



March 31, 2023

**OFFICE OF THE SPEAKER
THERESE M. TERLAJE**

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Time: 1:51pm
Received: [Signature]

Honorable Lourdes A. Leon Guerrero
Governor of Guam
Ricardo J. Bordallo Complex
513 West Marine Corps Drive
Hagåtña, GU 96910

Subject: Review of Lease Between the USA & GovGuam, DLM for Hospital & Medical Campus

The purpose of this communication is to address an unsigned lease between the U.S. Government and the Government of Guam, Dept. of Land Management provided to the AG's Office on Tuesday, March 14, 2023.

As a preliminary disclosure, this AG's Offices was *not* part of the negotiations leading up to the document that is the subject of this communication. As such, we were unable to earlier recommend any corrective changes to this attached lease. Further, the AG's Office understands that the Lessor will have signed the lease before issuance of this communication, and has committed to its terms.

Background.

Attached and identified as **Exhibit 1** is an unsigned lease agreement entitled, *Lease Between the United States of America and the Government of Guam, Department of Land Management* ("Lease"). The Lease is between the U.S. Government through the Secretary of the Dept. of the Navy and the Government of Guam, Dept. of Land Management.

The essential contractual terms are as follows (see attached *Exh. 1*):

1. Lease duration is for 50 years, with a 25 year option (75 yrs. total) from March 23, 2023 to March 14, 2073 for land located in Barrigada & Mangilao (Tract 18308, See Lease Attachment A (map)), ¶ 3;
2. Lease consideration (Lease payments) shall be fair market value for first 10 years (and shall not be payable if facility constructed and operational in 10 yrs.); and/or providing "*in-kind*" services (Attachment F for "*in-kind* services")

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has not been agreed to); note also Attachment C setting forth fair market values, ¶ 4.2;

3. Scope of the Lease project is "Attachment B," which is not identified, ¶ 4 and use specified in ¶ 5.1 (hospital & medical campus (*only*));
4. Damages are in the context of *not completing the project*, as set forth in Attachment C (rent schedule), ¶ 4.1; and default is set forth in ¶¶ 4.6 and 4.11.6; and
5. Purpose of the Lease is to build a hospital and medical facility for use by the People of Guam and "to benefit the military service members or dependents" with a takeover clause for full use by the military in a "war" or "national emergency," ¶ 5.1.

Based upon our meeting the undersigned further understands that the existing Guam Memorial Hospital located in Oka Tamuning will be replaced (shut down) due to its structural problems. The hospital and medical campus as described in the Lease is slated to be its sole replacement. Further, that the Lease project will cost in excess of \$700,000,000 and will be Guam's only hospital (replacement facility to GMH).

Legal Issues.

The Lease provides numerous legal problems that preclude this Office's approval in its present form. Those legal issues include:

- I. Non-compliance with Federal & Local Laws and not involving the Guam Legislature in authorizing and appropriating funds for the Lease; and
- II. Lease for Guam's Hospital / Medical Campus precluding access by the People of Guam.

Legal Analysis.

I. Role of the Guam Legislature Relative to the Lease.

The Organic Act of Guam provides that appropriations authority rests with the Guam Legislature (i.e. *Appropriation's Clause*). 48 U.S.C. § 1423j. Simultaneously, the Organic Act also provides that the Governor shall have supervision and control authority over departments and agencies and instrumentalities of the Executive Branch. The Governor shall also, "*subject to the laws of Guam*," have the duty to establish, maintain and operate public health services, including hospitals. 48 U.S.C. § 1421g. Under the Organic Act of Guam, both branches of government serve as a "*check and balance*" upon the other's actions in service of the People of Guam (Govt. of Guam).

A. Lease Commits Government of Guam Money and Resources Without Legislative Appropriation and is Not an Enforceable Lease.

The Supreme Court of Guam has made clear that the Governor is unable to enter into a contract that constructively appropriates funds by obligating the Government to pay an entity, such as a Lessor. *Pangelinan v. Gutierrez*, 2003 Guam 13, ¶ 22. Guam's High Court in *Pangelinan* stated,

[22] The Legislature undisputedly has not appropriated funds for the 1996 Agreement. Contrary to the lower court's holding, a thorough examination of the contractual provisions quoted at length indicate that the 1996 Agreement attempts to improperly divest the Legislature of its authority to appropriate funds by obligating the Government to pay GRRP a certain sum of costs as defined in the agreement, in the event that requisite legislative approval is not obtained in the first instance. See 1996 Agreement, Sections 4.03 and 4.04. Appellees' representation of the validity of the 1996 Agreement as being completely dependant upon legislative approval contradicts any reasonable interpretation of the terms of the contract. In fact, the 1996 Agreement improperly "set[s] apart from the public revenue a certain sum of money for a specified object," which is in effect, an appropriation. *In re Request of Gutierrez*, 2002 Guam 1 at ¶ 38. As a result, the court finds that the 1996 Agreement is in violation of 48 U.S.C. § 1423j, which reserves for the Legislature the plenary authority to appropriate funds. (Emphasis added).

Id. In this case the Lease clearly binds and commits the Government of Guam to make actual fair market value payments in the event that the project is not completed in 10 years. See Lease ¶¶ 4, 4.1, 4.2, 4.6 and 4.11.6, Attachment C. *Infra*. Further, it makes reference to an undefined "in-kind" consideration obligating the Government of Guam to provide (unspecified) assets or resources. *Infra*.

The Appropriations clause is a foundational tenement separating and balancing the Executive Branch's "power of the sword" from the Legislative Branch's "power of the purse." *United States House of Representatives v. Mnuchin*, 976 F.3d 1, 8 (D.C. 2020). Regarding the funding sources, although not expressly identified in the Lease, even if federal grant money were to be used for payment of this Lease for the next 50 – 75 years¹, Courts have held that block grant funding requires appropriation decisions by the Legislative Branch. *Cooper v. Berger*, 852 S.E.2d 46 (N.C. 2020). Regardless, the Lease poses a financial obligation upon the Government of Guam under ¶¶ 4, 4.1, 4.2, 4.6 and 4.11.6 (payment obligations & default provision) for paying 10 years of fair market rent if the hospital and medical facility are not built in 10 years and other terms are not satisfied.

¹ Lease terms provide a 50 year initial term, then renewable by option for another 25 years.

Most importantly, the alternative “in-kind services,” Attachment F, has not been agreed to. Therefore, the Lease obligates the Guam taxpayers (aka Govt. of Guam) to paying the fair market rent at the time of signing of the Lease. This money amount (fair market value, Attachment C) has not been appropriated by the Guam Legislature as required by Guam local and Federal law. *Infra*.

The danger posed by not having Attachment F agreed to at the signing of the Lease is two (2) fold. First, a material term has *not* been agreed to making the Lease unenforceable, *infra*. The second consideration, assuming that the lack of an in-kind consideration agreement between the parties is lacking but the Lease might otherwise be found enforceable² in a Court, is that the Lease will then plainly require a fair market value cash payment by the Government of Guam to Lessor.

The lease contains several provisions that discuss consideration (payments), to include:

4. CONSIDERATION Payment of fair market rental value shall accrue from the start date of this lease and be deferred until the facilities described in Attachment B are constructed and operational, and/or agreed upon services provided, but no longer than ten (10) years from the commencement date of this lease.

4.1. The Secretary of the Navy has determined that use of the facilities set forth in Attachment B for Department of Defense mission purposes including the benefit of United States military service members and dependents, and/or agreed upon services and/or facilities, provides the requisite in-kind consideration. If any of the facilities described in Attachment B (to be attached to this lease by modification prior to end of the accrual period) are not constructed within ten (10) years of the Start Date of this lease, or if Lessee refuses access and/or use to the Department of Defense for mission purposes including the benefit of United States military service members or dependents, Lessee shall pay cash consideration proportionately in an amount determined by the Secretary of the Navy for the loss in use of that facility, those facilities or services. If the Guam Public Hospital and Medical Complex is not constructed within ten (10) years of the Start Date of this lease, the Government may terminate this lease and Lessee shall remove all equipment and facilities from the leased property and Lessee shall pay all rent accrued to the Government without recourse to any claim of damages from the United States Government or any Department thereunder. Lessee shall provide the RECO biannual progress reports on the financing and construction of facilities.

4.2. As required by Title 10 United States Code, Section 2667, the Government of Guam shall pay to the Government annual fair market value rent, the amount of which has been determined by the Secretary of the Navy as set forth in the rent schedule, Attachment C, herein, for the term of this lease either in cash or in-kind consideration services and/or facilities. In-Kind Consideration shall be mutually agreed upon by the Parties to this lease and more particularly detailed in the In-Kind Consideration Services Memorandum of Agreement (MOA) between US Department of Navy and the Government of Guam which shall be executed and made a part of this Lease as Attachment F no later than one hundred twenty (120) days after the execution of this Lease. Government shall credit In-Kind Consideration Services and Benefits made available to the Government in accordance with the aforementioned MOA as consideration toward the Lessee's rental obligation. The Secretary of the Navy has determined that the services and/or facilities and benefits to be received in the form of In-Kind Consideration is not less than the fair market value of the lease interest hereunder, pursuant to the terms herein, and in accordance with the provisions of 10 U.S.C. §2667(c)(1)(F)

4.6. Lessee's failure to initiate construction of the Guam Public Hospital and Medical Complex during the Accrual Period is attributable to default under this lease. Lessee's failure to achieve an Operational Date within ten (10) years of commencement of the Start Date of this Lease shall be attributable to default under this Lease. Lessee's failure to perform good faith effort to comply with the terms of this Lease and the MOA attributable to In Kind Consideration Services and/or facilities during the Performance Period of this lease shall be attributable to default under this Lease.

² It is our opinion that the lack of an in-kind agreement envisioned by the parties makes the Lease unenforceable under Guam law as a material term has not been agreed to, and may never be reached. *Infra*.

Lease payments are “*deferred*” under ¶¶ 4 and 4.3 (if updates are provided as required and the project is completed in 10 year period); *however*, the obligation to pay fair market value clearly exists in the lease as a requirement if the facility is not built on schedule. Likewise, the “*in-kind*” payment described in the lease likewise is a form of consideration and carries with it a “*value*” that is clearly within the appropriations authority and duty (obligation) for only the Guam Legislature to decide in order to bind the Government of Guam (People of Guam). Notably, “*deferred lease payments*” does not equate to no consideration, nor does it dispense Lessee Government of Guam being obligated to pay to Lessor money or undefined in-kind consideration. *Infra*.

The Supreme Court of Guam likewise acknowledged that the Governor does indeed have the prerogative to administer the expenditure of funds; *however*, the funds must first have been appropriated. *Pangelinan v. Gutierrez*, 2003 Guam 13, ¶ 24. To do otherwise removes the Governor from acting within the Office’s authority, and that any contract (lease) is a “nullity.” *Id*. The Supreme Court of Guam clearly decided,

[24] Certainly, we do not attempt to limit the executive branch’s prerogative in administering the expenditure of funds which are appropriated. However, where the Governor involves the Government in a contract for the payment of money, without the requisite legislative approval for such contract, the Governor acts so without authority. See *Cray Research, Inc. v. United States*, 44 Fed. Cl. 327, 333 (1999) (finding that the contracting officer was without authority to contract in advance of appropriations).

[25] As a result of a violation of 48 U.S.C. § 1423j and 5 GCA §22401, we find the 1996 Agreement to be a nullity. “If contracts violative of statutory prohibitions may be executed by government agencies and subsequently enforced, the power of the legislature and the processes of government itself would be undermined.” *Heyl & Patterson Int’l v. Rich Housing of Virgin Islands, Inc.*, 663 F.2d 419, 432 (3d Cir. 1981). See also *Robert F. Simmons and Assocs. v. United States*, 360 F.2d 962, 965 (Ct. Cl. 1966) (“It is settled law that an agency of the Government cannot create a binding contract without the authority of an appropriation of funds from the Congress to cover the contract. If such an unauthorized contract is entered into, it is a nullity.”); *Hooe v. United States*, 218 U.S. 322, 334, 31 S. Ct. 85, 88 (1910) (“If an officer, upon his own responsibility, and without the authority of Congress, assumes to bind the government, by express or implied contract, to pay a sum in excess of that limited by Congress for the purposes of such a contract, the contract is a nullity, so far as the government is concerned, and no legal obligation arises upon its part to meet its provisions.”). *Cray Research, Inc.*, 44 Fed. Cl. at 333 (holding that where the contracting officer was without authority to contract in advance of appropriations, the Government “would not be bound . . . because the government is not bound by the unauthorized acts of its agents.”). (Emphasis added).

Id. at ¶¶ 24 and 25. Guam's High Court also cited the Guam Procurement Law limiting the Governor's ability to enter into contracts, which likewise applies in this case. *Id.* at ¶ 25. *Infra.*

In another case, the Supreme Court of Guam stated *In re Request of Gov. Felix Camacho Relative to the Education Facilities Construction Initiatives*, former Gov. Felix Camacho entered into a 20-year financing lease that pledged future Compact Impact Funds as payment. Guam's High Court ultimately held that the lease was valid because the legislature had enacted specific legislation that allowed the Governor to enter into the lease and to pledge the Compact funds. See *In re Request of Gov. Felix Camacho Relative to the Education Facilities Construction Initiatives*, 2006 Guam 5 ¶¶ 35-36. In this case the Guam Legislature has not done so. *Infra.*

Nevertheless, Guam's High Court also analyzed the case under a general rule that a sitting governor may not enter into contracts which extend beyond his term and thereby bind his future successors. *Id.* at ¶¶ 28-29. There are two (2) exceptions to this general rule: (1) if the legislature approves the long-term contract (applicable here); or (2) if the subject matter of the contract involves a proprietary (aka business) matter as opposed to a government function. *Id.* at ¶ 30. In other words, if legislative approval has not been given for the incurrence of long-term debt, then under the second exception a governor can still bind his successor to a contract if the subject matter involves a "proprietary function." *Id.* ¶ at 42. But if the contract relates to a "governmental function," then "no action taken by the sitting Governor is binding upon his successors." *Id.* at ¶ 42.

A "proprietary function" refers to a business matter. *Id.* ¶ 42. Even then, however, the contract at issue must be "reasonable" and "entered into in good faith." *Id.* ¶¶ 49, 51. In contrast, examples of a "governmental function" include the decision to build a school [*Id.* at ¶ 46] and the preservation of public health. *Id.* at ¶ 43. Clearly, the decision to build a new hospital is a governmental function since it relates to the preservation of public health. So under the basic general rule expressed by the Guam Supreme Court, the Governor cannot enter into a long-term contract and thereby bind future governors to the debt without prior legislative approval. As noted in *Bordallo v. Baldwin*, the decision on whether or not a hospital shall exist is within the purview of the Guam Legislature. *Bordallo v. Baldwin*, 624 F.2d 932, 934 (9th Cir. 1980). *Infra.*

Based upon the foregoing the Lease as written cannot be signed by this Office.

B. Lease Not in Compliance with Guam Procurement Law.

The Lease appears to violate the Guam Procurement Law, 5 G.C.A. § 22401(a)(3). In *Pangelinan v. Gutierrez*, the Supreme Court of Guam made clear that the Governor must follow the Guam laws that regulate procurements before entering into contracts, such as this Lease pending our Office's review. **Exhibit 1.** *Pangelinan v. Gutierrez*, 2003 Guam 13, ¶ 16. See also 5 GCA § 22401(a)(3). Guam's High Court stated in striking down the GRRP contract,

[16] Although not specifically cited by the parties or the lower court, as a corollary to Section 1423j, Title 5 GCA §22401(a)(3) provides that, "No officer or employee of the government of Guam, including the Governor of Guam, shall . . . [i]nvolve the government of Guam in any contract or other obligation, for the payment of money for any purpose, in advance of the appropriation made for such purpose. . . ." Title 5 GCA §22401(a)(3) [FN not included] (Emphasis added).

[23] Furthermore, we find the 1996 Agreement to be in violation of 5 GCA §22401. Under the terms of the 1996 Agreement, the Government is exposed to a potential liability in the amount of millions of dollars, if, through its own fault, certain conditions required of it by the contract are not met, one of which, incidentally, includes legislative approval. The Governor of Guam, in advance of the appropriation made for the purpose of the 1996 Agreement, entered into the agreement and thereby "involv[ed] the government of Guam in a contract or obligation for the payment of money." 5 GCA §22401(a)(3) (emphasis added). Such an action constitutes an "illegal expenditure." 5 GCA §22401 (quoting title). (Emphasis added).

Pangelinan v. Gutierrez, 2003 Guam 13, ¶¶ 16 and 23. In the lease contract it contains several paragraphs that make the Government of Guam liable "for payment of money for any purpose." Those provisions include Lease ¶¶ 4, 4.1, 4.2 (fair market value rent due to Lessor or in-kind consideration identified in the *not yet negotiated* Attachment F), and 4.6 and 4.11.6 (default requiring payment). Like in *Pangelinan*, the Lease exposes the taxpayers to millions in dollars of cash payments if certain conditions are not met, a.k.a. default. See Lease ¶¶ 4.6 and 4.11.6. See also *Id.* at 23. The Lease's default provision expressly requires full payment in cash by the Government of Guam, stating,

4.11.6. Default in Accrual and Performance Periods. Lessee's failure to perform good faith effort during the Accrual and Performance Periods to comply with the terms of this Lease and in accordance with Attachment F is attributable to default under this Lease. Rental payments deferred, but not paid, will become immediately due and payable in Cash Rent in accordance with Attachment C in the event of Lessee default resulting in termination in accordance with cure procedures of Paragraph 15.

Also, just because the alternate consideration set forth in the Lease is "*in-kind*," this is still a value that constitutes "consideration" that the Government of Guam is obligated to "pay" and therefore requires an appropriation by the Guam Legislature. Again, the lease has default provisions that result in actual cash payments. See Lease, ¶ 4.11.6.

Noteworthy is that even if the "*in-kind*" Lease provision were to be struck because it has yet to be negotiated and cannot be ascertained at the signing of the Lease, but the other Lease provisions are still enforceable such as the payment of fair market value as identified in Attachment C (Rent Schedule), the rent that becomes payable at the 10 year mark for the past 10 years if the project has not been completed (default) is a binding obligation of the Government of Guam that has not been appropriated by the Guam Legislature by law. The Lease as worded violates 5 G.C.A. § 22401(a)(3). *Pangelinan v. Gutierrez*, 2003 Guam 13, ¶¶ 16 and 23.

Finally, even under an Organic Act of Guam analysis of the Governor's special powers and duties allowing the Governor purview over public health services, the Organic Act still includes the caveat that the Governor's powers are "*subject to the laws of Guam*." 48 U.S.C. § 1421g. See also *Bordallo v. Baldwin*, 624 F.2d 932, 934 (9th Cir. 1980).

Based upon the foregoing the Lease as written cannot be signed by this Office.

**C. "*The Guam 21st Century Healthcare Center Act of 2021*" Does Not Apply
(12 G.C.A. § 83101, et seq. (Public Law 36-56)).**

"*The Guam 21st Century Healthcare Center Act of 2021*" ("Act") clearly does not grant the Governor authority to enter into the Lease. The Act clearly provides that the lease to own option was to be constructed upon Government of Guam real property. See 12 G.C.A. §§ 83101 and 82103. The Lease provides for use of Federal lands, and the return of Federal Lands in 50 to 75 years, along with the structures that will have been constructed by Guam's taxpayers (Govt. of Guam). The Act further contains the statement that the hospital would be built upon GovGuam property, and that this would be the manner in which the hospital would be constructed, especially when one considers that the Guam Legislature would need to fund any other hospital facility. 12 G.C.A. § 83103.

The Lease also conflicts with the legislative intent of the Act in that the facility is *not* solely for use and control by the Government of Guam. Specifically, ¶ 15.3 of the Lease terms expressly provides that once a "national emergency" is declared by the USA that the entire facility under the plain wording of the Lease could be used only for patients and purposes as specified by the USA (Lessor). The definition of what constitutes a "national emergency" is not limited or specified. We find that such ambiguity would be construed broadly to favor the Lessor, to the exclusion of Lessee Govt of Guam and its local residents. *Infra*.

D. Lease Appears Incomplete Within Four Corners of Document.

Another fatal problem with the Lease is that the Lease fails to include a “*meeting of the minds*” / agreement on **Attachment B** (facility) and **Attachment F** (in-kind consideration). It lacks being a complete contract setting forth a clear agreement between the Government of Guam and USA pertaining to material terms, such as lease consideration and scope of project. Specifically, ¶ 4.2 provides that the parties have agreed to “Attachment F” (in-kind consideration) that is identified as the “*In-Kind Consideration Services Memorandum of Agreement*” (“MOA”). See also Lease ¶ 4.11.1. However, that “*in-kind*” agreement has not been identified and is subject to further future negotiation. The parties clearly may not reach an agreement on “*in-kind*” consideration, and the scope, timing and nature of the “*in-kind*” consideration is speculative at best.

The actual consideration is not identified within the “*four corners of the lease agreement*,” and therefore lacks the understanding between the parties on what consideration shall be paid. An agreement that leaves material terms of a proposed contract to future negotiations is unenforceable. *New York Military Academy v. NewOpen Group*, 142 A.D.3d 489, 490 (N.Y. 2016). A mere agreement to agree, in which a material term is left for future negotiations, is unenforceable, unless a methodology for determining the material terms can be found within the four corners of the agreement or the agreement refers to an objective extrinsic event, condition, or standard by which the material terms may be determined. *Total Telcom Group Corp. v. Kendal on Hudson*, 157 A.D.3d 746, 747 (N.Y. 2018).

The Lease has material provisions still yet to be agreed to and therefore unenforceable. Guam law requires that consideration be identified. 18 G.C.A. § 85102(4). In this case the consideration of in-kind value is impossible to be ascertained and is subject to such further negotiation wherein the parties may never reach an agreement. Note 18 G.C.A. §§ 85507 and 85508. The Lease Agreement is not complete, and a material term has yet to be made clear pertaining to the scope, type and extent of “*in-kind*” consideration (as well as to the scope of the project³). *Kendal on Hudson*, 157 A.D.3d at 747. This contractual infirmity is in addition to the Legislative role that requires the Legislature be the Branch of Government to make an “appropriation,” (aka “*power of the purse*”) even if it is government assets (i.e. in-kind consideration). *Supra*. Paragraph 4.2 expressly states,

³ The size, scope and particulars of the project were not identified in the Lease Attachment B, which makes up the “hospital,” and “medical campus.” It would be imprudent for the AG’s Office to approve a document that lacks what is clearly a joint use facility that the Lessor and Lessee intend to be used between one another, without a more defined scope of the intended joint project, esp. when the Govt. of Guam bears huge financial consequences for non-completion within the 10 year period.

4.2. As required by Title 10 United States Code, Section 2667, the Government of Guam shall pay to the Government annual fair market value rent, the amount of which has been determined by the Secretary of the Navy as set forth in the rent schedule, Attachment C, herein, for the term of this lease either in cash or in-kind consideration services and/or facilities. In-Kind Consideration shall be mutually agreed upon by the Parties to this lease and more particularly detailed in the In-Kind Consideration Services Memorandum of Agreement (MOA) between US Department of Navy and the Government of Guam which shall be executed and made a part of this Lease as Attachment F no later than one hundred twenty (120) days after the execution of this Lease. Government shall credit In-Kind Consideration Services and Benefits made available to the Government in accordance with the aforementioned MOA as consideration toward the Lessee's rental obligation. The Secretary of the Navy has determined that the services and/or facilities and benefits to be received in the form of In-Kind Consideration is not less than the fair market value of the lease interest hereunder, pursuant to the terms herein, and in accordance with the provisions of 10 U.S.C. §2667(c)(1)(F).

Finally, even assuming the current Lease is an enforceable contract, the danger of not making this contract clear (now) between the parties who are presently negotiating it, invites a future lawsuit between the Govt. of Guam and the USA. The current Governor could conceivably *not* be the party that would negotiate either Attachments B or F given the broad and non-descript language currently contained in the Lease.

Based upon the foregoing the Lease as written cannot be signed by this Office.

II. Use of Hospital & Medical Campus for Lessor's Sole & Exclusive Use.

Lease ¶¶ 10 and 15.3 allow the Federal Government to use the facility in the event of "war" or "national emergency." Lease ¶ 4.11, the "Definitions" section of the Lease, does *not* include a definition for either terminology. This leads the reader to reasonably conclude that the hospital and medical campus can be used for *solely* the U.S. Government, to the exclusion of the local population and Government of Guam, under those 2 undefined situations. Paragraph 15.3 states,

15.3 National Emergency. In the event of war or national emergency, this Lease and all of its provisions shall be subject to any Government right, existing now or in the future, affecting the control, operation, regulation, take over, or exclusive or nonexclusive use of the leased premises. Nothing in this Lease shall prevent Lessee from pursuing any rights it may have for reimbursement from Government.

The inclusion of said paragraphs raises additional concerns that the Lease does *not* fall squarely within the Governor's Organic Act duty to establish, maintain and operate public health services *for the People of Guam* (Govt. of Guam), including hospitals, because ¶ 15.3 allows for its exclusive use by the Federal Government in a national emergency, to the exclusion of the People of Guam. Compare 48 U.S.C. § 1421g. In contrast, a local facility, such as the existing Oka Point Tamuning hospital is not contractually bound to serve and be take over solely for the Federal Government's use in cases of war or national emergency. That Oka Point hospital facility is exclusively for the Government of Guam and People of Guam's exclusive use⁴.

⁴ Obviously cooperation between the local and Federal govt. ordinarily occurs, but the Govt. of Guam currently is not contractually obligated to forfeit and prohibited from control and use of its govt.-owned facility in any time of national emergency or war, nor is it obligated to turn the hospital over to any Lessor or the Fed. govt.

Moreover, under the Lease control of the hospital and medical campus facilities does *not* remain under the exclusive control of our Organic Act Governor, nor the Government of Guam for that matter, in the event that ¶ 15.3 were invoked. Its exclusive management and use as a local public health services facility is lost for the local resident population, as well as under the *control of the Governor*, Legislature and local Courts. Paragraph 15.3 contractually relinquishes control of the hospital to the Lessor (USA). In that situation, the hospital and medical campus would be outside the Organic Act of Guam's statute that grants the Governor special powers over (local) public health services type decisions. *Id.*

Notably, in *Bordallo v. Baldwin*,

The legislature may, of course determine whether a hospital shall exist at all, where and how large it shall be, the size and qualifications for appointment to the governing body, and a wide variety of other matters establishing the laws of Guam "subject to" which the Governor perform his function with respect to the hospital, but it may not negate the command of the Organic Act that the ultimate responsibility for the governance of the Hospital be in the Governor. (Emphasis added).

Bordallo v. Baldwin, 624 F.2d 932, 934 (9th Cir. 1980). In that Ninth Circuit Court of Appeals decision, the question of whether or not to have a hospital can fall within the purview of the Guam Legislature. The Guam Legislature clearly stated in *The Guam 21st Century Healthcare Center Act of 2021*, and has earlier created by statute the existing Guam Memorial Hospital Oka Point Tamuning facility⁵, that the People of Guam shall have its own hospital for their own exclusive use. This Lease is contrary to existing Guam law in that the Lease allows for the new hospital and medical campus to be taken from the People of Guam's sole or partial use, to transfer that use to the Lessor's sole use to the exclusion of the People of Guam based upon ¶ 15.3. *Supra*. This is a separate and independent basis why the Lease conflicts with existing Guam law that a hospital exist for the People of Guam's sole or partial use and to always remain under the control of the Government of Guam.

An example illustrating the dual use problem facing this Lease under ¶ 15.3, is that the Lessor declares a "*national emergency*" that causes the Lessor to exercise its rights under ¶ 15.3. Guam's only local hospital under ¶ 15.3 would no longer be accessible nor available to non-military or non-Lessor authorized personnel. Residents with life-threatening conditions or medical ailments would be turned away from the medical equipment and personnel located at this only Guam-funded public hospital. Conceivably, under the Lease's current language, persons suffering from heart attacks, strokes, or any life-threatening emergency illnesses, medical conditions or injuries would be refused access to this locally funded public facility.

⁵ The Governor has publicly stated that the new hospital & medical campus shall replace the Oka Point Tamuning hospital.

Finally, the Guam Legislature has in the past statutorily provided for the construction and use of the Oka Point Tamuning hospital, as well as its renovation. 10 G.C.A. § 80109(v).

Based upon the foregoing the Lease as written cannot be signed by this Office.

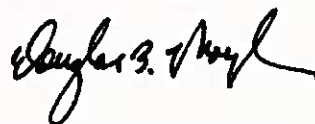
Summary.

Based upon the foregoing, the Office of the Attorney General is unable to sign the Lease in its current form. Our Office determines that the Lease in its current form is unenforceable. It requires legislative approval, and Attachments B and F must be completed. We recommend the following changes before approval:

1. secure legislative approval for the Lease agreement as drafted, and remove the in-kind agreement (Attachment F) and complete Attachment B (design work for the hospital and medical campus facilities) of the Lease; *or*
2. complete the in-kind agreement (Attachment F) and design for the hospital and medical campus facilities (Attachment B) and obtain legislative approval, *and*
3. remove the takeover provisions in ¶ 15.3 and obtain legislative approval, or include the takeover provisions in ¶ 15.3 and obtain legislative approval.

This Attorney General remains committed to assisting you in furthering your desires to provide effective healthcare for our community, and a hospital facility consistent with the appropriations approval by the Guam Legislature. To that extent, if you so choose, please do not hesitate to call upon me to assist in re-drafting and negotiating a healthcare agreement that might achieve your important goals. Otherwise, we have provided our changes to receive our approval for legality. Based upon our legal research, the lease agreement requires the participation and consent of the Guam Legislature, especially as it pertains to authorizing its appropriations towards a replacement healthcare facility (hospital) to the current Oka Point Tamuning hospital.

Respectfully,



Douglas B. Moylan
Attorney General of Guam