IN THE SUPREME COURT OF GUAM

VICENTE C. PANGELINAN and JOSEPH C. WESLEY
Plaintiffs-Appellants,

v.

CARL T.C. GUTIERREZ, Governor, JOHN F. TARANTINO, Attorney General, JAMES H. UNDERWOOD, Director of the Department of Public Works; EDWARD G. UNTALAN, Administrator of the Guam Economic Development Authority; CARL J.C. AGUON, Director of the Department of Land Management; Y'ASELA A. PEREIRA, Treasurer of Guam; GOVERNMENT OF GUAM
Defendants-Appellees,

and

GUAM RESOURCE RECOVERY PARTNERS
Intervening Defendants-Appellees.

Supreme Court Case No. CVA02-003
Superior Court Case No. SP0212-00

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on February 11, 2003
Hagåtña, Guam

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BEFORE: FRANCES M. TYDINGCO-GATEWOOD, Chief Justice (Acting)[1]; PETER C. SIGUENZA, JR., Justice *Pro Tempore;* JOHN A. MANGLONA, Justice *Pro Tempore*.

TYDINGCO-GATEWOOD, J.:

[1] This case addresses the enforceability of a 1996 contractual agreement between Defendant-Appellee Government of Guam ("the Government") and Intervening Defendant-Appellee Guam Resource Recovery Partners ("GRRP") (collectively referred to as "Appellees"). In the 1996 agreement, the Government granted an exclusive license to GRRP for the construction and operation of a waste reduction and resource recovery facility. Plaintiffs-Appellants Vicente C. Pangelinan and Joseph C. Wesley ("Appellants") argue that the 1996 agreement violates several Guam statutes, including Guam's procurement law. We find that the 1996 agreement is in violation of Section 1423j of the Organic Act of Guam and Title 5 GCA §22401 and therefore reverse the judgment of the lower court. Our finding on these issues precludes our need to address any further issues brought before us on appeal.

I.

[2] In 1982, the Government began contracting for the construction of a waste reduction and resource recovery facility on Guam. The first contract was entered into between the Government, Guam Economic Development Agency ("GEDA"), and International Energy Enterprises, Inc. ("IEEI"). This 1982 agreement granted IEEI an exclusive license to arrange for the financing, construction, and operation of the waste facility. Appellants' Excerpts of Record, tab 12, Ex. A, p. 1 (License Agreement) ("1982 License"). In return for constructing and operating the facility, the Government and GEDA promised IEEI that Guam

[1] The Chief Justice recused himself from this case and as the only full-time justice on the panel, Justice Tydingco-Gatewood was appointed Acting Chief Justice.

Power Authority ("GPA") would purchase all the electricity the plant produced. Appellants' Excerpts of Record, tab 12, Ex. A, p. 5 (License Agreement).

[3] A dispute later arose between GEDA and IEEI with respect to the 1982 License. GEDA claimed that the 1982 License was void as a result of IEEI's failure to perform and filed suit in the Superior Court of Guam. However, before GEDA further prosecuted its claim, it entered a second agreement, this time with G. Power, Inc. ("GPI"). GPI was a relevant party to these transactions because it held an option to purchase the 1982 license from IEEI. The agreement between GEDA and GPI, entered into in 1989, required GEDA to forgo prosecution of its claim against GEDA for an eight month period. In return, GPI gave to GEDA $10,000.00 and a promise to use its best efforts to exercise the option.

[4] In 1990, GPI exercised its option and purchased the license from IEEI. An amended license agreement was entered between GPI, GEDA, the Government, and GRRP. GRRP was an entity formed by GPI and Enprotech Guam, Inc. to fulfill GPI's obligations under the amended license agreement. The amended license agreement stated that GRRP and the Government intended to enter into a licensing agreement for the construction and operation of the waste-to-energy facility. It also modified certain terms and conditions of the original 1982 licensing agreement. Further, the amended license agreement stated that assignment of the license from IEEI to GRRP would terminate any and all interests that IEEI may have had in the 1982 License.

[5] In 1996, GRRP and the Government entered into the licensing agreement contemplated by the 1990 amended license agreement. Under this final agreement ("1996 Agreement"), which is the focus of the instant litigation, GRRP was given the exclusive right to develop and operate a waste reduction and resources recovery facility. The contract was signed by the Government and GRRP, and recommended

for execution by GEDA. The legislature did not approve the contract.

[6] After the 1996 Agreement was signed, the legislature enacted two separate public laws that severely limited the Government's ability to comply with certain terms of the 1996 Agreement. The first was P.L. 24-57:6, which prohibited the Government from expending any funds in fulfillment of the terms of the 1996 Agreement. The second was P.L. 24-272, which effectively prevented the GEDA administrator from issuing permits for the operation of waste-to-energy facilities.

[7] In June 2000, Appellants filed a Complaint for Declaratory and Injunctive Relief in the Superior Court, asking the lower court to declare the 1996 agreement void and enjoin the Government from performing under the contract. Appellants argued that the agreement violated the following: (1) Title 12 GCA §50103(f), P.L. 24-139, and P.L. 24-272, by authorizing GEDA to issue bonds without first obtaining legislative approval; (2) Title 1 GCA §1800, by contracting for the transfer of land without first obtaining legislative approval; (3) Title 48 U.S.C. § 1423j(a), by authorizing GEDA to incur a public debt without first obtaining legislative approval; and (4) Title 5 GCA, Chapter 5, by authorizing for the expenditure of public funds without following the procurement process.

[8] On July 31, 2001, having stipulated that there were no disputes as to any material fact, Appellants and Appellees each moved for summary judgment.

[9] On November 6, 2001, the lower court issued its Decision and Order, denying Appellants' summary judgment motion and granting summary judgment in favor of Appellees. Specifically, the lower court held as a matter of law, that the Procurement Law found in Title 5 GCA Chapter 5 does not apply to the 1996 Agreement; there is no violation of 1 GCA §1800 because the operation of a waste-to-energy facility is not a reserved government function; and there is no violation of Section 1423j(a) of the Organic

Act because "[t]he Court finds nothing in the agreement resulting in an appropriation of government funds without Legislative approval." Record on Appeal, tab 58, p.7 (Decision and Order). Finally, the lower court further found P.L. 24-57, and P.L. 24-272 to be in violation of the Contract Clause of the Organic Act and accordingly, inorganic and unconstitutional.

[10] It is from the lower court's decision that the instant appeal arises.

II.

[11] This court has jurisdiction over final judgments of the Superior Court pursuant to Title 7 GCA §§ 3107 and 3108 (1994).

III.

[12] A trial court's decision to grant or deny summary judgment is reviewed *de novo*. *See Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10, ¶ 7. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Guam R. Civ. P. 56(c) (1995).

[13] Issues of statutory construction and contract interpretation are reviewed *de novo*. *See Long-Term Credit Bank of Japan v. Superior Court*, 2003 Guam 10, ¶ 28; *Ronquillo v. Korea Auto., Fire, & Marine Ins. Co.*, 2001 Guam 25, ¶ 10.

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IV.

[14] The issue for our *de novo* review is the validity of the 1996 Agreement. Appellants argue that the 1996 Agreement attempts to appropriate government funds in violation of 48 U.S.C. § 1423j.

[15] The Organic Act of Guam, 48 U.S.C. §§ 1421, *et seq*., expressly reserves for the Legislature the power to appropriate money. 48 U.S.C. § 1423j(a). ("Appropriations, except as otherwise provided in this chapter, and except such appropriations as shall be made from time to time by the Congress of the United States, shall be made by the legislature."); *In re Request of Gutierrez*, 2002 Guam 1, ¶ 38. Accordingly, "pursuant to the Organic Act, the Legislature has plenary or absolute power over appropriations. . . . defined as the authority to set apart from the public revenue a certain sum of money for a specified object." *In re Request of Gutierrez*, 2002 Guam 1 at ¶ 38 (citations and quotation marks omitted). The policy behind the plenary power of the legislature is that "it is for the Legislature and not the executive branch, to determine finally which social objectives or programs are worthy of pursuit." *Id*. (citation and quotation marks omitted)

[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)[2] (emphasis added).

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[2] Title 5 GCA §22401(a)(3), formerly § 6118(a)(3) of the Government Code, was in effect since October 11, 1962.

[17] Title 5 GCA §22401 substantially tracks the language of the federal Anti-Deficiency Act, found in 31 U.S.C.A. § 1341,[3] which addresses "the problem that Executive branch officials were obligating funds before they were appropriated by Congress, and then making deficiency requests for appropriations that Congress had little choice in deciding because government agencies had basically committed to the United States to make good on the promise." 1 West's Fed. Admin. Prac. § 531, n.1 (4th ed.). Similarly, the policy prohibiting "illegal expenditures" is significant enough to warrant enforcement through penalties, including criminal penalties. Thus, "[a]ny officer or employee of the government of Guam" who violates Title 5 GCA §22401(a) "shall be subjected to appropriate disciplinary action by the branch of the government concerned, including removal where warranted, and any officer or employee of the government of Guam who shall knowingly and willfully violate subsection (a) hereof shall be guilty of a misdemeanor." 5 GCA §22401(c).

[18] In interpreting the legal effect of the 1996 Agreement, the lower court determined that although the agreement calls for the issuance of revenue bonds by GEDA, the agreement also properly and sufficiently acknowledges that legislative approval is a prerequisite to the issuance of such bonds. Essentially, the lower court found "nothing in the agreement resulting in an appropriation of government funds without Legislative approval" and for this reason, found no violation of § 1423j. Record on Appeal, tab 48, p. 7 (Decision and Order). We disagree.

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[3] Title 31 U.S.C.A. §1341(a)(1) states, "an officer or employee of the United States Government or of the District of Columbia government may not . . . . (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."

[19] At oral argument, Appellants correctly argued that, although the contractual language purports to acknowledge the need for legislative appropriation, it nonetheless violates § 1423j because it contracts for damages in the event that legislative approval is not obtained.

[20] The provisions of the 1996 Agreement reveal the obligations of the Government to satisfy conditions precedent, including obtaining legislative appropriation, as well as the consequences for failure to satisfy such conditions. Section 4.03, entitled " Conditions to Company's Obligation," states as a condition to GRRP's obligation, that

> (g) The Government shall have obtained all requisite Legislative Approval to the issuance by GEDA or another political subdivision of the Government of an aggregate amount of Bonds in an amount sufficient to finance the sum of the Facility Price and Financing Costs less the amount of Equity to be provided by the Company . . . .

Record on Appeal, tab 34, Ex. A, pp. 68-70 (1996 Agreement) (emphasis added). Section 4.04, entitled, "Satisfaction of Conditions Precedent," delineates the effect of failure to satisfy the conditions precedent:

> If, despite such good faith and diligence, all of the said Conditions Precedent set forth in . . . 4.03 are not so satisfied or are not waived by the Party whose obligations are conditioned thereon . . . then that Party may, by notice in writing to the other Party, terminate this Agreement as of the date of such notice, in which case this Agreement shall be null and void. In the event of a termination of this Agreement . . . . (c) If such failure is the result of Government Fault[4], then (i) this Agreement shall terminate, (ii) *the Government shall pay on or prior to the Termination Date to the Company its Phase I Development Costs, its Phase II Development Costs incurred through the Termination Date of this Agreement and the Defeasance Cost, if any, and the License Defeasance Cost*, and (iii) the Company shall have no other claim against the Government arising from or relating to this Agreement.

[4] In the definitions section of the 1996 Agreement, "Government Fault" is defined broadly and means: "any material breach, failure, nonperformance or noncompliance by the Government with the terms and provisions of this Agreement or the negligent or wrongful act or omission of the Government or any Government Affiliate of any agent, official, commissioner, employee, contractor, subcontractor at any tier or independent contractor of the Government or any Government Affiliate other than any breach, failure, nonperformance or noncompliance caused by an Uncontrollable Circumstance or Company Fault. . . ." Record on Appeal, tab 34, Ex. A, p. 28 (1996 Agreement).

Record on Appeal, tab 34, Ex. A, pp. 68-70 (1996 Agreement) (emphasis added).

[21] Phase I Development Costs is defined by the 1996 Agreement as

> [o]ne million five hundred thousand dollars ($1,500,000), in respect of development services by the Company before January 1, 1993. Phase I Development Costs shall not be subject to Cost Substantiation.

Record on Appeal, tab 34, Ex. A, p. 43 (1996 Agreement). Phase II Development Costs is also defined by the 1996 Agreement and means

> [o]ne million three hundred thousand dollars ($1,300,000), which shall be paid to the Company in respect of costs and expenses of the Company for the period from and after January 1, 1993, in connection with the development of the Facility; provided, however, that the Phase II Development Costs shall be subject to adjustment (i) if, within ninety (90) days following the Contract Date, the Government has not delivered to the Company either evidence of Legislative Approval or an unqualified opinion of nationally recognized bond counsel for the Government to the effect that no Legislative Approval is required for the execution, delivery and performance by the Government of its obligations hereunder . . . . Phase II Development Costs shall not be subject to Cost Substantiation and, unless otherwise agreed by the parties, shall not be subject to increase or reduction based upon actual costs incurred by the Company.

Record on Appeal, tab 34, Ex. A, pp. 43-44 (1996 Agreement). Defeasance Cost is defined as follows:

> [A]s of any calculation date, an amount sufficient to defease and discharge all outstanding Bonds in accordance with their terms, together with all related costs of defeasance and repayment, after giving effect to the release of any reserve funds or insurance proceeds which are made available for such purpose under the Indenture in connection with such defeasance, plus an amount equal to all outstanding Equity and all return thereon provided for under this Agreement accrued but unpaid as of such calculation date.

Record on Appeal, tab 34, Ex. A, pp. 15-16 (1996 Agreement). License Defeasance Cost means:

> [A]s of any calculation date (a) if such calculation date is prior to the Acceptance Date, the product of Three hundred thousand dollars ($300,000) times the number of years (including any partial year) prior to the year 2013, or (b) if such calculation date is on or after the Acceptance Date, the Fair Facility Value less the Defeasance Cost. . . .

Record on Appeal, tab 34, Ex. A, p. 35 (1996 Agreement).

[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.

[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).

[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.").

[26] Our holding that the 1996 Agreement is null and void renders unnecessary the disposition of the remaining issues on appeal.

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VI.

[27] The 1996 Agreement is null and void as a violation of Title 48 U.S.C. § 1423j and Title 5 GCA §22401. We **REVERSE** the judgment of the lower court and **REMAND** for entry of judgment consistent with this Opinion.