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December 19, 2007

The Honorable Ben C. Pangelinan
Senator, Twenty-Ninth Guam Legislature
324 W. Soledad Avenue, Suite 101
Hagatna, Guam 96910

Re: **TG Engineers, PC Contract with Department of Public Works for Design of Layon Landfill (Project No. DPW-SW-2004 (003)) (Our Ref: LEG 07-0356)**

Dear Senator Pangelinan:

You have asked us to look into your questions regarding a contract the Department of Public Works (DPW) entered into with TG Engineers, PC (TG Engineers) in May of 2005 for the design of the proposed Layon landfill at Dandan, Inarajan relative to the Consent Decree filed February 11, 2004 in the U.S. District Court of Guam in *United States vs. Government of Guam*, Civil Case No. 02-00022.

Your questions center on three basic issues and several sub-issues. Each of the three basic issues is discussed below separately, and a discussion of any sub-issue is incorporated within the responses to the basic issues.

1. Did DPW violate any procurement law by amending the contract six times to expand the scope of work, increase the fees, and extend the time frame within which to perform?

The request for proposals (RFP) for the project stated its purpose as the acquisition of environmental and engineering services for the development of design plans, specifications, and estimates (PS&E) for the new municipal solid waste landfill facility (MSWLF) to be built in Inarajan.[1] The overall project was described as "the delivery of preliminary, pre-final and final design documents of the MSWLF including wetland mitigation plans, permitting documents, and

[1] RFP, Basic Information I, page 1; Statement of Work, I, page 1.

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other supporting documents necessary to complete the work."[2]

According to the RFP[3], the overall project was to be divided into two phases, each with two tasks. They were:

Phase I:	Task I	site investigations and surveys
	Task II	preliminary (40%) PS&E
Phase II:	Task III	pre-final (100%) PS&E
	Task IV	final (100%) PS&E

The two tasks for Phase I were set out in more detail over five pages of the RFP.[4] The two tasks for Phase II were not as detailed in the RFP.[5] Further, the Phase II tasks were described in the RFP[6] as being optional:

> The Government, at its option, may request the Firm to perform the Tasks III & IV as described below to complete the PS&E for the Design of the New Municipal Solid Waste Landfill Facility. An amendment to the contract shall be executed and mutually agreed when the Government opts to implement the optional tasks.

Therefore, from the outset, DPW clearly envisioned the design project to be accomplished in two phases and as separate tasks. Also, DPW clearly intended to make a decision at a later time, at its sole option, as to whether the selected design firm should complete the optional second phase tasks. Only if the option were exercised would fees be negotiated for the optional tasks. Furthermore, DPW was clear that it would give the go ahead to complete any tasks via an amendment to the initial design contract.

Nothing unusual is suggested by DPW's manner of planning the project in phases further broken down into tasks, nor in DPW's discretion to decide after the project got underway as to whether the remaining tasks should be carried out. In fact, by breaking the project down into tasks, DPW showed foresight about the complexity of this particular design project and an appreciation of the problems surrounding the Consent Decree's requirements, which could possibly alter the direction

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[2] RFP, Statement of Work, II, page 2.

[3] RFP, Statement of Work, II, page 2.

[4] See, RFP, Statement of Work, II and III, pages 2 -7.

[5] See, RFP, Statement of Work, II and III, pages 2, 7-9.

[6] RFP, Statement of Work, III, page7.

taken by DPW once the project was begun.

After TG Engineers was selected as the best qualified offeror and negotiations for fees were begun, the parties fleshed out the statement of work (SOW) for Phase I, which was only five pages long in the RFP, into 24 pages[7] of detailed services. The much more detailed SOW dated April 28, 2005 attached to the contract was in no sense an alteration of the overall project which remained the same. Instead, the SOW finally agreed upon for Phase I signified exactly how TG Engineers proposed to accomplish the services DPW requested in the RFP for Phase I. The detailed services in turn allowed the parties to come to an agreement about fees. This is a common practice in the negotiation of professional engineering services for complex designs.

As the design contract shows, DPW and TG Engineers successfully negotiated fees for Tasks I and II. However, they agreed in the design contract to proceed only with Task I, and to continue with Task II only after an amendment to the contract had been executed.[8] Therefore, although the design contract stated the negotiated fees for both Task I and Task II, funds were certified only for Task I. When Amendment No. 1 was finally executed a few months later, the amendment made no change whatsoever to the negotiated fee or to the SOW for Task II, but merely gave the go ahead to TG engineers to proceed with Task II, certifying funds therefor.

As in the RFP, the design contract also reiterated DPW's option to decide at a later date whether or not the Phase II tasks should be performed by TG Engineers[9] by stating:

> If the Government were to choose this option, then the Government and the Consultant would negotiate an appropriate Scope of Work(s) and would execute an amendment(s) to the contract. However, the Government is not required to obtain the work described in Phase II by amendment to this contract, but may choose to obtain the work through other means, such as via another Request for Proposals and related contract.

So once again, there is no deviation between what DPW envisioned for the project when DPW issued the RFP and the contract's intent and terms. DPW always intended to maintain the sole option to decide later whether TG Engineers should complete the 100% design work, and this decision would be made after or while the first two tasks were being performed. There is nothing unusual about this procedure, and given the complexity of the project, was probably the best practice. Furthermore, should DPW decide to give the go ahead, having the same firm that prepared the preliminary 40% plans complete the 100% plans is sensible in terms of cost and time savings. As the same firm already possesses the background knowledge, the "pick up and go" time

[7] SOW dated 4/28/05, pages 3 - 27 for Phase I and pages 27-28 for Phase II.

[8] Contract, I, page 1.

[9] Contract, I, page 2.

is greatly minimized.

Subsequently, DPW indeed opted to have TG Engineers prepare the 100% pre-final report representing Task III, as well as the 100% final report representing Task IV. Statements of work and fees for both tasks were negotiated, all as set out in Amendment Nos. 2 through 6.[10]

Again, there is nothing unusual or illegal about any of these practices. Every step taken has been as disclosed in the RFP and in the design contract. The contract was amended several times, but amendments were always intended as the vehicle to carry out the four tasks. This is a practical way of dealing with a large project where many of the details of the phases or tasks the project is broken down into are not fully known or understood at the time the contract is awarded.

Also, the contract's term was not set or confined to a finite time frame, but was intended to be as long as it takes to complete all tasks. And, what may appear to be an expanded scope of work in an amendment was actually the fully negotiated services as proposed by TG Engineers to accomplish the general task described by DPW. Furthermore, the details of each task were dependent upon the results of the prior tasks, and so the tasks that followed could not be ascertained in detail until the prior tasks were completed or had progressed sufficiently to reveal in detail what must follow. Therefore, the elements and technicalities of a subsequent task were negotiated during the performance of a prior task or after completion of the prior task.

For the foregoing reasons, we have concluded that the amendment procedure used to implement subsequent tasks was always intended and fully disclosed from the outset, and that the use of amendments to negotiate the details of each task and to fund progressive tasks did not violate the terms of the original contract or any procurement law.

2. Did DPW's inclusion of the construction of a temporary access road in the design contract for the Layon landfill violate any procurement law or policy?

The temporary road was first mentioned in the SOW dated June 6, 2006 attached to Amendment No. 3. Paragraph 6.7 of that SOW states:

> Construct a temporary access road approximately 9,550lf and following the existing dirt road that is used for access to the site. The work includes the following.
>
> a. Site clearing & grading.
> b. Deliver base course from the DPW quarry on Ysengsong Road and place it 18" thick average and compacted over 95% for a 12'wide top width and 2:1

[10] Amendment No. 2 was for Tasks III and IV, but was later found to be void. As services for Task III had been fully accomplished, TG Engineers filed a claim and a settlement was eventually reached. Amendment Nos. 3 through 6 were for various portions of Task IV.

sideslopes.

c. Provide 4-locations per mile with 24" diameter x 20' long corrugated culvert pipes for cross drainage. Include a drainage sump and silt fencing at the discharge side of the culverts.
d. Provide a geotextile fabric as required at low spots and ponded areas.
e. Provide silt fence and sand bags during construction as required.
f. Monthly / post-storm silt fence maintenance.
g. Mobilization / demobilization of equipment.

Going back to the RFP and design contract, we find that the RFP[11] required the government to provide:

> Right of entries to private and government lands . . . for access into the property and areas affected by the proposed development.

A right to enter property is not the same as the construction of a temporary access road. However, the sample contract attached to the RFP[12] and the actual design contract[13] both contain the following identical provision:

> ACCESS: The Government, without cost to the Consultant, shall provide access to and make all provisions for the Consultant to enter upon public and private lands as required for the Consultant to perform his work.

This latter provision is clear that DPW had the obligation not only to secure any permission needed to enter the land leading to the site, but that DPW had the responsibility to provide actual physical access. One meaning of the term is permission or the right to enter, but the term also has a much broader meaning. The broader meaning would include the actual physical ability to enter the property once permission to enter is granted or obtained. For example, a dense jungle or fields deep with mud can make property inaccessible even with permission, and that is the sort of access problem TG Engineers encountered with this project. As used in the RFP and design contract, we see no intent to limit the term to mere permission.

The procurement history also shows that TG Engineers raised the issue of a temporary road at the first or one of the earliest negotiation meetings for Amendment No. 3. The SOW for Amendment

[11] RFP, SOW, VIII, page 14.

[12] RFP, SOW, Sample Contract, Section 13, page 4.

[13] Contract, Section 13, page 5.

No. 3 went through several phases of negotiation over approximately three weeks time.[14] TG Engineers summarized a meeting held May 23, 2006 in an email to DPW and other government personnel, and stated:

> TGE is concerned about proper access to the site . . with the wet season starting access will be difficult and cause problems and delays unless a stable road is built. It may be possible to stabilize the existing road with grading and compacted coral aggregate.
>
> TGE is discussing the road work with a contractor for pricing . . this needs to be discussed further with GEPA for permitting requirements.

In two separate email transmissions to DPW personnel both dated June 5, 2006, TG Engineers further stated:

> We have confirmed the scope with IBC for the temporary road and added the fee. This assumes the work begins ASAP and is completed before we get into heavy rain and wet conditions . . . .
>
> A couple other comments on the road . . the original price was for an estimated 2-miles and with contractor furnished materials . . this version is for 9,550lf and at the reduced price where the contractor will haul the material from the DPW Ysengsong quarry to the site. The DPW material supply and defined alignment have reduced the price by $121,750.

In a letter from DPW to the Navy dated March 14, 2007, DPW asked for a license to traverse Navy property to build the temporary road.[15] The letter explains:

> Construction of this road is temporary in nature and will be needed for a period of two years, commencing this month. No asphalt paving will be done. The Government of Guam through the Department of Public Works and its contractor(s) can assure the Department of Navy that the property will be restored to its original condition, upon termination of the License. . . .
>
> The construction of this Temporary Access Road is critical. . . . Safe and navigable passage to the site is currently compromised with deep ruts that prevent ingress and egress in a timely manner, especially in the wet season. This temporary access road will ease daily logistical problems in accessing the landfill site and staging of necessary heavy equipment.

[14] There are draft SOW's dated May 15, 2006, May 22, 2006, June 4, 2006, and June 5, 2006. The final version is dated June 6, 2006. Most of the drafts are accompanied by detailed fee proposals.

[15] Amendment No. 3 was finalized on June 12, 2006, but the actual construction of the temporary road did not take place until at least March of 2007.

All of the foregoing correspondence collectively establish that TG Engineers had the problem of being able to actually get to the site, not because of permission to enter from any landowners, but because the way to the proposed landfill was a muddy mess during the rainy season and during dry periods the mud would harden into deep ruts. Either way ingress and egress was extremely difficult if not nearly impossible. Time being of the essence for this design project, certainly, DPW did not want TG Engineers to spend the majority of any working day's daylight hours trying to get to and from the site. DPW wanted TG Engineers to spend its time providing the actual services.

Therefore, the temporary access road cannot be said to have been built solely for TG Engineers's benefit. Without a temporary access road in place to get the design project completed as quickly as possible, DPW's ability to meet the Consent Decree's deadlines would be compromised with monetary penalties looming large against the government of Guam. And so, while there is some benefit to TG Engineers in that with a temporary road their vehicles would not suffer extreme wear and tear and they would be able to complete the project and move on to other projects without delay, these are normal contingencies that an engineering business might encounter and therefore would take into consideration. Hence, the ultimate benefit of a temporary access road must be viewed as being for the developer, in this case to DPW, and not to the engineers doing the design work.

For the reasons set forth above, the need for some sort of improvement just to get to the site and back was justified. DPW having promised in the design contract to provide access at government expense, DPW was obligated to do just that. The only question remaining is whether DPW acted appropriately by having TG Engineers subcontract the construction.

Certainly, DPW could have bid the road construction out. In such case, given the time constraints, an emergency procurement would have to have been utilized unless the government wanted the design contract to come to a screeching halt while awaiting the regular bid invitation process and award for road construction which would take two to three months at an absolute minimum.

The nature of the road is for temporary access to the project site, which access is absolutely necessary in order to accomplish the design project itself, and so the two are inextricably intertwined. The temporary road has no meaning or function outside of the design project, and the design project cannot be completed within the government's time frame without the temporary road. If TG Engineers itself had purchased the equipment and materials, and employed construction labor, rather than subcontracting the work, then the question about circumventing the procurement law would never have been raised. Or, if to solve the access problem, TG Engineers had rented a special terrain vehicle or a helicopter to get to and from the site, undoubtedly, the question would not have been raised either. The temporary access road needs to be viewed in the same light as renting a special terrain vehicle or a helicopter. They all are means of getting ingress and egress to a place difficult to reach due to natural physical barriers. The fact that the means chosen was a temporary road rather than a special terrain vehicle or helicopter should not confuse the issue.

Also, the answer to any allegation of impropriety seems to resolve around just what sort of subcontracts are appropriate to an engineering design contract. One frequently sees design contracts with the authority to subcontract for land surveyors, architects, archeologists, and speciality engineers. These subcontracted services are never questioned because they are normally closely associated with engineering design projects.

Therefore, the deciding factor seems to be whether the construction of a temporary access road is also closely associated with certain engineering design contracts. In this case, we find that:

1. The design project was a large and complex one.

2. The site of the project was located on open natural raw land far from urban areas.

3. There was no means of ingress and egress to the site except over natural raw land which consisted of deep mud or deep ruts.

4. The government was not ready to construct a permanent access road to the site.

5. Time was of the essence due to the Consent Decree deadlines.

6. The temporary access road was just that - - a temporary non-permanent means of ingress and egress, to be removed some time after completion of the full project. Therefore, it should be viewed not as a road per se, but the same as a rental of a special terrain vehicle or a helicopter to get to a difficult site.

Given these reasons, the temporary access road seems closely tied to the success of the design project undertaken by TG Engineers, and was just as much a part of the project as was the subcontracting of land surveyors and other speciality engineers by TG Engineers. Therefore, we would have to conclude that no procurement law was circumvented by having TG Engineers subcontract for the construction of a temporary access road.

Regarding DPW supplying materials from a government quarry for the temporary road, we can find no fault with the government minimizing its overall expenses for the design project by supplying the materials, especially when the benefit of the temporary road is ultimately to the government.

Also, we found no evidence in the record to suggest that DPW selected TG Engineers' subcontractor for the temporary road.

3. The Consent Decree requires funding for a number of purposes and so if the Legislature has not appropriated expressly for any of those purposes at the time the Consent Decree was signed and filed, did the executive branch have the authority to enter into the Consent Decree?

The Consent Decree requires the government to accomplish two main tasks: (1) close the Ordot Dump[16] and (2) open and operate a new sanitary MSWLF[17].

The Legislature first mentions closure of the Ordot Dump and the search for a new site as a policy decision in P.L. 22-115, but no directives were given to DPW or any other executive branch agency in P.L. 22-115.[18] In 1998, however, the Legislature expressly gave DPW those duties with the enactment of P.L. 24-139 known as the Ordot Dump Closure and Solid Waste Management Alternatives Act (the 1998 Act) and codified at 10 G.C.A. Chapter 51, as amended by P.L. 24-272. The pertinent portions of the 1998 Act provided:

> The purposes of this Chapter [51] are to . . . (2) provide the authority and resources, including funding to plan for, establish, finance, operate and maintain efficient, environmentally acceptable solid waste management systems, privatized, but administered by the Department of Public Works and regulated by GEPA; . . . (12) authorize the closure and beneficial use of the Ordot Landfill site, and promote, assist and support the construction and operation of a privatized sanitary landfill, resource recovery and other solid waste management facilities . . . . [Emphasis added.]

10 G.C.A. §51101(b).

> The Department [of Public Works] shall have the following powers and duties pursuant to the Administration Adjudication Law to: . . . (2) privatize all other solid waste management facilities and operations . . . within the policy guidelines of the Solid Waste Management Plan, including the closure and beneficial use of the Ordot Landfill site, source reduction, recycling, composting, resource recovery, waste reduction, new landfill and transfer stations. This responsibility shall also address construction debris or demolition waste, metallic debris, white goods, tires and green waste; contracts with private entities shall fully encompass development, financing, construction and operation of any such facilities; (3) fulfill any of its duties under this Act and consistent with the SWMP by entering into contracts with private entities; all such new contracts shall be entered into according to the procedures of the Guam Procurement Law, Chapter 5, Division 1 of Title 5 of the Guam Code Annotated, and other applicable laws of Guam . . . . [Emphasis added.]

10 G.C.A. §51103(b).

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[16] Consent Decree, IV, 8 on pages 5-8.

[17] Consent Decree, IV, 9 on pages 8-11.

[18] That portion of P.L. 22-115 concerning a new site was later repealed by P.L. 23-95, but the section on closure of the Ordot Dump remains.

However, in 2000, the Guam Supreme Court issued a decision in *Pangelinan, et al. vs. Gutierrez, et al.*, 2000 Guam 11 (March 10, 2000) finding P.L. 24-139 to be invalid. A subsequent decision in another case *Pangelinan, et al. vs. Gutierrez, et al.*, 2004 Guam13 (September 9, 2004) found P.L. 24-272 to be void due to the invalidity of P.L. 24-139. Hence, the 1998 Act does not exist today, and what we are actually left with is the 1995 version of the Solid and Hazardous Waste Management and Litter Control Act enacted pursuant to P.L. 23-64 (the 1995 Act).[19]

The 1995 version is not as direct about closing the Ordot Dump or opening a new landfill as the 1998 version, but it does indicate the following:

> The Department of Public Works shall be responsible for: (1) . . . Public sanitary landfills, hardfills, transfer stations, processing or recycling plants as currently exist or may be established will be operated and maintained by the Department of Public Works. The Director of Public Works, with the approval of the Governor, may execute a contract after public bid with a private party or firm for the collection and disposal of any solid or bulky waste, or other offensive substances, or separate items thereof including the operation of any sanitary landfill, hardfill, transfer station, processing, recycling or storage plant which is publicly owned . . . . [Emphasis added.]

10 G.C.A. §51103(b)(1). The foregoing establishes that DPW has authority over new landfills to be built, and could contract for the operation of such new landfills, which broadly speaking must necessarily encompass the design and building of a new landfill prior to operation.

The 1995 Act does not mention closing the Ordot Dump, only DPW's responsibility for existing landfills. However, the Legislature's policy statement in P.L. 22-115 previously mentioned was never repealed and remains as uncodified legislation today. It states:

> Closure of Ordot Landfill. The Ordot Sanitary Landfill shall be closed and all disposal of solid waste thereat terminated no later than three (3) years after the effective date of this Act.

Therefore, even if the two *Pangelinan* decisions have invalidated the 1998 Act, the 1995 Act read in conjunction with P.L. 22-115 still gives DPW sufficient authority to close the Ordot Dump and to go forward with a new landfill and enter into contracts therefor.

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[19] Notwithstanding the two Supreme Court decisions invalidating P.L. 24-139 and P.L. 24-272, the Legislature has continued to make amendments to the 1998 version of the Solid Waste Management Act. See, P.L. 24-309 (Dec. 18, 1998); P.L. 25-70 (July 15, 1999); P.L. 25-93 (Dec. 29, 19999); P.L. 25-175 (Dec. 14, 2000); P.L. 26-35 (Oct. 1, 2001); P.L. 28-11 (Mar. 9, 2005); and P.L. 28-56(June 30, 2005). The website for the Compiler of Laws indicates that "until this Article is corrected by the legislature, it is presented here in the form repealed and reenacted by P.L. 24-272 and amended by subsequent laws as indicated in SOURCE comments. However, reference must be made to the Article as it existed prior to P.L. 24-139. Thus, the Article, as repealed and reenacted by P.L. 23-64, is included in its entirety in a NOTE at the end of this Article."

We next examine whether there were any funding sources for DPW to build a new landfill. The Consent Decree describes the funding for the two tasks as follows[20]:

> Within 120 days, the Government of Guam shall submit to U.S. EPA a financial plan for funding those actions identified in Paragraphs 8 and 9, over time, including the funding source or sources and a schedule to secure funds for the capital and operating costs necessary to fully implement those actions identified in Paragraphs 8 and 9 above. The parties acknowledged and agree that the total amount of funding needed to complete the projects required under this Consent Decree is not currently available. The parties agree that the projects shall be funded by the Solid Waste Operations Fund, established by 10 G.C.A. §51118, including the costs and expenses directly related to the closure of the Ordot Dump and the development, design, construction, and operation of a new sanitary landfill. The parties also agree that the Solid Waste Operations Fund shall not be regarded as the exclusive source of funding for the projects, and that the Government of Guam may obtain funding from other sources. The Government of Guam shall use its best efforts to obtain sufficient funding to fully implement the projects required by this Consent Decree. If funding form the Solid Waste Operations Fund is not sufficient to fully implement the projects, the Government of Guam shall seek funding through legislative appropriation, loans, grants, and rates charged for consumer services such as tipping or user fees. [Emphasis added.]

The parties agreed that the Solid Waste Operations Fund (SWOF or the Fund) would be the main funding source for the two tasks. The SWOF was established by 10 G.C.A. §51117 pursuant to the 1995 Act and authorizes the Fund's use for "the administration and implementation of this Article." As already mentioned above, the 1995 Act authorizes DPW to enter into contracts regarding landfills.[21] Therefore, DPW had sufficient authority to "implement" the 1995 Act by designing and constructing a new sanitary landfill, and to fund it with the SWOF. Whether or not the SWOF would have sufficient money to handle any task would be another matter. However, the Fund was envisioned as a revolving one into which revenues flowed as collected and expenses were paid as incurred. The Consent Decree does not indicate that all tasks had to be funded at the time the Consent Decree was entered into. Therefore, tying the Consent Decree tasks to the revolving fund does not appear to violate any illegal expenditures law.[22]

The Consent Decree also indicates that other funds could be used, that the executive branch was to use its best efforts to obtain funding if necessary, and that the executive branch was to seek legislative

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[20] Consent Decree, IV, 10a on page 11.

[21] It should be noted that the quoted paragraph from the Consent Decree cites to 10 G.C.A. §51118, a section that first appeared in the 1998 Act which was later invalidated by the first *Pangelinan* case in 2000.

[22] See, 5 G.C.A. §22401.

assistance for funding. There does not seem to be any provision requiring the Legislature to fund anything, only that the executive branch shall use its best efforts to obtain legislative assistance.

Furthermore, given that DPW has the authority to close the Ordot Dump and to open a new sanitary landfill, DPW could use any other funds available to it, and does not necessarily need a specific appropriation for closing the Ordot Dump nor a specific appropriation for opening a new sanitary landfill.[23]

In sum, the executive branch had the authority to enter into the Consent Decree, and did not commit the Legislature to any action. Therefore, there appears to be no separation of powers issue. Furthermore, a statute regarding the SWOF indicates it may be used as a funding source for the tasks. Hence, there appears to be no violation of any illegal expenditures law, and if the tasks can be paid from other existing sources, no specific appropriation for any Consent Decree task was necessary.

Sincerely,

J. PATRICK MASON
Deputy Attorney General

[23] Our Office inquired with the Office of the Public Auditor ("OPA") on December 18, 2007, about the status of the OPA's review of DPW's expenditures and funding sources for the TG Engineers contract. The OPA indicated that the review is still pending.