Section 3(e) above, (ii) prohibit the participation of Ineligible Offerors described in Section 13 (*Conflict of Interest*) of this Act, and (iii) otherwise ensure that only world class private operators, or a bidding consortium with a world class private contractor as a member, qualify for the opportunity to bid for the Concession. To commence the pre-qualification process, the CCU shall arrange for the publication of an announcement requesting the submission of expressions of interest for the Concession from potential bidders in at least three major financial publications, one major trade magazine or journal, and one newspaper published in Guam.

(c) **Request for Proposals.** After the selection of pre-qualified bidders, the CCU shall prepare (to the maximum extent possible) a final set of terms and conditions for the Transaction Documents based on consultations with pre-qualified bidders prior to the issuance of the Request for Proposal (“RFP”). During such consultations, the CCU will seek to establish through an inter-active process the most favorable terms and conditions for GWA’s rate-payers on all non-bid price terms, including, but not limited to, Stipulated Order compliance, GWA System performance, water and wastewater service targets, the GWA Employee Transfer Terms, protection of existing annuities and other benefits received by retired GWA employees, continuity of service during system turnover, responsibility for environmental liability and changes-in-law, reduction of non-revenue water, performance bond coverage, buy-out pricing, base rate adjustments, extra-ordinary rate adjustments, fixed rate periods, customer service levels, responsibility for bulk water supply, GWA’s liability for default and any other requirement that the CCU may deem appropriate. The RFP may consist of among other things: (i) an invitation to submit a final bid for the Concession based (to the maximum extent possible) on financial criteria such as the lowest rate to be paid by rate-payers as well as any other criteria that the CCU may deem appropriate; and (ii) the Concession Agreement, other Transaction Documents (which shall include provisions that address the GWA Employee Transfer Terms) and a Rate Stabilization Agreement (approved by the PUC in accordance with Section 7(c) (*Regulatory Procedure*)). In addition to an order of the PUC that approves the Rate Stabilization Agreement, the CCU shall also obtain the Employee Coordinating Committee’s approval of the GWA Employee Transfer Terms that form part of the Transaction Documents before the CCU issues the RFP to pre-qualified bidders; *provided, however*, that the ECC shall be deemed to have automatically given such approval if either (i) the ECC fails to take affirmative action on the GWA Employee Transfer Terms within 21 calendar days of the CCU’s solicitation for approval, or (ii) the ECC by affirmative action withholds its approval of GWA Employee Transfer Terms that, in the reasonable opinion of the CCU, satisfy the criteria in Section 3(c).

(d) **Selection of Preferred Bidder.** The selection of the preferred bidder and the award of the Concession over GWA Systems shall not be subject to the

requirements of Chapter 5 of Division I, Title 5 of the G.C.A.,<sup>1</sup> or its companion rules and regulations. Upon its receipt of proposals from pre-qualified bidders, the CCU shall rank each responsive proposal and select a preferred bidder in accordance with the selection criteria set forth in the bidding rules prepared by the CCU.

(e) **Government Approval.** Upon the selection of a preferred bidder, the CCU shall obtain the Government's approval by statute of the Transaction Documents to be signed by the preferred bidder; *provided, however*, that the Government shall be deemed to have automatically given such approval if (i) the Government fails to enact legislation in response to the CCU's solicitation of approval within 45 calendar days of the date when the CCU transmits such solicitation to the Speaker of the Legislature, and (ii) the Governor approves such Transaction Documents.

(f) **Award.** Upon the Government's approval of the Transaction Documents, the CCU shall arrange for the satisfaction or waiver of all conditions precedent for the award of the Concession. Thereafter, GWA shall have the authority to award the Concession to the Concessionaire pursuant to the Concession Agreement. In the event that the preferred bidder cannot satisfy its conditions precedent within the time frame prescribed in the bidding documentation or the Transaction Documents (as the case may be), CCU may in its discretion cause GWA to terminate its relationship with the preferred bidder and repeat the process set forth in clause (e) above and this clause (f) with the next highest ranked bidder, and (if necessary) with each additional bidder according to their ranked status, until the award of the Concession.

#### **Section 5. Role of GWA Employees.**

(a) **Employee Coordinating Committee.** A coordinating committee (the "*Employee Coordinating Committee*" or "*ECC*") shall represent, and act for and on behalf of, GWA employees during the transaction process. The ECC shall consist of a minimum of five members and maximum of [●] members employed by GWA and elected by the GWA employees. As by-laws governing the ECC's deliberation, (i) the

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<sup>1</sup> Guam procurement laws.

affirmative vote of at least a majority of members in attendance at any meeting shall be necessary for any action taken by the ECC, (ii) the ECC members shall appoint one member (the “*Chairperson*”) to chair all meetings, (iii) the Chairperson (or his or her designee) shall have the authority to convene meetings of the ECC by providing each other member with at least 24 hour prior notice with an agenda of matters for resolution or discussion and delivering a copy of same to the CCU’s Transaction Sub-Committee, and (iv) the Chairperson shall cause written minutes of all actions taken to be prepared and delivered to each ECC member with a copy delivered to the CCU’s Transaction Sub-Committee. The ECC shall negotiate the GWA Employee Transfer Terms with the CCU for inclusion in the Transaction Documents.

**(b) Employee Financial Advisor.** GWA shall hire, and pay for, a financial advisor (the “*Employee Financial Advisor*”) who shall advise the ECC on the development and approval of the GWA Employee Transfer Terms, which satisfy the criteria in Section 3(c). Neither the Guam Procurement Act as provided in Title 5 of the G.C.A. nor the Guam Administrative Regulations that govern procurement shall apply to the procurement by GWA of the Employee Financial Advisor. The ECC shall provide input into the request for proposal distributed by GWA for the procurement of services to be provided by the Employee Financial Advisor.

**(c) Transaction Participation.** Each member of the Employee Coordinating Committee shall have a right to participate in the transaction process by attending regular meetings of the Communications Sub-Committee, established by the CCU to promote transparency and solicit stakeholder input during the preparation and issuance of the RFP for the award of the Concession.

## **Section 6. Water and Wastewater Service Franchise.**

**(a) Establishment.** Subject to the laws of Guam and the United States, *I Liheslaturan Guåhan* hereby constitutes and establishes a water and wastewater service franchise (the “*Franchise*”) which shall confer upon the holder thereof the privilege and right to (i) produce, treat, transmit, store, distribute and sell water to, as well as collect, treat and dispose of wastewater within the Service Area as a regulated common water and wastewater service provider, (ii) establish, modify

from time to time (with the approval of the PUC) as well as bill and collect from customers within the Service Area, reasonable rates and charges for water and wastewater services at levels consistent with the PUC's rate-setting policy, (iii) construct necessary works along or across any street or public highway or watercourse or public utility easement, or over any lands owned by the Government, (iv) construct necessary works on United States lands to the same extent as the Government may perform such works, (v) alter and redesign the GWA Systems, and (vi) conduct exploratory drilling, install pumps and extract bulk water from groundwater sources, on and underneath property possessed by the Government. "Service Area" means the entire Island of Guam; *provided, however*, that the Franchise holder shall have obtained approval from the United States Government before exercising any of its Franchise rights within real estate possessed by the United States Government or any branch or subdivision thereof.

**(b) Exclusivity.** The Franchise shall confer exclusive rights on the holder thereof, *provided, however*, that such exclusivity shall not limit, or impair, the right of other parties to (i) produce, distribute and/or sell bottled drinking water, or (ii) provide sanitation or plumbing services on customers' premises, in each case within the Service Area.

**(c) Transfer and Term.** On the date that GWA awards the Concession to the Concessionaire in accordance with Section 4(f) (*Award*), the Franchise shall automatically transfer by operation of law to the Concessionaire, which shall enjoy all of the rights and privileges of a holder of such Franchise, and the Concessionaire shall acknowledge its acceptance of the Franchise in the Concession Agreement. The term of the Franchise shall commence on the date of such award and expire upon the expiration or early termination of the Concession period as defined in the Concession Agreement.

**(d) Suspension.** The powers conferred on GWA under Sections 14104 (a), (d), (f) and (k) of 12 G.C.A.<sup>2</sup> shall be suspended and cease to have legal effect during the term of the Franchise.

(e) **No Assignment / Change-in-Control.** Except as otherwise provided in any Transaction Document, the Concessionaire shall not assign, sell or otherwise transfer the Franchise, or any of the rights or privileges arising thereunder, to any other party, nor merge with any other party, nor shall a direct or indirect controlling interest in the Concessionaire be transferred in whole or part, to any other party without prior CCU approval during the term of the Franchise.

(f) **Franchise Fee.** In an effort to ensure that the Concessionaire may provide water and wastewater services to its customers at the lowest possible rates and subject to Section 3(f), *I Liheslaturan Guåhan* waives payment by the Concessionaire of any fee or other consideration for the transfer and grant of the Franchise.

(g) **Regulatory Oversight.** For so long as the Concessionaire holds the Franchise (i) the PUC shall have regulatory oversight supervision over the Concessionaire which shall have the status of a “Public Utility” under 12 G.C.A. §12000(a), and (ii) GWA shall remain as a Public Utility under such law to the extent required to effectuate the intention of this Act.

(h) **Indemnity.** Prior to the award of the Concession, the Concessionaire shall have entered into an agreement with the Government, acting through the Governor, to indemnify, defend and hold harmless, the Government and all of its agencies, political subdivisions and corporations and any of their officers, employees and other representatives against personal injury, property damage and death directly or indirectly arising out of the exercise by the Concessionaire of its rights and privileges under the Franchise.

(i) **Restricted Activities.** The Concessionaire shall not distribute and/or sell bottled drinking water produced from water resources within Guam without the prior approval of the CCU.

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<sup>2</sup> Clauses (a), (d), (f) and (k) confer upon GWA the powers enumerated in Section 6(a)(i)-(vi) above.

**Section 7. Rate Stabilization.**

(a) **General.** On or prior to the Concession award date, the Concessionaire and PUC shall enter into an agreement (the “*Rate Stabilization Agreement*”) that establishes the process by which rates and connection charges payable by customers for water and wastewater services provided by the Concessionaire during the Concession period are established and changed. The PUC shall have the authority to establish, sign, execute, deliver, perform and enforce, such agreement including all amendments thereto (regardless of whether this Act expressly contemplates the terms in such agreement) so long as such terms do not conflict with this Act. Upon its execution and delivery, the terms of such agreement shall govern any and all changes to rates, and bind the PUC, the Concessionaire and each of their respective successors in interest and assigns during the Concession period.

(b) **Rate-Setting Policy.** The Rate Stabilization Agreement shall implement a general rate-setting policy that allows the Concessionaire to petition for the recovery over specified portions of the period of the Concession of (i) its operating and maintenance expenses efficiently and prudently incurred, (ii) applicable Guam business taxes, including corporate income taxes, (iii) Concession Fee payments, if made on an annual basis, or the amortization of Concession Fee payments, if made as a one time up front payment, (iv) depreciation, if applicable, (v) debt service payments incurred to finance prudently made investments, (vi) any other expenditures that the PUC may find just and reasonable under 12 G.C.A. § 12015(a), and (vii) a rate of return on direct equity invested and retained earnings, including a return on any unamortized Concession Fee if financed by equity by the Concessionaire. The rate setting policy shall balance the People of Guam’s need for affordable and reliable water and wastewater services against the Concessionaire’s need for an economically viable Concession. All rates and change determinations by the PUC that further the foregoing policy shall be deemed just and reasonable under 12 G.C.A. § 12015(a).

(c) **Regulatory Procedure.** As soon as possible after the effective date of this Act, the CCU on behalf of GWA shall prepare and file with the PUC a petition

for a Rate Stabilization Agreement, and the first associated rate plan contemplated by such agreement, that will apply on and after the award date of the Concession. As the CCU will select a preferred bidder on the basis that the Concessionaire shall provide rate-payers with water and wastewater services at a rate discounted from a benchmark rate required for GWA to provide the same services with the same level of subsidies, the provisions of Public Law 26-23<sup>3</sup> shall not apply to such petition. The Rate Stabilization Agreement and any such plan shall be subject to review and approval, approval with amendments or disapproval by the PUC after due notice and hearing in accordance with PUC rules and regulations and all other applicable law. The CCU shall obtain the PUC's approval of the Rate Stabilization Agreement prior to the distribution of the RFP. Each pre-qualified bidder shall have standing to participate under PUC rules and regulations in the foregoing proceedings prior to such issuance.

**Section 8. Government Support.**

(a) **Payment Guarantee.** The Governor shall have the authority for and on behalf of the Government to negotiate, execute and deliver, one or more instruments guaranteeing all payments by GWA arising under the Transaction Documents in favor of the Concessionaire and any other payee thereunder.

(b) **Exemption From Taxation.** In an effort to ensure that the Concessionaire may provide water and wastewater services to its customers at the lowest possible rates, the Concessionaire, all property acquired for the Concession and all revenues and income derived from the Franchise, shall be exempt from taxation by the Government or by any political subdivision or corporation thereof and from all taxes imposed under the authority of *I Liheslaturan Guåhan*, or with respect to which *I Liheslaturan Guåhan* is authorized to grant an exemption; *provided, however,* that the foregoing exemption shall (i) not apply to corporate income taxes payable by the Concessionaire under 48 U.S.C. § 1421i, and (ii) only apply to revenues and income derived from business activities expressly contemplated by the Concession Agreement.

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<sup>3</sup> The rate-payers' bill of rights, which imposes certain publication, notice and hearing requirements in addition to the PUC's own procedures for rate increases.

(c) **Pledge and Agreement by Government.** The Government hereby pledges to and agrees with the Concessionaire (for so long as the term of the Concession has not expired or terminated), and the holders of any notes or bonds issued by GWA or the Concessionaire (until such notes or bonds have been fully paid, met and discharged) and payable solely from revenues of the Concessionaire, that the Government shall not: (i) materially limit, restrict or otherwise impair the rights and powers of the Concessionaire arising under this Act (as of the award of the Concession), the Transaction Documents or the Rate Stabilization Agreement to establish, maintain, revise, invoice and collect rates, fees and other charges from its customers; (ii) repeal, amend or modify Chapter 12, Title 12 of the G.C.A. in any way that would materially impair the powers, duties or effectiveness of the PUC thereunder in relation to the Concessionaire and its rates; or (iii) limit, restrict or otherwise impair the powers vested in GWA and the Concessionaire under the following sentence. The Government hereby authorizes GWA and the Concessionaire to include this pledge and agreement in any agreement with the holders of such notes or bonds issued by GWA or the Concessionaire, respectively, for and on behalf of the Government.

**Section 9. Security Interests.** Subject to any restriction that may be contained in the Transaction Documents or the Rate Stabilization Agreement, the Concessionaire and its affiliates shall have the right to create security interests over any of its assets, rights or interests, as required to secure any financing needed for the purpose of fulfilling its obligations under the Concession Agreement, including, in particular (i) a pledge of payment receivables from the Concessionaire's rate-payers, (ii) a pledge of termination payments and any other remittances by GWA or any agency of the Government contemplated by the Transaction Documents, (iii) a pledge of any indirect ownership interest in the Concessionaire (*provided, however,* that the CCU shall have the right to approve the documentation evidencing such ownership pledge), and/or (iv) any security interest over new assets contributed to the GWA Systems by the Concessionaire to finance the acquisition or construction of such assets.

**Section 10. Enforcement and Amendments of Transaction Documents.** The CCU shall have the power and oversight authority to (i) enforce, and cause GWA to enforce,

the Transaction Documents, and (ii) amend, and cause GWA to enter into amendments of, the Transaction Documents; *provided, however*, that the CCU shall also obtain the approval of *I Liheslaturan Guåhan* for all material amendments. For the purpose of this section, “*material amendment*” means any amendment to a Transaction Document that either substantially conflicts with the principles and guidelines for the Concession defined in this Act, or substantially increases the Government’s exposure under the payment guarantee described in Section 8(a) (*Payment Guarantee*).

**Section 11. Protest Provisions.**

(a) **Standing.** Only parties who have satisfied the pre-qualification criteria established by the CCU (as evidenced by the CCU’s resolution confirming such satisfaction) and submitted a proposal in response to the RFP shall have standing to protest the CCU’s selection of a preferred bidder or the CCU’s ranking of the proposals submitted by each pre-qualified bidder (the “*CCU’s Selection and Ranking Decision*”).

(b) **Timing of Protest.** The CCU must receive a protest within five Guam business days of the date on which the CCU selects the preferred bidder.

(c) **Form and Content of Protests.** Protests shall be in writing and set forth the factual and legal basis(es) in support thereof. Protests shall be addressed to the CCU and one original, five copies and one electronic copy shall be included in the protest package. The protesting party shall also simultaneously forward the protest package with the same types and number of copies to the PUC.

(d) **CCU Review.** The protesting party and the CCU shall exercise reasonable efforts to resolve such protest on an amicable basis within ten Guam business days of the date on which the CCU receives the protest package. In the event the protesting party and the CCU cannot resolve such protest in accordance with the preceding sentence, the PUC shall review the protest in accordance with subsection (e) below.

(e) **PUC Review.** Within 60 calendar days of its receipt of the protest package, the PUC shall review each protest that cannot be resolved in accordance with subsection (d) above and prepare a written decision (“*PUC’s Decision*”) based

upon whether the CCU's Selection and Ranking Decision was 'arbitrary' or 'capricious', or whether there existed fraud in the evaluation process that had a material and demonstrable effect upon such decision. In conducting such review, the PUC may request and consider additional information submitted by the protesting party and shall request and consider the comments of the CCU on the protest. To the fullest extent permitted by applicable law, the PUC's Decision shall be final and *not* subject to review or appeal.

## **Section 12. Amendments**

**(a) Priority of Water Uses.** Section 7 of Public Law 20-06 is hereby *amended* by deleting all references to "*Public Utility Agency of Guam*" and replacing such references with "*Guam Waterworks Authority and its concessionaire*".

**(b) Well Drilling Activities.** Section 2(d) of Public Law 22-18 is hereby *amended* by deleting all references to "*Public Utility Agency of Guam*" and replacing such references with "*Guam Waterworks Authority and its concessionaire*".

**(c) PUC's Rate-Setting Policy.** Section 12004 of 12 G.C.A. is hereby *amended* by inserting the following sentence after the second paragraph:

"Notwithstanding any other provision of this Act, the Commission will ensure that rates and connection charges for water and wastewater services rendered by the Guam Waterworks Authority's concessionaire during the period that such concessionaire holds the water and wastewater service franchise shall at all times be sufficient for the recovery over specified portions of the period of the concession of (i) its operating and maintenance expenses efficiently and prudently incurred, (ii) applicable Guam business taxes, including corporate income taxes; (iii) concession fee payments, if made on an annual basis, or the amortization of concession fee payments, if made as a one time up front payment, (iv) depreciation, if applicable, (v) debt service payments incurred to finance prudently made investments, (vi) any other expenditures that the Commission may find just and reasonable under 12 G.C.A. § 12015(a), and (vii) a rate of return on direct equity invested and retained

earnings, including a return on any unamortized concession fee if financed by equity by the concessionaire.”

**(d) Charges for Water Use.** Section 12015.3 of 12 G.C.A. is hereby *amended* by inserting the following clause at the end of the section:

“(i) For the avoidance of doubt, Guam Waterworks Authority’s concessionaire shall not qualify as a private water well operator, and such concessionaire shall not be required to pay monetary charges for water drawn by such concessionaire at anytime during the concession period.”

**(e) Bond Issuance.** Section 50103(k) of 12 G.C.A. is hereby *amended* by inserting the following clause at the end of the section:

“Notwithstanding the foregoing or Article 2 of 12 Guam Code Annotated, the Guam Waterworks Authority shall have the authority to issue qualified private activity bonds or other instruments of indebtedness itself as a source of financing for capital improvements to be undertaken by the Guam Waterworks Authority’s concessionaire without the approval of the Legislature or the Guam Economic Development & Commercial Authority on the conditions that (i) the concessionaire is not in default under the concession agreement with the Guam Waterworks Authority at the time of such issuance, (ii) the concessionaire fully and completely indemnifies the Guam Waterworks Authority against, and takes full responsibility for, all payments of principal and interest, contingency amounts and any other amounts of any kind arising out of such issuance, (iii) a pledge of, and lien upon, the rate revenue remitted by rate-payers for the provision of water and wastewater services secures the payment obligations arising out of such bonds or other instruments, and (iv) the Public Utilities Commission pre-approves such issuance.”

**(f) Certification of Sewer Lines.** Section 5401(3) of 12 G.C.A. is hereby *amended* by deleting the reference to “*Guam Waterworks Authority*” and replacing such reference with “*Guam Waterworks Authority (or, during any period in which the Guam Waterworks Authority has granted a concession, its concessionaire)*”.<sup>4</sup>

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<sup>4</sup> Section 5401(3) defines that certain plan for the development of the As-Tumbo subdivision, and provides that such plan shall require “adequate sewer lines, as certified in writing by Guam Waterworks Authority and the Guam Environmental Protection Agency.”

**(g) GWA's Rule-Making Powers.** Section 14104(j) of 12 G.C.A.<sup>5</sup> is hereby *amended* to read as follows:

“(j) to adopt such rules and regulations as may be necessary for the exercise of these enumerated powers; *provided, however,* that from the date of the award of the concession by the Authority through the expiration or termination thereof, to exercise such powers and to adopt such rules and regulations as may be required pursuant to the Authority’s agreements with its concessionaire or otherwise necessary to give effect to such concessionaire’s franchise, for so long as such franchise shall remain in effect together with its concessionaire through a joint rule-making committee established pursuant to and in accordance with the concession agreement;”

**(h) Guam Administrative Rules.** Section 2101(a) of Title 28 of the Guam Administrative Rules and Regulations is hereby *amended* to read as follows:

“(a) 12 GCA, Section 14104(j) authorizes the Guam Waterworks Authority to prescribe rules and regulations, including matters pertaining to business management, as may be necessary for the proper and efficient operation of the Agency, or as may be required pursuant to the Authority’s agreements with its concessionaire or otherwise necessary to give effect to such concessionaire’s franchise, so long as such franchise shall remain in effect, and to do so together with its concessionaire through a joint rule-making committee during the period from the date of the award of the concession to the termination or expiration thereof. Such rules and regulations shall include, but not be limited to, the manner in which charges for utility services and installation shall be paid to the Agency. During any period in which the Guam Waterworks Authority has granted a concession, each reference to the Guam Waterworks Authority, GWA or the Agency in the Rules and Regulations of this Article 1 (other than this Section 2101(a)) shall refer exclusively to the Guam Waterworks Authority’s concessionaire.”<sup>6</sup>

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<sup>5</sup> Section 14104 of the GWA Act lists GWA’s powers.

<sup>6</sup> Confirm with Guam counsel that the GAR may be modified by legislative action, without GWA or public involvement.

**(i) Frank D. Perez Economic Revitalization and Enhancement Zone Act.**<sup>7</sup>

(i) Section 58104 of 12 G.C.A. is hereby *amended* to read as follows:

“11. producing water or disposing of wastewater, or both, jointly with, or pursuant to a concession granted by, the Guam Waterworks Authority;”<sup>8</sup>

(ii) Section 58128.7(a)(8) of 12 G.C.A. is hereby *amended* to read as follows:

“(8) Private Water Contractor. ‘Private Water Contractor’ means a corporate entity or partnership, including the Guam Waterworks Authority’s concessionaire, which operates a community-wide water production and distribution system, a wastewater disposal system, or both such systems under a concession agreement or other form of joint operating agreement with the Guam Waterworks Authority.”

**(j) Contractor Licenses.** Section 70116(a)(19) of 21 G.C.A. is hereby *amended* by deleting the reference to “Guam Waterworks Authority” and replacing such reference with “Guam Waterworks Authority (or its concessionaire)”.<sup>9</sup>

**(k) Deep Well A-32.** Section 3 of Public Law 27-73 is hereby *amended* to read as follows:

“Section 3. Any interest of the Guam Waterworks Authority (GWA) in the lot identified as Lot No. 64-3, Agana Heights, containing an area of 5,120.23± square meters, as shown in Instrument No. MA11092, Department of Land Management, and Document No. 340078, Department of Land Management, with the exception of that area required by GWA or its concessionaire for the purpose of protection, development and production of ground water for the use or resale by GWA or its concessionaire, specifically Deep Well A-32, shall be conveyed from the Guam Waterworks Authority to the government of Guam for public recreation purposes.

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<sup>7</sup> The Act establishes the qualifying certificate program as an economic incentive tool to entice investors into Guam. This amendment allows the Concessionaire to qualify for an income tax rebate as a “private water contractor”.

<sup>8</sup> Section 58104 prescribes the eligibility requirements for a qualifying certificate.

<sup>9</sup> Section 70116 deals with the revocation, suspension and non-renewal of licenses issued by the Contractors License Board. Section 70116(a)(19) describes the willful failure to pay when due a debt or penalty incurred for

The government of Guam hereby grants to the Guam Waterworks Authority an easement over Lot No. 64-3 in Agana Heights, required for GWA to use, maintain, operate, utilize, repair and access Deep Well A-32 for the purpose of protection, development and production of ground water for the use or resale by GWA in the interests of the public health and welfare of the people of Guam, with such rights taking effect upon the conveyance by GWA of Lot No. 64-3, Agana Heights, to the government of Guam. GWA shall have the right to lease its rights arising out of such easement to its concessionaire.”<sup>10</sup>

**Section 13. Conflict of Interest.**

**(a) General.** No Restricted Person (as defined below) shall be eligible to acquire, directly or indirectly, an ownership interest in the Concessionaire for two years after the date of the award of the Concession. For the purpose of this Section 13, the term “*Restricted Person*” shall mean any:

(i) elected or appointed officials of the Government and members of *I Liheslaturan Guåhan* who hold office at any time during the period (the “*Restricted Period*”) that commences on the date when the CCU first solicits expressions of interest from potential bidders under Section 4(b) (*Pre-Qualification*) hereof and expires on the date of the award of the Concession;

(ii) any GWA employee (including any unclassified manager of GWA), or any person under contract with the CCU, who participates as a member of the CCU’s Transaction Sub-Committee at any time during the Restricted Period;

(iii) advisor or consultant who worked with the CCU or GWA to develop the Request for Proposal during the Restricted Period;

(iv) advisor, consultant or employee of *I Liheslaturan Guåhan* who advised or worked with *I Liheslaturan Guåhan* on matters related to the Concession during the Restricted Period;

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damaging a public utility operated by GTA, GPA, GWA or the Department of Public Works as one of several causes for such revocation, suspension or non-renewal.

<sup>10</sup> Public 27-73 transferred Lot 64-3, which the Government initially conveyed to GWA in 1997, back to the Government for recreation purposes, subject to GWA’s rights to access and use Deep Well A-32.

(v) escrow agent that holds funds on deposit for any purpose related to the Concession during the Restricted Period, or any of its directors, officers or, *if* such escrow agent has *not* issued publicly-traded securities, owners of any percentage of such agent's outstanding beneficial interests;

(vi) offeror, or any legal entity comprising an offeror, with a director or officer (or, *if* such offeror has not issued publicly-traded securities, a person that directly or indirectly holds an ownership in such offeror) who is:

(1) related by consanguinity of the third degree, which, for the purposes of this Act, shall include all children, parents, grandchildren, siblings, grandparents, great-grandchildren, nieces, nephews, uncles, aunts and great-grandparents of a person, to any person described in §§ 13(a)(i), (a)(ii), (a)(iii), (a)(iv) or (a)(v) above;

(2) related by consanguinity of the third degree to the spouse of any person described in §§ 13(a)(i), (a)(ii), (a)(iii), (a)(iv) or (a)(v) above;

(3) the spouse of a person related by consanguinity of the third degree to any person described in §§ 13(a)(i), (a)(ii), (a)(iii), (a)(iv) or (a)(v) above; *or*

(4) the spouse of any person described in §§ 13(a)(i), (a)(ii), (a)(iii), (a)(iv) or (a)(v) above; *and*

(vii) offerors or any entity comprising an offeror or affiliated with an offeror, who has paid or agreed to pay any person described in §§ 13(a)(i), (a)(ii), (a)(iii) or (a)(iv) above, for the purpose of advising, consulting, representing, brokering or otherwise assisting such entity in its efforts to acquire the Concession.

In addition, the successful offeror shall *not* solicit for employment or employ any person described in §§ 13(a)(i), (a)(ii), (a)(iii) or (a)(iv) above, for the period *prior* to and two years *after* the award of the Concession, nor shall any subcontract or business arrangement be entered into between the successful offeror and any firm in which a Restricted Person has any financial

interest, for the period *prior* to and two years *after* the award of the Concession; *provided, however*, that such offeror may retain any unclassified manager of GWA who qualifies as a Restricted Person for a period *not to exceed* one year *after* the date of the award of the Concession for the sole purpose of providing post-closing transition assistance.

Also for the purpose of this Act, the term "*official of the Government*" means any person holding any elected office in Guam or any appointed member of the Government, including members of boards, commissions and task forces, as well as any person working directly for the office of *I Maga'lahaen Guåhan* or otherwise under contract to the office of *I Maga'lahaen Guåhan*.

**(b) Economic Benefit.** Subject to Sections 13(a) (*General*) and 13(c) (*Limitations on Employment*), no Restricted Person (as defined in Section 13(a) (*General*) above) shall receive any economic benefit from any offeror or entity comprising an offeror.

**(c) Limitations on Employment.** For the avoidance of doubt, nothing in this Act shall limit the ability of any person, including any employee of GWA or persons under contract with the CCU, (other than a Restricted Person) to obtain employment with, and/or receive or purchase an ownership interest (either as individual shares or as part of any employee stock purchase program) in, the Concessionaire or its parent company, subsidiaries or affiliates.

**(d) Publicly-traded Securities.** For the purposes of this Section, "*publicly traded securities*" means any securities traded on a recognized national market in the U.S. or comparable market exchange outside of the U.S.

**Section 14. Procurement by Concessionaire.** Neither the Concessionaire nor the expenditure of any funds received by the Concessionaire shall be subject to either the Guam Procurement Act as provided in 5 G.C.A. or the Guam Administrative Regulations that govern procurement. The Concessionaire shall procure goods and services in accordance

with the Concession Agreement. Section 14104.1 of 12 G.C.A. (Sec. 15 of P.L. 26-76)<sup>11</sup> is hereby *repealed* in furtherance of the objectives of this Section 14 and the intention of this Act.

**Section 15. Repealing Clause.** Except where this Act expressly suspends their legal effect, all laws or parts of any law inconsistent with the provisions of this Act are hereby repealed or amended accordingly.

**Section 16. Severability Clause.** If any court or tribunal invalidates any provision of this Act, the other provisions not affected by such invalidation shall continue in operation.

**Section 17. Effectiveness.** This Act shall take effect upon enactment.

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<sup>11</sup> Section 14104.1 imposes certain contractual restrictions on GWA, mainly with respect to maintenance services relative to sewage pumps, booster pumps, and all pumps and other facilities directly associated with water wells (responsibilities that the Concessionaire shall assume pursuant to this Act).